“A letter of intent is the invention of the devil [that] should be avoided at all costs.”

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Reading Time : **3 min**

In light of this mega-verdict, here are some important reminders for anyone who is considering entering into a letter of intent or memorandum of understanding:

- DO have express, broad “nonbinding” language.
- DO use a hybrid agreement with a clear separation between “binding” and “non-binding” portions of the LOI.

Parties should be very clear as to which terms in the LOI are binding and which are not. It is considered best practices for “nonbinding” portions of the LOI to include standard deal points (price, quantity, timing, etc.). The “binding” section of the LOI should include standard provisions related to confidentiality and, if agreed upon, exclusivity. In addition, the “binding” portion should include language that (1) explicitly disclaims the creation of a partnership or joint venture until the execution of a definitive agreements and receipt of requisite approvals, regardless of the subsequent actions of the parties; (2) explicitly waives fiduciary duties (to the extent permitted by law) that the parties may owe to one another; (3) mutually waives the right to sue for any breach of duty or to claim a partnership exists; (4) mutually waives the right to a jury trial and refers disputes arising out of or related to the agreement to arbitration; and (5) expressly includes any conditions precedent to creation of a binding agreement.

- DO NOT publicly state that a partnership or joint venture exists.

Course of conduct is a critical piece of evidence a jury will consider when determining whether a party intended to be bound by a LOI. For example, Enterprise and ETP issued joint press releases and jointly solicited carriers for the proposed pipeline that was the subject of the alleged JV. In the eyes of the jury – just as “marrying” someone on Facebook might be used as evidence of a common law marriage – public actions appear to have overruled what was otherwise a tightly drafted "nonbinding" letter of intent.

- DO make clear which party owns any property rights generated during the evaluation phase.
- DO NOT characterize any property rights generated during the evaluation phase as "joint property" or agree to share profits or losses with the other party.

Under Texas law, one factor the trier of fact may use to establish the existence of a statutory partnership is the "right to receive a share of profits." Thus, it is important to clarify that any expense allocation arrangements entered into prior to execution of definitive agreements are limited in scope and narrowly drafted and to explicitly disclaim any intention to share in the profits and losses of the potential business until definitive agreements are executed.

- DO, at each stage of evaluation of the project, reiterate in writing with the counterparty the nonbinding, non-partnership nature of the relationship.
- DO NOT[1] contribute money or other assets until the parties execute definitive agreements.

These points may seem trivial (and prior to this jury finding, may have seemed unnecessary), but the devil is in the details. In the excitement of a prospective business deal, parties may be eager to press forward as fast as possible. However, a little restraint, such as occasionally reiterating the non-partnership relationship of the parties to an LOI or resisting the urge to contribute assets to a joint account, can offer valuable legal protection if negotiations ever turn sour.

The jury verdict in the *ETP v. Enterprise* case has unquestionably put the energy community on alert regarding the issue of when certain relationships may be viewed as partnerships or joint ventures in the eyes of the law, even if the parties had originally agreed otherwise on paper. While careful drafting is important in minimizing the risk of creating a partnership where none is intended, diligent conduct throughout the relationship is just as important.

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[1] The blanket prohibition on joint accounts is a bit simplified. The reason a party should avoid contributing to a joint account is that a jury could find that the percentage of total assets in the account contributed by such party constitutes a surrogate for an agreement with respect to the division of profits between the joint account holders.

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