MEDIATING DISPUTES AND DOCUMENTING SETTLEMENTS

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AGENDA

I. Negotiation and Mediation

A. Pre-suit mediation and delayed litigation

B. Admissibility of statements made in mediation

C. Ethical considerations in negotiation and mediation

II. Drafting a Settlement Agreement

A. Where to start

B. Key Provisions

C. Other issues (bankruptcy considerations, pocket judgments, promissory notes, etc.)

III. Questions

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WHY?

- **Most cases settle**
  - Judges want parties to mediate
  - Whether by mediation or informal negotiation, most cases settle
- **COVID-19: few trials, lots of mediations**
  - Backlog of trials; uncertain timing for return to normal courthouse operations
  - Mediators say the remote mediation success rate is about the same as in-person mediation
  - Zoom/videoconference mediations may be here to stay
    - Never too late to brush up on your Zoom skills…

Pre-Suit Mediation and Delayed Litigation

- **Parties may wish to participate in mediation before a lawsuit is filed**
  - Consider statutes of limitation, contractual claim periods and any other deadlines
- **Parties may wish to mediate shortly after suit is filed**
  - Consider answer deadlines and whether they need to be extended
- **Actionable advice:**
  - Never assume the dispute will settle; approach all deadlines as inflexible
  - Agreements to extend deadlines should be in writing; consider a tolling agreement before delaying the filing of a claim

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Admissibility of Statements Made in Mediation

Rule 408 Protects…

- **An Offer of Settlement**
  - An offer of settlement, or accepting, promising to accept, or offering to accept a settlement offer is “not admissible—on behalf of either party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.”
    See Fed. R. Evid. 408(a)(1).
- **Conduct or Statement Made During Negotiations**
  - “Conduct or a statement made during compromise negotiations *about the claim*” is not admissible.
    See Fed. R. Evid. 408(a)(2).

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Admissibility of Statements Made in Mediation

But not so fast…

- **Exceptions:**
  - "The court may admit this evidence ***for another purpose***, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."
    See Fed. R. Evid. 408(b) (emphasis added).

Admissibility of Statements Made in Mediation

Rule 408 Does Not Protect…

- **Facts and documents exchanged during settlement discussions:**
  - "A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation."
    See 1974 Advisory Committee's Note
- **Tortious or wrongful conduct during negotiation:**
  - Libel, assault, breach of contract (consider confidentiality agreements, for example), etc.

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Ethics: Statements Made in Mediation

Rule 4.01. Truthfulness in Statements to Others

- "In the course of representing a client a lawyer shall not knowingly (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person . . . ."

Comment to Rule 4.01: False Statements of Fact

- "[U]nder generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representation of material fact."

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ETHICS: SCOPE OF REPRESENTATION

Rule 1.02. Scope and Objectives of Representation

- "[A] lawyer shall abide by a client's decisions . . . Whether to an accept an offer of settlement of a matter, except as otherwise authorized by law."

Comment to Rule 1.02: Scope of Representation

- "Except where prior communications have made it clear that a particular proposal would be unacceptable to the client, a lawyer is ***obligated to communicate any settlement offer*** to the client in a civil case . . . ."
- "A lawyer should consult with the client concerning any such proposal, and generally it is for the client to decide whether to accept it."

Preparing for Mediation

Make a Plan

- Will there be an opening session?
- Who will present for your side?
- Talk to any business representatives about Rule 408 protections.
- Explain the mediator's role.
- Submit mediation statements on time; attach any critical exhibits.

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Dispute Settled; Now What?

DRAFT A SETTLEMENT AGREEMENT.

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A Settlement Agreement is a Contract

Write it down.

“That's all we have, finally, the words, and they had better be the right ones.”

Raymond Carver

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A Settlement Agreement is a Contract

Governed by contract law

- "If parties reach a settlement agreement and execute a written document disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."

  Tex. Civ. Prac. & Rem. Code § 154.071(a).

- "A settlement agreement is a contract, and its construction is governed by legal principles applicable to contracts generally."

  Donzis v. McLaughlin, 981 S.W.2d 58, 61 (Tex. App.—San Antonio 1998, no pet.).

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Is Your Settlement Agreement Enforceable?

Martin v. Martin, 326 S.W.3d 741 (Tex. App.—Texarkana 2010)

- Settlement agreement determined unenforceable as a mere "agreement to agree."
- Settlement agreement provided that the parties "will negotiate a shareholder agreement that will be applicable to all shareholders."
- The parties could not agree on the content of a shareholder agreement and never executed one.
- "When an agreement leaves material matters open for future adjustment and agreement that never occur, it is not binding on the parties and merely constitutes an agreement to agree."

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Martin v. Martin Continued…

- "Said another way, a party cannot accept an offer so as to form a contract unless the terms of that contract are reasonably certain."
- "It is only when an essential term is left open for future negotiation that there is nothing more than an agreement to agree."
- "Because the settlement agreement leaves this essential provision open for future agreement that never occurred, it is binding and merely constitutes an agreement to agree in the future. As such, it cannot be enforced."

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Where to Start

Know what you agreed to in the first place.

- Carefully document the agreement that resulted from the negotiations, and make sure your adversary knows what agreement was reached.
- Mediator may help with preliminary documentation; double check the mediator's description of the agreement.
- Some settlement agreements may be preceded by term sheets, emails, or other correspondence.

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Key Issues: Parties

Who is a party?

- Company A and Company B?
- Company A and Company B and all of their "predecessor, successor, parent, subsidiary, and affiliate entities"?
- "Affiliate," as defined in the Texas Business Organizations Code, is "a person who controls, is controlled by, or is under common control with another person." That can be a broad group of parties. Define the parties precisely—you may not want every "affiliate" obligated (e.g., payment obligations) under the settlement agreement.

Key Issues: Consideration

What is the consideration for the agreement?

- Typically money and releases
  - Money: "In consideration of the Releases contained in Paragraph 2, Defendant shall pay $10.00."
  - Releases: discussed below.
- Cancellation or forgiveness of indebtedness?
  - Generally speaking, cancellation or forgiveness of a debt is taxable income. Seek the advice of a tax attorney or advisor to understand the tax implications of any debt forgiveness.

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Key Issues: Releases

Structuring Releases

- Who is a releasing party?
- Who is a released party?
  - A party can be a beneficiary of a release without being a party to the agreement. If you intend for a non-party to be released, make that clear in the agreement.
- Are the releases mutual?
- Upon what occurrence are the releases effective (*e.g.*, execution of agreement, receipt of funds, dismissal of a lawsuit)?

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KEY ISSUES: RELEASES

Example:

- "Party A and Party B each hereby fully and finally release and forever discharge each other, together with each other's employees, agents, officers, affiliates, members, partners, insurers, and attorneys (collectively the 'Released Parties'), from any and all claims and causes of action, of any nature or type, whether known or unknown and including but not limited to claims for breach of contract or for negligence or gross negligence or intentional misconduct, that arise from or relate to the [**DISPUTE**]. This release applies to claims brought by anyone claiming by, through, or under any of the Released Parties. Party A and Party B agree to waive all such claims against each other and agree not to file suit against any of the Released Parties for any such claims."

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Key Issues: Releases

What types of claims are released?

- To release a claim effectively, the releasing instrument must "mention" the claim to be released. Although the "mention" requirement does not bar general, categorical releases, such releases are to be narrowly construed.
  - *See Keck, Mahn & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh Pa.*, 20 S.W.3d 692, 697-98 (Tex. 2000).

**Note: if the settling parties have continued business dealings unrelated to the settled dispute, the releases should be narrowly defined.

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Key Issues: Releases

Can a future claim for negligence be released?

- "Although we recognize that most contractual provisions operate to transfer risk, these particular agreements are used to exculpate a party from the consequences of its own negligence."
- Release of a party for its own negligence is an extraordinary shifting of risk, and the Court has developed "fair notice" requirements that apply to such agreements.
  - *Dresser Indus. Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

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Key Issues: Releases

Fair Notice:

- Express negligence doctrine: a party seeking release from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract.
- Conspicuousness: something must appear on the face of the contract to attract the attention of a reasonable person when he looks at it.
  - *Dresser Indus. Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

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Key Issues: No Admission of Liability

Examples:

- "Nothing in this Agreement shall constitute an admission of liability or an acknowledgement of any defense, all of which is denied."
- "This Agreement shall not be construed as or deemed to be evidence of any admission or concession on any Party hereto of (1) the merit or lack of merit of any matter asserted in the Lawsuit; or (2) any liability or wrongdoing whatsoever, which liability and wrongdoing are hereby expressly denied by each of the Parties."

Key Issues: Non-Disparagement

Example:

- "Each Party agrees that it will not disparage, or cause or encourage any other person or entity to disparage, either orally or in writing, (i) any of the other Parties, or (ii) any of the other Parties' business, products, services, or practices. This Section shall not prevent either Party from filing a legal action for breach or enforcement of this Agreement or from providing truthful testimony in any legal proceeding. Each Party shall be deemed to have complied with this Section by informing its respective executive team of the Party's obligations under this Section."

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Key Issues: Confidentiality

Example:

- "Except as allowed to be disclosed in this Agreement, the Parties agree to maintain the terms of this Agreement in confidence and agree that they will not disclose the terms of this Agreement to any other person or entity not employed by a Party, except as may be required by law, to the Internal Revenue Service, or by court order."
- May provide exceptions (for attorneys, accountants, etc.)

Key Issues: Ownership of Claims

Examples:

- "The Parties are the sole owners of the claims each releases in this Agreement, no other person or entity has, or has had, any interest in the respective claims, demands, obligations, or causes of action referred to in this Agreement except as otherwise set forth in this Release."
- "The parties expressly represent and warrant that they have not assigned, sold, transferred, or otherwise conveyed or purported to assign, sell, transfer, or otherwise convey to any person or entity any claim released or discharged by this Agreement."

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Key Issues: Authority to Settle

- Settlement agreements entered into by a party lacking authority may be voidable.
- Authority to sue v. authority to settle – may be an important distinction

Example:

- "The Parties expressly represent and warrant that they and/or their legal representatives are legally competent and authorized to execute this agreement. The persons signing this Agreement represent and warrant that they are authorized to sign the Agreement and bind the party for whom they sign."

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Key Issues: Integration

Example:

- "The parties acknowledge that this Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, and all prior agreements, negotiations, and understandings with respect to the subject matter hereof are superseded by this Agreement."

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Key Issues: Successors

Example:

- "The parties acknowledge that each and every covenant, warranty, release and agreement contained herein shall inure to the benefit of, and be binding upon, the agents, subsidiaries, employees, officers, directors, assigns, and successors in interest of the parties."

Key Issues: Disclaimer of Reliance

Why?

- "[F]raudulent inducement is almost always grounds to set aside a contract despite a merger clause, but in certain circumstances, it may be possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause."
  - *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 332 (Tex. 2011)

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Key Issues: Disclaimer of Reliance

How?

- The clause must specifically disclaim *reliance* on any representations made outside of the representations contained in the Agreement.
- *It is not enough* to say that no representations were made other than the representations contained in the agreement.
- A merger clause is not enough to disclaim reliance.

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Key Issues: Disclaimer of Reliance – *Italian Cowboy*

Schlumberger	*Forest Oil*	*Italian Cowboy*
[E]ach of us ... expressly warrants and represents ... that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that none of us is *relying* upon any statement or representation of any agent of the parties being released hereby. Each of us is *relying* on his or her own judgment....	[We] expressly represent and warrant ... that no promise or agreement which is not herein expressed has been made to them in executing the releases contained in this Agreement, and that they are not *relying* upon any statement or representation of any of the parties being released hereby. [We] are *relying* upon [our] own judgment....	Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises ... except as expressly set forth herein.

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Key Issues: Modification

Example:

- "The parties agree that this Agreement may not be modified or varied in its terms by an oral agreement or representation or otherwise, except by a written instrument signed by all of the parties."

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Key Issues: Waiver

Example:

- "The parties agree that no breach of any provision of this Agreement can be waived except in writing. The waiver of a breach of any provision of this Agreement shall not be deemed a waiver of any other breach of any provision of this Agreement."

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KEY ISSUES: COUNTERPARTS

Example:

- "The parties agree that this Agreement may be executed in one or more counterparts, any one of which need not contain the signatures of more than one party, but all such counterparts taken together shall constitute one and the same Agreement."

Key Issues: Signatures

Do we need a notary?

- Usually not.
- May be a good idea if one party to the agreement is an individual person rather than a business entity.

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Key Issues: Miscellaneous Provisions

- Choice of law
- Choice of venue
- Any lien releases
- Dismissal of lawsuit
- Termination of a contract
- Indemnity

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Other Issues: Bankruptcy Considerations

Bankruptcy may significantly impact a settlement agreement:

- A settlement involving payment may be voidable as a preference if the party who paid the settlement files bankruptcy within 90 days after payment. 11 U.S.C. 547(b).
- Counterargument: the dismissal of claims is “new value,” exempt from preference risk under 547(c)(1).
- Settling parties should consider the risk that the settlement payment is determined a voidable preference.

Other Issues: Bankruptcy Considerations

Potential Solution: A Springing Release

- The releasing party may negotiate for a provision stating that the release of claims is delayed until 91 days after payment, at which point, the payment would not be voidable as a preference under 11 U.S.C. 547(b).
- The releasing party may also negotiate for a provision that states that the full amount of the claim will not be reduced or released until 91 days after payment.

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Other Issues: Pocket Judgment

What is a pocket judgment?

- An agreed judgment that one party owes the other party a sum of money.
- The agreed judgment is held and not submitted to the judge for signature unless a default occurs.

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Other Issues: Pocket Judgment

The judgment must be agreed when entered.

- The "court cannot render a valid agreed judgment absent consent at the time it is rendered." *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995).
- "A party may revoke its consent to a settlement agreement at any time before the judgment is rendered on the agreement." *S&A Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995)

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Other Issues: Promissory Note

- Some parties may request the execution of a promissory note in connection with the settlement agreement.
- You still need a settlement agreement containing the release language and other essential provisions settling the dispute.

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QUESTIONS?

THANK YOU.

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