



After the Table: Basics of Papering the Deal

By Robert A. Creo

Earlier columns have addressed the lawyer's identity and reputation; explored self-awareness; perpetual learning; professional growth through civic service; persuasion and emotion — specifically fear and anxiety; the preparation and self-control necessary for engaging at the bargaining table; opening positions and negotiation strategies; the best practices and language of persuasion; power, leverage and relationships and closing the deal. This column addresses memorializing and documenting the negotiated claim resolution or transaction with a memorandum of agreement, letter of intent (LOI) or material term sheet.

Let's Shake On It!

When I was a young advocate in the days before email, fax machines and other electronic wizardry, it was common for lawyers to reach a settlement orally and, if in face-to-face negotiation, to seal the deal with a handshake. Sometimes one of the lawyers might send a letter outlining the key terms or any special conditions, but usually the process for claims, divorces and other contested matters was to draft only one document — the final release or document. This was true even when the resolution was reached by telephone. Some transactions, such as real estate sales, in-

involved standard forms or other fill-in-the-blank documents that could be completed by handwriting or on the typewriter. There were also times when the lawyer could call in a secretary to take the terms by shorthand and then type them while we waited with the clients. Partnerships and transfers of assets and businesses usually were memorialized by a nonbinding LOI setting forth the economic terms and contingencies. Drafts were reviewed in meetings or exchanged by mail and, later, by fax. The pace was manageable despite looming deadlines. That was then. Now is now!

Pennsylvania, like a number of jurisdictions, enforces oral agreements provided that key elements, such as consideration and clear material terms, are present. The usual exceptions are for sale of an interest in real property, sale of goods falling outside of the Uniform Commercial Code in excess of \$500, leases of property in excess of one year, payment of the debts of others, residential construction and specific contractual situations addressed in the statute of frauds. Many contracts, including those for services and settlements of lawsuits, do not have to be in writing, and oral statements or affirmative action and/or conduct create binding obligations and duties even in the absence of any documentation. Also included are documents that are prepared and exchanged but not signed by the party against whom they are being enforced, which may or may not be subject to performance within one year or enforceable due to partial compliance, detrimental reliance or other consideration.

During one of my early commercial cases where I served as the mediator, counsel for one party stated in a counsel-only caucus that he was going to petition the state court to enforce a settlement based upon the oral understanding reached on one economic component, even though significant business relationship issues remained unaddressed or unresolved. He indicated that he would expect to call me as a witness in court if the opposing counsel denied reaching agreement on the economic payment issue. Fortunately we were able to resolve the matter globally that day. I immediately revised my agreement to mediate to make it clear that there would be no settlement



without a written memorialization signed by the participants and, when required by law for public entities, formally approved by the appropriate officials with authority.

Term Sheets and Tentative Agreements

In complex transactions such as transfers of businesses or goods, employment agreements and real property or other long-term relationships, letters of intent setting forth the material terms and conditions occur. These are rarely drafted in face-to-face meetings, but are usually created after the oral negotiations between the clients reach a tipping point and hand money is ready to be exchanged. Even the simplest transfer of a business or real estate involves a due diligence period or time to obtain financing or address other issues. An LOI or other terms can be reconstructed from email exchanges, which can now be conveniently created and confirmed via smartphone, iPad or other contemporaneous exchanges.

Contracts based solely on email exchanges have been enforced in many jurisdictions. *See, e.g., Al-Bawaba.com, Inc. v. Nstein Technologies Corp.*, 862 N.Y.S. 2d 812 (2008) (emails including typing of sender's name satisfies statute of frauds); *Basis Technology Corp. v. Amazon.com, Inc.*, 71 Mass.App.Ct. 29 (2008) (upheld settlement based upon statement in email from counsel that the parties would memorialize the settlement "in a written agreement, to be signed by individuals authorized by each party. . ."); and *Stevens v. Publicis*, 50 A.D. 3d 253 (2008) (series of emails set forth the terms in writing to modify employment agreement).

If the parties handwrite a draft of a term sheet, it is usually on a yellow legal pad in black ink. Although orange is the easiest color to see, research has shown that black ink on yellow is the best for writing perception and comprehension.

Pennsylvania is about the only jurisdiction that recognizes the "intending to be

legally bound" language as sufficient consideration for entering into an enforceable agreement under the Uniform Written Obligations Act.

The concept of reaching a tentative agreement arises when all parties agree to specific deal points, subject to resolving all issues. It is a package deal and nothing is settled until all is resolved and reduced to writing, subject to formal approval. This is common in collective-bargaining relationships in which a union committee must take the full proposed contract back to the membership, and public bodies, such as school boards, must formally vote to approve the contract. Representatives of public bodies lack authority to bind their public to contracts or settlements without following the mandated approval process.

Contents of Initial Document or Term Sheet

Based on my experience, the following elements are usually included in any document executed by the participants at the conclusion of negotiations or a mediation session when further documentation is going to be drafted.

1. Title — Document title should include language specifying whether the document is only a tentative framework or expression of intent or if it is a binding and enforceable resolution. For example, use words of this nature to confirm intent: final, binding and fully enforceable settlement terms and conditions; final and binding term sheet; enforceable settlement agreement and tentative proposed agreement or letter of intent
2. Case or transaction identification — Recitation of the case caption or other identifying characteristics of the dispute or transaction
3. Parties named
 - a. Recitation of all parties, persons and entities to be bound
 - b. Addresses, notices and other document formalities



4. Consideration — In Pennsylvania, language that indicates that a "signer intends to be legally bound" satisfies the contractual requirement for consideration.

5. Deadlines and timelines, including dates for comprehensive documents, filings and payments

6. Economic terms, including payment dates, notes, guarantees and other terms

7. Noneconomic terms, including non-admissions and dismissal of pending actions

8. Disparagement for commercial, employment and other service/relationship-oriented contracts

9. Mutuality, liquidated damages, med-arb clause

10. Confidentiality

11. Choice of law

12. Attorney's fees and costs — Court and/or arbitrator can award discretionary fees and/or costs

13. Dispute resolution clause for binding/enforceable resolutions — Designation of mediation, arbitration or med-arb, or judicial remedies if final document language; or for gaps or omissions and mutual mistakes

The individuals responsible for drafting and the next steps should be agreed upon by counsel.

Contents of the Dispute-Resolution Clause Options

1. Naming of court, tripartite panel or neutrals, or mediator designates arbitrator
2. Naming of arbitration rules, or expressly empower arbitrator to create process and procedure
3. How dispute-resolution clause may be invoked
4. Scope of authority of arbitrator: Does it extend beyond defining the terms of agreement to enforcement or damage issues?
 - a. Interprets all express and implied terms
 - b. Serves as interest arbitrator to fill in any blanks or gaps
5. Waivers by parties
 - a. No recusal because arbitrator served as mediator
 - b. Waiver of disqualification motions since advocates may be deemed witnesses
6. Conduct of the hearing considerations
 - a. Type of record (stenographic transcript or video or audio recording), if any
 - b. Can arbitrator consider only documents or evidence formally presented by parties at hearing? Or can arbitrator introduce documents and statements made by either party during the course of the mediation, including in caucus?
 - c. Can the opposing counsel be called as an adverse witness? If yes, does another counsel have to be there, too, to provide representation during the examination?
 - d. Will participants in the mediation be permitted to provide information by testimony or affidavit?
 - e. If a neutral other than the mediator is the arbitrator, may the mediator be permitted to provide information or testimony?
 - f. Decision mechanics and remedial authority
 - i. Award document must contain a jurisdictional statement confirming the appointment and authority of the

arbitrator.

- ii. Is there going to be a reasoned opinion and award?
- iii. Are there going to be formal findings of fact and conclusions of law?
- iv. Does the arbitrator act in equity with broad remedial authority to fashion a remedy?
- v. Can the arbitrator order relief in the nature of injunctive orders such as to execute documents or issue payments by a certain dates?
- vi. Can the arbitrator bifurcate the issue of prevailing-party attorney's fees and costs?

What You Need to Do

Your client need not sign all documents to create a binding agreement. Artful communication avoids the trap of falling into a binding agreement based upon what you say, write or type. A disclaimer should be added prominently in any substantive email communication expressly stating that the content or proposals are strictly subject to signatory approval from the clients and that no enforceable agreement shall be created based solely upon exchanges among counsel. When counsel desire to bind the parties mutually despite lack of full agreement on all terms or conditions or language, this can be accomplished with careful drafting of a document addressing all contingencies. ¶

TAKEAWAYS

- Be wary of inadvertent agreements created orally or by email or text.
- Counsel can bind the clients, so include disclaimers in oral and written communications.
- Courts can enforce agreements despite no meeting of the minds on all terms.
- Use appropriate language of “binding and enforceable” when appropriate.
- Include a mechanism, such as arbitration or judicial findings, for filling in gaps or resolving disputed terms.



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References and Additional Sources

- *Beverly v. Abbott Laboratories*, No. 15-1098 (7th Cir., 2016) (settlement of Title VII and ADA claims based upon handwritten document produced at mediation enforceable under Illinois law after exchange of written confirmations only between counsel despite unsigned terms on indemnification, allocation of funds, future employment and express language for release and waiver).
- Sharon Press and Paul M. Laurie, A Mediator's Obligation to Memorialize the Agreement, *Dispute Resolution Magazine*, 39 (ABA, Fall, 2015).