Michigan case law concerning use of emails in alternative dispute resolution

BY LEE HORNBERGER

This article discusses Michigan case law concerning the use of emails in arbitrations, mediations, and settlement discussions.

WORDING OF EMAIL DID NOT CREATE BINDING SETTLEMENT AGREEMENT WITH PUBLIC BODY

Citizens Ins Co of Am v. Livingston Co Rd Comm[1] involved an alleged settlement agreement negotiated via email. There was an unsuccessful mediation with subsequent email correspondence from the mediator to the attorneys for the parties and among the attorneys for the parties. The defendant government argued that a series of emails which plaintiffs claimed constituted a settlement agreement were not binding. Because discovery was ongoing, the circuit court declined to rule on whether there was an enforceable settlement agreement. The Michigan Court of Appeals held that the series of emails constituted a binding agreement.

The defendant filed an application for leave to appeal to the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated the portion of the Court of Appeals judgment that held that there was a valid settlement agreement.[2] The Supreme Court held that the parties did not enter into a binding settlement agreement and the circuit court should have granted the defendant government motion for summary disposition. According to the Supreme Court, emails between the parties showed that the alleged settlement agreement was subject to approval by the Livingston County Road Commission, which had yet to do so.

In a concurring opinion,[3] Justice Brian Zahra, joined by Justice Elizabeth Welch, agreed with the majority that there was no binding settlement agreement. But he also believed the Court should have specifically held that there cannot be a settlement agreement with a public

body without approval made in an open meeting in light of *Presnell v. Wayne Bd of Co Rd Comm'rs*[4] and the Open Meetings Act.[5]

NO TYPED NAME AT BOTTOM OF EMAIL CAN MEAN NO AGREEMENT

Dabash v. Gayar[6] involved a settlement agreement negotiated via email. The defendants filed a motion to enforce the purported agreement. The circuit court granted the motion, but the Court of Appeals reversed, holding that the parties had not reached an enforceable agreement and when a case involves an agreement to settle pending litigation, the settlement must comply with MCR 2.507(G). Because no version of the settlement agreement or purchase agreement had the plaintiff's signature at the bottom, neither document was enforceable against plaintiff, and nothing in the exchange of emails demonstrated that the plaintiff ever accepted the defendants' offer. The lesson from this case: email acceptance of an offer is not effective unless there is a signature at the bottom of the email.

TYPED NAME AT END OF EMAIL CAN CREATE MCR 2.507(G) AGREEMENT

In *Kloian v. Domino's Pizza LLC*,[7] the Court of Appeals affirmed the circuit court's decision that an enforceable settlement agreement existed between the parties. The original settlement agreement — contained in email messages from March 18, 2005 — satisfied the subscription requirement of MCR 2.507(G). The 2005 email containing the terms of the settlement offer was subscribed by the plaintiff's attorney because he typed his name at the end of the email, and it also contained the defendant attorney's name at the end of the email.

The modification of the settlement agreement did not satisfy the requirement because there was no "evidence of the agreement … in writing, subscribed by the party against whom the agreement was offered or by that party's attorney" per MCR 2.507(G).[8] However, a March 21, 2005, email from the plaintiff's attorney requesting a mutual release had that attorney's name at the top of the email; subscription requires a signature at the bottom. The original settlement agreement, and not the modified settlement agreement, complied with MCR 2.507(G).

The circuit court correctly enforced the original settlement agreement; the modified agreement was unenforceable. If a modification of a settlement agreement is unenforceable under MCR 2.507(G), the original agreement remains enforceable. Furthermore, the parties entered into a binding settlement agreement that was set forth in a series of email messages exchanged between the parties' attorneys.

COURT CANNOT CREATE CONTRACT WHEN EMAILS DO NOT

Deep Harbor Condo Ass'n v. Marine Adventure, LLC[9] involved a settlement agreement negotiated via email. The attorneys exchanged emails about a potential settlement; the issue before the Court of Appeals was whether the emails resulted in an enforceable settlement agreement.

One of the attorneys moved to enforce the settlement agreement, claiming the emails represented a settlement enforceable under MCR 2.507(G), the terms of which included a global release of all claims by all parties. The other parties opposed the motion, contending that the emails represented mere negotiations and not an enforceable settlement. The circuit court concluded that the emails were an enforceable agreement, reasoning that the settlement proposed the attorney who moved to enforce it was accepted by the other attorneys on behalf of their clients. However, the circuit court did not enter into a settlement agreement because the parties had not agreed to specific terms. Instead, the circuit court ordered the parties to submit proposed settlement documents and agreed to hold a hearing to resolve the issue. The appellants contended that the emails did not show a meeting of the minds on all essential terms and instead represented mere negotiations among the parties.

The Court of Appeals sided with the appellants, deciding that no agreement was set forth on the record in open court. The purported agreement was set forth in an email chain among the attorneys. Emails can form a contract in compliance with MCR 2.507(G) — provided the emails evince a meeting of minds and are subscribed by the party against whom the agreement is offered or that party's attorney. When an email chain purports to reflect a settlement agreement, the emails must contain indisputable proof that it is a final agreement of the parties and include terms on which the parties settled.

MEDIATOR RESPONDING TO PARTIES REQUEST FOR INTERPRETATION

Mediation in *In re Edmund Talawanda Trust*[10] resulted in the parties consenting to the mediator making a proposal for resolution of remaining issues. The mediator's proposal became the settlement agreement. The appellants argued that the mediator lacked authority to make a binding post-mediation ruling pertaining to the interpretation of a certain paragraph. Prior to the closing, the parties emailed the mediator inquiring who would be responsible for the cost of replacing a roof, and the mediator provided a response. The Court of Appeals agreed with the mediator's interpretation of the settlement agreement but did not address the issue of whether it was binding; interpretation of an agreement is subject to de novo review.

ATTORNEY SIGNATURE CAN CREATE BINDING CONTRACT

In *Turner v. Turner*,[11] a case that involved settlement without mediation, the Court of Appeals stated that negotiations and settlement are part of any civil lawsuit, including domestic relations matters, and agreements signed by the party or the party's attorney are binding under MCR 2.507(G).

The parties negotiated a consent judgment of divorce in person and through a series of emails. At the close of negotiations, the wife's attorney drafted the necessary documents and signed them, as did the husband and his attorney. The judgment was a contract binding

on both parties despite the wife's later disagreement, and the circuit court properly entered the consent judgment.

A party's attorney can bind the party to a settlement or consent even where the party does not give the attorney actual authority to do so. Where the attorney has apparent authority to enter into an agreement on the client's behalf, it would be unjust to the opposing party to set it aside. When a client hires an attorney and holds the attorney out as counsel representing them in a matter, the client clothes the attorney with apparent authority to settle claims. The opposing party is generally entitled to enforce the settlement agreement even if the attorney was acting contrary to the client's express instructions unless the opposing party has reason to believe the attorney has no authority to negotiate a settlement. The court and parties in a divorce action are bound by settlements in writing and signed by the parties or their representatives. The client's remedy is not against the opposing party but against the attorney in malpractice.

EXCULPATORY LANGUAGE IN EMAIL SIGNATURE BLOCK CAN PREVENT SETTLEMENT

In *Haqqani v. Brandes*,[12] the Court of Appeals reversed the circuit court's enforcement of a settlement agreement negotiated via emails, holding that email signature block language that said, "Signature: Nothing in this communication is intended to constitute an electronic signature. This email does not establish a contract or engagement."[13] precluded it from being binding acceptance of an offer. The lesson here is that a signature block can prevent an email from establishing a contract.

MEDIATOR SHOULD CONFIRM DOMESTIC VIOLENCE PROTOCOL

Pohlman v. Pohlman[14] was a split decision in which the Court of Appeals affirmed circuit court enforcement of a mediated domestic relations settlement agreement. Because the plaintiff wife did not allege or show that she was prejudiced by the mediator's alleged failure to screen for domestic violence, any noncompliance with MCR 3.216(H)(2) was harmless. In her dissent, Hon. Elizabeth Gleicher argued that the circuit court was obligated to hold a hearing to determine whether the wife was coerced into the settlement.[15]

The Michigan Supreme Court directed the circuit court to hold an evidentiary hearing and submit findings concerning the wife's allegation that her signature on the settlement agreement was involuntary,[16] and the circuit court found that the mediator had complied with the obligation to screen for domestic violence per MCR 3.216(H)(2) and MCL 600.1035(2). After the Supreme Court received the findings, the application for leave to appeal was denied.[17]

There are a number of lessons from *Pohlman*. There should be email confirmation from the mediator to the advocates that the domestic violence protocol was followed; advocates should share the parties' mediation summaries with their clients; and iron-clad language regarding compliance with the protocol should be included in the mediated settlement agreement.

PREHEARING FILING OF EXHIBITS VIA EMAIL WITH ARBITRATOR

In *Fette v. Peters Constr Co*,[18] the Court of Appeals found that the record did not support the plaintiffs' contention that an arbitrator considered exhibits that the defendant shared electronically before the hearing in making the award determination. Even if the award was against the great weight of the evidence or not supported by substantial evidence, the Court of Appeals was precluded from vacating it. Allowing parties to electronically submit evidence prior to the hearing did not affect the plaintiffs' ability to present the desired evidence at the hearing.

INADVERTENT EMAIL SENT BY ARBITRATOR

During the course of arbitration in *Thomas v. City of Flint*,[19] the neutral arbitrator inadvertently sent an email to the plaintiff's counsel that was intended for one of the arbitrator's own clients. The plaintiff's counsel then requested that the arbitrator recuse herself; the arbitrator declined. The plaintiff then moved that the neutral arbitrator be disqualified. The circuit court granted the plaintiff's motion to disqualify the neutral arbitrator, and the defendant appealed.

The Court of Appeals reversed the order, ruling that the unintentional email did not give rise to an objective and reasonable perception that serious risk of actual bias existed per MCR 2.003(C)(1)(b). In her concurrence, Hon. Kathleen Jansen added that if the plaintiff wished to challenge the impartiality of the neutral arbitrator, the plaintiff was required to wait until after the award was issued.[20]

CONCLUSION

Here are some best practices concerning the use of emails in alternative dispute resolution:

- Emails meant to become a contract must have the sender's signature at the bottom.
- Type the sender's signature at the bottom of the email rather than relying on the signature embedded in the email signature block.
- Settlement-related emails must not have signature blocks that contain exculpatory "this is not a contract" language.
- Do not send emails to the wrong people.
- Clarify whether exhibits emailed pre-hearing to the arbitrator are in evidence.

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ENDNOTES

1. *Citizens Ins Co of America v Livingston Co Rd Comm*, 343 Mich App 354; ___ NW2d ___ (2022) (Docket No. 356294), rev'd in part, vacated in part by *Citizens Ins Co of America v Livingston Co Rd Comm*, ___ NW3d ___ (2024).
2. *Citizens Ins Co*, ___ NW3d at ___.
3. *Id.* (Zahra, J., concurring).
4. *Presnell v Wayne Bd of Co Rd Comm'rs*, 105 Mich App 362; 306 NW2d 516 (1981).
5. MCL 15.261 *et seq*.
6. *Dabash v Gayar*, 343 Mich App 285: 997 NW2d 463 (2022).
7. *Kloian v Domino's Pizza LLC*, 273 Mich App 449; 733 NW2d 766 (2006). *Kloian* was followed in *Trevino v Siler*, unpublished per curiam opinion of the Court of Appeals, issued January 17, 2017 (Docket No. 330120); and *St Paul of the Cross Passionist Retreat Ctr, Inc v SBA Towers III, LLC*, unpublished per curiam opinion of the Court of Appeals, issued January 15, 2015 (Docket No. 318325).
8. *Kloian*, 273 Mich App at 456.
9. *Deep Harbor Condo Ass'n v Marine Adventure, LLC*, unpublished per curiam opinion of the Court of Appeals, issued July 13, 2023 (Docket No. 360185).
10. *In re Edmund Talawanda Trust*, unpublished per curiam opinion of the Court of Appeals, issued June 29, 2023 (Docket Nos. 360789, 360790).
11. *Turner v Turner*, unpublished per curiam opinion of the Court of Appeals, issued February 10, 2022 (Docket No. 354495).
12. *Haqqani v Brandes*, unpublished per curiam opinion of the Court of Appeals, issued October 21, 2021 (Docket No 355308).
13. *Id.*
14. *Pohlman v Pohlman*, unpublished per curiam opinion of the Court of Appeals, issued January 30, 2020 (Docket No. 344121), lv den ___ Mich ___ (2021).
15. *Id.* (Gleicher, E., dissenting).
16. *Pohlman v Pohlman*, 507 Mich 928; 957 NW2d 338 (2021).
17. *Pohlman v Pohlman*, 508 Mich 939; 964 NW2d 37 (2021).
18. *Fette v Peters Constr Co*, 310 Mich App 535; 871 NW2d 877 (2015).
19. *Thomas v City of Flint*, unpublished per curiam opinion of the Court of Appeals, issued April 22, 2014 (Docket No. 314212).
20. *Id.* (Jansen, K., concurring).