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Don't Run With Scissors: Seven Tips for Avoiding Inherently Dangerous Drafting Practices at the Eleventh Hour of a Construction Mediation Session

Gregory R. Meeder* Lisa M. Kpor†

The complex nature of a construction dispute routinely compels design professionals, contractors, owners, and insurers to seek resolution of their conflicts through mediation. At the conclusion of an extended mediation session, the parties and their counsel must be prepared to draft a mediation settlement agreement before the stakeholders and their counsel physically leave the mediation. This mediation settlement agreement, which is often referred to as a memorandum of agreement (MOA) or memorandum of understanding (MOU), may ultimately become the only document memorializing the agreement of the parties. As a result, it is vital that the drafters carefully craft an enforceable, binding, and standalone term sheet, even if the parties intend to enter into a more comprehensive, formal settlement agreement with additional terms at a later date. Buyer's remorse, which can be forced upon one of the parties by a decision influencer who did not attend the mediation, must be avoided if the parties who reached the agreement want to capture the benefit of their mediation. This article will offer seven drafting tips to consider when preparing a settlement mediation agreement that will enhance the probability that the MOA or MOU will withstand judicial scrutiny as an enforceable and complete settlement agreement.

*Gregory R. Meeder is a nationally recognized construction lawyer and neutral who practices at the Chicago office of Holland & Knight LLP.

†Lisa M. Kpor is a commercial litigator and ethics lawyer in the Chicago office of Holland & Knight LLP. The views expressed in this article are those of Gregory Meeder and Lisa M. Kpor and are not necessarily those of Holland & Knight or its clients. This article offers general information and should not be taken or used as legal advice.

Tip No. 1: Ensure that the agreement is memorialized in writing and executed by all of the parties to the agreement.

It is extremely important to ensure that any agreement reached during the mediation is memorialized in writing and fully executed before the parties leave the session. In many jurisdictions, a written agreement is a prerequisite to enforcement.

In *Billhartz v. Billhartz*, an appellate court in Illinois noted that the "Uniform Mediation Act . . . contemplates that a signed, written agreement is admissible and enforceable following mediation and that oral communications generally are not."[1] Using that logic, the court determined that the agreement at issue was not enforceable even though the parties "orally indicated they had reached an agreement" during the mediation session because the parties did not sign the memorandum of settlement.[2]

In Alabama, relevant statutory authority requires that any settlement agreement, including those reached after mediation, be reduced to writing to become enforceable.[3] Trial courts are even willing to enforce handwritten agreements signed by counsel for the parties at the conclusion of mediation.[4] Therefore, it is wise to put any agreement of the parties into writing and confirm that all of the parties have executed the agreement prior to ending the mediation.

[1] *Billhartz v. Billhartz*, 2015 IL App (5th) 130580-U, ¶ 38.

[2] *Id.* at ¶ 45 ("The oral agreements and draft provisions created during and after mediation will not constitute the formation of a binding contract. Accordingly, we find that the circuit court erred in finding that the parties entered into a binding and enforceable oral settlement agreement at mediation.") (internal citation omitted).

[3] *Cincinnati Ins. Cos. v. Barber Insulation, Inc.*, 946 So. 2d 441 (Ala. 2006) ("However, Framco *admits* that the technical requirements for enforcement have not occurred and (1) the agreement was not reduced to writing and (2) the agreement was not made on the minutes of the trial court. Because the agreement, if one existed, does not comply with § 34-3-21 [of the Alabama Code], the trial court erred in enforcing it.") (internal citation and quotations omitted) (emphasis in original).

[4] *See, e.g.*, *In re Estate of Davinroy*, 2017 IL App (5th) 160385-U, ¶¶ 21-22; *Fidelity and Guar. Ins. Co. v. Star Equp. Corp.*, 541 F.3d 1 (1st Cir. 2008) (enforcing handwritten settlement mediation agreement).

Tip No. 2: Familiarize yourself with the applicable case law and local rules in your jurisdiction.

Legal authority related to the formation and enforcement of a memorandum of agreement entered into at the close of mediation varies greatly depending on your jurisdiction, but such authority can be critical in resolving issues arising from the agreement.[5]

Take for example how different jurisdictions view oral mediation settlement agreements. Such agreements would likely be invalid in Illinois, Alabama, and any states that have adopted the Uniform Mediation Act. But in federal court "it has long been recognized that oral settlement agreements reached during a mediation or pretrial conference are fully enforceable by the court presiding over the underlying litigation."[6] Thus, it is important to know whether any action related to your dispute would arise under federal or state law.

Similarly, it is equally important to review the applicable local rules in your jurisdiction before preparing a memorandum of understanding. In Cook County, Illinois, an agreement must be "reduced to writing and signed by each of the parties." In Monroe, Perry, and Randolph counties of Illinois, an agreement during mediation must be "reduced to writing on the Memorandum of Agreement Form or attached thereto and signed by the parties and their counsel, if any, at the conclusion of the mediation." If any of these conditions are not met—e.g., counsel did not sign the memorandum—the agreement will not be enforceable.[7] In the Eighteenth Judicial Circuit of DuPage County, Illinois, an agreement "shall be reduced to writing and signed by the parties or their agents before termination of the mediation conference." Reviewing the applicable statutes, local rules, and common

[5] *See, e.g.*, *In re Patterson*, 969 P.2d 1106 (Wash. Ct. App. 1999) (applying Washington Court Rule 2A of the Civil Rules of Superior Court); *Cincinnati Ins. Cos.*, 946 So. 2d at 449 (relying on provisions of the Alabama Code to resolve whether an alleged settlement agreement was enforceable).

[6] *Thermos Co. v. Starbucks Corp.*, No. 96 C 3833, 1998 WL 299469, at *4 (N.D. Ill. May 29, 1998).

[7] *See In re Marriage of Akbani*, 2014 IL App (5th) 130266 (2014), ¶ 41.

law in your jurisdiction will aid you in satisfying relevant conditions on agreements reached during mediations.

Tip No. 3: Include a provision stating that the agreement is binding and enforceable between the parties.

Another suggestion to consider is to include a provision in the mediation settlement agreement stating that the agreement is binding and enforceable between the parties.

In *Majkowski v. American Intern. Group, Inc.*, all of the parties present at a mediation executed a "Settlement Term Sheet" at the conclusion of the mediation, which provided that the term sheet was "a binding and enforceable agreement between the parties."[8] The term sheet also noted that the parties would agree to and execute a more detailed agreement in the future.[9] Weeks later, one of the parties had a "change of mind" and refused to sign the more detailed, formal settlement agreement.[10] The U.S. District Court for the Northern District of Illinois held that the "Settlement Term Sheet" signed during the mediation was valid and enforceable despite the plaintiff's refusal to execute the detailed settlement agreement because, among other things, the document explicitly stated it would be binding and enforceable on the parties.[11] As such, it is a best practice to include a clause stating that the agreement is binding and enforceable.[12]

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[8] *Majkowski v. American Intern. Group, Inc.*, No. 08 CV 4842, 2008 WL 5272193, at *1 (N.D. Ill. Dec. 16, 2008)

[9] *Id.*

[10] *Id.*

[11] *Id.* at *4.

[12] *See also Patterson*, 969 P.2d at 1111 (enforcing an agreement signed at the conclusion of mediation that was signed by the parties, but not their counsel, where the agreement stated it was "binding and enforceable").

Tip No. 4: Include a provision stating that, if a dispute arises during the negotiation of a final settlement agreement, the mediator will act as arbitrator of any such dispute, and his or her decision will be final and binding upon the parties and unappealable.

Occasionally, parties that have reached an agreement during the mediation session end up in a dispute over the specific language proposed in the formal settlement agreement. Incorporating a procedure in the memorandum of understanding to resolve such disputes ensures that these quarrels are handled conclusively and efficiently. At a minimum, provide that the mediator will act as an arbitrator of any such dispute, and his or her decision will be final and binding upon the parties and unappealable.

Tip No. 5: Provide that a formal written settlement agreement is NOT a precondition of settlement.

A mediation settlement agreement should expressly state whether or not a formal written agreement is a condition precedent of settlement. Mediation parties who acknowledge that the agreement reached in mediation is binding and enforceable should remove all doubt and provide that the execution of a formal settlement agreement is not a precondition for settlement.[13]

[13] *Brownlee v. Hospira, Inc.*, 869 F.3d 509 (7th Cir. 2017).

Tip No. 6: State That All Material Terms Are Included in the Mediation Settlement Agreement.

To have an enforceable agreement, many courts require that the parties have a "meeting of the minds" on all material terms, even where the parties have a mutual understanding that certain contract terms will be negotiated at a later time.[14] Consequently, a memorandum of agreement should contain all material terms of the arrangement procured during the mediation and explicitly state that all material terms have been included therein. The parties should also ensure that the material terms are outlined in a clear and unambiguous manner to support any subsequent enforcement motion or argument.[15]

Tip No. 7: For purposes of clarity and efficiency, include a date certain for when the formal, detailed written settlement agreement will be finalized and executed.

It is also helpful to include a date certain for when a formal, detailed written settlement agreement will be finalized and executed, just as a construction completion date is utilized in a construction contract. This completion and execution date provides a trigger date for assistance, if needed, from the mediator who then becomes the arbitrator of any drafting dispute that may arise. Assuming you have incorporated the guidance outlined above, his or her decision will be final.

[14] *See, e.g.*, *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248 (Tex. App. 2002); *Academy Chicago Publishers v. Cheever*, 578 N.E.2d 981 (Ill. 1991).

[15] *See, e.g.*, *Majkowski,* 2008 WL 5272193, at *1 (granting motion to dismiss action that was previously resolved through mediation where the terms of the settlement mediation agreement were "finite and clear"); *Commissioner of Transportation v. Lagosz*, 209 A.3d 709, 717 (Conn. App. Ct. 2019) (enforcing the mediation settlement agreement that contained the "only essential term of the settlement agreement," which was the amount of compensation to be paid).

Conclusion

Following the tips above will increase the probability that a court will find that an eleventh-hour mediation settlement agreement reached at the conclusion of an exhausting but successful mediation session will be valid, complete, and enforceable.