

## STRATEGIC OPTIONS IN CONCLUDING A CIVIL LAWSUIT

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Ahhhh . . . You sigh with relief as you put the finishing touches on the settlement agreement. Once the agreement is signed, this civil case is over, right? Well, not actually - the lawsuit must still be concluded. But that just requires a motion to dismiss, right? Perhaps and perhaps not. Dismissal by motion is but one of six different procedural methods you can use to conclude a civil lawsuit. What method is best depends upon the terms of the particular settlement and the objectives of the parties.

When a settlement is consummated by the exchange of full payment for a release of all claims, the procedural method for concluding the lawsuit probably does not matter. Similarly, when the nature of the litigation requires use of a particular method to conclude it, such as in a class or marriage dissolution action, you must use the prescribed procedure. But if the settlement does not fall neatly into either of these two categories, then the procedural method used to conclude the lawsuit can be important in negotiating settlement terms and in ensuring the settlement's success.

**Practical Considerations in Settlement:** It is axiomatic that parties settle in order to end their controversy, but often they also have practical concerns about privacy (confidentiality as to the existence of the settlement or its terms), a desire for finality (to avoid further litigation) and to ensure that the settlement agreement can be enforced if there is a default. These objectives combine in numerous ways, and in some settlements may be in conflict. For example, parties may want a settlement agreement to be kept private, but also to have a court approve it. One party may want a public declaration of fault or an agreement that creates a fixed obligation, but the other party may want no public record that would adversely impact financial or credit reports. One party may prefer a single, lump sum payment, the other may prefer structured payments made over a period of time. If payments are made over time or there are other future obligations, a party may be concerned about how the obligation will be enforced and at what cost. These and other practical objectives can be directly impacted by the procedural method used to conclude the lawsuit.

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## **A Summary Chart:**

As noted earlier, there are six common procedural methods by which a civil lawsuit in a federal or Colorado court can be concluded - closure of the case, dismissal by notice, motion and order of dismissal, motion and order approving a settlement agreement, judgment by offer and acceptance, and judgment by stipulation. The following chart sets out these methods, the applicable rule of civil procedure, some applicable caselaw and the method's advantages and drawbacks. Although the chart is intended to be a resource in negotiating, drafting and implementing settlement agreements, it is simply a summary. To put it to best use, it will be helpful to be familiar with the doctrines of collateral estoppel, *res judicata*, accord and satisfaction, waiver, release, and estoppel. In addition, there may be substantive laws, local rules or procedures that apply in a particular context.

## **Case Studies:**

Every case and settlement is unique. As a consequence, the universe of possible settlement scenarios is endless, limited only by the creativity of counsel and clients. The following are examples that illustrate how the procedural method used to conclude the litigation can relate to settlement objectives.

**Case Study #1:** The parties reach a settlement on the eve of a critical event in the lawsuit - entry of a preliminary injunction, taking of a critical deposition or during trial. There is insufficient time to draft and sign the settlement agreement before the event occurs, but the parties do not want to incur further expense in the proceeding and cannot convince the court to stay the case while settlement terms are being drafted and the written agreement executed.

One simple way to stop the litigation is to close the case, but this requires a motion and a court order, which may be hard to get if there is a possibility that the case will be reopened to start up anew if there is a dispute about the written settlement terms. Dismissal by notice would also be immediate, but final. However, a joint motion to dismiss that requests an order of dismissal, but also requests that such order be stayed for a period of time to complete the settlement drafting, execution and consummation might be used. This approach offers finality and a definite time frame to complete the settlement process, while leaving open a window for relief if there is an inability to finalize the agreement.

**Case Study #2:** The parties agree that the dispute will be resolved by one party making periodic payments to the other. The receiving party has concerns about future performance and does not want to initiate a new action to enforce the terms of the settlement agreement. The paying party does not want entry of a monetary judgment.

Here, a combination of methods might prove beneficial. The case might be closed upon the execution of a settlement agreement in which the paying party stipulates both to reopening of the case and to entry of judgment (in a specified amount or in accordance with particular calculations) in the event of default. The privacy of closure acts as a “carrot” to encourage timely payment. The ability to reopen the case to have a stipulated judgment entered acts as the “stick,” allowing the receiving party the ability to have a judgment entered and to collect it in the same action.

If there is a possibility that the paying party will not have the liquid assets to do so, but may have property (personal or real) or may acquire property from which the debt might be collected, the receiving party may want to record a consensual lien to secure payment or to have a judgment entered right away with the promise not to collect upon the judgment except in the event of default. If the paying party does not want a consensual lien recorded or a judgment entered, the receiving party might require an irrevocable letter of credit or some type of payment bond.

**Case Study #3:** The parties seek to resolve trademark infringement or patent litigation with terms that enjoin future infringement. (This could also apply in cases with ongoing non-monetary obligations.) One or both parties anticipate that there may be future disputes. Dismissal or entry of judgment are not well suited to address the possibility of ongoing disputes, unless the court expressly reserves jurisdiction to consider disputes regarding enforcement of the settlement. A motion to approve the settlement and requesting that the court order the performance of the settlement would both reserve jurisdiction and allow invocation of court’s contempt authority. However, if the parties desire the terms of the settlement to remain confidential, they might request closure of the case, with an express reservation in the court order that the case can be reopened for enforcement of all or particular portions of the settlement agreement.

**Case study #4:** A manufacturing company is sued for a product defect. This is one of a number of such suits. The company is willing to pay the plaintiff a cash settlement without admission of liability upon the condition that the terms of the agreement will be kept confidential. The plaintiff is willing to accept the payment and to give a release, but wants an order approving the settlement agreement.

The defendant's desire for confidentiality and the plaintiff's desire for an order approving the agreement are in conflict. To obtain such order, the existence of the settlement, if not its terms, will become public. Given the request for a court order, the defendant may have ongoing concerns about the plaintiff maintaining confidence as to the agreement in the future.

To address the privacy concern, closure of the case or dismissal by motion and order could be used without disclosing the terms of the settlement agreement. However, the mere appearance of such an entry in the court record strongly implies that a settlement agreement exists. This may raise several red flags in the eyes of other litigants in similar situations. In contrast, dismissal by notice would give no indication that any settlement had been reached. Unfortunately, this option is only available before an answer or motion for summary judgment is filed.

Dismissal, either by motion or notice, also might impact enforcement of the confidentiality provision of the settlement agreement. Unless the court reserves jurisdiction to enforce the settlement agreement, which would reveal its existence, a new action might be required to enforce the confidentiality agreement.

**Conclusion:**

Because every settlement is unique, one can imagine a kaleidoscope of circumstances that raise concerns about privacy, finality and enforcement. These might include urgency in the litigation, publicity, the impact of the settlement upon upcoming financial transactions or records or other litigation, concerns about further litigation by parties in privity with a litigant, possibility of future bankruptcy filings or the need to collect or transfer unusual assets that are located outside of Colorado. Familiarity with the different methods that can be used in concluding the litigation can be a valuable tool in negotiating settlement terms and in fulfilling a client's settlement objectives.

### Procedural Methods for Resolving a Civil Case

RESOLUTION METHOD	RULE	MECHANICS	FINALITY	ENFORCEMENT	PROS & CONS
Close the case	D.C. Colo. L. Civ. R. 41.2	Parties move for closure. An order directs the clerk to close the case, which removes it from the court's active docket.	Closure is a purely administrative event. It has no effect on the rights or claims of the parties. <sup>1</sup> In essence, it simply discontinues the litigation without resolution. If the closure is premised upon a settlement agreement, however, parties might argue that the doctrines of accord and satisfaction, waiver, estoppel, or release preclude reopening the case or institution of another lawsuit in order to determine the claims.	No order or judgment to enforce.	<p><b>Pros:</b></p> <p>(1) The process is quick and simple.            (2) The terms of a settlement agreement can remain private, but closure of the case after extensive litigation may suggest that a settlement agreement exists.</p> <p><b>Cons:</b></p> <p>(1) The process offers no order or judgment that can be enforced.            (2) If closure is premised upon a settlement agreement that provides for entry of judgment in the event of default, a party might seek to reopen simply to enter judgment. However, if a settlement agreement has resolved the parties' claims, a court may refuse to reopen the case to enforce the settlement agreement. In such event, default under the settlement agreement may require a new lawsuit for breach of contract.</p>
Dismiss claims and defenses	Voluntary Dismissal by Notice  Fed. R. Civ. P. 41(a)(1)  C.R.C.P. 41(a)(1)	Under Rule 41(a)(1), a notice of dismissal results in dismissal without a court order. This can be made by the plaintiff, unilaterally, before an Answer or Motion for Summary Judgment is filed (whichever occurs first). Alternatively, a stipulation of dismissal signed by all parties who have appeared in the action can be filed. Note: the federal rule requires the signature of all parties; the Colorado rule allows the stipulation to be signed by the parties' attorneys.	A dismissal is without prejudice unless otherwise stated in the notice or stipulation. This allows a party to initiate new litigation on the same claims. <sup>2</sup> However, a notice of dismissal operates as an adjudication on the merits if the plaintiff has once previously dismissed an action in any state or federal court that was based on or included the same claim. <sup>3</sup> If dismissal is based upon a settlement agreement, the doctrines of accord and satisfaction, waiver, estoppel, or release may preclude litigation of the underlying claims.	No order or judgment to enforce. If the rule makes the dismissal preclusive, it can be asserted as an affirmative defense in subsequently filed litigation.	<p><b>Pros:</b></p> <p>(1) Relatively quick and simple.            (2) The terms of the settlement agreement can remain private, but a stipulation of dismissal evidences the existence of the settlement agreement.            (3) Unless the dismissal is with prejudice (either intentionally or by operation of law), a new action can be filed.</p> <p><b>Cons:</b></p> <p>(1) Repetitive dismissal may result in a bar to litigation of a claim.            (2) Enforcement of a settlement agreement will require a new lawsuit.            (3) No court order may be issued confirming the case dismissal.</p>
Dismiss Claims and Defenses	Voluntary Dismissal by Motion and Order of the Court  Fed. R. Civ. P. 41(a)(2)  C.R.C.P. 41(a)(2)	The parties file a motion requesting dismissal. An order enters "upon such terms and conditions as the court deems proper."	Unless the order so provides, the dismissal is without prejudice. If the dismissal is with prejudice, it is a final order which subjects the parties and those in privity with them to the doctrine of <i>res judicata</i> but not collateral estoppel. <sup>4</sup>	In a federal action, unless jurisdiction is specifically reserved, the court may be unable to enforce the settlement agreement. <sup>5</sup> In such event, enforcement of the settlement agreement requires a new lawsuit for breach of contract. Note: if the underlying federal jurisdiction was based upon a federal question, a new action for breach of contract might be limited to state court.	<p><b>Pros:</b></p> <p>(1) The terms of a settlement agreement can remain private, but its existence is public.</p> <p><b>Cons:</b></p> <p>(1) The court must approve the dismissal. This could take time or result in imposition of undesirable conditions or limitations.            (2) Care must be taken to specify whether the dismissal is with or without prejudice. In federal cases, care must be taken to specifically reserve jurisdiction to enforce the settlement agreement.</p>
Order approving a settlement agreement	No particular rule	The parties move that the court approve the terms of a settlement agreement. The order may also compel performance of the settlement terms. A hearing may be required. Note: most courts may not adopt agreed recitations by the parties as "findings."	This is often used when there are ongoing obligations that the parties want to be enforced by the court through its contempt power. Approval may require notice to interested parties (e.g. class members) and a period to object. Often the order approving the settlement also contains a directive to close the case. If so, the case must be reopened to enforce the agreement. The settlement agreement determines what issues or claims are precluded.	Enforcement mechanisms depend upon the terms of the agreement and the order approving it. They can include contempt <sup>6</sup> , reopening the case for imposition of various specified sanctions or entry of a judgment.	<p><b>Pros:</b></p> <p>(1) Variety of means for enforcement including contempt powers.</p> <p><b>Cons:</b></p> <p>(1) No privacy with regard to the existence or terms of settlement.            (2) Possible notice requirements, delay, hearing, rejection of some terms, and imposition of undesirable terms.            (3) Great care needs to be taken in drafting the settlement agreement to prevent estoppel and/or loss of ability to relitigate claims.</p>

Judgment by Offer and Acceptance	Fed. R. Civ. P. 68 C.R.C.P. 68 was repealed effective July 1, 1990. Now see: § 13-17-202, C.R.S.	In federal and state cases, a party defending against a claim makes an unconditional offer of judgment to an adverse party at least 10 days before trial. If, within 10 days, the offer is accepted, the offer, notice of acceptance and proof of service must be filed with the court. The clerk then enters judgment according to the agreed terms.  In Colorado cases, if a plaintiff makes an offer of settlement at least 14 days before trial and it is accepted within 14 days, it becomes a binding settlement agreement fully enforceable by the court in which the civil action is pending. <u>It is not a judgment.</u>	Ordinarily, the judgment is final and precludes subsequent litigation of claims (including those that could have been raised) and issues. It binds parties and those in privity with them. However, an offeror may reserve the right to appeal from the court's pre-judgment rulings.	Enforced as any judgment. See below.	<b>Pros:</b> (1) Relatively simple if the parties agree. (2) The judgment is final; can have maximum preclusive effect or can reserve issues for appeal. (3) Because it is a judgment, it can be enforced in the jurisdiction where it is entered or in foreign jurisdictions.  <b>Cons:</b> (1) Must comply with the rule precisely to have judgment enter - limited to the terms specified, e.g., if no reference to costs, costs are not awarded. (2) No privacy. Judgment is a public record that may impact financial reports and credit records.
Judgment by Stipulation	No particular rule, but generally see Fed. R. Civ. P. 54-63 and C.R.C.P. 54-63, and 121	Parties can submit a proposed stipulated judgment, with or without a motion. However, Fed. R. Civ. P. 58(a)(1) requires that every judgment be set forth in a separate document.	The issued judgment is final and precludes subsequent litigation of claims (including those that could have been raised) and issues that were actually litigated. Also binds parties and those in privity with them.	Enforcement of federal judgments is governed by state law. Fed. R. Civ. P. 64. Remedies include use of judgment liens, levy and execution, garnishment, etc. In Colorado see C.R.C.P. 69-71, 102-104; Colo. R. Cty. Ct. Civ. P. 369 & 403; STEPHEN W. SEIFERT, COLORADO CREDITORS' REMEDIES - DEBTORS' RELIEF, (West Pub. Co. 1990 & Supp. 2006). Judgments can also be collected in foreign jurisdictions.	<b>Pros:</b> (1) Simple, single document. (2) Entry starts appeal period. (3) Has broadest preclusive effect. (4) Is enforceable for 20 years in a variety of ways and in various jurisdictions.  <b>Cons:</b> (1) No privacy. Judgment is a public record that may affect financial reports and credit. (2) If satisfied, requires filing/recording of a satisfaction of judgment. (3) Limited time to modify.

(Footnotes)

1 See *Mickeviciute v. I.N.S.*, 327 F.3d 1159,1161 (10th Cir. 2003).

2 See *Wright & Miller*, FEDERAL PRACTICE AND PROCEDURE, §2367 (2006); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001).

3 A plaintiff may avoid the effects of this rule if the plaintiff is able to successfully set aside or vacate the dismissal of the second action. See *Engelhardt v. Bell & Howell Co.*, 299 F.2d 480, 484 (8th Cir. 1962).

4 See *Wright & Miller*, FEDERAL PRACTICE AND PROCEDURE, §2367 (2006); *Ground Water Appropriators of the South Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22, 25-26 (Colo. 2003).

5 See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *McKay v. United States*, No. 06-1194, 2006 WL 3291757, at \*1 (10th. Cir. Nov. 14, 2006) (not selected for publication).

6 .See 18 U.S.C. §401; *F.T.C. v. Kuykendall*, 371 F.3d 745, 751-67 (10<sup>th</sup> Cir. 2004); C.R.C.P. 106-107.