Daily Journal

May 27, 2011

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The Devil Is in the Details

A draft settlement agreement is the GPS of mediation, reaching a verbal agreement without this is a risk that should never be taken.

It is 7 p.m. You and your clients have been plugging away all day in an earnest effort to settle a contract dispute. After innumerable starts and stops, you are exhausted and hungry, but have finally reached a verbal agreement with the opposing parties. Now is the time to head out for a celebratory dinner. Not so fast. The important work of the day has just begun and unless you have prepared in advance for this work, you may very well learn that the devil is in the details.

You would not consider yourself prepared for a trial unless you had drafted your jury instructions and closing argument. When you enter the courtroom on the first day of jury selection, you know where you want to end up and you have meticulously plotted a detailed path to get you there. Likewise, you should not commence most mediations unless you have thoroughly considered your "closing" - i.e., the material settlement terms. In mediation, as in trial, you may not anticipate every twist, but any surprise should occur not for want of preparation. As you begin mediation, you, and ideally your client as well, should likewise know where you want to go. A draft settlement agreement is the GPS of mediation; guiding you along your preferred route, but flexible enough to accommodate a change of course. This tool is all the more expedient, the more complex the litigation.

Preparing a draft of your settlement agreement in advance and bringing along an electronic version that you can edit as negotiations progress, will assist you during the negotiations and place you at an advantage at the culmination. Without a thoroughly considered draft agreement in hand at the moment the parties verbally agree to terms, you are left with two choices: shake hands, execute a bare bones term sheet and fight over the details later, or labor over the details on the spot when everyone is already spent. The former option carries the risk that the parties discover later that there are material terms that have not been addressed and the deal falls apart. If you have omitted a material term at mediation, a court will be unable to enforce your agreement under Code of Civil Procedure Section 664.6. Critzer v. Enos (2010) 187 Cal.App.4th 1242, 125.

Equally problematic, if subsequent negotiations over the wording of the formal settlement documents become protracted, fortunes may change with the passage of time to cause a settling party to reconsider. Consider for example, the circumstance where a settling defendant is hit in the interim with a new lawsuit by a third party.

Bankruptcy may now become a far more attractive option over settlement. On the other hand, drafting a detailed formal agreement from scratch at the end of mediation can be tedious, time-consuming and acrimonious - especially if everyone is exhausted, cranky and impatient. If, instead, you produce a carefully considered draft settlement agreement, you will insure that all of your client's concerns are addressed before anyone leaves the mediation.

The process of drafting the settlement agreement in advance also allows counsel to focus on seemingly insignificant details that may have profound consequences. The signature line is a perfect example. Who are the real parties and who must be included to achieve the goals of your client? If one of the parties to the settlement is an entity, who will sign for that entity? Will they be present at the mediation or available near a fax machine? Are there other individuals who should be bound but will likely not be present at the mediation?

An agreement is not enforceable under Section 664.6 unless the parties have personally signed the same agreement (or acknowledged the terms in open court). The courts have rejected arguments of agency, or claims that the client authorized an attorney to settle. Notably, in Critzer, it was not enough that the attorney for the Homeowners Association recited the settlement terms on the record in court; the court was still reluctant to enforce the agreement where the client was not personally present - even where the absent client was the party seeking to enforce the agreement. Critzer even suggests that the insurer must personally consent to a settlement, rather than its retained counsel. Once you have focused on those signature lines, make sure you ask that all of the necessary signatories, both yours and your opponents, either attend the mediation or remain on call near a fax machine.

If you have carefully deliberated over a draft agreement as an adjunct to pre-mediation discussions with your client, you will also be more likely to address all of your client's concerns in the course of negotiations, as opposed to tacking them on at the end of the session. No one will be surprised at the end of a long mediation by new terms such as confidentiality or non-disparagement.

And while not every client relationship will allow a more candid "what if" discussion pre-mediation, there may be important legal details that might be discussed in advance, such as indemnification, mutual releases, and confidentiality. If you and your client are not yet ready pre-mediation to address potential deal breakers and sensitive areas of compromise, you can nonetheless explore your client's business or financial circumstances to allow you to plan ahead, even if unilaterally. Given adequate time to consider the impact of various choices on your client's circumstances, you will be better prepared to identify the necessary parties to a settlement and the universe of claims that need to be addressed. If a settlement agreement is likely to reference anything requiring detailed description, you will have documents such as inventories or property descriptions readily available to attach as exhibits to the settlement.

Likewise, a general release should be carefully considered and not automatically grafted onto a settlement term sheet. If the opposing parties have several different relationships, you may need to carefully construct the scope of the release. Similarly, if the parties have had a long-term professional relationship such as lawyer-client, they may have a history of different transactions beyond the matter that has given rise to the lawsuit. If you were drafting the settlement agreement in advance of mediation, you

would be more likely both to elicit and flag these details and to account for such nuances in the settlement document signed at mediation.

While preparation of the perfect settlement agreement by the close of mediation may not always be practical, at a minimum, you should arrive at the mediation with a draft that accounts for all anticipated material terms so as to insure its enforceability under Section 664.6. Your original draft should identify the necessary signatories to the agreement. It should describe the claims your client wishes to resolve among all of the parties involved in the settlement. If the agreement anticipates a dismissal of the complaint before execution of all settlement terms, make sure it expressly allows the court to retain jurisdiction to enforce the terms of the settlement pursuant to Section 664.6. The release should quote Civil Code Section 1542 and contain an express waiver of its terms. If the agreement anticipates more formal documentation, set a deadline for the parties to agree to terms and designate the mediator as the arbiter of any language disputes that cannot be resolved by the deadline. Make clear that the document signed at mediation contains all of the material terms and that subsequent documentation will not add any new material terms. Include a recitation that the agreement is admissible in court to enforce its terms, notwithstanding mediation confidentiality.

The documentation signed at the conclusion of a successful mediation is key to the successful execution of your agreement. It can make or break the enforceability of your agreement. Don't leave the office without it.

Judge Patricia Collins retired into a fulltime ADR practice with ADR Services, Inc. in 2008 after a 20-year career at the Los Angeles courts. For additional information about Judge Collins, including her resume and representative matters, please visit her website, www.judgecollins.com, or call us at (310) 201-0010.