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## Don't Forget to Finalize the Mediated Settlement Agreement



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). [READ MORE..](#)

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