Deal or No Deal? Don't Leave a Mediation Without a Signed Final Settlement Agreement

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The parties, their attorneys and the mediator worked a long day and into the night to reach a settlement of the parties' disputes and to avoid an upcoming trial of a lawsuit. Finally, just before 10:00 p.m., the mediator announced that an agreement had been reached. Everyone convened in the large conference room. The mediator produced a sheet of paper and wrote down the terms of the parties' agreement, announcing each term as he did so. Among other terms, the parties agreed to prepare and sign a final settlement agreement within a week. Once all of the key terms were identified, the mediator made copies of the memorandum and gave one to each of the attorneys. Everyone shook hands, and the mediation adjourned.

In the week following the mediation, the plaintiff's lawyer prepared a draft settlement agreement which reflected the agreed-to terms and added several new and different terms, which the plaintiff deemed "necessary" to the final agreement. The defendant, however, refused to agree to the additional terms, and the plaintiff refused to withdraw them. Thus, the parties never signed a final written settlement agreement. Frustrated, but hoping to salvage the deal, the plaintiff filed a motion asking the court to enforce the terms of the settlement agreed to at the mediation.

Deal or no deal? "No deal," ruled a federal court in *Intersections, Inc. v. Loomis*, a case decided under Virginia law involving similar facts to this hypothetical scenario. Although the parties reached a tentative agreement during mediation, one of the terms specified that the parties would ultimately be bound by a formal written settlement agreement. Since that condition never occurred, the court ruled that the parties never reached a binding settlement agreement:

In this case, the evidence demonstrates that there is no binding, legally enforceable settlement agreement between the parties. Although the parties reached a tentative agreement during the settlement conference on January 14, 2010, they explicitly contemplated that they would ultimately be bound only by a written, signed, fully integrated settlement agreement.

The fact that the plaintiff included additional terms in the draft agreement not found in the mediation term sheet was further evidence that there was no “meeting of the minds” between the parties. Without a meeting of the minds, there was no enforceable contract.

The Supreme Court of Virginia has reached the same conclusion in a similar case. In *Golding v. Floyd*, the court ruled that a “Settlement Agreement Memorandum,” which had been signed by all parties at the mediation, was not a binding settlement agreement since all parties understood that a formal settlement agreement had to be drafted and signed.

Mediation is a great vehicle for resolving legal claims and disputes. If the parties reach an agreement at the mediation session, it is preferable that they sign a written settlement agreement before the mediation concludes. If the parties do not execute a final agreement or leave the mediation with an understanding that matters are not settled until a final document is signed, they run the risk of losing the agreement they were so close to obtaining. It is not unusual for a party to second-guess its decision after time away from the mediation or for the party’s attorney to realize, upon later committing the agreement to writing, that he did not include a term important to his client when reaching an agreement in principle at the mediation. To avoid this possibility, most professional mediators will insist that, if a deal is reached, a binding agreement must be written and signed by the parties before the mediation is concluded. A good practice is for the parties to work on the form of a settlement agreement in advance of the mediation, leaving blanks for terms likely to be negotiated.

For more information about this topic, please contact the author or any member of the Williams Mullen Construction Team.

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