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Don't Forget the Memorandum of Settlement!

By: Michele Sales
Mediator, Arbitrator

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A good mediator recommends that the parties draft and sign a Memorandum of Settlement at the conclusion of what appears to be a successful mediation. The Washington Supreme Court recently re-emphasized the need for such a writing in its decision of *In re Disciplinary Proceeding of Bradley R. Marshall*, 279 P.3d 291 (2009).

Part of the complaint against attorney Marshall involved whether a settlement had been reached at mediation[1] by a King County Superior Court Judge. The court noted that "most, if not all, of those present believed some settlement was intended"[2], including the judge.[3] However, two of the Plaintiffs decided that they did not want to settle. Shortly after the mediation, the Defendant's counsel sent a release and settlement agreement that those two Plaintiffs refused to sign. According to the charges and findings, Mr. Marshall then attempted to force those clients to proceed with the settlement against their wishes.

While the facts of the Marshall case are not ones we hear about on a regular basis, the issue of one party trying to renege on a settlement does raise its ugly head at times. It may occur because someone close to the party (spouse, parent, significant other) who did not attend the mediation and witness the reasons or basis for the settlement tells the party that settlement was a bad idea. Other times, it may simply be that a party changes his or her mind after thinking about the day's events over night. Worst of all, it may be that the party felt compelled by his attorney to agree to a settlement. Whatever the cause, it is worth revisiting the idea of signing a memorandum at the conclusion of mediation and what needs to be in that writing.

CR 2A states, "No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court…unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same." In similar fashion, RCW 2.44.010 (1) states that an attorney has the authority to bind his client, but that the court shall disregard all agreements "unless such agreement … [is] signed by the party against whom the same is alleged, or his attorney."

Washington law has been clear since the early 1980's that standard contract law governs whether the parties have reached a settlement. *Stottlemyre v. Reed*, 35 Wn.App. 169, 665 P.2d 1383 (1983). It is interesting to note that although the agreement in *Stottlemyre* was only an oral agreement, the appellate court found that the attorney's written

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Mediator Focus: Judit Gebhardt

By: Penny Gans, WAMS Staff

Judit Gebhardt is a passionate woman whose intense curiosity and readiness to take advantage of opportunities have given her a variety of life experiences that enhance her skills as a professional neutral. Judit has been a WAMS panel member since 1988 and is a recently retired Industrial Appeals Judge. In her thirty-two year judicial career, Judit conducted bench trials and delivered more than 1,600 decisions in work-related personal injury, occupational disease and toxic exposure cases as well as medical standard of care, workmen's compensation fraud, wage loss, pension, and consumer protection matters. She is an avid student of medical developments and stays current by attending jury trials to hear expert testimony. Judit has a wealth of knowledge about entitlement programs (Medicare, Medicaid, and Social Security), knowing that ten to twenty percent of injury cases have an entitlement element lurking somewhere.

As a judge, Judit's decisions required careful listening, a critical skill that has served her in good stead as a mediator. She believes that mediation is very personal, especially for the plaintiff, so she actively engages with the parties so they know their situation has been understood. In her words, "Resolution usually occurs when parties are able to consider all opportunities and reach the best decision." Her experience as a judge has convinced her that mediation is a safer environment than the courtroom for allowing parties to reach a conclusion that will be more satisfying than if a judge or jury make the decision for them. As a mediator, Judit does not direct the parties to a solution, but she provides information and perspective to facilitate settlement. When she feels that a case should have settled, she continues to work with the parties after the mediation is over to bring resolution.

In addition to mediating a wide range of cases, Judit is frequently asked to arbitrate UIM, tort, and commercial disputes or for the State of Washington's Lemon Law program. She has also taught Evidence, Worker's Compensation, and Administrative Law in various CLE courses and has served as chair of the Administrative Law section of the Washington State Bar.

Raised in a conservative, German-speaking household in Oregon, Judit's first passion was classical ballet and her first job was helping her father in the family bakery. She became politically active in high school and found a mentor in independent senator Wayne Morse, whose re-election campaign she managed in Washington County and who encouraged her to consider law school. At Portland State University, Judit studied math and psychology and helped develop a Women's Studies program. At Willamette University Law School, she developed a Family Law Center and spent three years as a family law litigator while gaining her JD in 1976. She became a Hearing Examiner for the Department of Employment Security before being appointed to the Washington State Board of Industrial Insurance Appeals.

In her personal life, Judit also enjoys exploring how pieces best fit together. She is an avid quilter, creating heirloom quilts for friends and family members based on collaborative designs worked out on a computer. Her other ongoing project is the completion of a 1500-piece Tiffany-style stained glass lamp. Judit's interest in stained glass resulted in her becoming the owner of a publishing house specializing in instructional materials for stained glass hobbyists. Judit is most passionate about her family, especially her two grandchildren. She has always encouraged them to do as she has always done: to relish their choices and always follow the paths that interest them. Her caring, down-to-earth manner, confidence, and love of the dispute resolution process allow everyone who encounters Judit to know they are in good hands.

Did you Know?

The WAMS website now offers a mobile version for easier viewing on your mobile phone or blackberry. Just click "Switch to mobile site" on the homepage to utilize this feature.

www.usamwa.com

…WAMS Buzzz

Riveka Crooms, WAMS Compliance Manager, was recently awarded as one of Pierce County's Adult Volunteers of the Year for her work in the youth diversion program in Juvenile Court. Congrats!

Bill Rush is taking his wife on a cruise to the Far East via the Suez Canal and Somali coast, hoping to avoid pirates along the way. Bon Voyage!

Kudos to Cliff Freed for providing pro bono mediation services in a church-employment matter. Everyone involved was very appreciative.

Thank you and well done Kathleen Wareham for serving on the 17th Annual NW Dispute Resolution Conference Committee, helping to line up sponsors, speakers and topics to make the conference a continuing success. The conference takes place on the first weekend in May each year at the University of Washington School of Law.

Don't Forget the Memorandum of Settlement!, Continued from page 1…

representation in an affidavit that a settlement was reached was sufficient to meet the "signed by the party…or his attorney" provision of the statute. Some might say that this ruling was appropriate because "the law favors the private settlement of disputes and is inclined to view them with finality".[4] But counsel should not rely on such a creative interpretation of the Rule and statute and should make sure that a settlement document is created and signed.

Subsequent cases have flushed out the court's holding in *Stottlemyre* by clarifying that a party's subjective intent not to be bound until the execution of a final settlement agreement will not void an otherwise enforceable settlement agreement.[5] However, the agreement must not have been reached by fraud, coercion or mistake.[6]

The signature of the party's attorney is **not** needed if the party has signed.[7] Alternatively, *Stottlemyre* holds that an attorney's signature alone **is** adequate to bind the party assuming all other things are equal. In this instance, however, the practical effect is likely to be that the party fires his attorney and institutes a malpractice action.[8]

But the courts have said that the settlement memorandum must refer to **all** material terms, or there is a basis to challenge whether a settlement was reached. In *Howard v. DiMaggio* 70 Wn.App. 734, 855 P.2d 335 (1993), the appellate court found that attorneys simply agreeing on the settlement amount (cash plus repayment of the Plaintiff's PIP carrier) did not cover all material terms. The appellate court found that the Plaintiff had not agreed to sign a medical guaranty letter, had not agreed to "the details of the release and hold harmless documents", and had not agreed who would be the designated payees on the check. Thus, the alleged settlement agreement was not considered enforceable.

Similarly, in *Lavigne v. Green* 106 Wn.App. 12, 23 P.3rd 515 (2001), the parties attended a mediation at which they agreed on an amount of settlement. No writing was signed. Allegedly, the insurance adjuster at the mediation said there "were no additional terms or provisions or conditions on the settlement".[9] However, a release was sent that included indemnification, hold harmless and full release language. The party seeking to avoid the agreement essentially conceded that his real disagreement was about the amount of the settlement, but because he raised a genuine issue of material fact on the other terms, the appellate court sent the matter back to the trial court for determination.[10]

My strong recommendation is to make sure a memorandum is signed when you believe you have reached a settlement. In a personal injury action, the memorandum should indicate the amount of settlement, that all claims will be released, that an indemnification and hold harmless as to subrogated

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interests will be signed along with a release, that the lawsuit (if any) will be dismissed with prejudice and without costs, and that the parties acknowledge that the agreement is binding and enforceable. Defense representatives may simply choose to bring a standardized settlement agreement and then later supplement it with a document that acknowledges receipt of the settlement check by the plaintiff.

In an employment case, the extent of the terms can be much more involved. While a mediator can assist in drafting a memorandum during or at the end of the mediation, a better practice is for defense counsel to provide a copy of a proposed settlement agreement to plaintiff's counsel prior to the mediation and then make changes as the mediation proceeds throughout the day. Not only are the non-monetary terms (ie, confidentiality, no re-hire, no application for rehire, no disparagement, etc.) outlined for the plaintiff's attorney clearly and concisely, but you have given the plaintiff plenty of opportunity to seek more information about the meaning of terms before signing.

While these suggestions provide no guarantee that your mediated settlement agreement will not be challenged, your client should be better protected by taking these affirmative steps in mediation.

[1] The decision refers to the proceeding with Judge Heavey as a mediation in some places and as a settlement conference in others. Whichever correctly describes the proceeding, the use of a CR 2A document would have alleviated part of Mr. Marshall's problems.

[2] *Id.*

[3] 279 P.3d at 303, fn 22.

[4] 35 Wn.App. at 173.

[5] *Morris v. Maks,* 69 Wn.App. 865, 850 P.2d 1357 (1993).

[6] 106 Wn.App. at 15. The court reviewed each argument under an abuse of discretion standard and found the evidence lacking in *Patterson*. There is an interesting discussion on a plaintiff's mistake as to policy limits in a mediation and subsequent settlement in *Brinkerhoff v. Campbell,* 99 Wn. App. 692, 994 P.2d 911 (2000) that bears reading in its entirety.

[7] *In re Patterson*, 93 Wn.App. 579, 969 P.2d 1106 (1999).

[8] *See, e.g., In re Ferree,* 71 Wn.App. 35, 856 P.2d 706 (1993).

[9] 106 Wn.App. at 15.

[10] See also *Veith v. Xterra Wetsuits, L.L.C.,* 183 P.3d 334 (2008) in which the court succinctly concludes that so long as the parties are still in negotiation on material terms and have not resolved their disagreements over some of them, there is nothing for the court to enforce.

Larry Levy

"Thanks for your help in getting this case settled. I know that all of my clients were impressed with your efforts in moving the case to closure."

- WAMS Client

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