Mediated Settlement Agreements

Don't put off until tomorrow what you can do at mediation.

WRITTEN BY **SCOTT BAKER**

It happens at mediations across Texas each day. After a long, contentious, and exhausting day, the parties finally find terms on which they agree to end their conflict and they want to go home. Quickly. The attorneys draft a one-page, bullet-point list of the agreed terms that the parties sign. One of those terms provides that the attorneys will prepare and the parties will execute a "more formal settlement agreement" or other documents after the mediation.

Generally, three things can happen when the execution of the parties' final settlement agreement is put off until after the mediation. Like with football's forward pass, two of them are bad. And the third possibility often is not very good either. This article suggests counsel consider preparing before mediation a draft settlement agreement with anticipated terms that the parties will desire or require and, after the agreement is revised throughout the day to reflect the parties' mediated agreements, having the parties finalize and execute their settlement agreement at mediation. Doing so can save significant time and expense and it can help to deliver the reason the parties engaged in mediation—to put conflict behind them for good.

Even when the subsequent "more formal agreement" is executed, it is costly and time-consuming to finalize

"Bare bones" mediated settlement agreements include terms that all parties know are important—things like payments, releases, and dismissals of litigation. But summary term sheets often do not address issues that one or both parties believe will be included in the subsequent agreement because they may be considered to be merely boilerplate or otherwise noncontroversial. Terms such as confidentiality, choice of law or venue, non-disparagement, or indemnification may be thought to be so insignificant that they may not be discussed, or even considered, at the mediation.

However, when counsel exchange drafts after mediation, it is not uncommon for there to be disagreement over terms that were not included on the summary term sheet or over the "formal" language for terms that were included.[1]

Usually, parties and counsel work through those issues and complete the subsequent agreement or other documents. But it can take hours of the lawyers' and parties' time, spanning weeks or months to finalize the settlement. While the parties have secured their settlement under this scenario, they will have incurred sometimes substantial cost and delay to do so.

Parties are thrust back into litigation when they cannot agree upon the subsequent agreement or other documents

Appellate opinions from across Texas demonstrate that parties sometimes do not agree upon, or otherwise do not execute, the agreement or other documents called for in a mediated settlement agreement.[2] What do the parties have then? To find out, they are required to litigate whether: 1) the subsequent agreement is a condition precedent to the formation of an enforceable agreement, without which the parties are not bound by the summary term sheet; or 2) the subsequent agreement is to be merely a memorial of an already enforceable contract—the mediated term sheet.[3]

The litigation paths are costly, time-consuming, and can foreclose the ability to include terms that could have been negotiated at mediation

If the parties' intent is clear and unambiguous on the face of the mediated term sheet,[4] then a court can on summary judgment decide as a matter of law whether the term sheet is enforceable.[5] However, as in many other types of cases, prevailing on summary judgment is certainly not assured. "Often it is a difficult question of fact" to determine the parties' intentions when they agreed to execute subsequent documents "and there are very many decisions holding both ways."[6] And even if a party obtains summary judgment, it will have spent significant time and expense briefing, arguing, and providing summary judgment evidence on the many factors that a court may consider to decide the issue.[7]

When a court determines that the parties' intent is ambiguous, then a trier of fact will be required to determine whether the parties intended for the mediated term sheet to be binding. Of course, the cost and delay that parties incur to conduct a trial over the parties' intentions will exceed even the substantial time and expense involved with seeking summary judgment.

If it is decided, whether on summary judgment or at trial, that the parties intended to be bound by the mediated term sheet, then the parties' disputes are resolved. However, the terms of the parties' agreements are restricted to the terms of the mediated term sheet without other terms that one or both parties may have desired or included had they known that the subsequent agreement would not be consummated. And if it is determined that the subsequent agreement was a condition precedent to a binding settlement, then the parties are right back where they were before the mediation—they have no settlement of their disputes—but at substantial expense and delay.

Consider finalizing the settlement agreement at mediation

To avoid those potential issues, this article suggests counsel consider finalizing settlement documents for the parties to execute at mediation. There are several benefits to finalizing an agreement at mediation.

The mediator can help. The parties hired a mediator for his or her assistance and skill in helping them resolve tough issues. Why work through only some of the issues and leave others to be negotiated later without the mediator's help? Take full advantage of the time with the mediator, his or her skill set, and the services he or she provides.

Mediation is the best time to address and resolve issues. Mediation presents a unique opportunity when all counsel and the parties' decision-makers are in one place with undivided attention on resolving their disputes. After mediation, counsel and parties will spread their time and focus to dozens of other concerns. Therefore, even without substantial disagreements over content, post-mediation negotiations and drafting of documents can take weeks or months. Addressing all issues at mediation allows parties to more quickly and efficiently consider and work through settlement terms and to end their conflict.

The draft agreement is a checklist of terms to negotiate and resolve. It is not uncommon for the parties to focus on only one or two key issues at mediation such as payment and

release terms. A substantially complete agreement can remind counsel and parties of other issues that need to be negotiated and resolved at mediation.

Achieve finality. Parties go to mediation to resolve their disputes and to end litigation and the time and resources that it consumes. Mediators appreciate the opportunity to help parties end their conflict. Utilize your mediator and the mediation process fully by not leaving additional issues to be negotiated and possibly litigated.

If it is not possible to finalize the agreement at mediation, make the parties' intentions clear

Getting a final mediated settlement agreement executed at the end of mediation may not be possible in every case. A mediated term sheet that requires the parties to execute additional documents later may be all that can be done. In those cases, the mediated term sheet should clearly provide whether the parties intend to be bound by the term sheet if the subsequent agreement or documents are not consummated. Texas caselaw provides guidance for parties to do that—by using plain and unequivocal language that leaves no room for doubt of the parties' intentions.[8] "[A] party who does not wish to be prematurely bound by a letter agreement should include 'a provision clearly stating that the letter is nonbinding, as such negations of liability have been held to be effective.'"[9] Caselaw cautions that simply making a mediated term sheet "subject to" subsequent documentation is not the type of clear language that reliably demonstrates the parties' intent.[10]

For all other cases, consider going to mediation with a substantially complete settlement agreement that can be revised at the mediation to reflect the agreements the parties make during the session. Getting an executed and final settlement agreement can eliminate later disputes and the delay and cost associated with additional negotiations and, possibly, litigation. Walking away from mediation with a final agreement helps to achieve the benefit of mediation—ending conflict for good. **TBJ**

NOTES

1. The issues surrounding agreements to prepare subsequent documents arise in circumstances other than mediation. *See, e.g., Foreca, S.A. v. GRD Dev. Co.,* 758 S.W.2d 744 (Tex. 1988) and *John Wood Group USA, Inc. v. Ico, Inc.,* 26 S.W.3d 12, 15 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (business negotiations); *McCain v. Promise House, Inc.,* 2018 WL 2042009 *1 (Tex. App.—Dallas May 2, 2018, no pet.) (mem. op.) and *Gen. Metal Fabricating Corp. v. Sterigou,* 438 S.W.3d 737, 741 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (Rule 11 agreements). The analyses in these and similar opinions are applicable to mediated settlement agreements.
2. *See, e.g., West Beach Marina, Ltd. v. Erdeljac,* 94 S.W.3d 248, 258 (Tex. App.—Austin 2002, no pet.); *Lerer v. Lerer,* 2002 WL 31656109 *1 (Tex. App.—Dallas Nov. 26, 2002, pet. denied); *Hardman v. Dault,* 2 S.W.3d 378, 380 (Tex. App.—San Antonio 1999, no pet.); *Club Park Dev., Inc. v. Intervest-Churchill Pointe, Ltd.,* 1999 WL 33747844 *2 (Tex. App.—Eastland May 27, 1999, no pet.); *Martin v. Black,* 909 S.W.2d 192, 195 (Tex. App.—Houston [14th Dist.] 1995, writ denied).
3. *Border Gateway, L.L.C. v. Gomez,* 2011 WL 4361485 *3 (Tex. App.—Houston [14th Dist.] Sept. 20, 2011, no pet.) (mem. op.); *Hardman,* 2 S.W.3d at 380; *Martin,* 909 S.W.2d at 196.
4. Cases provide guidance on language that Texas courts have found to be either clear or ambiguous on intent to be bound to a term sheet if subsequent documents contemplated by the term sheet are not executed. *See* cases cited in notes 8 and 10.
5. *See West Beach Marina, Ltd.,* 94 S.W.3d at 258; *Hardman,* 2 S.W.3d at 380.
6. *Foreca, S.A.,* 758 S.W.2d at 745 (citing A. Corbin, Corbin on Contracts § 30 at 97 (1963)); *see also West Beach Marina, Ltd.,* 94 S.W.3d at 257 (stating that "[i]t is generally a fact question for the jury to determine whether the parties intended to be bound by the written agreement or intended the agreement to be preliminary and without legal significance.").
7. *See Martin,* 909 S.W.2d at 196-97 (identifying eight Restatement [Second] of Contracts factors that courts may consider to determine parties' intent to be bound by a preliminary agreement).
8. *See, e.g., Med Vision, Inc. v. Medigain, LLC,* 2017 WL 1190494 *12 (N.D. Tex. Mar. 31, 2017) (mem. op.); *1st Resource Group, Inc. v. Olukoga,* 2017 WL 218290 *3 (Tex. App.—Fort Worth Jan. 19, 2017, no pet.) (mem. op.); *Border Gateway, L.L.C.,* 2011 WL 4361485 at *3-4; *Castano v. San Felipe Agric., Mfg., & Irrigation Co.,* 147 S.W.3d 444, 448 (Tex. App.—San Antonio 2004, no pet.); *see also John Wood Group USA, Inc.,* 26 S.W.3d at 17.
9. *John Wood Group USA, Inc.,* 26 S.W.3d at 19 (citing E. Allan Farnsworth, Farnsworth on Contracts § 3.8b at 193 (1990)).
10. *See Martin,* 909 S.W.2d at 197; *Foreca, S.A.,* 758 S.W.2d at 746.

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