FOURTEEN

Achieving Formal Settlement

The final stage of mediation requires disputants to design an implementation and monitoring procedure and to formalize the settlement. Success in this final stage assures both an immediate settlement and an agreement that will hold over time.

Implementing the Settlement

Implementation refers to procedural steps that disputants or mediators take to operationalize an agreement and to terminate a dispute (Coser, 1967). Implementation is discussed here as a specific phase of negotiation and separate set of mediator interventions because it poses critical problems that must be overcome if the agreement is to endure. The process may occur before, during, or after reaching a substantive settlement.

The success of a substantive agreement frequently depends on the implementation plan's strength. Parties may fail to reach substantive agreement because they cannot conceive how it could be implemented. Later, parties may fail to adhere to a poorly conceived plan. Insufficient consideration of implementation may result in settlements that create devastating precedents that may result in reluctance to negotiate in the future; damaged interpersonal relationships; and financial, time, or resource losses. For these reasons, mediators may need to carefully assist parties in devising reasonable, efficient, and effective implementation procedures.

There are two types of procedures for executing agreements: "A self-executing agreement is one which is either: (1) carried out in its entirety at the time it is accepted, or (2) formulated in such a way that the extent to which the players adhere to its terms will be self-evident. A nonself-executing agreement, on the other hand, is one which requires from the parties continuing performance which may be difficult to measure in the absence of special monitoring arrangements" (Young, 1972, p. 58).

An example of a self-executing agreement was the mediated settlement of a dispute over the amount of legal fees a client was to pay a lawyer. Once the parties agreed on the amount, the client wrote the lawyer a check for the amount owed. The payment immediately terminated the dispute.

The negotiated settlement of visitation terms for the child of a divorcing couple illustrates a nonself-executing agreement. Since visitation will occur over many years, the agreement will not be carried out in its entirety when the negotiation terminates. The parents will need to cooperate over time to ensure that the spirit as well as the specific terms of the agreement is carried out. Frequent conflicts over visitation rights illustrate the difficulties of interpretating and complying with nonself-executing agreements.

A self-executing agreement is clearly a stronger and more effective means of ensuring that a settlement will be managed according to the negotiated terms. Compliance is tangible and immediate, and chances of violation are minimized. Mediators can often significantly assist parties in designing self-executing implementation plans so that the conflict can be terminated rapidly and to prevent settlement from being extended over time.

However, not all conflicts can be terminated or settlements completed in a self-executing and immediate manner. Certain settlements may inherently or structurally require continued performance over a long period of time. Child or spousal support payments, house or car payments, environmental per-

formance standards monitoring, and compliance with agreements about ongoing work relationships illustrate cases that require ongoing performance.

Compliance is difficult to measure in nonself-executing agreements, and this type of agreement often results in later discord due to differing interpretations. In disputes in which parties cannot reach a self-enforcing agreement, they often prefer not to settle at all or to use other settlement procedures rather than negotiate an agreement that may not be implemented or in which compliance is difficult to determine. In these cases, disputants may fail to agree not because they are unable to reach a substantive settlement on issues in dispute, but because they do not trust each other to perform according to the plan over time (Schelling, 1956).

Mediators and negotiators consider eight factors in implementing a settlement:

1. A consensual agreement about the criteria used to measure successful compliance.
2. The general and specific steps required to implement the decision.
3. Identification of the people who have the power to influence the necessary changes.
4. An organizational structure (if applicable) to implement the alternatives.
5. Provisions that will accommodate either future changes in agreement terms or changes in disputing parties.
6. Procedures to manage unintended or unexpected problems or violations of the settlement that may arise during implementation.
7. Methods to monitor compliance, and identity of monitor(s).
8. Determination of the monitor's role (for example, whistleblower or enforcer).

Criteria for Compliance and Implementation Steps

The probability of noncompliance by one or more parties may increase according to (1) the larger the number and complexity of issues in dispute, (2) the greater the number of

parties involved, (3) the higher the level of psychological tension and distrust, and (4) the longer the terms of the agreement must be performed. This does not mean that the parties will intentionally violate the agreement, but that structural variables make violation more likely. Negotiated or mediated agreements are not inherently more prone to noncompliance than other forms of dispute resolution processes. In fact, research indicates that mediated agreements have a high compliance rate (Cook, Rochl, and Shepard, 1980; Pearson, 1984; Bingham, 1984). However, because negotiated settlements are often conducted on an ad hoc basis, they are more susceptible to violation than conflict resolution approaches with strictly defined implementation procedures such as judicial or legislative decisions.

Mediators encourage disputants to strictly define both the criteria and the steps to be used in implementing their decisions to mitigate this inherent weakness. Mediators usually assume that the degree to which compliance criteria and steps are defined determines how well substantive or procedural disputes due to misinterpretation of agreements can be avoided. Implementation steps clearly can be so strictly defined that they hinder more than help, and parties can use highly defined agreements to create problems for each other. Minor infractions can escalate into another full-scale conflict or to claims of compliance in bad faith, but this does not appear to be the norm.

Criteria for evaluating the success of implementation steps are similar to those used to evaluate a substantive settlement's effectiveness. Implementation steps should be (1) cost-efficient; (2) simple enough to be easily understood, yet detailed enough to prevent loopholes that cause later procedural disputes; (3) realistic in their demands on or expectations of parties; and (4) able to withstand public scrutiny, if necessary, of standards of fairness.

Monitoring the Performance of Agreements

Agreements that must be performed over time often have self-contained evaluation procedures and structures. Parties often strictly define standards and schedules of performance, and periodic meetings are designated to review compliance.

The performance agreement may be monitored by the parties themselves; by a joint committee composed of party representatives in complex multiparty disputes; or by a third party who is usually not the mediator (Straus, Clark, and Suskind, n.d.).

For example, in a complex dispute involving seventy city government employees, the parties established an ongoing monitoring committee to ensure that all participants complied with tasks, responsibilities, and a work schedule that had been established. An annual facilitation meeting was established in which all the parties were to report on their progress and reach additional decisions as new issues developed.

If a third party is to conduct monitoring effectively, the monitoring body must be composed of an individual or group that the disputants respect and trust. Its membership may vary according to the type of dispute. Community disputes may call for a large committee. Straus, Clark, and Suskind (n.d.) urge that "a committee of this type should include prominent community leaders, agency representatives, and technical advisors committed to the consensus that has been reached and to implementing the terms of the bargain. The membership of such a committee should be approved by all parties to the negotiation (and might include some of them)" (p. V-55).

In small interpersonal disputes or in intraorganizational conflicts, the monitor may be one or two individuals who are trusted by the disputing parties. For example, a divorcing couple designated relatives to monitor compliance with visitation terms.

Parties should clearly define the performance standards by which compliance is measured, the role of the monitors, and the limits of the third party's authority for monitoring to be effective. Careful definition of these variables minimizes problems with the monitoring committee's or individual's functioning at a later time.

Monitoring committees or individuals assigned to oversee an agreement's implementation may be given a degree of responsibility according to their function. Monitors may merely review progress and confirm or deny that compliance has occurred, or they may actually oversee implementation of the agreement.

A third role for monitors is to activate a grievance procedure conducted by the parties themselves or by a third party. A grievance procedure is a process disputants identify to manage disagreements that arise during or as a result of the settlement's implementation phase. The establishment of a grievance procedure is often a functional prerequisite for initial settlement. Parties often believe that a grievance procedure gives them a way to redress new problems, to modify agreement if necessary, and to avoid abandoning the entire settlement because of difficulty implementing a small component of the settlement.

Grievance procedures vary in form and process. The grievance procedure may be no more than a general agreement to reopen negotiations or return to mediation before pursuing other options such as litigation, or it may specifically define the method of settling a new conflict. Many labor-management, commercial, and interpersonal contracts provide for either renegotiation or binding arbitration to resolve a dispute. Courts are including or requiring similar procedures in some mediated settlements involving child custody.

Formalizing Settlement

The final steps of negotiating or mediating a dispute focus on formalizing the settlement. This depends on (1) the implementation of commitment-inducing procedures to enhance the probability of adherence and (2) some form of symbolic conflict termination activity.

Commitment-Inducing Procedures. Negotiated settlements endure not only because their implementation plans are effectively structured and meet the interests of the parties, but because parties are psychologically and structurally committed to the agreement. Negotiators and mediators should be particularly concerned in this last phase of negotiations with building in psychological and structural factors that will bind the parties to the negotiated settlement. Commitment-inducing procedures can be voluntary and self-executing practices or measures executed by an external party.

Self-Executing Commitment Procedures. Self-executing commitment procedures are activities initiated by the mediator

or the negotiators that enhance the probability that the disputants will comply with the settlement. Specific measures include

- Private oral exchange of promises between disputants in the mediator's presence.
- Private oral exchange of promises between disputants in the presence of authority figures or parties from whom the disputants would not like disapproval should they violate the agreement (relatives, workplace superiors, mentors, religious leaders, and so forth).
- Public oral exchange of promises (press release or press conference).
- Symbolic exchange of gifts, tokens of affection, first payments, early payment (Fisher, 1969), and so forth as an indication of bargaining in good faith and willingness to fulfill commitments.
- Symbolic gesture of friendship that demonstrates a willingness to take personal risk in order to implement the negotiated settlement.
- Informal written agreements (memorandums of understanding).
- Formal written agreements (contrasts, covenants, and so forth).

Self-executing activities to enhance commitment should not be underestimated as means of ensuring compliance. Cook, Rochl, and Shepard (1980, p. 56), in a study measuring agreement stability among mediated cases in neighborhood justice centers with informal or unenforced commitment procedures, found that of 315 respondents, between 81 and 95 percent of all initiators stated that they had honored all the terms of the agreement. Between 52.4 and 74.1 percent of a sample of 286 respondents in the same study agreed that the other party or parties had honored all the terms of the agreement. Labor-management settlements have much higher rates of compliance. These data indicate that there is significant voluntary adherence to the terms of negotiated settlements.

Externally Executed Commitment Procedures. There are, however, problems with voluntary compliance. Negotiators and mediators attempt to overcome these weaknesses with structural and external enforcement provisions that enhance commitment to agreements.

Parties often initiate mutually binding commitment procedures that, once established, are structural assurances that the settlement will be maintained. These structural assurances determine that performance of established settlements will be enforced and that the parties will not rely on promises of good faith or unpredictable pressures of public opinion. There are a variety of structural means of inducing commitment.

Legal Contracts. The most common way of assuring commitment to an agreement is to turn the settlement into a legal contract, an agreement between two or more parties that is judicially enforceable. Contracts are characterized by an exchange of consideration, a promise, or an act that one party agrees to perform in return for promises or acts from another. For example, several therapists wanted to establish a private group practice. One of their prospective partners was better known and earned a larger income. They wanted to resolve how they were to invest capital in the practice and the terms for payment of each partner. They hired a mediator to help resolve their differences over financial arrangements and to draft a memorandum of understanding that they would later ask a lawyer to formalize as a contract. All parties wanted to have their financial rights protected by a formal contract.

Legal contracts provide parties with judicial recourse should one or more parties fail to honor promises. Parties who have suffered what they consider a breach of contract can sue another party for redress of grievances. If the suit is successful, the plaintiff or party initiating the suit can receive one of three possible types of remedies (Straus, Clark, and Suskind, n.d., pp. V-58-59):

- Damages—financial compensation for the consequences of the defendant's breach.
- Recision of the contract--the court voids the contract and releases the plaintiff from his or her contractual obligations.

- Specific performance—the court orders the defendant to comply with the terms of the contract.

Negotiated agreements do not automatically become contracts enforceable under law. The enforceability of contracts depends both on the laws and rules of the legal jurisdiction in which they are promulgated and the forms that the contracts take.

Although a verbal agreement may be considered a legal contract, especially if conducted in the presence of witnesses, a written document is safer. Written documents that are to become contracts must contain at minimum (1) the *name* (or kind of contract); (2) the *parties,* including date and place of agreement; (3) *recitals* that detail the relationship of the parties and describe the contract's function; (4) the *promise clause,* which describes the exchanges the parties are to make; and (5) *closing* and *signatures* (Brown, 1955).

In addition to the contents of agreements listed above, the way that the settlement is written can make a difference in its acceptability and later compliance. Saposnek (1983, p. 102) identifies four additional factors to consider in drafting agreements: (1) "the clarity of the clauses," (2) "the degree of detail in the clauses," (3) "the balance of . . . concessions," and (4) "the attitude and perspective connoted."

Clarity of clauses refers to writing that details the agreement in such a way that diverse interpretations or misinterpretations are not possible. Mediators should work with the parties to clarify their intentions and then draft the memorandum of understanding, which will later become a contract, so that loopholes are eliminated. The mediator should ask himself or herself and the parties where later interpretation problems might exist and try to eliminate them in the initial draft.

Degree of detail in the clauses refers to the degree of specificity in the agreement. Usually, the more precise the terms of settlement, the less likely that interpretation conflicts will arise. In disputes in which the parties are highly emotional and in which there is little trust, strictly worded agreements that specify all details may be crucial in terminating the dispute.

In disputes in which the parties have a positive relationship, however, detail can, on occasion, be viewed as a disadvantage. The detailed agreement may indicate lack of trust or inability to solve new problems that may arise in the future. One party may also use the detailed agreement to harass the other so that the terms are honored to an excessive degree. Fanatical adherence to an agreement's details can cause another party to resist compliance and thus promote additional discord. The mediator, in drafting an agreement, must clearly consider the abilities of the parties to negotiate later details if they are specifically defined in the agreement, the degree of trust of the parties, and the tendency of the parties to use an agreement as a weapon against their opponents. Specificity can either encourage or discourage future conflict.

Balance of concessions refers to the equity of exchanges the parties conduct. The written agreement should clearly identify what is to be exchanged and written so that the settlement does not appear one-sided. The document may alternate parties from one exchange clause to the next to maintain the perception of balance. The exchanges need not be equal in number, but the importance of the interests satisfied must be equivalent to avoid renewed conflict. The mediator will often have to search for the terms that will facilitate exchange.

On occasion, a psychological concession such as "John acknowledges that Philip was proceeding in good faith" can be traded for a specific substantive exchange. Equality of exchange can also be maintained by mentioning both parties in the clause. For instance: "Neither Paul nor Mary will make disparaging remarks about the other parent in the presence of the children." By treating both equally, an acceptable exchange may be made.

A positive attitude and perspective are the final consideration in drafting an agreement. A settlement document is an affirmation of the willingness and ability of the parties to cooperate. The document should note and encourage cooperative attitudes and behaviors. In the recitals, the preamble to the section that details precise exchanges, the mediator may include a statement about the willingness of the parties to end the dispute, their commitment to bargaining in good faith, their dedication to complying with the agreement, and their commitment to cooperative problem solving.

In a business relationship, the statement may read, "After

a period of bargaining in good faith, labor and management have agreed to the following terms that both expect to result in mutual benefit." In a custody case, the parents may affirm that "both of us love our children very much and want to arrange for a living situation that will provide them with stability and continuity with both parents, their extended families, their neighborhood, and friends. We make the following agreements because we believe that they are the best possible arrangements for the children and for each of us."

Judicial supervision is a second structural means to bind parties to agreements. In this instance, the disputing parties may have reached a negotiated settlement while they were in the midst of the judicial process. They have already filed to contest a case in court, but they reach an agreement before the judicial hearing. The parties then stipulate to the court the terms of their agreement and the court includes these terms in the final decree. This is common practice, for example, in mediated settlements of divorce. The court must legally mandate the separation, but the parties can negotiate and stipulate the terms of the divorce providing that they are not unconscionable. In this model of implementation, the parties take their agreement to their respective lawyers, who may change the wording to comply with legal standards and practice and then submit the document to the court as a stipulated settlement.

A second example of judicial supervision of negotiated settlements is in the selection of representatives to negotiations that will affect classes of people in complex disputes. Straus, Clark, and Suskind (n.d., pp. V-61-62) suggest that legislation could be passed that would establish "a process whereby a court supervises the selection of representatives to act as agents of recognized diffuse interests. This is precisely the procedure currently employed to appoint representatives in class action suits." A similar procedure has been used to appoint the guardian *ad litem* to represent a child's interests in mediated disputes involving termination of parental rights (Mayer, 1985).

Some negotiated settlements ultimately result in legislative action. Legislative bodies inherently use negotiation procedures in their daily operations, but in this case I refer to extraparliamentary negotiations.

Negotiated settlements that concern policy content have occasionally been recommended for inclusion in legislative bills. The National Coal Policy Project and the Air Quality Dialogues produced recommendations that were sent to Congress as the basis for subsequent bills (Murray, 1978; Carpenter and Kennedy, 1980). A negotiated settlement that is drafted into a bill and passed by a legislature attains status as a law. This law can be enforced by appointed officials, thus binding the parties to the terms of the negotiated settlement.

In some instances, negotiated settlements can be formalized and parties bound to adhere to agreements by executive action. This is especially the case when negotiations are sponsored by an elected or appointed executive. The negotiated settlement on flood control of the Snoqualmie River in Washington State and the negotiated environmental protection measures for the issuance of dredge and fill permits on Sanibel Island in Florida were both negotiated under the auspices of an executive office—the governor and the U.S. Army Corps of Engineers, respectively—and were subsequently approved by executives or the regulatory agency.

Parties can be structurally bound to implement settlement agreements by devising economic incentives or constraints that encourage adherence. Two economic approaches are common: agreeing on indemnification and performance bonds (Straus, Clark, and Suskind, n.d.).

Agreement on indemnification refers to a commitment by the parties to the amount and form compensation will take if one or more parties fail to comply with the terms of the agreement. Agreement on indemnification pressures the parties to adhere to the agreement because the costs of not doing so are specified before the breach of contract occurs. However, this succeeds only when conditions of violation are easily identified or measured. An example of agreement on indemnification occurred in the terms of settlement between a shopping center developer and residents of the surrounding neighborhood who might be adversely affected by the mall's presence. The developer agreed to protect land values of residential property owners by guaranteeing a sale of the property at a fair market price to be determined by an appraisal before the mall's construction.

The developer agreed to buy the properties or pay the difference between the actual selling price and the appraised value if the former price was lower. This offer was to be in effect for five years after the mall's construction (Baldwin, 1978).

Performance bonds are one step beyond agreements on indemnification in that they require a party to post a bond or reserve a specific sum of money to ensure that assets are available to pay for noncompliance. The use of performance bonds is an ancient method of ensuring adherence to agreements. Fifteenth- and sixteenth-century Japanese warlords required performance bonds in the form of relatives of their subordinates; the warlords held these relatives captive in their capital cities. If a functionary did not perform the established duties, his relatives would be put to death.

Performance bonds are usually funds held in escrow by a financial institution. The release of the bond is effected by an appointed neutral party who establishes if the terms of the settlement have been violated. This third party may be a monitoring committee established by the parties themselves or an independent, publicly recognized authority.

In the case described above, the shopping center developer agreed to construct a fourteen-foot-high landscaped berm as a boundary between the development and the residential neighborhood. A $100,000 letter of credit was deposited at a local bank to guarantee construction funds.

Symbolic Conflict Termination Activities. While some social processes have definite beginnings and endings, others have no precise points at which they may be said to have started or terminated. Coser (1967, p. 47) observes that social conflicts "follow a law of social inertia insofar as they continue to operate if no explicit provision for stopping their course is made by the participants. Whereas in a game, for example, the rules for the process include rules for its ending, in social conflict explicit provisions for its termination must be made by the contenders."

Whereas lower animals have devised regularized communication patterns to symbolize when a conflict should or has in fact ceased, human beings have not. Failure to define when a conflict has ended or when a negotiated settlement has been

reached can result in extended unnecessary conflict. The forms that symbolic conflict termination activities take clearly depend on the context in which the dispute occurs and the degree of common acceptance of the symbols.

Negotiators and mediators often try to create activities that symbolically indicate termination of a conflict. Handshaking, formal signing procedures, toasts, and celebratory meals are common ways of jointly affirming the termination of a dispute. One mediator provided a divorcing couple with a bottle of champagne to acknowledge the end of a successful child custody negotiation. In a large community dispute over county land use, the participants celebrated successful completion of negotiations with a banquet that all parties attended.

Although negotiators themselves may identify and initiate some ritual act or behavior that terminates a conflict or negotiation, persisting antagonism or lack of innovative skills may inhibit their acceptance. Mediators can often help the parties to plan or structure termination ceremonies. Naturally, the mediator's initiative depends on the situation, what is appropriate for the parties, and the authority the parties have vested in him or her to design termination activities.