# Don’t Forget to Finalize the Mediated Settlement Agreement

***Judge Abraham J. Gafni (Ret.)***
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Many settlements are reached at the end of an exhausting day or days of mediation. Consequently, rather than wrapping up everything at that point, parties may settle orally, with the understanding that either they or the mediator will prepare a document that will memorialize their agreement.

Often, however, upon reconsideration, a client may become unwilling to honor the prior understanding. The adversary is, of course, upset. After all, the settlement was reached not only between the parties, but with the assistance of and in the presence of a mediator. In fact, the mediator, often upon the parties’ request, prepares and distributes for signature a proposed settlement term-sheet or even a full-blown settlement agreement that sets forth the agreement. The problem, however, is that the recalcitrant client will contend that there is no proof of the actual mediated settlement, and that the document circulated by the mediator is an inadmissible “mediation communication” if all parties have not signed the document.

Such a situation arose in a recent case in the Colorado Court of Appeals (although it might arise under Pennsylvania’s mediation statute as well).

In *Tuscany Custom Homes v. John B. Westover,* No. 19CA1724, (Col. App. Dec. 31, 2020), the parties had apparently arrived at an oral settlement agreement during a mediation. Nothing was memorialized in writing or signed at that time as the mediator had computer problems. Subsequently, the mediator followed up with an email to all three parties summarizing the mediated settlement and requesting that counsel review the email and acknowledge their assent to its terms. All counsel agreed that the mediator’s email was correct and then continued to exchange emails for several days with some minor changes being made in its terms. Eventually plaintiff’s counsel prepared a “draft agreement,” to which counsel for Westover responded: “We don’t have

any changes. Provided there's no redlines, we'll get our client to sign." The plaintiff and the other defendant signed the draft agreement, but Westover then refused to sign.

The plaintiff filed a motion to enforce the settlement. It claimed that an oral agreement had been reached at the mediation; and, further, that the mediator's emails and the subsequent exchanges among counsel, including the draft agreement, were proof of its terms. Westover objected on the ground that the emails, exchanges and draft agreement were inadmissible "mediation communications" under Colorado's statutory protection for such communications. See, Sections 13-22-302 (2.5) and 307(3).

The trial court found in favor of the plaintiff. It ruled that the communications in the mediator's email and the draft agreement were not made in the presence of the mediator, were not connected to the specific mediation services, and were separate negotiation proceedings. It viewed the mediator's emails merely as written confirmation of what had been originally agreed to by the parties and, therefore, were not "mediation communications."

The Colorado Court of Appeals reversed, holding that the mediator's email did satisfy the "statutory definition of a mediation communication" under the Colorado statute, which provides that a "mediation communication" is "any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding or dispute resolution program proceeding, including, but not limited to, any memoranda, notes, records, or work product of a mediator, mediation organization or party." Section 13-22-302(2.5) (*Cf.* Pennsylvania's statute at 42 PS Section 5949 (c) which contains a definition which, while differing in language, essentially encompasses the same concepts). The Colorado court further noted that excluded from this mediation privilege (as it is in the Pennsylvania statute) is a final written agreement reached as a result of mediation "so long as the agreement has been fully executed."

The appellate court concluded that the mediator's email was a "mediation communication" in that it "outlined the terms of the contract allegedly formed during mediation." The court also found that it was prepared "pursuant to" a "mediation services proceeding" because the parties had agreed that the mediator would draft and send to the parties the summary of the agreement.

The court rejected the argument that the mediator's email should not be viewed as a "mediation communication" because he had sent it at the "behest" of the parties. As the court noted, the statute does not distinguish between communications prepared on the mediator's own initiative and those requested by the parties.

But was the draft agreement which involved direct exchanges between the parties also part of the mediation proceedings and hence also a "mediation communication"? Yes, said the appellate court—this was also a mediation communication without regard to whether it had been made at the behest of the mediator.

The court concluded that the draft agreement had been prepared at the mediator's behest as the mediator had told the parties that his "summary will be used to prepare a formal mutual release and settlement agreement that is to be prepared by the plaintiff's counsel." Moreover, the mediator was kept in the loop when a party asked for an update about the status of the agreement, and the mediator followed through asking for and securing an update. Finally, when the draft agreement was eventually distributed, the mediator was included among its recipients.

But even if the mediator had not instructed the plaintiff's counsel to prepare the draft agreement, and the parties alone had decided on this step, it would, nonetheless, have been a "mediation document communication" because of how it was presented to the court. The plaintiff and one defendant offered the draft agreement "for the sole purpose of proving that the parties orally communicated the terms of a settlement during the mediation proceeding. … Hence the [plaintiff and other defendant] disclosed information concerning a mediation communication by offering the draft agreement to prove the terms of an oral agreement reached during mediation."

The court added that "Otherwise, a party—after going through a mediation proceeding—could write down oral communications made during the mediation, not seek any other party's written assent to the document, and then submit the document as evidence of an agreement reached at the mediation, claiming that it was not written in the mediator's presence or at the mediator's behest." Here, however, "the plaintiff and other defendant improperly disclosed information concerning a 'mediation communication' by offering the draft agreement as evidence of an alleged oral agreement, even though not all parties had executed the draft agreement."

Consequently, the court refused to enforce the claimed settlement agreement because the only evidence of the agreement was an inadmissible "mediation communication."

As this article is being prepared, it should be noted that the opinion of the Colorado court may not be final as it has not been released for publication and a petition for rehearing or certiorari may be pending. Perhaps, upon further review, Colorado courts will determine that the subsequent exchanges among counsel, including the draft agreement, occurred after the mediation had formally ended and should not, therefore, be characterized as mediation communications.

Nonetheless, the issues raised in this opinion reflect the care that counsel must take in assuring that once an agreement is reached, it be memorialized in a fully executed writing, in a manner that will allow evidence of it to be admitted in court. Care should be taken that a "settlement document," defined in the Pennsylvania statute as "A written agreement signed by the parties to the agreement," is prepared and signed, so that it "may be introduced in an action or proceeding to enforce the settlement agreement expressed in the document unless the settlement document by its terms states that it is unenforceable or not intended to be legally binding."

In short, after reaching a settlement, assure that appropriate steps are immediately taken to memorialize the basic terms of the agreement to the extent possible, including signing by the parties, even if a more formal document is later to be prepared. This will assure that evidence of the agreement may be introduced into court and serve as the basis upon which the settlement may be confirmed and enforced. •

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