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Murlyn Craig Reese v. Tingey Construction and/or Freemont Compensation Insurance Group, LWP Claims Solutions, Inc., Real Party in Interest and Petitioners : Reply Brief

Utah Court of Appeals

IN THE SUPREME COURT OF THE STATE OF UTAH

MURLYN CRAIG REESE, Plaintiff-Respondent, v. TINGEY CONSTRUCTION AND/OR FREEMONT COMPENSATION INSURANCE GROUP, Defendants-Respondents, LWP CLAIMS SOLUTIONS, INC., Real Party in Interest and Petitioners.	REPLY BRIEF OF REAL PARTY-IN-INTEREST AND PETITIONER, LWP SOLUTIONS, INC. Case No. 20060594-SC

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I. MR. REESE'S CLAIM THAT LWP DID NOT PARTICIPATE IN A MEDIATION AND IS THEREFORE NOT ENTITLED TO THE PROTECTION OF CONFIDENTIALITY WAS NOT PRESERVED BELOW AND IS THEREFORE WAIVED BY MR. REESE.[1]

Mr. Reese's argument that LWP Solutions, Inc. ("LWP") did not participate in a mediation with Mr. Reese and therefore is not entitled to the protections of confidentiality given to mediation discussions was not raised before the trial court and it is therefore waived. "As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances." State v. Brown, 856 P.2d 358, 359 (Utah Ct. App. 1993); Sweet v. Sweet, 138 P.3d 63, 64 fn2 (Utah App.2006).

Here, Mr. Reese has not alleged plain error or exceptional circumstances, and the Court should decline to address Mr. Reese's argument that LWP and Mr. Reese were not participating in a mediation at the time that he alleges an oral agreement was reached because this issue was not raised below. In fact, the plain language of Mr. Reese's arguments to the trial court belie his claims. In the affidavit submitted by Mr. Henriksen in support of his Motion to Enforce Settlement Agreement, Mr. Henriksen noted that

[1] As was the case in Mr. Reese's opposition to LWP Solutions, Inc.'s to Motion for Discretionary Interlocutory Appeal, Mr. Reese and his counsel utilize derogatory and improper language in its brief, which LWP asks the court to ignore. For example, Mr. Reese uses language such as "fabricate," "grossly misinterprets," "falsely," "exaggerate," "twisted," "conceal," and "misinterpret." Also, the use of the phrase "Welch" as reference to the alleged failure of LWP to adhere to some imagined agreement is a racially prejudicial statement. The use of the phrase "to Welch" originated in the early 19th Century when the English government decided that all Welsh children should speak English in school. Any child caught speaking Welsh had a board place around his/her neck and could only get rid of it by "telling on" another child who was using Welsh. "Welshing" came to be used to describe a person who was a "traitor." See http://www.rsdb.org. However, it is clear that it is a racial slur that this Court should not adopt in any of its published opinions.

"[a]t the mediation conference the parties reached an agreement for the resolution of all issues in the case, including the subrogation interest of LWP." R69 (emphasis added). Mr. Henriksen also admitted that Ms. Acosta, as counsel for LWP, was present during the mediation. R69. In the Motion itself, Mr. Reese admitted that LWP participated in the mediation. R55-56. Mr. Reese stated "[d]uring the mediation it came to that point and the Plaintiff's counsel asked LWP to compromise the amount of the lien" so the case could settle. R56 (emphasis added). Mr. Reese also made representations to the trial court such as "later in the mediation" and "[t]he mediation, therefore, concluded because all three parties reached this satisfactory agreement." R57.

In no uncertain terms, Mr. Reese took the position at the trial court level that LWP participated in the mediation and that any alleged agreement between LWP and Mr. Reese was reached during such mediation. Mr. Reese cannot now take the contrary position. He did not preserve at the trial court level his argument that he and LWP were not participating in a mediation at the time the alleged agreement was reached.

LWP does note that Mr. Reese has revealed the weaknesses of his own position by attempting to switch defenses on appeal. Rather than seek to distinguish the case law, rules and statutes proposed by LWP, Mr. Reese seeks to side-step their application. See Opposition at page 18 (where Mr. Reese argues that the Alternative Dispute Resolution Act, Utah Code Annotated § 78-31b-8, B, Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999) and Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution do not apply). By his own actions, Mr. Reese acknowledges that he has no real defense to the fact that all mediation discussions are confidential.

Furthermore, Mr. Reese's own actions at the mediation itself belie his claim that LWP was not a participant in the mediation. For example, LWP was addressed by the mediator during the initial "joint session" of the mediation where the ground rules of the mediation were set forth by the mediator. LWP was asked to meet with and discuss the case with the mediator alone, the mediator and the plaintiff, and the mediator and Tingey Construction. LWP was identified on the proposed Memorandum of Understanding and was asked by Mr. Reese to execute this document. These facts are conclusive evidence that LWP was a participant in the mediation (even if it was not a party to the underlying legal action) and that all participants at the mediation (including Mr. Reese) treated LWP as a participant.

If new evidence were allowed, LWP would introduce evidence which would show that LWP participated in the mediation because it believed that it was entitled to the benefits and limitations of mediation and would not have participated otherwise. Mr. Reese did not argue to the trial court that LWP was not participating in the mediation and as a consequence, LWP was deprived of its due process right to introduce evidence to rebut this claim. It is for precisely this reason that appellate courts refuse to hear issues raised for the first time on appeal.

In short, Mr. Reese's argument that LWP was not a participant in the mediation was not preserved in the trial court and is therefore waived. The Court should disregard all arguments asserted by Mr. Reese which attempt to argue that LWP was not a participant in the mediation and is not entitled to the benefits of confidentiality.

II. MR. REESE MISCHARACTERIZES SEVERAL FACTS IN HIS RECITATION OF THE FACTS WHICH LWP CAN REBUT.

LWP would first like to point out the difficult position in which it finds itself. LWP believes in the force and benefit of mediation and believes that the only way in which mediation will continue to prosper is if confidentiality of the mediation process is preserved. However, Mr. Reese has made several statements in his Opposition that are inaccurate, incomplete and misleading. LWP will attempt to rebut and respond to these statements without breaching the confidentiality of the mediation process. Any statement by LWP in its response should not be viewed by this Court as a waiver of the confidentiality of the mediation discussions between LWP and Mr. Reese. That LWP is in this unusual predicament is further evidence of why alleged oral agreements reached during mediation should not be allowed. The Uniform Mediation Act which Utah adopted on May 1, 2006 and the Court-Annexed Rules of Alternative Dispute Resolution all require that agreements reached during mediation be reduced to writing so as to avoid the exact situation in which LWP finds itself here.

A. The Trial Court Delayed in Allowing LWP to Intervene, Causing Procedural Problems.

At page 7 of it Opposition to LWP's brief in support of its appeal, Mr. Reese states that LWP "addresses [itself] as an intervening party without authority to do so." Mr. Rees touts this fact as evidence that LWP was being dishonest with the trial court.

What Mr. Reese fails to mention is that when LWP filed a proposed order with the court it *simultaneously* filed a motion to intervene. R135. LWP had expected that the trial court would recognize the procedural problems faced by LWP because it was subject

to the trial court's order but, as a non-party, was not in a position to appeal the ruling. LWP simultaneously filed the motion to intervene with the expectation that the trial court would grant the motion to intervene *prior* to issuing an order binding LWP to produce its counsel for deposition. R135. Unfortunately, the trial court made the subsequent procedural error of executing an order directing LWP to produce its counsel without first allowing LWP to intervene. R179, 197.

As this Court is aware, LWP was left in a procedural quagmire and was forced to concurrently file a motion for discretionary interlocutory appeal and a petition for an extraordinary writ. R195, 196. LWP sought the extraordinary writ because, as a non-party, it did not have standing to appeal the trial court's ruling that it should produce its counsel for deposition regarding the confidential mediation discussions. R195. Over Mr. Reese's objections, LWP was allowed to intervene in the suit and then this Court granted its petition for discretionary interlocutory appeal. R157, 197, 205. Mr. Reese's comment at page 7 of his opposition that LWP wrongfully identified itself as an intervening party in its proposed order is, at best, a half-truth and obviously does not fully explain to the Court the procedural history of the suit. LWP intended that the trial court allow it to intervene prior to executing its proposed order. The trial court did not do this. Mr. Reese's attempt to point to this fact as evidence of LWP's deceptive tactics fails miserably.

Next, at page 8, Mr. Reese disparages LWP for waiting until June 29, 2006 (the day before LWP's counsel was to be deposed) to file its motion to quash the deposition

notice and to file its motions for discretionary appeal and motion for extraordinary writ. R185. Again, Mr. Reese deletes important facts that make LWP's behavior reasonable.

Mr. Reese issued a faulty Notice of Deposition on June 22, 2006. (See Motion to Quash Deposition at page 185 of the record for a discussion of the deficiencies of this notice). The trial court did not execute an order directing LWP to produce its counsel for deposition until June 26, 2006. R179. As noted above, this order did not address the issue of whether LWP would be allowed to intervene in the suit even though it directed LWP to produce its counsel for deposition. R179. In its Motion to Quash Notice of Deposition of S. Grace Acosta, LWP informed the trial court (yet again) that it had not been allowed to intervene in the suit and that procedurally it was being disadvantaged by the trial court's failure to allow it to intervene.[2] R185.

The trial court did not allow LWP to intervene in the suit until July 10, 2006, after LWP had filed its motion for discretionary appeal, after it had filed its petition for extraordinary relief and after the date for Ms. Acosta's deposition had run. R197. What Mr. Reese fails to acknowledge is that LWP waited until the day before Ms. Acosta's deposition to file its motion to quash because it wasn't until that date that LWP knew that the Court would not rule on its motion to intervene until after the deposition date. Mr.

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[2] LWP believed that it could not file an Appellate Rule 5 Petition for Discretionary Appeal until the trial court allowed it to intervene in the suit. In order to preserve its arguments for appeal, LWP filed concurrent Rule 8 Motions for Extraordinary Writ and a Rule 5 Petition for Discretionary Writ. This court denied the Rule 8 Extraordinary Writ and noted in its ruling that LWP had the ability to protect itself by proceeding with its already filed Rule 5 Petition for Discretionary Appeal. LWP also filed the Motion to Quash the Notice of Deposition for Ms. Acosta concurrently with a motion to stay the proceedings during pendency of appeal. LWP was forced to file both the motion to quash and the motion to stay to ensure that the deposition of Ms. Acosta did not take place.

Reese's attempt to attribute mal intent or bad faith to LWP's actions is misplaced and based upon incomplete facts. LWP kept hoping the trial court would rule on its motion to intervene and when it didn't, LWP had no choice but to file a motion to quash the day before the deposition.

B. *The Mediator did Conduct Negotiations between LWP and Mr. Reese.*

At page 11 of his opposition, Mr. Reese states, "Mr. Felt, the mediator, was not involved in mediating the agreement which was made between Craig Reese and LWP." This is not true. LWP met with Mr. Reese and the mediator jointly at times, spoke with the mediator privately and spoke with the defendants and the mediator in joint sessions as well. Mr. Felt was actively trying to get LWP to alter its position so as to facilitate a settlement. Mr. Reese is yet again mistaken on this fact. Also noteworthy is that LWP was included in the Memorandum of Understanding from the mediator. If LWP was not a party to the mediation, it would not have been included in the Memorandum of Understanding drafted by the mediator.

C. *LWP did not Change its Mind Because No Agreement was Ever Reached.*

Mr. Reese also misstates the facts when he claims that LWP "changed its mind" about an agreement. Without waiving any confidentiality about the mediation discussions, Mr. Reese is mistaken in his belief that LWP agreed to waive the requirement that he exhaust funds from other sources prior to LWP resuming its obligation to continue making medical payments to Mr. Reese. This term was never discussed between the parties. R126-131.

After lengthy discussion between Mr. Reese, the mediator and Tingey (in which LWP did not participate), Mr. Reese's counsel exited an office and told Ms. Acosta that an agreement had been reached between Mr. Reese and the defendant, Tingey Construction. R129. Ms. Acosta called her client to discuss the settlement and its role in the settlement. R129. While reviewing the terms with LWP, Ms. Acosta realized that LWP and Mr. Reese had not discussed a central term. R129-30. Ms. Acosta immediately notified Mr. Reese's counsel of this fact and then refused to execute the Memorandum of Understanding because it contained the term to which LWP did not agree. R129-131. A contract was not formed between LWP and Mr. Reese because an essential term was not discussed and agreed to.

D. *LWP has Always Asserted that No Agreement was Reached.*

Despite Mr. Reese's claim to the contrary, LWP has always maintained that the parties never discussed whether Mr. Reese would be required to exhaust funds from the settlement before LWP's obligation to continue medical treatment would resume. R125-131. Mr. Reese argues in his brief at page 13 that he did not know until the hearing on May 22, 2006 that LWP asserted that no agreement was reached between the parties and that he was shocked by this revelation. R213, 39:23-25; 40:18-20. This is obviously not true.

In support of its opposition to Mr. Reese's motion to enforce settlement, LWP submitted copies of two letters between counsel. R91-93. In the letter found at R91, LWP informed Mr. Reese as follows:

> Thus, it is our position that neither a memorandum of understanding nor a firm agreement had been reached. It is also our position that settlement negotiating in mediation are not complete and finalized until all parties agree to the final version of the written proposal. It is for this very reason that I always contact or meet with my client near the end of mediations to confirm that this is the agreement they intended to make. I do not sign any mediation summary until it is read to my client (or if my client is present, read together). Until that point, or until there is a memorandum of understanding, the agreement is tentative.

R92.

On February 1, 2006, LWP again wrote Mr. Reese. In that letter, LWP stated as follows:

> As I have told you before, it is my position and the position of my client, that no agreement was reached during the mediation and that we were still in negotiations when the mediation concluded.
>
> . . .
>
> Again, no writing was executed in this case and it was only when the terms were being reduced to writing that I contacted my client for final approval and did not get such approval.

R93-94.

Additionally, LWP attached an affidavit of its counsel to the Opposition to the Motion to Enforce Settlement Agreement. R88. In that affidavit, Ms. Acosta stated as follows:

> Prior to leaving the mediation on December 30, 2005, I made it clear to all involved that LWP did not agree to the terms of the settlement set forth in the document drafted by the mediator, Paul Felt.
>
> I refused to execute the written agreement because it contained a term to which LWP did not agree. I told Mr. Henriksen this as soon as it became clear to me that the term included in the document had not been agreed to by my client.

R88. Thus, LWP has always maintained that no agreement was reached during the mediation and that the agreement was not reached because one essential term—whether Mr. Reese would be required to exhaust—was never discussed. R93, R88. LWP has always maintained that the parties were still in the process of negotiation when LWP's counsel left the mediation. R93. LWP has always maintained that the parties never agreed to waive its right to have Mr. Reese exhaust all funds collected prior to resuming payment of his medical bills because this term was never discussed between LWP and Mr. Reese. R88.

However, as LWP has argued at length in its introductory brief, it is in error for the trial court (and this Court) to engage in this type of fact discovery and analysis. The discussions in mediation are confidential. The rules relating to mediation require that any agreement reached during mediation be reduced to writing so as to preclude Courts from requiring evidentiary hearings so as to prove alleged oral agreement allegedly reached during mediation. The trial court abused its discretion when it ordered that Ms. Acosta be deposed and its ruling should be reversed and the sanctity of mediations maintained.

E. *Ms. Acosta Stayed at the Mediation to Negotiate A Settlement and for No Other Purpose.*

Next, Mr. Reese argues at page 13 of his brief that "Ms. Acosta remained in Craig Reese's Counsel's office for close to an hour during which she spoke with her client by phone and explained to LWP that she had already made the offer several times and Craig Reese had accepted it and relied upon it." First, Mr. Reese's counsel was not privy to attorney-client privileged communication between Ms. Acosta and LWP and he is only

speculating as to what was said between Ms. Acosta and her client. R131. Ms. Acosta remained at the mediation for her own purposes and Ms. Acosta is not required to reveal her reasoning which is protected by attorney-client privilege and is attorney work-product. Mr. Henriksen's speculation and conjecture is not evidence.

If Mr. Henriksen intends to offer his own testimony on this point, then upon remand he should be disqualified as counsel in this case and LWP should be granted leave to depose him and conduct further discovery into this matter. LWP recognizes the unprecedented nature of this request and makes it only to highlight the ludicrous nature of Mr. Reese's position. If oral agreements allegedly reached during mediation were enforceable, then proceedings such as the one at bar where attorneys and mediators are forced to appear as witnesses in violation of their respective oaths and ethical canons would become commonplace. This Court should adopt the reasoning of the cases from other jurisdictions cited by LWP in its opening brief and should adopt the reasoning of the Utah Model Mediation Act (Utah Code § 78-71c-101 et seq.) and find that all agreements reached during mediation must be reduced to writing so as to avoid the breach of mediation confidentiality.[3]

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[3] At page 17 of his opposition, Mr. Reese asks that this "court. . . affirm the trial court's order with the specific instruction of allowing Craig Reese to depose Ms. Acosta and offer evidence to establish the existence of an agreement." Yet again, Mr. Reese ignores the dangers in this request. He does not ask for direction regarding the scope of such deposition, whether attorney-client privilege communications must be revealed, whether LWP can depose the other attorneys in the suit etc. Mr. Reese turns a blind eye to the obvious difficulty and problems with his request. LWP identifies these deficiencies to highlight yet again the unreasonableness of a rule, which would allow disputed oral agreements reached during mediation to be enforced. The bright-line rule that all

F. *LWP did not Waive its Objections by Agreeing to Let Mr. Reese File his Motion in the Underlying Case.*

At page 33 of his Opposition, Mr. Reese asserts that the parties "stipulated that the district court could hear and determine the matter to enforce the settlement agreement." One again, Mr. Reese omits relevant facts which put his statement into context.

Prior to Mr. Reese filing his Motion to Enforce Settlement Agreement, Mr. Reese inquired if LWP would object to his filing the motion within the confines of the existing case. LWP, as a professional courtesy and so as to facilitate the more rapid review ofthe issue, agreed that the motion to enforce could be filed in the same action. However, by letter, LWP informed Mr. Reese that it was not waiving any objections to the enforcement proceedings. R93.

Had LWP known that the trial court would order its counsel deposed prior to allowing it to intervene in the suit and that Mr. Reese himself would oppose a motion to intervene, LWP would not have extended Mr. Reese this professional courtesy, for Mr. Reese has demonstrated LWP no reciprocal courtesy. LWP's agreement that the motion to enforce could be brought within the confines of the underlying litigation is not a waiver of its right to object to the motion to enforce nor a waiver of its right to intervene.

G. *LWP Discussed The Mediation Only Out of Necessity to Preserve its Rights and Because it was Forced to do so by Mr. Reese.*

Hypocritically, Mr. Reese attacks LWP at page 33 and 34 of his Opposition for revealing details about "the mediation and agreement." Mr. Reese himself (despite

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mediation agreements be reduced to writing is the better reasoned and most workable rule.

denying it elsewhere) admits that LWP was involved in the mediation when he makes this claim. But most importantly, it is unbelievable that Mr. Reese chastised LWP for disclosing confidential information when it did so only because it was forced to do so by Mr. Reese.

At the May 22, 2006 hearing, LWP presented the court with an affidavit from LWP's counsel. R126. LWP made it very clear at the hearing that it only did so at the trial court's "insistence." R213, 29:7-10. At every turn, LWP has tried to preserve the confidentiality of the mediation proceeding, but has been forced by Mr. Reese to push the envelope on the point and reveal more and more information. That Mr. Reese would criticize LWP for its behavior is quite amazing and is the classic case where a party creates an error and then complains about it. See State v. Alfatlawi, ___ P.3d ___ (Utah App. 2006), 2006 WL 3742123 (noting that the invited error doctrine prevented a party from profiting from error which it assisted in creating).

III. THE TRIAL COURT DISREGARDED UTAH CODE ANNOTATED § 78-31B-8 WHEN IT ORDERED LWP'S COUNSEL BE DEPOSED.

At page 27 of his brief, Mr. Reese argues that "LWP has grossly mis-characterized the district court" by saying that it ruled "that settlement discussions made during the course of a mediation were not confidential and could be admitted into evidence." The trial court's ruling states that "Mediation discussions contain both 'confidential' and 'non-confidential' discussions." R179. In no uncertain terms the trial court ruled that certain discussions made during the course of mediation were non-confidential. R179. Also, at no time prior to the ruling by the trial court has any court in the state of Utah ever held

that there were confidential and non-confidential components to mediation. The established rule of law in Utah since this Court's ruling in Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999), has been that all mediations are confidential. Period. Accordingly, LWP's summary of the trial court's ruling is hardly a "gross mis-characterization" of the trial court's holding.

Mr. Reese goes on to argue that the trial court "properly rules that evidence concerning a separate agreement made between LWP, a non-party to the mediation, and Craig Reese during and mediation between Craig Reese and Tingey were not confidential . . . ." See page 27 of Mr. Reese's Opposition. At no time did the trial court ever make any finding that LWP was not a party or participant to the mediation; that LWP and Mr. Reese were negotiating outside the confines of mediation; or anything of this sort. It is Mr. Reese who is mis-characterizing the trial court's ruling, not LWP.

Even though Mr. Reese adamantly (and for the first time on appeal) argues that LWP was not a participant to the mediation of this dispute, he relies upon Utah Code Ann. § 78-31b-8(4) (a statute which addresses only mediation) to support his argument. See Opposition at page 27. Mr. Reese argues that Utah Code Ann. § 78-31b-8(4) allows parties and the neutral to agree that a mediation can be non-confidential. Mr. Reese incorrectly limits the statute to parties *to the litigation* when the plain language provides that it is the parties *to the mediation* (of which LWP was a party) must agree.

Here, as a party to the mediation, LWP does not agree to waive confidentiality of this mediation. According to § 78-31b-8(4), if LWP does not agree to waive confidentiality then it cannot be waived. Thus, § 78-31b-8(4) support's LWP's argument

that all mediation discussions are confidential and cannot be revealed to third parties. Mr. Reese's attempt to alter the meaning of the statute so as to provide him with a basis for breaching the confidentiality of the mediation discussion is an incorrect reading of the statute and is not supported by any case law or rules of statutory construction.

What is clear again and again is that Mr. Reese cannot overcome the fact that it is common knowledge that when a party is asked to participate in a mediation (even if their role is that of a lien holder) that party gets the benefits and the limitations of the mediation process. No matter how hard Mr. Reese struggles to exempt himself from this, he cannot succeed. LWP participated in a mediation. As a participant to a mediation, it is entitled to the benefits of confidentiality. See Utah Code § 78-31b-8(4).

At page 30 of his opposition, Mr. Reese cites three Utah court cases for the proposition that Utah Courts often reveal the terms of settlement agreements in published opinions. The cases relied upon by Mr. Reese are not persuasive and should be disregarded by the court for none of them involves agreements reached during the confines of mediation.

At page 35 of his Opposition, Mr. Reese states that "the district court did not even order Ms. Acosta to be deposed about confidential matters. The trial court determined that the separate agreement was a different issue than the issue of liability between Tingey and Craig Reese." Mr. Reese argues that since the trial court only requires Ms Acosta to testify about "non-confidential" portions of the mediation, § 78-31b-8 is not violated.

This argument begs the question of which portions of the mediation would be considered confidential and which would not be considered confidential. The trial court has issued a ruling, which if enforced by the Court, would require subsequent litigation of every mediation that did not result in a written agreement. Suddenly, every time one participated in a mediation and an agreement was not reached, there would be a chance that things you said during the course of the mediation could be used against you.

This would have a chilling effect on all mediations. The better approach is the bright-lined approach of the Utah Uniform Mediation Act, Utah Code § 78-31b-8, and the reasoning of Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999), which preserves confidentiality. Similarly, the courts in Vernon v. Action, 732 N.E.2d 805, 806 (Ind. 2000), In re Acceptance Insurance Company, 33 S.W.3d 443 (Tex. Civ. App. 2000), and Wilmington Hospital L.L.C. v. New Castle County, 788 A.2d 536 (Del. Ch. 2001), each have found that the most reasonable approach is to require that agreements reached during mediation be reduced to writing. If an "exception" to the confidentiality rules is made in circumstances when a party wishes to enforce an oral agreement, it would surely become an instance where the exception would swallow the rule. See Vernon, 732 N.E.2d at 809 (noting that an exception for oral agreements has the potential to swallow the rule).

LWP asks this Court to adopt the reasoning of those authorities that hold that any agreement reached during the course of a mediation must be reduced to writing to be enforceable. If this Court were to enforce alleged oral agreements then there is a fear

that the precepts of confidentiality-- which are the cornerstone of mediation--would be unrecognizably eroded.

IV. MR. REESE'S ATTEMPT TO DISTINGUISH CASE LAW RELIED UPON BY LWP FAILS.

Mr. Reese attempts to distinguish the case law LWP relies upon in its appellate brief, but fails.

A. *The Principles in Lyons v. Booker Apply to this Case.*

Mr. Reese takes considerable effort to distinguish the court's ruling in Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999). Mr. Reese argues that Lyons is distinguishable because (1) the court ordered mediation in that case and (2) the rules of appellate mediation specifically state that mediation is confidential. Mr. Reese's attempt to distinguish himself from Lyons fails.

LWP acknowledges that Lyons v. Booker dealt specifically with appellate mediation but doubts that the Court intended its importance to be limited only to appellate mediation. The pronouncement by the court in Lyons that mediation discussions were confidential was not specifically limited to appellate mediation and the language therein is broad enough to encompass all types of mediation.

Also, the parties here voluntarily agreed to mediation this dispute. At the joint opening session the mediator advised the parties that the rules of mediation applied. Unfortunately, because Mr. Reese did not raise his claim that LWP was not a participant in the mediation at the trial court level, LWP was deprived of its right to introduce evidence on this point. But it is important to note that Mr. Reese has not introduced any

evidence, which proves that the parties did not intend the rules of confidentiality provided by statute and court rule to apply to the mediation of the dispute.

B. *The Utah Uniform Mediation Act Support's LWP's Claim of Confidentiality.*

Furthermore, this Court need not rely solely upon Lyons to find that the mediation between LWP and Mr. Reese was confidential. Effective May 1, 2006, the Utah Legislature adopted the Uniform Mediation Act, Utah Code § 78-31c-101 (2006) et seq. While the mediation between LWP and Mr. Reese occurred prior to the effective date of the Act, section 78-31c-114 of the Act notes that after May 1, 2007, only 4 months away, the Uniform Mediation Act applies to all mediation agreements, no matter when entered. Thus, by the mere passage of time, the Act will apply to the mediation between Mr. Reese and LWP and will provide LWP with the confidentiality to which it is required without reliance on Lyons.

Also relevant is that § 78-31c-104 plainly states that any "participant" to a mediation is entitled to confidentiality and that any participant can require that others who are participants to the mediation maintain such confidentiality as well. See id. ; see also, Karen Hobbs, Mediation Confidentiality and Enforceable Settlements: Deal or no Deal? (2006), http://www.hobbsmediation.com/pg12.cfm, See also Addendum at page 24.

C. *The Cases Relied Upon by Mr. Reese to Argue that Oral Mediation Agreements Can be Enforced are Distinguishable.*

Mr. Reese relies upon the case of Catamount Slat Prod. Inc. v. Sheldon, 845 A.2d 324, 331 (Vt. 2003), for the proposition that parties may rely upon oral contracts even if

they intend to memorialize into written document. Opposition at page 37. However, Mr. Reese fails to state that in Catamount the court also found as follows: "On the other hand, if either party communicates an intent not to be bound until he achieves a fully executed document, no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract." Id. at 329. In that case, the court found that the parties did not intend to be bound until the execution of a written document.

The same is true here. Ms. Acosta called LWP to discuss the final terms of the agreement when she was handed the written Memorandum of Understanding. R126-131. Her actions alone illustrate that LWP did not intend to be bound until the terms of the written agreement were reviewed with LWP.

This is the same reasoning set forth in the case of Kaiser Foundation Health Plan of Northwest v. Doe, 903 P.2d 375 (Or.App. 1995). Mr. Reese cites this case claiming that the court in Kaiser found that an oral agreement reached during mediation was enforceable. What Mr. Reese fails to advise this Court is that the plaintiffs' attorney in that case executed a written document at the conclusion of the mediation which memorialized the essential terms of the agreement. See id. at 379. The plaintiff only refused to execute the more-lengthy, subsequent document. See id. The trial court in that case could litigate the terms of the settlement without delving into the confidentiality of the mediation because the material terms of the agreement had been reduced to writing. See id.

The case at bar is distinguishable. Here, prior to leaving the mediation, LWP refused to execute any written document on the ground that no agreement had been

reached. R126. LWP advised all involved that the Memorandum of Understanding included a term to which LWP did not agree. R88, 126. There is no way to determine whether an oral agreement was reached by the parties without breaching the confidentiality of the mediation process.

Mr. Reese also relies upon the case of Riner v. Newbraugh, 563 S.E.2d 802 (W. Va 2002). That case is also distinguishable. There, post-mediation, the mediator negotiated a settlement over the phone and reduced it to writing. See id at 804. The mediator and one of the parties executed the document and forwarded it to the other parties. See id at 804-05. The second party did not sign the document but drafted its own document and asked that the others execute his document which included additional terms. See id at 805. When the parties declined to execute the new document, the parties brought suit to enforce the settlement agreement. See id.

The facts of Riner are quite different from the facts here. Even though the second party refused to execute the document proposed to it by the first party, the second party did execute some form of writing. The court enforced the agreement to the extent the terms of the two documents matched. See id at 809. Also important is that neither party raised the issue of confidentiality. See id.

Thus, the cases relied upon by Mr. Reese to support his claim that the trial court properly ordered LWP to produce its counsel for deposition have facts which are very different from the case at bar. This Court should follow the cases proposed by LWP as they are more closely on point.

V. LWP's RELIANCE ON CASE LAW FROM OTHER JURISDICTIONS IS PROPER AND SHOULD BE ADOPTED BY THE COURT.

It should be noted that Mr. Reese fails to distinguish much of the case law relied upon by LWP in its opening brief and this should be taken as an admission that LWP's assertion of the holdings and application of such law is accurate. Mr. Reese has capitulated on these points.

Mr. Reese weakly attempts to distinguish Vernon v. Action, 732 N.E.2d 8005 (Ind. 2000), Wilmington Hospital L.L.C. v. New Castle County, 788 A.2d 536 (Del. Ch. 2001), and Ryan v. Garcia, 33 Cal.Rpt.2d 158, 159 (Cal. Ct. App. 1994), by reviving his argument that LWP and Mr. Reese were not "in a mediation" and argues that, as a consequence, the reasoning in these cases do not apply. As stated before, this argument was not preserved below. Moreover, it is inaccurate. LWP attended and participated in the mediation. It is entitled to the benefits and burdens of mediation.

Mr. Reese does not attack LWP's account of Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992) (noting that for federal mediation program to work "participants must trust that matters discussed at a conference will not be revealed to the judges."); In re Acceptance Insurance Company, 33 S.W.3d 443 (Tex. Civ. App. 2000)(where the court entertained a writ of mandamus to address the error of allowing parties to testify at trial regarding confidential mediation discussions). Reno v. Haler, 734 N.E.2d 1095, 1099 (Ind. Ct. App. 2000) (Where agreement within confines of mediation was enforced because the mediator had taken handwritten notes and the parties signed these notes in lieu of a more formal document, but still requiring some form of writing that "contain the

terms to which the parties agreed".); Spencer v. Spencer, 72 N.E.2d 661 (Ind. Ct. App. 2001) (where agreement within confines of mediation was dictated by the mediator at the end of the mediation but one party thought she would be given the chance to review this dictation prior to signature was found not enforceable until it had been signed by the parties); Regents of the University of California v. Sumner, 50 Cal.Rptr.2d 200 (Cal. Dist. Ct. App. 1996) (noting that oral discussion after mediation had concluded was not subject to the same confidentiality protections as statements within mediation).

As the court in Ryan, supra, held: "Judicial sifting of statements made at a confidential mediation to select those which can be used as evidence of an agreement contravenes the legislative intent underlying adoption [of ADR rules and] . . . undercuts the effect of the statute intended by the Legislature." 33 Cal. Rpt.2d 158 at 161. Most importantly, the court in Ryan noted that if oral mediation settlements were enforceable, it would be "costly and time-consuming." Id. at 162. Allowing for oral mediation settlement "permits full-blown trials to determine, in each mediation case, if there was an oral agreement and, if so, on what terms." Id.

VI. CONCLUSION

LWP respectfully requests that the trial court be reversed and that this matter be remanded to the trial court with direction that Mr. Reese's motion to enforce be dismissed with prejudice for lack of admissible evidence in support thereof.

RESPECTFULLY SUBMITTED, on this 12th day of January 2007.

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X. ADDENDUM

Mediation Confidentiality and Enforceable Settlements: Deal or No Deal?

Karin S. Hobbs, Attorney/Mediator

After hours of mediation, the parties have reached a "deal" on the principal issues. The parties want closure. Attorneys begin preparing the written agreement to ensure the deal is clear, complete, final and enforceable. Confidential mediation discussions continue. Emotions run high as the parties work through the final issues. If the "deal" is not written and signed, is there an agreement? Are the discussions confidential? How do attorneys ensure confidentiality of mediation? How do attorneys create an enforceable settlement agreement and avoid court action?

Why is confidentiality so important? Confidentiality is a critical element of successful mediation. In order for the mediator, the attorneys and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can talk openly. Frequently, some of the motivating forces behind lawsuits are legally irrelevant and yet exceptionally important to understanding the conflict and facilitating resolution. Frequently, clients disclose private events, perceptions or issues in mediation they would not want disclosed to anyone. Explaining their concerns and fears is often critically important to them in order to resolve the conflict. If discussions with the mediator are not confidential and privileged, the mediation process, the mediator's role and the potential for resolution are significantly diminished.

In preparing for mediation, attorneys explain to clients that mediation is confidential. "These are settlement discussions and cannot be disclosed in court," attorneys tell their clients. "You can feel free to talk to the mediator. She won't disclose it to the other side if you tell her the information is confidential." In the opening session of the mediation conference, the mediator explains that the discussions are confidential and privileged. All participants sign an Agreement to Mediate stating they understand the mediation process, the mediator's role and the confidentiality of the discussions. Mediation proceeds based on an understanding that the mediation discussions are confidential.

Despite mediation confidentiality, courts are increasingly asked to enforce settlement agreements reached in mediation jeopardizing confidential mediation discussions.[4]

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[4] Simmons v. Ghaderi, 143 Cal. App. 4th 410 (Cal App. 2d Dist.) (2006).

Confidentiality and privilege, two different yet intertwined concepts, are often used interchangeably. Confidentiality means the mediation communications are not disclosed. The mediation privilege is a rule providing that the confidential communications are not admissible in court. Utah recently enacted the Uniform Mediation Act articulating guidelines for mediation privilege and mediation confidentiality. Attorneys can take steps to plan for and create enforceable settlement agreements to ensure that the process remains confidential and privileged.

1. The Uniform Mediation Act

a. Mediation Communications

On May 1, 2006, Utah became the eighth state to adopt the Uniform Mediation Act (UMA).[5] The Uniform Mediation act defines mediation communication as "conduct or a statement, whether oral, in a record, verbal, or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." Utah Code Ann. § 78-31c-102(2) (2006). Thus, discussions with a mediator before, during or as a continuation of the mediation discussions are both confidential and privileged under the Uniform Mediation Act. When the mediator meets with the attorney and client before mediation or in a follow-up meeting, the protections of confidentiality and privilege continue to apply.

b. Mediation Confidentiality

i. Prior to the Uniform Mediation Act

Even prior to the creation of the Uniform Mediation Act, courts throughout the country recognized mediation confidentiality as essential to effective mediation because it allows a candid and informal exchange of information.[6] "The process works best when parties speak with complete candor, acknowledge weaknesses, and seek common ground, without fear that, if a settlement is not achieved, their words will later be used against

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[5] Utah joins Washington D.C., Iowa, Nebraska, Illinois, Ohio, New Jersey, and Washington. Vermont was the ninth state to adopt the UMA, and the UMA is pending in four states: New York, Massachusetts, Connecticut and Minnesota.

[6] Foxgate Homeowners Association v. Bramalea California, Inc., 26 Cal.4th 1,14 (Cal. 2001); Sharp, D., Mediation Confidentiality, AAA Handbook on Mediation (2006). Hoffman, D. and Shemin V., The Uniform Mediation Act: Upgrading Confidentiality in Mediation, Massachusetts Lawyers Weekly, July 18, 2005.

them in the more traditionally adversarial litigation process."[7] Courts agree that "[w]hat is said and done during the mediation process will remain confidential, unless there is an express waiver by all parties or unless the need for disclosure is so great that it substantially outweighs the need for confidentiality."[8] Further, "[t]he mediation process was not designed to create another layer of litigation in an already over-burdened system."[9]

ii. Confidentiality under the Uniform Mediation Act

The Uniform Mediation Act, finalized in 2003, solidifies and reinforces mediation confidentiality. Mediation confidentiality, according to the drafters of the Uniform Mediation Act, encourages parties to have an informal and candid exchange of ideas.[10] Frank discussions are essential to opening constructive and creative dialogue and to enabling parties to discover ways to resolve their disputes independent of the judicial system.[11] According to the Act, "[t]his frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and adjudicatory processes."[12]

The Utah Uniform Mediation Act specifies that mediation communications are "confidential to the extent agreed by the parties or provided by other law or rule of this state" unless subject to the open and public meetings statutes or government access to records laws. Utah Code Ann. § 78-31c-108 (2006). Thus, the act provides for a general protective umbrella of confidentiality over mediation communications.

iii. Confidentiality Rules and Statutes in Utah

Utah's Alternative Dispute Resolution Act also provides that "[u]nless all parties and the neutral agree, no person attending an ADR proceeding . . . may disclose or be required to disclose any information obtained in the court of an ADR proceeding, including any memoranda, notes, records, or work product." Utah Code Ann. § 78-31b-8(4). Further, "an ADR provider . . . may not disclose or be required to disclose any information about any ADR proceeding to anyone outside the proceeding . . . ." Utah Code Ann. § 78-31b-8(5).

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[7] Princeton Ins. Co. v Court of Chancery of Delaware, 883 A.2d 44, 51 (Del. 2005); see also, Foxgate Homeowners Association v. Bramalea California, Inc. 26 Cal.4th1,14 (Cal. 2001).

[8] Lehr v. Afflitto, 382 N.J. Super. 376, 391, 889 A.2d 462, 472 (N.J. 2006).

[9] Id.

[10] Uniform Mediation Act, Final Version with prefatory remarks, National Conference on Commissioners of Uniform State Laws (2003).

[11] Id.

[12] Id.

Further, the Utah Rules of Alternative Dispute Resolution provides "[m]otions, memoranda, exhibits, affidavits, and other written, oral or other communication submitted . . . to the ADR provider . . . shall be confidential and shall not be made a part of the record or filed with the clerk of the court. Neither shall any such communication be transmitted to the judge to whom the case is assigned . . . ."[13] The ADR provider "shall not disclose to or discuss with anyone, including the assigned judge, any information about or related to the proceedings, unless specifically provided otherwise in these rules. ADR providers shall secure and ensure the confidentiality of ADR proceeding records."[14]

Rule 4-510 of the Utah Rules of Judicial Administration also states that "No ADR provider may be required to testify as to any aspect of an ADR proceeding except as to any claim of violation of URCADR Rule 104 which raises a substantial question as to the impartiality of the ADR provider and the conduct of the ADR proceeding involved."

Thus, the Utah Uniform Mediation Act, Utah's Alternative Dispute Resolution Act, the Utah Rules of Alternative Dispute Resolution and the Utah Rules of Judicial Administration all provide that mediation discussions are not to be disclosed to others. In one narrowly drawn Utah appellate case, the Utah Court of Appeals enforced the confidentiality of court-ordered appellate mediation stating that counsel, the parties, and the mediator could not disclose any statements, comments, or notes made during the initial mediation conference or in related discussions.[15]

Mediation confidentiality is more expansive than confidentiality in other professional relationships. In many professional relationships, the duty of confidentiality, such as the attorney/client relationship and the physician/patient relationship, the obligation restricts the professional only and not the client or patient.[16] For example, in the attorney/client relationship, the client is free to disclose conversations with the attorney, whereas the attorney is prohibited from doing so.[17] However, mediation is different. In mediation, the duty to maintain confidentiality extends ***to all participants from all participants***, including third-parties, "to the extent agreed to by the parties or provided by other law or rule of this state." Utah Code Ann. § 78-31c-108 (2006). The Utah Uniform Mediation Act specifically allows third party involvement in mediation and allows third-parties the protection of mediation confidentiality and the mediation privilege.

c. Mediation Privilege

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[13] Rule 103, Utah Rules of Alternative Dispute Resolution
[14] Id.
[15] Lyons v. Booker, 982 P.2d 1142 (Utah 1999).
[16] Utah R. Evid 506(c); DeBry v. Goates, 999 P.2d 582 (Utah 2000).
[17] Rule 1.12 Utah Rules of Professional Conduct

So, how does the mediation privilege mesh with mediation confidentiality? Confidential mediation communications, under Utah evidentiary law, are settlement discussions under the federal and state rules of evidence and are not disclosed in court.[18] The Uniform Mediation Act specifically provides for a mediation privilege and articulates waivers of the privilege and exceptions to the privilege. For example, in the medical profession, patient records are confidential; however the physician/patient privilege regulates whether the information can be admitted as evidence in court. Similarly, mediation communications are confidential, and the privilege governs admission of the confidential information in court.

d. Waiver of the Privilege

How can the privilege be waived, thus allowing the mediation communications to be admitted as evidence in a proceeding? The Uniform Mediation Act provides that the mediation privilege may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and is expressly waived by the mediator and by the third party participants. Thus, in order to waive the privilege, *everyone involved* in the mediation must waive the privilege in a record or in a proceeding.

The Act further states that a person may be precluded from asserting the privilege if a person discloses or makes a representation about a mediation that prejudices another person in a proceeding. Utah Code Ann. § 78-31c-105(2) (2006). Thus, attorneys, clients, mediators and third-party participants in mediation should be forewarned that they may waive the privilege if they make a statement about mediation communications. For example, if a client takes confidential mediation discussions to the media and the disclosure prejudices the other side, the privilege may be waived. If the privilege is waived, it is only waived to the extent necessary for the person to respond to the representation or disclosure.

All mediation participants should be on notice that disclosure of confidential information may leave a crack open in a door they wanted sealed shut. For example, if a mediation participant learns confidential information during mediation, disclosure of that information may give rise to a lawsuit for breach of contract, i.e., the mediation agreement. If damages are proven, a plaintiff may prevail on the breach of a confidentiality provision in a mediation agreement. All mediation participants should understand that breaching the Agreement to Mediate and mediation confidentiality can lead to future problems and potential lawsuits.

e. Exceptions to the Privilege

[18] Utah R. Evid. 408; Fed. R. Evid. 408.

The Act also provides exceptions to the mediation privilege. Prior to the Uniform Mediation Act, case law developed exceptions to the mediation privilege. In 1999, Magistrate Judge Wayne Brazil jolted the mediation community when he ordered a mediator to testify. [19] In Olam, a woman participated in mediation late into the night and signed an agreement. She then moved to set aside the agreement, claiming that she was physically, intellectually and emotionally incapable of giving consent. The court held that the best evidence of her capacity to consent was testimony from the mediator. After both parties waived their right to maintain the confidentiality of the mediation communications, but the mediator did not waive confidentiality, Judge Brazil ordered the mediator to testify in a sealed proceeding. Judge Brazil reasoned that the public interest in disclosing the confidential mediation discussions outweighed the interest in confidentiality. Although this case has been distinguished due to the parties' waiver of confidentiality, the case created great concern among the mediation community and is often cited for the proposition that the interest in confidentiality may be weighed against the public interest in disclosing the confidential information.[20]

Mediation confidentiality has also been deemed waived when an attorney failed to object to admission of or evidence of events occurring in mediation.[21] In addition, a juvenile's significant constitutional right to a defense has been held to outweigh mediation confidentiality.[22]

Prior to May 1, 2006, attorneys relied on the evidentiary rule that evidence of conduct or statements made in compromise negotiations is not admissible.[23] The Utah Uniform Mediation Act creates a specific mediation privilege and extends it to the parties, the mediator and third-party participants. The mediation communication is not privileged if the mediation communication is demonstrated "in an agreement evidenced by a record signed by all parties to the agreement." Utah Code Ann. § 78-31c-106(1) (2006). Thus, if all parties sign an agreement, that agreement is not privileged. In addition, there is no privilege if the mediation communication is available to the public under the public meeting laws or if a threat is made to inflict bodily injury or to commit a crime of violence. Also, the Act states there is no mediation privilege if the mediation communication is used to plan a crime or if it is sought or offered to prove or disprove a

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[19] Olam v. Congress Mortgage Company, 68 F.Supp.2d 1110 (N.D. Cal. 1999)

[20] Eisendrath v. Superior Court, 109 Cal.App.4th 351 (2003) (participants to mediation cannot impliedly waive their confidentiality rights by challenging the agreement reached in mediation.)

[21] Regents of University of California v. Sumner 42 Cal. App.4th1209 (1996).

[22] Rinaker v. Superior Court, 62 Cal.App.4th 155 (Cal. 1998) (Prior inconsistent statements made by a witness at mediation may be introduced at a subsequent delinquency hearing.).

[23] Utah R. Evid. 408. The Utah rule is identical to Rule 408 of the Federal Rules of Evidence.

claim or complaint of professional malpractice. Utah Code Ann. § 78-31c-106(1)(b) – (e) (2006).

Finally, the Utah Uniform Mediation Act states that mediation communications are not privileged if "there is a need for the evidence that substantially outweighs the interest in protecting confidentiality." Utah Code Ann. § 78-31c-106(2)(b) (2006). To qualify under this provision, the mediation communications must not otherwise be available and the communication must be sought or offered either in a felony or misdemeanor proceeding *or in a proceeding regarding a contract arising out of mediation.* Thus, if one of the parties seeks to enforce a mediation agreement, the court may find no mediation privilege if a more important countervailing public interest is involved, the evidence it not otherwise available and the communication is sought in an action to enforce a mediated agreement. Utah Code Ann. § 78-31c-106(2) (2006)

2. Practical Steps to Maintain Confidentiality and Avoid Court Action

a. Prepare Settlement Agreement in Advance of Mediation

Mediation has expanded enormously. As a result, actions to enforce mediated agreements are becoming more common. Although the Uniform Mediation Act and other rules offer a veil of confidentiality, what practical steps can attorneys take to avoid court action and preserve confidentiality?

Prior to the mediation conference, attorneys should envision standard provisions of a settlement agreement. Attorneys can either arrive at the mediation conference with a laptop computer, a partially drafted settlement agreement or prepared staff members standing by to compose and/or email documents to the mediation. Clients are also excellent sources of this preparation, as they often identify unknown and important terms.

b. Create and sign a written agreement in mediation

At the close of the mediation conference, attorneys and clients should create and sign a written agreement addressing all essential terms, if possible. Additional time spent in mediation drafting and signing the settlement agreement, while everyone is focused on settling the case, will significantly reduce the most common reason to explore confidential mediation communications. How can you accomplish this effectively at the end of a long day when the participants are exhausted? What if a party voices a desire to prepare the agreement the following day or a desire to "sleep on it." At this point, the clients and attorneys are required to think about the benefits of closure versus the risk the agreement may fall apart. Both options are available. If a signed agreement is not possible due to lack of information, insufficient time or complexity of the issues, the parties may want to continue the process. If enough of the information is available,

continuing the process is generally not helpful. However, some cases require more than one or two mediation sessions. In addition, attorneys should clarify for clients the impact of leaving the mediation without signing an agreement, the loss of momentum, and whether either party will be held to any statements made during the mediation process. Momentum is another consideration. At the end of the negotiation, parties have momentum and are more likely to concede on minor issues.

c. Desire for Finality vs. Reluctance to Enter an Agreement

Finalizing the agreement in writing is the final stage of the mediation process. Momentum is often lost if the parties leave mediation without an agreement. Frequently, if an agreement is not signed on the day of mediation, one party retracts the agreement. Attorneys and clients can prepare for this tension of reluctance to enter an agreement versus desire for finality by understanding this tension exists and knowing this tension is a common final step in resolving conflict. Mediators and attorneys can facilitate closure. As the agreement is prepared, food can be delivered, rejuvenating the participants. Clients can take a walk around the block, check their email or run an errand. Just the brief break assists the parties in clearing their minds and preparing to sign the final agreement.

d. Standard Provisions in Settlement Agreements

Standard provisions in settlement agreements include releases of liability, resolution of all claims and defenses, dismissal of lawsuits, timelines and security for payments, confidentiality clauses, cooperation in preparing documents necessary to effectuate the agreement, and payment of attorney fees. The parties may want their agreement to state that in the event of a dispute regarding the agreement, they will return to mediation prior to initiating court action. As with all other provisions of the agreement, this provision could be negotiated, including the process to be used, the allocation of costs and other terms that serves the parties interest in resolving the dispute and avoiding the litigation process. To avoid claims of duress, agreements should also state that the parties enter the agreement freely, voluntarily, without duress or coercion and with the advice of counsel.

Standard Settlement Agreement Provisions:

- Mutual releases of liability
- Dismissal of lawsuit(s)
- Timelines for payments, interest, security, liens
- Confidentiality clauses
- Cooperation in preparing documents necessary to effectuate agreement
- Payment of attorney fees
- Resolution of all claims and defenses
- Dispute resolution clauses, i.e., mediation, arbitration, allocation of costs
- Agreement entered freely, voluntarily, without duress or coercion and with the advice of counsel

e. Achieving Closure

The goal of the mediation process is to empower parties with information and a process for solving their own issues by mutual agreement without court intervention. If the process produces another layer of litigation, the mediation process will suffer and parties will hesitate to engage in frank and productive settlement discussions. After the agreement is signed, the clients generally feel relief. They have compromised more than they wanted but are relieved the conflict is resolved. Carefully crafted settlement agreements insulate the parties from court action, and allow parties to resolve the conflict, move on and focus their emotions and energy on other more positive aspects of their lives.

UTAH UNIFORM MEDIATION ACT

78-31c-101. Title.

This chapter is known as the "Utah Uniform Mediation Act."

78-31c-102. Definitions.

As used in this chapter:

(1) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) "Mediation communication" means conduct or a statement, whether oral, in a record, verbal, or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(3) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(4) "Mediator" means an individual who is neutral and conducts a mediation.

(5) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(6) "Person" means an individual, corporation, estate, trust, business trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(7) "Proceeding" means:

(a) a judicial, administrative, arbitral, or other adjudicative process, including related prehearing and posthearing motions, conferences, and discovery; or

(b) a legislative hearing or similar process.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) "Sign" means:

(a) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(b) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

78-31c-103. Scope.

(1) Except as otherwise provided in Subsection (2) or (3), this chapter applies to a mediation in which:

(a) the mediation parties are required to mediate by statute, court, or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(b) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(c) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by an entity that holds itself out as

providing mediation.

(2) The chapter does not apply to a mediation:

(a) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(b) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the chapter applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(c) conducted by a judge who might make a ruling on the case; or

(d) conducted under the auspices of:

(i) a primary or secondary school if all the parties are students; or

(ii) a correctional institution for youths if all the parties are residents of that institution.

(3) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections **78-31c-104** through **78-31c-106** do not apply to the mediation or part agreed upon. However, Sections **78-31c-104** through **78-31c-106** apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

78-31c-104. Privilege against disclosure -- Admissibility -- Discovery.

(1) Except as otherwise provided in Section **78-31c-106**, a mediation communication is privileged as provided in Subsection (2) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section **78-31c-105**.

(2) In a proceeding, the following privileges apply:

(a) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(b) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(c) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

78-31c-105. Waiver and preclusion of privilege.

(1) A privilege under Section **78-31c-104** may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation, and:

(a) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(b) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(2) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section **78-31c-104**, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(3) A person that intentionally uses a mediation to plan, attempt to commit or commit

a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section **78-31c-104**.

78-31c-106. Exceptions to privilege.

(1) There is no privilege under Section **78-31c-104** for a mediation communication that is:

(a) in an agreement evidenced by a record signed by all parties to the agreement;

(b) available to the public under Title 63, Chapter 2, Government Records Access and Management Act, or made during a mediation session which is open, or is required by law to be open, to the public;

(c) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(d) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(e) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(f) except as otherwise provided in Subsection (3), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(g) subject to the reporting requirements in Section **62A-3-305** or **62A-4a-403**.

(2) There is no privilege under Section **78-31c-104** if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that:

(a) the evidence is not otherwise available;

(b) there is a need for the evidence that substantially outweighs the interest in protecting confidentiality; and

(c) the mediation communication is sought or offered in:

(i) a court proceeding involving a felony or misdemeanor; or

(ii) except as otherwise provided in Subsection (3), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(3) A mediator may not be compelled to provide evidence of a mediation communication referred to in Subsection (1)(f) or (2)(c)(ii).

(4) If a mediation communication is not privileged under Subsection (1) or (2), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under Subsection (1) or (2) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

78-31c-107. Prohibited mediator reports.

(1) Except as required in Subsection (2), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(2) A mediator may disclose:

(a) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(b) a mediation communication as permitted under Section **78-31c-106**; or

(c) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(3) A communication made in violation of Subsection (1) may not be considered by a court, administrative agency, or arbitrator.

78-31c-108. Confidentiality.

Unless subject to Title 52, Chapter 4, Open and Public Meetings Act, and Title 63, Chapter 2, Government Records Access and Management Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state.

78-31c-109. Mediator's disclosure of conflicts of interest -- Background.

(1) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(a) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(b) disclose any known fact to the mediation parties as soon as practical before accepting a mediation.

(2) If a mediator learns any fact described in Subsection (1)(a) after accepting a mediation, the mediator shall disclose it as soon as practicable.

(3) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(4) Subsections (1), (2), (3), and (6) do not apply to an individual acting as a judge or ombudsman.

(5) This chapter does not require that a mediator have a special qualification by background or profession.

(6) A mediator must be impartial, unless after disclosure of the facts required in Subsections (1) and (2) to be disclosed, the parties agree otherwise.

78-31c-110. Participation in mediation.

An attorney or other individual designated by a party may accompany the party to, and participate in, a mediation. A waiver of participation given before the mediation may be rescinded.

78-31c-111. International commercial mediation.

(1) In this section:

(a) "International commercial mediation" means an international commercial conciliation as defined in Article 1 of the Model Law.

(b) "Model Law" means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on 28 June 2002

and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002.

(2) Except as otherwise provided in Subsections (3) and (4), if a mediation is an international commercial mediation, the mediation is governed by the Model Law.

(3) Unless the parties agree in accordance with Subsection **78-31c-103**(3) that all or part of an international commercial mediation is not privileged, Sections **78-31c-104** through **78-31c-106** and any applicable definitions in Section **78-31c-102** of this chapter apply to the mediation and nothing in Article 10 of the Model Law derogates from Sections **78-31c-104** through **78-31c-106**.

(4) If the parties to an international commercial mediation agree under Article 1, Section (7), of the Model Law that the Model Law does not apply, this chapter applies.

78-31c-112. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act.

78-31c-113. Uniformity of application and construction.

In applying and construing this chapter, consideration should be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

78-31c-114. Application to existing agreements or referrals.

(1) This chapter governs a mediation pursuant to a referral or an agreement to mediate made on or after May 1, 2006.

(2) Notwithstanding Subsection (1), on or after May 1, 2007, this chapter governs all agreements to mediate whenever made.

VIII. CERTIFICATE OF SERVICE

I hereby certify that on the 16th Day of January 2007, a true and accurate copy of the Appellate Brief of LWP Solutions, Inc. was served by hand delivery on the following:

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