NY Ruling Should Make Counsel More Cautious In Emails

By **Christopher Gorman** (August 3, 2021, 3:30 PM EDT)

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Email is an essential part of the practice of law in the modern age. Attorneys regularly use it to communicate with clients and other counsel. Emails pertaining to potential settlements of active cases and prelitigation matters are exchanged between counsel every single day.

The question of whether and when settlement correspondence exchanged between counsel crosses the line from mere correspondence to an enforceable settlement agreement has long been the subject of debate.

At the heart of the divergent court decisions on this subject was the courts' interpretation of New York Consolidated Laws, Civil Practice Law and Rules, or CPLR, Rule 2104, which reads in pertinent part: "An agreement between parties or their attorneys relating to any matter in an action ... is not binding upon a party unless it is in a writing subscribed by him or his attorney."

Courts, in attempting to draw distinctions between what is or is not an enforceable settlement agreement based upon email exchanges, often focused on very minute details which few attorneys would ever consider significant.

For instance, there is a line of cases holding that an email in which the party's or attorney's name is retyped at the end of an email is sufficiently subscribed for purposes of CPLR 2104 so as to render the email enforceable as a settlement agreement. In contrast, there is also a line of cases holding that an email in which a party's or its attorney's name is prepopulated in the email is not sufficiently subscribed for purposes of CPLR 2104 so as to be enforceable.

As one might expect, this minute distinction spawned much litigation over whether an attorney typed their name at the conclusion of an email discussing settlement or whether the signature at the end of an email was generated automatically by the attorney's email account.

On July 8, the New York State Supreme Court Appellate Division, First Department in Matter of Philadelphia Insurance Indemnity Co. v. Kendall,[1] sought to clarify, in the court's words, "the certitude of settlements effected via email," by doing away with the distinction found in the prior case law.

Specifically, in Kendall, recognizing the realities of the modern practice of law and the importance of email communications to that practice, the First Department greatly relaxed the standards against which to judge the enforceability of settlements via email by concluding that the mere sending of an email with the intention of communicating a settlement offer or effectuating a settlement was sufficient to create an enforceable settlement agreement pursuant to CPLR 2104.

As detailed below, this clarification is significant for attorneys practicing within the First Department — and perhaps eventually New York state, depending upon if a further appeal is taken to the New York Court of Appeals — because it requires that even more care be taken than usual when communicating with adverse counsel by email regarding settlement.

Indeed, based upon Kendall, it is much more likely now that correspondence exchanged between counsel pertaining to settlement can cross the line into becoming an enforceable settlement agreement, thereby requiring that counsel be cautious in his or her email correspondence with counsel for adverse parties.

The Kendall Decision

Erika Kendall was injured while driving her employer's vehicle. Kendall made a claim under the supplementary underinsured motorist, or SUM, benefit provision in her employer's automobile policy with Philadelphia Insurance Indemnity Co., the employer's insurer. Kendall and Philadelphia proceeded to arbitration on Kendall's claim for SUM benefits.

The arbitrator rendered a decision awarding Kendall $975,000. The decision was emailed to Kendall's counsel and faxed to Philadelphia's counsel on the same day it was rendered. However, neither counsel received the decision. At this same time, counsel for the parties were negotiating a settlement.

Thereafter, the parties reached an agreement by email to settle the dispute for $400,000. On that day, Kendall's counsel emailed Philadelphia's counsel: "Confirmed – we are settled for 400K." Below this appeared "Sincerely," followed by counsel's name and contact information. Shortly thereafter, Philadelphia's counsel emailed in reply, attaching a more formal written settlement agreement.

After Kendall's counsel received the arbitrator's decision and before Kendall signed the more formal written settlement agreement, counsel for Kendall indicated that he would not proceed with the $400,000 settlement and demanded payment of the $975,000 awarded by the arbitrator.

The petitioner thereupon brought a special proceeding seeking to enforce the settlement agreement and to vacate the arbitration award. The Supreme Court of New York, New York County, among other things, denied the petition to vacate the arbitration award. Philadelphia appealed.

The Appellate Division, First Department reversed, thereby enforcing the settlement and directing that the arbitration award be vacated. In so doing, the court explained that it was "writ[ing] to clarify that the transmission of an email, and not whether an email 'signature' can be shown to be retyped, is what determines that a settlement stipulation has been subscribed for purposes of CPLR 2104."

Citing the fact that "the electronic storage of records has become the norm, email has become ubiquitous, and statutes allowing for electronic signatures have become widespread," the court held that the "distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today."

In the words of the court:

It is not the signoff that indicates whether the parties intended to reach a settlement via email, but rather the fact that the email was sent. ... [I]f an attorney hits 'send' with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own, then it is unnecessary for them to type their own signature. This

rule avoids unnecessary delay caused by burden-shifting "swearing contests over whether an individual typed their name or it was generated automatically by their email account."

Conclusion

Kendall requires that counsel engaged in email correspondence pertaining to a settlement proceed with caution in order to avoid mere settlement correspondence crossing the line to become an enforceable settlement agreement.

While Kendall does not provide that every email purporting to settle a disputed will be "unassailable evidence of a binding settlement," Kendall makes it much more likely that a settlement could be effectuated by email exchanges without more formal written documentation memorializing all the terms of the settlement.

There are several specific areas, highlighted by the court in Kendall, where counsel will need to be cautious in order to avoid having email communications pertaining to settlement be viewed as an enforceable settlement agreement.

For instance, the court found it particularly significant in enforcing the terms of the parties' emails as the equivalent of a settlement agreement that the parties resolved by email "the sole issue" of "how much" Kendall "would accept in settlement of her SUM claim."

While stating that "an email settlement must, like all enforceable settlements, set forth all material terms," the court seemingly only focused upon the fact that the parties reached agreement by email regarding the financial terms of the settlement in determining to enforce the email correspondence between counsel as the equivalent of a settlement agreement. It is not clear from the decision in Kendall that the parties reached agreement by email on anything other than the financial terms.

The financial terms of a settlement, while undoubtedly significant, are not the only terms of a settlement agreement between parties that can be of import to the parties. For example, parties often negotiate extensively as part of finalizing a settlement agreement regarding the scope of releases. Similarly, parties may also have concerns over confidentiality or nondisparagement language that frequently gets included in a settlement agreement.

Thus, counsel seeking to avoid the enforcement of emails as the equivalent of a settlement agreement would be wise to include disclaimer language in settlement correspondence exchanged between counsel. For instance, language may need to be included in emails addressing settlement that any settlement between the parties cannot be deemed final until all material terms are agreed to in a separate writing signed by the parties themselves — and not just counsel — and specifically identify certain of those terms.

Without such disclaimer language, counsel run the risk under Kendall of a court enforcing an email exchange as a settlement agreement that counsel or the parties never intended to be final or thought would be subject to further negotiation.

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[1] Matter of Philadelphia Insurance Indemnity Co. v. Kendall, 2021 N.Y. Slip Op. 04284, --- A.D.3d ----, --- N.Y.S.3d ---- (1st Dep't July 8, 2021).