To : BLS Executive Committee
From : The Statutory Settlement Agreement Task Force
Date : September 5, 2022
Re : Preliminary Analysis of The Statutory Settlement Agreement Proposal

The Statutory Settlement Task Force was formed at the 2022 winter meeting of the Florida Bar in response to Senator Beltran's proposal to prepare a statute that is designed to bring litigation, in which the principal terms of a settlement are agreed to, at mediation to a close. This would be accomplished by providing a statutory form of settlement agreement that would be imposed upon the parties, if they failed to agree to a form of settlement agreement on their own.

In response, the Section formed this Task Force to research the manner in which other jurisdictions have addressed this issue and the impact of existing law. In that regard, we would like to offer our thanks to Alejandra Iglesia and Tyler Stall, BLS Fellows who dedicated their time to research this issue.

The Task Force agrees that offering litigants model language to effectuate the efficient resolution of cases is valuable. The Task Force has concerns that imposing contract terms, or contract language, on parties statutorily (a) may be a violation of their right to contract, and (b) may also have the effect of impairing the confidentiality of mediation proceedings and the statutory privilege that precludes disclosure of communications made during those proceedings.

Freedom to Contract

It is a fundamental principle under Florida law, as under the law of other states, that "contracts are voluntary undertakings and contracting parties are free to bargain for – and specify - the terms and conditions of their agreement." *Lugassy v. Lugassy*, 298 So.3d 657, 659 (Fla. 4th DCA 2020), quoting *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.,* 145 So.3d 989, 993 (Fla. 4th DCA 2014). The Florida Supreme Court recently held "[i]t is a matter of great public concern that freedom of contract be not lightly interfered with." *City of Largo v. AHF-Bay Fund, LLC,* 215 So. 3d 10, 16 (Fla. 2017). Indeed, Florida courts have held that "[t]he right to contract is one of the most sacrosanct rights guaranteed by our fundamental law." *Miles v. City of Edgewater Police Dep't/Preferred Governmental Claims Sols.*, 190 So. 3d 171 (Fla. 1st DCA 2016). "The right to make contracts … is both a liberty and property right and is within the protection of the guaranties against the taking of liberty or property without due process of law." *Id*.; *see also Lugassy*, at 659. Moreover, as the court held in *Lugassy*, "freedom of contract entails the freedom not to contract, except in the case of innkeepers, common carriers and certain other 'public service companies,' and except as restricted by antitrust, antidiscrimination, and other statutes." *Id*., *quoting Yachting Promotions, Inc. v. Broward Yachts, Inc.*, 792 So.2d 660, 663-664 (Fla. 4th DCA 2001). In *Lugassy*, the court held that the trial court did not have the authority to order a 50% owner of a corporation's stock to sign

documents necessary for the corporation to secure a loan, including a personal guaranty, in the context of a suit for the corporation's dissolution due to deadlock filed by the other 50% shareholder. Compelling a party to a mediation to agree to statutorily specified settlement terms that the party did not agree to at mediation would likewise appear to violate this fundamental principle.

Chilling Effect on the Mediation Process

The cornerstone of the mediation process is confidentiality. Section 44.405(2), Florida Statutes, thus provides that communications during the course of a mediation are confidential and create a privilege on the parties to the mediation to preclude disclosure of such communications. Moreover, Florida Rule of Civil Procedure 1.730(b) requires that all mediation agreements be reduced to writing and signed by the parties. Numerous Florida appellate courts have thus held that testimony and evidence regarding alleged oral agreements reached during mediations are inadmissible, and such agreements cannot be enforced unless all parties to the purported settlement have signed the agreement. *See*, *e.g., Gardner v. Wolfe & Goldstein, P.A.*, 168 So.3d 1281, 1281 (Fla. 4th DCA 2015); *Gordon v. Royal Caribbean Cruises, Ltd.*, 641 So.2d 515, 517 (Fla. 3d DCA 1994).

Florida courts have been quite aggressive in protecting the confidentiality of mediation communications and have gone so far as to strike the pleadings of a party that revealed a mediation offer. *Paranzino v. Barnett Bank, N.A.*, 690 So. 2d 725, 729 (Fla. 4th DCA 1997) (court stating "[i]f the trial court were to allow this willful and deliberate conduct to go unchecked, continued behavior in this vein could have a chilling effect upon the mediation process."); *see also* section 44.406, Fla. Stat. (providing that any mediation participant who knowingly and willfully discloses a mediation communication in violation of section 44.405 shall consent to jurisdiction, be subject to equitable relief, compensatory damages, attorney's fees, mediator's fees, and costs incurred in the mediation proceedings as well as other appropriate relief).

It is common for litigants to develop an outline of settlement term, which they agree to, but do not not reduce those terms to writing before they leave the mediation room. The parties often commit to formalizing the settlement agreement the next day. They shake hands and leave mediation, believing they have settled, even though nothing was signed. Later, one of the parties, having second thoughts, declines to proceed with the tentative settlement. Although the opposing party undoubtedly is frustrated with this result, in the absence of a written settlement agreement signed by all of the parties, even if it were otherwise proper to statutorily impose certain contractual terms to complete an oral settlement agreement reached during a mediation, the frustrated party seeking enforcement of such an agreement would still be required to introduce evidence of communications made during the mediation to show that that the other party or parties agreed to the remaining terms of the alleged settlement; thus, violating the rule of mediation confidentiality, as well as the rule and case law precluding enforcement of unsigned settlement agreements in the context of mediations.

Treatment by other Jurisdictions

Many, if not most, jurisdictions in the US have a rule of civil procedure, like Fla. R. Civ. Pro. 1.730(b), that requires any settlement reached at mediation between parties to be reduced to writing in order to be enforceable. Similarly, most, if not all, jurisdictions also follow Fla. Stat. 44.405, deeming all mediation communications to be confidential. While a handful of jurisdictions do permit enforcement of an oral agreement at mediation, or shortly thereafter, no jurisdictions have a separate statutory form of settlement agreement that would be imposed upon parties at mediation, if they failed to agree to a form of settlement agreement on their own.