

## ARTICLES

### Sign On the Dotted Line!

By Hon. Nancy Holtz

“One of the main purposes of mediation is the expeditious resolution of disputes. Mediation will not always be successful, but it should not spawn more litigation . . . .”

So said the New Jersey Supreme Court in the case of [\*Willingboro Mall LTD v. 240/242 Franklin Avenue, LLC\*](#), 35 A.3d 680 (2012), as it considered a mediation which itself became the controversy. Five depositions, a four-day evidentiary hearing, and two appeals later, the high court set forth a new rule in New Jersey requiring that, to be enforceable, an agreement reached at mediation must be in writing.

The controversy began when a commercial case, arising out of the sale of a mall, was sent to mediation by the trial court. At mediation, the parties reached an agreement. The mediator reviewed the terms of the settlement with the parties, but the settlement terms were not put in writing at the conclusion of the mediation.

Several weeks later, in what may have simply been a bout of buyer’s remorse, Willingboro’s manager balked at the settlement. He complained that his attorney and the mediator had unduly pressured him to settle. In his words, he would have confessed to the Lindbergh kidnapping and the Kennedy assassination if it meant he could have extricated himself from an “incredible uncomfortable, high pressure situation.”

With Willingboro refusing to honor the deal struck at mediation, Franklin brought a motion to enforce the terms of the settlement that included certifications from its own attorney and the mediator disclosing communications made during the mediation. Rather than oppose the motion invoking the mediation communication privilege, Willingboro opposed the motion with its own disclosures of confidential communications.

During the evidentiary hearing conducted by the trial court, Willingboro changed course and moved to strike the confidential communications already disclosed. But the trial court found that Willingboro had waived the privilege and that a binding agreement had been reached between the parties. On appeal, the appellate division affirmed.

Willingboro next appealed to the New Jersey Supreme Court and two issues were certified: (1) whether New Jersey law required that a settlement agreement reached at mediation be reduced to writing at the time of the mediation to be enforceable, and (2) whether Willingboro had waived the privilege that protects communications made during mediation from disclosure.

The New Jersey Supreme Court noted that there is a mediation communication privilege with only two exceptions: (1) the signed writing exception, which allows a written settlement agreement to be admitted into evidence to prove a settlement; and (2) when there is a waiver of the privilege.

The court stated that “[i]n the absence of a signed settlement agreement or waiver, it is difficult to imagine any scenario in which a party would be able to prove a settlement was reached during the mediation without running afoul of the mediation-communication privilege.” The court upheld the ruling that Willingboro had waived the privilege and that the settlement was binding.

Recognizing that the court system favors the settlement of disputes by mediation, the court observed that the success of mediation depends on confidentiality. To protect this confidentiality while encouraging the use of mediation to reach binding settlement agreements, the court announced a new rule: “[G]oing forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforced.”

As the courts continue to encourage mediation as a more economical and expeditious means to resolve cases, this new rule in New Jersey will no doubt be adopted in other jurisdictions that have yet to address the issue. A signed writing (or video or audio recording, which the high court suggested as an alternative) may ensure the enforceability of settlements reached at mediations.

### **A Mediator’s Takeaway**

Mediators may wish to provide a standard form that attorneys can utilize to memorialize the key terms of a settlement. In the event the parties are not able to complete a memorandum of understanding before the close of the mediation proceedings, the mediator may want to suggest that the mediation remain open until the settlement is reduced to writing.

Parties choose mediation for expedience and economy. *Willingboro* should serve as a cautionary tale to mediators: Parties are entitled to rely on the guarantee of confidentiality at mediations. If a dispute arises, a mediator may not divulge privileged communications in order to assist a party in enforcing a settlement reached during mediation. The result in *Willingboro* speaks volumes about the consequences of disclosing confidential communications.

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