

The Final Agreement

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All Sides. One Solution.*

The ultimate goal of a mediation is a full settlement. To that end, the parties should leave a mediation with a fully executed enforceable agreement.

In practice, reaching a deal at a mediation can be just the beginning of resolving a dispute. Often the parties prepare a term sheet at the end of the mediation that contains the key terms. The challenge with this approach is that it creates the risk of delay as well as further disputes. The parties can continue to have a disagreement about the terms of the agreement.

A risk of having only a term sheet is that if the parties cannot agree later to the final settlement agreement it may necessitate involving the judge on a motion to enforce the settlement. This could lead to unintended consequences for one or both sides.

A way to avoid that situation is to have the mediator serve as the arbitrator and enter a binding decision in the event of a dispute about the settlement terms. Yet, that creates more delay and additional fees for the parties.

All of this can be avoided by working together to achieve the intended goal — having a final binding agreement before the parties leave the mediation. One approach is to send opposing counsel a draft settlement agreement in advance of the mediation with all of the material terms. The draft agreement could also be shared real time at the mediation. It can be modified throughout the process. This provides the other side the opportunity to review it without the time pressure of seeing it for the first time having just settled the case (possibly late in the day/evening). Counsel will need sufficient time to review the document and confer with his/her client before responding to the proposed agreement. While it may show your hand about some of the terms, it provides the framework to negotiate during the mediation. For example, if you plan to include a liquidated damage provision for a breach of the confidentiality provision the other side may want to negotiate some term in exchange for your non-negotiable term.

While typically the defendant prepares the formal settlement agreement, it may be effective to have each side prepare key terms so that the language is suitable to everyone.

At times there are tax issues that must be considered. These decisions necessitate the expertise of a tax advisor, not counsel. It makes sense to have hashed out these provisions in advance of the mediation.

If a full agreement is not being executed at the time of the mediation, counsel should include a date certain for when the draft formal agreement will be provided to the other side and a date certain for execution of the agreement by all parties. Consider using the date of the mediation as the trigger date for payment. The other approach is to include language that a payment is due “no later than X date.”

The most effective way to accomplish the goal of a final settlement is to prepare and share the agreement in advance of the mediation. Leave with the negotiation table with a final deal.