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Mediation Notes

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Flour and Eggs Don't Always Make a Biscuit

One of the issues that sometimes arises at mediation is whether an enforceable agreement exists if a second document is contemplated. What if one party signs a mediation agreement that contemplates a longer formal settlement document with confidentiality provisions, merger, remedies for breach and all of the belts and suspenders? Is there really an enforceable deal if a party refuses to sign the longer settlement agreement and release? The law is neither easily summarized nor consistent. Some courts faced with a Motion to Enforce Settlement treat the signed mediation agreement as an enforceable deal and view the contemplated release as more or less perfunctory. Other courts find that if the language of the mediation agreement contemplates a second document that must be mutually agreed upon and executed, and if that second document is not agreed upon, then there is no deal.

This is a fixable problem. If the parties want to make a final deal, the intent needs to be made clear. If the parties have a common understanding of the essential terms, but one side wants to "see" a final and formal settlement agreement and release terms (which cannot be created during the mediation session), then the best solution is to draft a memorandum of understanding. This document should make clear "this is not an enforceable agreement" but simply a list of the negotiated deal points. There is nothing more frustrating than for one party to insist there is a deal and another to say there is not because some event or condition has not occurred or there

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is a later problem with the release terms.

The lawyers and the mediator need to shepherd the deal in such a way that there is no room for ambiguity on the question of whether a deal was had. It may be sub-optimal to end the mediation with merely a memorialization of terms, but sometimes, one side or both are not comfortable making a deal without a clear and complete writing. Later disputes over enforceability are expensive, and they create privilege and confidentiality problems for all concerned. Of course, there is the risk that a party may change their minds between the mediation session and the creation of the final agreement. To that end, we suggest the parties bring form agreements and draft language in advance so that it may be possible to create a final and complete agreement on the day of mediation. A memo of understanding that disclaims contract formation is not preferred at mediation, but it is better than a later fight over whether a deal was made. Before you leave mediation at the end of the day, be clear whether you have flour and eggs or if you are leaving with the whole biscuit.

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