The "Standard" Release

By Amy L. Lieberman

Have you ever come to agreement in mediation on the number to settle, at 4 p.m., and found yourself still negotiating the terms of the release at 7 p.m.? Or, have you ever reached agreement on the number, signed a written document memorializing that agreement with an agreement to execute a more formal release later and run into roadblocks when it came to negotiate the release because the other party objects to what you thought were "standard" terms?

In some cases, this can lead to a delay of weeks or even a month or more in getting the darned document signed. Such a delay increases costs and can threaten to derail agreement.

Negotiations over release terms can cause immense frustration. Yet, in most every instance, these struggles can be avoided when anticipated by counsel in advance.

Common Release Issues

The following are examples of release terms that can cause divisiveness:

1. A request for a "mutual" release, when there are no counterclaims.
2. A request for "mutual" non-disparagement or confidentiality, when one party is so large, they cannot and will not agree to bind their entire organization.
3. A request for liquidated damages in the event of a breach of confidentiality, and the amount thereof.
4. A request to pay over time (installments) or to structure a settlement.
5. A request for a stipulated judgment in the event of default.
6. Tax treatment of the settlement proceeds (*i.e.,* Form 1099, W-2) in an employment situation, apportionment of the payment, and to whom the payment will be directed between client and counsel.
7. Indemnification provisions relating to tax treatment if the IRS disagrees with how the parties have allocated payment.
8. Other non-monetary provisions that were not raised at the mediation, but turn out to be important to one of the parties, such as a letter of reference, return of property, a "no-rehire" provision, a 21-day review and revocation provision for employees over 40, etc.
9. How much money will be allocated to attorney's fees and costs.

Stumbling Blocks

I'm sure you may well have encountered other stumbling blocks. Think about these things in advance. For example, is a mutual release "standard?" In the absence of asserted or threatened counterclaims, usually not. Yet, if a party hesitates to sign a mutual release, it creates a fear that perhaps that party is holding on to a claim which it just might assert in the future. This fear, coupled with a refusal to make the release mutual can be a roadblock.

Similarly, if one party agrees not to disparage the other, why shouldn't the other agree? Isn't reciprocity the norm? The challenge here that a company cannot control all its personnel. A typical solution is to ask for specified people to be instructed not to make any disparaging comments.

What is an acceptable proportionate amount for liquidated damages in the event of breach, so that the provision will be enforceable and not construed as a penalty? Will the concept of liquidated damages at all be a deal breaker?

If preliminary work has not been done on these issues, ultimate agreement is prevented while discussions are held, phone calls are made and last-minute research is done. Realize that while attorneys may be used to certain provisions, clients may not have seen them before. And, it is reasonable to anticipate that attorneys who do not typically practice in a particular area may challenge how "standard" a provision really is, and be hesitant to agree on certain terms.

Be Proactive

Proactive steps can help avoid the frustration of release negotiations:

- Prepare and send a draft release to the other side before the mediation.
- Bring hard copies of the release as well as your laptop with the digital release to the mediation, to allow you to easily make revisions.
- Discuss possible areas of challenge or concern with your client before the mediation.
- If you have neglected to cover anticipated release issues ahead of time, take advantage of the time the mediator is meeting with the other party to do so.
- Have ready access to people who are not present at mediation, but are decision-makers on release issues, or who may have needed information. This can include accountants or CPAs, tax attorneys, and client representatives who are not present but can look up information for you.
- Pay attention to physical needs. Although typically lunch is provided in mediation, sometimes clients are nervous and anxious and choose not to eat. Both client and counsel run out of energy and patience if they have not eaten – or for that matter, if they have not been able to leave a conference room for some fresh air.

Remember these basics so all parties can stay focused to get to the end game – the final, signed agreement.

Amy L. Lieberman is a full-time professional mediator of employment and business conflict. She has repeatedly been listed in the Best Lawyers in America, Southwest Super Lawyers, and Arizona's Finest Lawyers in alternative dispute resolution, and is the author of the book, "Mediation Success: Get it Out, Get it Over, Get Back to Business." Visit www.insightmediation.com or call Amy at (480) 246-3366 for more information.