



# Settle Your Small Claims Dispute Without Going to Court

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by Attorney Ralph Warner

March 2001



This product is adapted from *Everybody's Guide to Small Claims Court*, by Ralph Warner (Nolo).

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Edition: 2.0

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ISBN: 0-873337-652-8

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## Settle Your Small Claims Dispute Without Going to Court

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**Y**ou've just yelled "I'll sue you," and slammed down the phone. Maybe the cleaners lost your shirt, the travel agency canceled your trip, your neighbor cut down your tree, or your customer or tenant didn't pay you on time. Any of these cases might be likely candidates for Small Claims Court. Their dollar value is low (Small Claims Courts usually have limits on the amount you can claim); the controversy is simple; and with a little preparation you could present your case without the expense and hassle of hiring a lawyer. Small Claims Courts offer a rare forum in which a person can, with very little paperwork and expense, have a judge decide who was right and who was wrong, and order someone to pay up accordingly.

But does that mean you should rush right over and file your lawsuit? Not necessarily. You may be angry; you may even feel that you have to save face and follow through on your threat to sue. But litigation should be a last, not a first, resort. In addition to being time-consuming and emotionally draining, lawsuits—even the Small Claims variety—tend to polarize disagreements into win-all or lose-all propositions where face- and money-saving compromise is difficult. It's not difficult to understand how this occurs. Most of us, after all, are terrified of making fools of ourselves in front of strangers. When forced to defend our actions in a public forum, we tend rather regularly to adopt a self-righteous view of our own conduct, and to attribute the vilest of motives to our opponents. Many of us are willing to admit that we have been a bit of a fool in private—especially if the other person does, too—but in public, we tend to stonewall, even when it would be to our advantage to appear a little more fallible.

Although I am a strong advocate of Small Claims Court, I have nevertheless witnessed many otherwise sensible people litigate disputes that never should have been filed in the first place. In some instances, the amount of money was too small to bother with or there was little chance of collecting any money at all. In others, the problem should have been talked out over the back fence. And there were some situations in which the practical importance of maintaining civil, personal or business relationships between the parties made it silly to go to court over a few hundred or even a few thousand dollars.

Let me emphasize this last point: It is almost always wise to look for a non-court solution when the other party is someone you'll have to deal with in the future. Typically, this would include a neighbor, a former friend or a relative. Similarly, a small business owner will almost always benefit by working out a compromise settlement with another established local business or a long-term customer or client. For example, an orthodontist who depends on referrals for most new customers will want to think twice before suing a patient who has refused to pay a bill in a situation where the patient is genuinely upset (whether rightly or wrongly) about the services she has received. Even if the orthodontist wins in court, he is likely to turn the former patient into a vocal enemy—one who may literally badmouth him from one end of town to the other.

### TIME TO GET ORGANIZED

Whether or not your dispute ends up in court, now is the time to set up a system to safeguard key papers and evidence. It's no secret that more than one case has been won (or lost) because of good (or bad) recordkeeping. One excellent approach is to get a couple of manila envelopes or file folders and label them with the name of your dispute (Lincoln vs. Williams). Use one folder to store all relevant documents, such as receipts, letters, names and addresses of potential witnesses and photographs. The other file will be for your court papers. Even if you don't end up in court, the files will serve you well in a mediation session, and be good records for the future. Make sure to conscientiously store your files in a safe place.

### A. Try to Talk Your Dispute Out

It is rarely a waste of time to try to negotiate a compromise with the other party. Indeed, you are often *required* to make the attempt. The law in many states requires that a “demand” for payment be made prior to filing a Small Claims Court action. A number of states require this “demand” to be in writing.

But first things first. Before you reach for pen and paper, try to negotiate directly with the person with whom you are having the dispute. The wisdom of trying to talk out a dispute may seem obvious, but it apparently isn't. I am frequently consulted by people with an “insurmountable dispute” who never once tried to calmly talk it out with the other person. Clearly, many of us have a strong psychological barrier to talking to people we are upset with, especially if we have already exchanged heated words. If you fall into this category, perhaps it will be easier to pick up the phone if you remind yourself that a willingness to compromise is not a sign of weakness. After all, it was Winston Churchill, one of the twentieth century's greatest warriors, who said, “I would rather jaw, jaw, jaw than war, war, war.”



**A compromise offer is not binding.** It's important to know that an offer of compromise, made either orally or in writing, does not legally bind the person making it to sue for that amount if the compromise is not accepted. Thus, you could make an oral or written demand for \$2,000, then offer to compromise for \$1,500 and, if your compromise offer is turned down, still sue for \$2,000.

In an effort to help you arrive at a good compromise, here are a few of my personal dispute resolution rules, which, of course, I modify to fit the circumstances:

- If you are the potential plaintiff, start by offering to shave about 20% off your original demand, in exchange for a settlement. Any less and you won't be taken seriously. Any more and you're giving away too much too soon.

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- If you are the potential defendant and conclude that the plaintiff probably does have a decent case, start by offering about 50% of the amount demanded. This should be enough to start negotiations without conceding too much too soon. Many plaintiffs will ultimately agree to knock as much as one-third off their original demand to save the time and trouble of going to court.
- Money isn't always at the root of the problem. If you pay close attention to the other party's concerns, you may find that the key to arriving at an agreement can be found elsewhere. For example, a print shop might agree to refund a customer \$2,000 on a disputed job in exchange for an agreement to continue to work together and speak well of each other in the future.
- The patient negotiator has the edge. Many Americans are in a hurry to arrive at a solution and, in their haste, will agree to a bad one. Take your time. If you make a lowball offer and the other person gets mad and hangs up, you can always wait a few days and call back.
- Good negotiators rarely change their position quickly, even if the other side does. Instead, they raise or lower their offer in small increments (5%–10%). For example, if your opponent counters your original offer of a 20% reduction by offering to pay half of what you ask for, you'll do best by not jumping to accept, but instead countering by reducing your original demand by 30% or 35%. If you do, there is a decent chance your opponent will further improve her offer. And even if she doesn't, you haven't lost anything, since once she has made an offer, she is unlikely to withdraw it.



**It's rarely wise to split the difference.** Often, an inexperienced negotiator will offer to split the difference or settle a claim for 50 cents on the dollar. It's rarely wise to quickly agree to do this, since, after all, your opponent has already conceded that amount. Better to counter with an amount between your last offer and your opponent's "split the difference" offer.

- Estimate how much money a compromise settlement is worth to you, given the fact it eliminates the time and aggravation of going to court. I do this by putting a dollar value on my time and then multiplying by the number of hours I estimate going to court will take. Also, based on the facts of your case, take into consideration the chances that you might lose, or get less than you ask for. In a recent study of 996 Small Claims cases that actually went to trial, only 32% resulted in the plaintiff receiving 100% of the amount claimed; 22% resulted in the plaintiff getting between 50% and 100% of the amount claimed; 20% resulted in the plaintiff getting less than half; and in 26% of the cases, the plaintiff got nothing at all. ("Small Claims and Traffic Courts," by John Goerdt (National Center for State Courts).)

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**Example:** In a recent dispute my business, Nolo, had with a phone company, Nolo originally asked for \$5,000. The phone company admitted some liability and offered to compromise. After considering the value of the time and energy Nolo would invest bringing the dispute to court, we were willing to lower our demand to \$3,500. And although we were sure we had a strong case, we had to admit that a judge might not agree, so we decided to subtract another \$500 and accept a settlement for \$3,000. Unfortunately, after several conversations and letters, the phone company wouldn't offer a dime more than \$2,000. This was too low, and we decided to go to court. As it happened, the judge awarded us the entire \$5,000. But then the phone company appealed and received a new trial (a somewhat unusual feature of California law). After the case was presented over again, the second judge reduced our final award to \$3,500. Considering that it was easier to prepare the case the second time, we still came out ahead of the game, as compared to accepting the \$2,000. But in truth, given the time needed to prepare for two court presentations, we probably netted only about \$500 more.



On several occasions when I have been involved in important negotiations I've gotten help by rereading *Getting to Yes: Negotiating Agreements Without Giving In*, by Roger Fisher and William Ury (Penguin). I also like *Getting Past No: Negotiating Your Way From Confrontation to Cooperation*, by William Ury (Bantam).



**If you settle, sign a written agreement pronto.** If you talk things out with your opponent, write down your agreement as soon as possible. Oral settlement agreements, especially between people who have small confidence in one another, are often not worth the breath used to express them. And writing down an agreement gives each party a chance to see if they really have arrived at a complete understanding. Often one or more details still must be hashed out. (In Section D of this guide, I show you how to reduce a compromise agreement to writing.)

## B. Mediate Your Dispute

Mediation, a procedure in which the disputants meet with a neutral third party who helps them arrive at their own solution, is available in most areas. Depending on your location, trained mediators may be standing by at the Small Claims courthouse or, if not, can usually be found at a local community mediation service. Either way, mediation is often conducted by volunteers at no cost to you. Where fees are charged, they are almost always low. In most areas of the country, mediation of Small Claims disputes is entirely voluntary, but in a few, such as Maine and Washington, D.C., mediation must be attempted before a case can go into the courtroom.

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A mediation session, which will typically last anywhere from 30 minutes to three hours, consists of you and all other parties to a dispute sitting down with a mediator whose role is to help you arrive at your own solution. Unlike a judge, a mediator has no power to impose a judgment, with the result that mediation sessions tend to be much more relaxed than a court proceeding.

Many people who find themselves in the middle of a dispute ask why they should waste time mediating with an opponent who they believe is unreasonable. My best answer is that, when the parties to a Small Claims Court case voluntarily agree to mediate, the overwhelming majority of disputes are settled. And even in court systems where everyone is forced to mediate as a mandatory precondition to going to court, about 50% of cases settle. Settlement is especially likely when, deep down, one or both parties realize they have an interest in arriving at a solution at least minimally acceptable to the other party. As noted above, this is particularly common in disputes between neighbors or small business people who live or work in the same geographical area and really don't want the dispute to fester.

It is also of interest that studies have shown that people who agreed to have their cases mediated were more likely to be satisfied with the outcome of the case than litigants who went to trial. Not surprisingly, one reason for this is that people who arrive at a mediated settlement are more likely to pay up than are people who have a judgment imposed on them after losing a contested trial.

Is mediation always a good idea? No. If you are determined to get the total amount you are asking for, and you will have no ongoing relationship with the other party (such as a large corporation or government agency), bypassing mediation and going directly to court (except in the few places where mediation is mandatory) can make sense.

**Example:** John rented an apartment from Frontier Arms, Inc. When he moved out and left the unit undamaged and spotless, the Frontier Arms manager made up a bogus reason to avoid refunding his deposit. John decided that proposing mediation was a waste of time, since he was pretty sure a judge would enter a judgment for his entire \$1,500, plus a \$500 penalty, as provided by his state's rental deposit law.

Assuming you do want to mediate, how can you get a reluctant opponent to the table in areas where mediation isn't mandatory? Often you can get help from your local court-sponsored or community mediation program. Typically, as soon as you notify the agency that you have a dispute and would like to try mediation (notification is often automatic with a court-sponsored program), an employee or volunteer with the mediation program will contact the other party or parties and try to arrange a mediation session.

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**Defendant's Note:** Suppose now that you are a defendant in a Small Claims case or have received a letter threatening suit. Should you ask for mediation? The answer is almost always a resounding yes, assuming you have a defense to all or part of the plaintiff's claim or believe that, while the plaintiff may have a decent case, he is asking for too much. Mediation will give you a great opportunity to present your side of the dispute and hopefully, with the help of the mediator, arrive at an acceptable compromise. It can also allow you to bring up other issues that may be poisoning your relationship with the plaintiff, which would not be considered relevant in court.



**Learn to be a good mediator.** People who are well prepared to engage in mediation are likely to achieve better results than those who take a more casual approach. The best source of information on how to mediate successfully is *How to Mediate Your Dispute: Find a Solution Quickly and Cheaply Outside the Courtroom*, by Peter Lovenheim (Nolo). I can almost guarantee that if you read it before you mediate, you will achieve better results than would otherwise have been possible.

### Arbitration

In addition to mediation, a few states also offer binding arbitration before a volunteer lawyer as an alternative to having a case heard in Small Claims Court. Typically, the lawyer and the parties involved sit down at a table and discuss the case. If the parties don't arrive at their own solution, the arbitrator renders a decision just as a judge would. The only advantage of arbitration over going before a Small Claims judge or a commissioner is that, in some areas, it's faster to meet with the arbitrator. Unfortunately, arbitration comes with a big built-in disadvantage: The arbitrator is likely to be a volunteer lawyer far less knowledgeable about the broad range of laws that apply to consumers and small businesses than a judge. For this reason, I usually recommend against this procedure.

**New York Note:** In New York state, where volunteer lawyer arbitrators are routinely used, this disadvantage is compounded by the fact that there is no appeal from the decision of an arbitrator as there is from the decision of a regular judge.

**Nonbinding Arbitration:** In a few areas, a procedure called nonbinding arbitration is available. This is much like mediation, in the sense that both parties must agree to any settlement. The only difference is that, unlike a mediator, who doesn't make a formal recommendation, the arbitrator will recommend—but not compel—a solution. Especially if it's more easily available than mediation, it's often a good idea to try nonbinding arbitration, since the arbitrator's recommendation can be a pretty good guide as to what will happen if the case ends up going to court.

## C. Write a Formal “Demand” Letter

If your efforts to talk your problems out fail (or, despite my urging, you refuse to try) and you decide not to propose or agree to mediation, your next step is to send your adversary a letter. As noted above, many courts require that a “demand” letter be sent. But even where there is no such requirement, it is almost essential that you send one. Why? Two reasons. First, in as many as one-third of all disputes, your “demand” letter will serve as a catalyst to arriving at a settlement. Second, even if no settlement results, setting out your case in a formal letter affords you an excellent opportunity to lay your case before the judge in a carefully organized way. Or, put another way, it allows you to “manufacture” evidence that you will likely be permitted to use in court if your case isn’t settled.



**You can be sued without first being sent a letter that suit is imminent.** Some people believe they can’t be sued until they receive a letter asking for payment. This is not necessarily true, even in states where a plaintiff must demand payment as a precondition to suing. A simple past due notice from a creditor, which states that if the account isn’t paid promptly, court action will be pursued, usually meets a requirement that a formal demand for payment be made.

A personal note is in order here. In the almost 20 years since I first began to write about Small Claims Court, readers have sent in hundreds of Small Claims success stories. One thing has consistently delighted me: Many self-proclaimed winners never had to file their Small Claims case in the first place. These readers took my advice and wrote the other party a clear, concise letter demanding payment. As a result of either the letter itself or conversations it engendered, they received all, or at least a significant part, of what they asked for.

That a simple letter can be so effective may at first seem paradoxical, especially if you have already unsuccessfully argued with your adversary in person or over the phone. To understand why the written word can be so much more effective, think about the times you have found yourself embroiled in a heated consumer dispute. After angry words were exchanged—maybe even including your threat of a lawsuit—what happened next? The answer is often “nothing.” For all sorts of reasons, from a death in the family, to the chance to take a vacation, to simply not having enough time, you didn’t pursue your “I’ll sue you” threat. And, of course, you aren’t the only one who may not have followed up on a verbal threat to bring a lawsuit. In fact, so many people who verbally threaten to sue don’t actually do it, that many potential defendants don’t take such threats seriously.

But things change if you write a letter, laying out the reasons why the other party owes you money and stating that if you fail to get satisfaction, you plan to go to Small Claims Court. Now, instead of being just another cranky face on the other side of the counter or a voice on the phone, you and your dispute assume a sobering realness.

Really for the first time, the other party must confront the likelihood that you won't simply go away, but plan to have your day in court. And they must face the fact that they will have to expend time and energy to publicly defend their position, and that you may win. In short, assuming your position has at least some merit, the chances that the other party will be willing to pay at least a portion of what you ask go way up when you make your case in writing.

### 1. Writing Your Letter

When writing your demand letter, here are some pointers to keep in mind:

1. *Use a typewriter or computer.*
2. *Start by concisely reviewing the main facts of the dispute.* At first it may seem a bit odd to outline these details; after all, your opponent knows the story. But remember—if you end up in court, the letter will be read by a judge, and you want her to understand what happened.
3. *Be polite.* Absolutely avoid personally attacking your adversary (even one who deserves it). The more annoying you are, the more you invite the other side to respond in a similarly angry vein. This is obviously counterproductive to your goal of getting your opponent to make a businesslike analysis of the dispute and ask herself such questions as:
  - What are my risks of losing?
  - How much time will a defense take?
  - Do I want the dispute to be decided in public?
4. *Ask for exactly what you want.* For example, if you want \$2,000, don't beat around the bush, ask for it. And be sure to set a deadline. Ten days to two weeks is usually best; anything longer and your opponent has less motivation to deal with you right away.
5. *Conclude by stating you will promptly file in Small Claims Court if your demand is not met.*
6. *Keep a copy of all correspondence in your files.*

## 2. A Real Small Claims Case

Now let's consider a real Small Claims case. The facts (with a little editorial license) were simple. Jennifer moved into Peter's house in August, agreeing to pay \$550 per month rent. The house had four bedrooms, each occupied by one person. The kitchen and other common areas were shared. Things went well enough until one chilly evening in October when Jennifer turned on the heat. Peter was right behind her to turn it off, explaining that heat inflamed his allergies.

As the days passed and fall deepened, heat became more and more of an issue. One cold, late November night, Jennifer returned home from her waitress job to find her room "about the same temperature as the inside of an icicle." After a short cry, she started packing and moved out the next morning. She refused to pay Peter any additional rent, claiming she was within her rights to terminate her month-to-month tenancy without giving notice because the house was uninhabitable. It took Peter one month to find a suitable tenant and to have that person move in. Therefore, he lost rent in the amount of \$550.

After calling Jennifer several times and asking her to make good the \$550 only to have her slam down the phone in disgust, Peter wrote her the following letter.

---

January 1, 200x  
61 Spring St.  
Detroit, MI

Jennifer Tenant  
111 Lake St.  
Detroit, MI

Dear Jennifer:

You are a real idiot. Actually, you're worse than that: you're malicious—walking out on me before Christmas and leaving me with no tenant when you knew that I needed the money to pay my child support. You know that I promised to get you an electric room heater. Don't think I don't know that the real reason you moved out was to live with your boyfriend.

Please send me the \$550 I lost because it took me a month to rerent the place. If you don't, I will sue you.

In aggravation,  
Peter Landperson

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To which Jennifer replied:

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January 4, 200x  
111 Lake St.  
Detroit, MI

Peter Landperson  
61 Spring St.  
Detroit, MI

Dear Mr. Landperson:

You nearly froze me to death, you cheap bastard. I am surprised it only took a month to rent that iceberg of a room—you must have found a rich polar bear (ha ha). People like you should be locked up.

I hope you choke on an ice cube.

Jennifer Tenant

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As you have no doubt guessed, both Peter and Jennifer made the same mistake. Instead of being businesslike, each deliberately set out to annoy the other, reducing any possible chance of compromise. In addition, they each assumed they were writing only to the other, forgetting that the judge could be privy to their sentiments. Thus, both lost a valuable chance to present the judge with a coherent summary of the facts as they saw them. As evidence in a subsequent court proceeding, both letters were worthless.

Now let's interrupt these proceedings and give Peter and Jennifer another chance to write more sensible letters.



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January 1, 200x  
61 Spring St.  
Detroit, MI

Jennifer Tenant  
111 Lake St.  
Detroit, MI

Dear Jennifer:

As you will recall, you moved into my house at 61 Spring St., Detroit, Michigan, on August 1, 199x, agreeing to pay me \$550 per month rent on the first of each month. On November 29, you suddenly moved out, having given me no advance notice whatsoever.

I realize that you were unhappy that the house was a little on the cool side, but I don't believe that this was a serious problem, as the temperature was at all times over 60 degrees and I had agreed to get you an electric heater for your room by December.

I was unable to get a tenant to replace you (although I tried every way I could and asked you for help) until January 1, 200x. This means that I am short \$550 rent for the room you occupied. If necessary, I will take this dispute to court because, as you know, I am on a very tight budget. I hope that this isn't necessary and we can arrive at a sensible compromise.

I am also willing to try to mediate this dispute using the local community mediation service, if you agree. I have tried to call you with no success. Perhaps you can give me a call in the next week to talk this over.

Sincerely,

Peter Landperson

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To which our now enlightened Jennifer promptly replied:

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January 4, 200x  
111 Lake St.  
Detroit, MI

Peter Landperson  
61 Spring St.  
Detroit, MI

Dear Peter:

I just received your letter concerning the rent at 61 Spring St. and am sorry to say that I don't agree either with the facts as you have presented them, or with your demand for back rent.

When I moved in August 1, 199x, you never told me that you had an allergy and that there would be a problem keeping the house at a normal temperature. I would not have moved in had you informed me of this.

From early October, when we had the first cool evenings, all through November (almost two months), I asked that you provide heat. You didn't. Finally, it became unbearable to return from work in the middle of the night to a cold house, which was often below 60 degrees. It is true that I moved out suddenly, but I felt that I was within my rights under Michigan law, which clearly allows tenants to sue landlords for constructive eviction when the landlord fails to provide a necessity such as heat. In fact, you are lucky that I am not suing you for damages for constructive eviction.

Since you mentioned the nonexistent electric heater in your letter, let me respond to that. You first promised to get the heater over a month before I moved out, but never produced it. Also, as I pointed out to you on several occasions, the heater was not a complete solution to the problem, as it would have heated only my room and not the kitchen, living room and dining areas. You repeatedly told me that it would be impossible to heat these areas.

Peter, I sincerely regret the fact that you feel wronged, but I believe that I have been very fair with you. I am sure that you would have been able to rent the room promptly if the house had been warm. Since I don't believe that any compromise is possible, mediation does not make sense. If you wish to go to court, I'll be there with several witnesses who will support my position.

Sincerely,

Jennifer Tenant

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As you can see, while the second two letters are less fun to read, they are far more informative. In this instance, the goal of reaching an acceptable compromise or agreeing to mediation was not met, but both have prepared a good outline of their positions for the judge. Of course, in court, both Peter and Jennifer will testify, present witnesses and possibly other evidence that will tell much the same story as is set out in the letters. However, court proceedings are often rushed and confused and it's nice to have a written statement for the judge to fall back on. Be sure the judge is given a copy of your demand letter when your case is presented. The judge won't be able to guess that you have it; you will have to let her know and hand it to the clerk.

### 3. Sample Demand Letters

Below are letters a consumer might write to an auto repair shop after being victimized by a shoddy repair job and a contractor who botched a remodeling contract.

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February 1, 200x  
Tucker's Fix-It-Quick Garage  
9938 Main St.  
Chicago, IL 61390

Dear Mr. Tucker,

On January 1, 200x, I took my car to your garage for servicing. Shortly after picking it up the next day, the engine caught fire because of your failure to properly connect the fuel line to the fuel injector. Fortunately, I was able to douse the fire without injury.

As a direct result of the engine fire, I paid the ABC garage \$1,281 for necessary repair work. I enclose a copy of their invoice.

In addition, I was without the use of my car for three days and had to rent a car to get to work. I enclose a copy of an invoice showing the rental cost of \$145.

In a recent phone conversation you claimed that the fire wasn't the result of your negligence and would have happened anyway. And even if it was your fault, I should have brought my car back to your garage so you could have fixed it at a lower cost.

As to the first issue, Peter Klein of the ABC Garage is prepared to testify in court that the fire occurred because the fuel line was not properly connected to the fuel injector, the exact part of the car you were working on.

Second, I had no obligation to return the car to you for further repair. I had the damage you caused repaired at a commercially reasonable price and am prepared to prove this by presenting several higher estimates by other garages.

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Please send me a check or money order for \$1,426 on or before July 15. If I don't receive payment by that date, I'll promptly file this case in Small Claims Court.

You may reach me during the day at 555-2857 or in the evenings until 10 p.m. at 555-8967.

Sincerely,

Marsha Rizzoli

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February 1, 200x  
Beyond Repair Construction  
10 Delaney Avenue  
Lincoln, Nebraska

Dear Sirs:

You recently did replacement tile work and other remodeling on my downstairs bathroom at 142 West Pine St., here in Lincoln. As per our written agreement, I paid you \$4,175 upon completion of the job on January 1, 200x.

Only two weeks later, on January 15, I noticed that the tile in the north portion of the shower had sunk almost half an inch, with the result that our shower floor was uneven and water pooled in the downhill corner before eventually going down the drain.

In our telephone conversations, you variously claimed that the problem:

- was in my imagination
- was my fault, because the floor was uneven to begin with
- was too minor to bother with.

Sorry, but I paid for a first-class remodeling job and I expect to receive it. Please contact me within ten days to arrange to pay me \$1,200 (the cost of redoing the work per the enclosed invoice from ABC Tile) or to arrange to redo the work yourself. If I don't hear from you by February 11, I will promptly file in Small Claims Court.

Sincerely,

Ben Price

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## D. Write Down the Terms of Any Settlement

If you and the other party agree to a settlement, either on your own or with the help of a mediator, it's important to promptly write it down. When a mediator is involved, preparing a written agreement is usually the last step in the process. In some areas, this written agreement is then automatically made part of a court order (judgment), while in others it's simply a binding contract. The difference is that if a court order is not obeyed, collection procedures can begin immediately, while in the case of a broken contract, a lawsuit must be filed and a judgment obtained before collection procedures can begin.

If you and your opponent negotiate your own settlement, you'll need to cooperate to reduce it to writing. Lawyers call a contract settling a dispute a "release," because in exchange for some act (often the payment of money), one person gives up or releases her claim against another. For instance, if the paint on John's building is damaged when Joan, a neighboring property owner, spray paints her building on a windy day, John might agree to release Joan from liability (that is, not sue Joan) if Joan agrees to pay \$2,000 to have the damaged area of John's building repainted.

As long as a written release is signed voluntarily by both parties, is fair in the sense that neither party was tricked into signing on the basis of a misrepresentation, and provides each party with some benefit (if you pay me \$500, I won't sue you and I'll keep my dog out of your yard), it is a valid contract. If either party later violates it, the other can file a lawsuit and receive a court judgment for appropriate damages.

It's important to understand that releases are powerful documents. If you release someone who damaged your car for \$500, only to later find out that the damage was more extensive, you'll be stuck with the \$500 unless you can convincingly claim the other party was guilty of misrepresentation or fraud. Of course, in most situations, where the details of a dispute are all well known, a release can be comfortably signed with the knowledge that the dispute will finally be laid to rest.

Below we provide a sample release. Visit <http://www.nolo.com> for releases tailored to specific situations, including releases you can fill out on your computer or online. In addition, release forms are often available from office supply stores that carry legal documents and in lawyers' form books, available at law libraries.

No matter where you get your release, it should contain the following information:

1. The names and addresses of the party being released and the party granting the release.
2. A brief description of the "what," "when" and "where" of the dispute or issue to which the release pertains. (The release below provides several blank lines for you to briefly describe the events giving rise to the need for the release.)

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3. A statement of what the person giving up a claim is getting in return. As mentioned, for a release to be a valid contract (which it must be to be enforceable), the person signing the release (releasor) must receive something of benefit (called “consideration” by lawyers) in exchange for her agreement to give up her right to sue. The release below provides a space for this “consideration” to be described. Typically, it is money. If so, simply enter the amount. If it is an agreement by the releasee to perform or not perform some act (for example, stop his dog from barking at night), describe the act.

4. A statement that the release applies to all claims arising from the dispute or issue, both those known at the time the release is signed and those that may come along later. This provision is very common in releases; without it they wouldn't be worth much.

5. A statement that the release binds all persons who might otherwise have a legal right to file a claim on behalf of the releasor (for example, the releasor's spouse or heirs).

Although I have included this provision in my releases for caution's sake, it is rare that it will ever prove relevant. In fact, such persons are usually bound by the release anyway. It's important to remember, however, that listing these people in a release does not affect any rights that such persons may otherwise have in their own behalf. Thus, in the community property states of Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin, where each spouse may independently own a portion of any claim, both spouses should definitely sign every release.

6. The date the release is signed.

7. The signatures of the parties. Legally, only the person granting a release needs to sign it, but we think it is better practice for both parties to do so—after all, this important document contains statements that affect both their rights. In the case of mutual releases, which occur when both parties give up a claim against the other, both must sign.

8. The release below contains a place for the signatures of witnesses. There is no legal requirement for a release to be witnessed, but if you don't trust the other person and think he may later claim “it's not my signature,” a witness can be a good idea. If a release involves a lot of money or a potentially large claim, you may want to bolster the chances of its being upheld (should it ever be challenged later) by signing it in front of a witness or two who can later testify, if the issue arises, that the other party was under no duress and appeared to know what he was doing. If your release involves a small claim, it is not necessary to do this. To encourage you to have your release witnessed where appropriate, I have included two lines on each release for witnesses to sign. If you decide to dispense with witnesses, put “N.A.” on each of the lines.

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### GENERAL RELEASE

1.       (Person signing release)      , Releasor, voluntarily and knowingly executes this release with the express intention of eliminating Releasee's liabilities and obligations as described below.
2. Releasor hereby releases       (person being released)      , Releasee, from all claims, known or unknown that have arisen or may arise from the following occurrence:       (description of events giving rise to release, including location and date if appropriate; see box for sample language)

*Sample Language:*

- a. "Repair work incompletely done to Releasor's boat at the Fixemup shipyards on 5/6/02."
- b. "Agreement by Releasee made during the week of June 6, 20\_\_, to deliver the fully laid out and pasted-up manuscript for the book Do Your Own Brain Surgery to Releasor's address no later than July 6, 20\_\_, which Releasee failed to keep."
- c. "A tree growing on Releasee's property at 1011 Oak St. fell into Releasor's backyard at 1013 Oak St. on August 7, 20\_\_. It damaged Releasor's fence, which had to be replaced. The tree itself had to be removed by ABC Tree Terminators."

3. In exchange for granting this release Releasor has received the following consideration:       (amount of money, or description of something else of value which person signing release received from other party; see box for sample language)

*Sample Language:*

- a. "\$150 cash."
- b. "a used RCA television set."
- c. "an agreement by (Releasee's name) to desist from further activities as described in Clause 3 of this release."
- d. "an agreement by (Releasee's name) to repair Releasor's Apple Macintosh computer by January, 20\_\_."

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4. In executing this release, Releasor additionally intends to bind his or her spouse, heirs, legal representatives, assigns and anyone else claiming under him or her. Releasor has not assigned any claim covered by this release to any other party. Releasor also intends that this release apply to the heirs, personal representatives, assigns, insurers and successors of Releasee as well as to the Releasee.

This release was executed on \_\_\_\_\_, 20XX, at  (city and state)

\_\_\_\_\_  
Releasor's Signature

\_\_\_\_\_  
Releasee's Signature

\_\_\_\_\_  
Address

\_\_\_\_\_  
Address

\_\_\_\_\_  
Releasor's Spouse's Signature

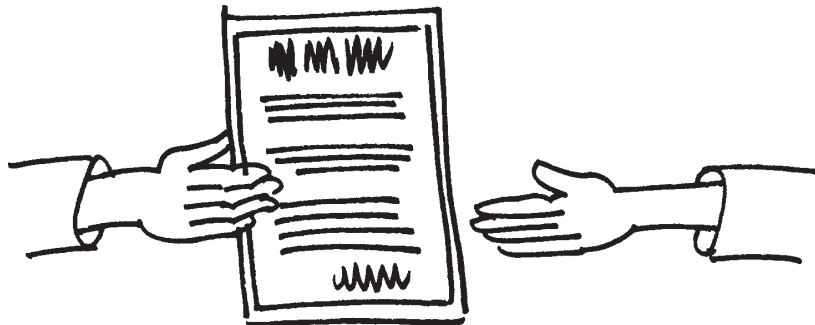
Witnesses:

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address





**If possible, have your settlement made part of a court order.** Assuming a Small Claims case has actually been filed, you may have a choice as to whether your agreement is made part of a court order or is simply written as a binding contract between you and the other party. Especially if it's less trouble (sometimes getting a court order involves an extra trip to court), you may be tempted to accept a contract. Generally, I recommend against this. Since a court order is easier to enforce, having your settlement agreement made part of one (assuming it's possible, of course) is definitely worth a little extra effort.

### E. Agreement Just Before Court

Occasionally, disputes are settled while you are waiting for your case to be heard. Even on court day, it is perfectly proper to ask the other person if he or she wishes to step into the hall for a moment to talk the matter over. If you can agree on a last-minute compromise, wait until your case is called by name by the courtroom clerk and then tell the judge the amount you have agreed upon and whether the amount is to be paid all at once or over time. Typically, the judge will order that the case be dismissed if one person pays the other the agreed-upon amount on the spot, or, if payment is to be made later, will enter a judgment for the amount that you have agreed upon.

Another possibility is that you and your opponent will agree to a last-minute attempt to mediate. If so, you will want to explain this to the judge, who in turn will normally delay ("continue," in legalese) your case until the mediation session takes place. If mediation works and your case settles, you and the other party should jointly notify the court clerk. ■

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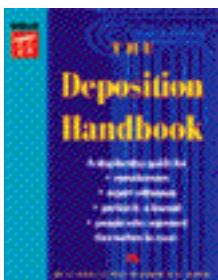
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