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It Was Late; The Printer Was Down: How to Complete a Mediation, Clarified: *Kluwer v. PPL Montana* (December 31, 2012)

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It was late; the printer was down

How to complete a mediation, clarified: Kluver v. PPL Montana (December 31, 2012)

IT WAS LATE, THE PRINTER WAS DOWN
How to Complete a Mediation, Clarified:
Kluver v. PPL Montana (December 31, 2012)

PREFACE: This month's "Evidence Corner" is not about trial evidence, but about the evidence necessary to avoid a trial. In Kluver v. PPL, experienced lawyers thought they had settled an acrimonious case in a marathon mediation session and circulated the Memorandum of Understanding by email that night. One client's second thoughts resulted in almost three years of litigation and appeal about the validity of that agreement, before the Montana Supreme Court ruled on New Year's Eve 2012.

It was dark (but not stormy) at 9:56 p.m. on July 14, 2010 in Billings. The sun had set, there was only a sliver of moon, the wind had dropped to just a whisper, and the temperature was a pleasant 71 degrees.¹ The ranchers and the power company had been fighting in court for more than 3 years, and they had spent about 14 hours in that day's mediation session. It appeared that they had settled the dispute and could end the case without trial, to everyone's satisfaction. The lawyers were tired, and both they and their clients were ready to go home. It was a good day's work; the nasty² war seemed to finally be over. Both sides had agreed that the whole deal would be put to bed, with the exchange of cash, deeds and leases completed, within 60 days.

The lawyers who had congregated on behalf of the ranchers and their opponent, PPL, were not rookies. Some were from highly esteemed Montana firms; others were from well-known big city firms outside Big Sky. They all knew the size of the dispute, the acrimony between the parties, and the large amount of money and property involved in the settlement. That night, they concurred about how to memorialize and preserve the agreement before they left the hotel which had hosted the mediation session.

One of the lawyers for the Kluvers and other plaintiffs "took a crack" at typing out the terms of the agreement on his laptop computer. He did this in his party's conference room, working with his client to be sure the document on the screen accurately reflected their understanding of the agreement. Once the plaintiffs' lawyers and their clients were satisfied, the drafter intended to print the "Memorandum of Understanding" (MOU) in the hotel's business center. Unfortunately, the printer was not working and because it was so late, there was no one around to

fix it. Instead, the drafter took his laptop into the defendant's conference room and all of the lawyers looked at the MOU on his screen. When all the lawyers approved the MOU, the drafter emailed the document to all the lawyers and everyone went home thinking the war was over.

In fact, the armistice lasted only a few weeks. One of the ranch families, the Kluvers, quickly regretted the night's work, and refused to go forward with the documents necessary to complete it. They instructed their lawyer to file a formal "Notice of Failure of Settlement Discussions." In response, PPL moved to enforce the settlement, joined by the other family, the McRaes³. The war raged on for two and half more years, with battles at both the trial court and Montana Supreme Court levels. The Court issued its decision on the very last day of 2012, as Kluver v. PPL Montana, LLC, 2012 Mont. 321, 368 Mont. 101.⁴

In the end, the settlement stood and the parties were ordered to execute it, but Justices Nelson⁵ and Cotter, in separate opinions, vehemently disagreed with the majority⁶ and would have found no settlement. Even if the opinion is finally released without modification, it should stand as a very strong warning to all lawyers involved in mediation of civil disputes: beware of the dragons at the end of the day! The lawyers who were left to complete the paperwork at the end of the mediation followed standard protocol, but it wasn't enough when, in the hot light of the next few days, one party got cold feet. Kluver's best use may be as a primer in how to use that final hour before dawn⁷, to make the midnight agreement stick.

1. Make sure your agreement covers all the material details; leave as little as possible to be "decided later."

The Kluver majority reiterated the basic requirements for an enforceable settlement agreement:

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3 These are the lead families in each camp; the unraveling of the settlement divided the community, with several ranchers on each side of the "get'er done" vs. "need better deal" divide.

4 According to WestlawNext, this case has not yet been released for publication, and may be revised or withdrawn until then; however, the Montana Supreme Court itself cited Kluver repeatedly in a released opinion on February 5. See, Olsen v. Johnston, 2013 MT 25.

5 This is Justice Nelson's very last dissent before retirement, capping a career which spanned almost two decades on the Supreme Court.

6 Justice Wheat wrote the majority opinion, joined by Chief Justice McGrath and Justices Rice, Baker and Morris.

7 My colleague, Prof. Eduardo Capulong, teaches the mediation courses at the law school. I am grateful to him for his review of this article, and have incorporated several of his suggestions. His biggest observation is that marathon mediation sessions like that in Kluver may be fundamentally flawed: the longer the process, and the later the hour, the less "voluntary" the agreement may be, and the more likely one party or the other may be to regret it the next day or week.

1 <http://weather.philly.com/auto/philly/history/airport/KBIL/2010/7/14/DailyHistory.html>
2 "¶ 110 In closing, I would note that anyone reading the briefs and record in this case will recognize that the litigation and settlement attempt were nasty for any number of reasons."

Kluver v. PPL Montana, LLC, 2012 MT 321, Nelson, J. dissenting.

¶ 31 Settlement agreements are contracts, subject to the provisions of contract law. *Murphy v. Home Depot*, 2012 MT 23, ¶ 8, 364 Mont. 27, 270 P.3d 72. A contract requires (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. *Hurly*, ¶ 17 (citing § 28–2–102, MCA). **A contract must contain all its essential terms in order to be binding.** *Hurly*, ¶ 17.

Kliver v. PPL Montana, LLC, 2012 MT 321. You don't need to write up the formal deed or lease⁸, but you should leave as little as possible to translate between those documents and your settlement agreement. If your opponent wants to weasel out, you can bet she will argue that an essential term is missing, and then you throw yourself on the mercy of the court to decide whether you have met the vague standard of "reasonable certainty."

¶ 36... This Court has held that where parties intend to form a binding agreement, the fact that they plan to incorporate it into a more formal contract in the future does not render it unenforceable. *Steen v. Rustad*, 132 Mont. 96, 104, 313 P.2d 1014, 1019 (1957). "[A]bsolute certainty and completeness in every detail is not a prerequisite of specific performance, only reasonable certainty and completeness being required. Those matters which are merely subsidiary, collateral, or which go to the performance of the contract are not essential, and therefore need not be expressed in the informal agreement." *Steen*, 132 Mont. at 106, 313 P.2d at 1020 (internal citations omitted).

Kliver v. PPL Montana, LLC, 2012 MT 321. Justice Nelson's dissent concludes that the *Kliver* MOU did not contain all of essential elements of the contract, and cites email correspondence between counsel the following day about "tweaks" as evidence that the deal was not complete:

The Ruggiero email [the MOU written that night] did not include many of the practical details and terms needed for its execution. As noted, Ruggiero himself characterized his email as a "tentative" settlement agreement, and defense counsel likewise characterized it as a "draft." Rogers stated in an email to Ruggiero the next day: "We have made a few modifications to the Settlement Memorandum of Understanding after you emailed us the draft late last night."

Kliver v. PPL Montana, LLC, 2012 MT 321. It may be late, and you may be tired, but it isn't going to get any easier to figure out a detail in the morning, or next week, and postponement may become fatal.

2. Use, consistently, the phrase "Final Settlement Agreement."

⁸ Indeed, those of us who are litigators and thus most likely to be present at the mediation sessions may not be competent to prepare formal real estate documents.

One of the Klivers' arguments was that in fact there was no agreement, and one of the arrows in that quiver was the fact that, later, various parties described the M.O.U. as "tentative" and a "draft."

¶ 39 The Klivers also put much weight on the fact that the parties described the MOU as a "draft" and a "tentative settlement" in post-MOU communications, arguing this indicates there was no binding agreement. The District Court found that while the use of the word "tentative" in the Notice was "inartful and, in hindsight, imprecise, none of it constitutes an admission or supports an inference that the MOU and the map did not express a final, agreed-upon settlement, nor do any of these post-mediation statements constitute an agreement by the parties to, in any fashion, amend or change the material terms of settlement described in the map and the MOU." We agree.

Kliver v. PPL Montana, LLC, 2012 MT 321. Justice Nelson did not agree on this point, and found counsel's description to be evidence that no agreement had actually occurred:

[T]he terms "tentative" and "draft" constitute objective evidence that Ruggiero's July 14 email was *not* the parties' final agreement. Indeed, Rogers testified that "I used the word draft because we did it after 14 hours of mediation and we all got tired." He admitted that "[w]e knew we had it to tweak, elaborate on a few issues..." In light of this testimony, it seems to me that the Ruggiero email was not the parties' "signed, written agreement" but, rather, was a "mediation-related communication" made in the process of reaching a final "signed, written agreement." Section 26–1–813(3), MCA.

Kliver v. PPL Montana, LLC, 2012 MT 321.

The majority of the Court sided with the enforcers but again, why run this risk? From the get-go, label the document "Final" and then use that adjective, not any lesser form, in every written and oral communication. Don't let yourself, or your opponent, deviate. If your opponent starts to use "draft" or "tentative," immediately correct her in writing: "This is a final settlement agreement, to which all parties are bound. This is neither a draft nor tentative."

3. Have the actual parties physically sign an actual written agreement before the session ends, if at all possible.

Some oral contracts may be enforceable, but without a writing, the parties may have very different accounts of whether they actually had an agreement and/or the terms they agreed to. Furthermore, the Montana Code requires several kinds of contracts, not just real estate transactions, to be in writing to be enforceable.⁹ In *Kliver*, the statute of frauds applied because the Klivers agreed to deed a fee simple interest and PPL agreed to execute a renewable 99-year lease of the surface of the same land back to the Klivers. Both factions of the Supreme Court

⁹ See, e.g., M.C.A. 40-4-201 (family law settlement agreements must be in writing); M.C.A. 72-3-915 (probate distribution agreements must be in writing).

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held that for this agreement to be enforceable, M.C.A. 28-2-903¹⁰ and 70-20-101 required a writing, “subscribed by the party to be charged...” Both statutes allow a party’s agent to sign for the party, but expressly state that the agent’s authority to do so must be in writing.

A substantial part of Kliver centered on these requirements. The Klivers did not physically sign the MOU that night, or ever.¹¹ The majority sidestepped this fact, holding that the Klivers’ lawyer’s email transmission was sufficient:

We conclude that because Ruggiero attended the entire mediation with the Klivers as their attorney, the MOU explicitly states that the parties reviewed and approved it, and Karson Kliver later told the McRaes that a settlement had been reached, there is no clear error in the District Court’s finding that the Klivers authorized Ruggiero to agree to the MOU.

Kliver v. PPL Montana, LLC, 2012 MT 321, ¶ 29. Justice Nelson strongly disagreed, and would therefore have held the MOU unenforceable:

Yet, since the email was not sent from the email account of the party sought to be charged here (i.e., the Klivers), the question arises whether Ruggiero had legal authority to bind the Klivers to the terms of an email that they themselves did not draft, did not sign, and did not transmit. As will be seen, there is no admissible evidence that the Klivers authorized Ruggiero to contractually bind them to the terms stated in his email.

Kliver v. PPL Montana, LLC, 2012 MT 321, §67 (Nelson, J.).

The best way to avoid this potential problem is to have all parties, not just their lawyers, actually sign a physical written document which reflects all the essential terms of the agreement. This will require the tired and perhaps unhappy¹² parties to remain on the scene a little bit longer, while the attorneys actually

draft the document, print it, and have all parties sign it. The reward for this extra time is that the statute of frauds argument will be a non-starter.

The lawyers in Kliver did intend to print the document that night, but were stymied by a common problem: the hotel printer was down. One way to surmount this obstacle is to carry your own printer with you, which you have tested and know will work. Even if the mediation occurs in your own office, you may have trouble with one printer, so be sure there is a backup AND someone who knows how to use them, if you do not. This may require you to keep a staff person late, but “a stitch in time saves nine.”

If printing is absolutely impossible, there are some other electronic options—see below—but the very best solution is old-school: pack a pad of paper and a pen, and handwrite the document. (This solution obviously works best when the transaction is fairly simple, and when the drafter has decent handwriting). Then have each party read that handwritten paper and sign it. This may be a great time to break out that fountain pen your parents gave you for law school graduation, but a simple BIC will do just fine. (As long as we are being this detailed, I prefer blue ink for signatures, so that it is clear that this is the “original” per the Best Evidence Rule.) The physical act of signing should bring home to your client and your opponent that this is a serious, binding agreement and there is no turning back. Either the case will be resolved finally or everyone would know that it isn’t.

4. Have the lawyers sign the agreement too.

There is no legal authority requiring this, nor was it mentioned in Kliver. However, the lawyers’ signatures evidence the fact that the parties had legal counsel prior to the parties’ signatures, and that the writing reflects the attorneys’ understanding of the terms of the agreement. Note, however, Justice Nelson was right: the plain language of the statute of frauds doesn’t allow the kind of bootstrapping the Kliver majority used to hold that the Klivers’ attorney’s “signature” bound the Klivers. In this respect, Kliver should not be read as any kind of assurance that it is normally all right to dispense with the client’s signature if the lawyer is willing to sign on her behalf. The attorneys’ signatures should be in addition to, not instead of, the clients’ signatures.

5. If it is absolutely necessary to allow a lawyer to sign for a client, obtain a separate document expressly granting the lawyer that authority to do so.

If it is imperative that the clients leave before the written agreement is signed, at least have them sign a written authorization for their attorney to act as their agent in signing the settlement agreement. The statute of frauds¹³ does allow a

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10 Mont. Code Ann.28-2-903. What contracts must be in writing.

(1) The following agreements are invalid unless the agreement or some note or memorandum of the agreement is in writing and subscribed by the party to be charged or the party’s agent:

(a) an agreement that by its terms is not to be performed within a year from the making of the agreement; ...

(d) an agreement for the leasing for a longer period than 1 year or for the sale of real property or of an interest in real property. The agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing and subscribed by the party sought to be charged.

(2) Evidence of an agreement described in subsections (1)(a) through (1)(d) is not admissible without the writing or secondary evidence of the writing’s contents....

70-20-101. Transfer to be in writing—statute of frauds

An estate or interest in real property, other than an estate at will or for a term not exceeding 1 year, may not be created, granted, assigned, surrendered, or declared otherwise than by operation of law or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring it or by the party’s lawful agent authorized by writing.

11 Actually, neither did the McRaes, but they joined PPL in moving for enforcement of the agreement, so the fact that their lawyer signed the agreement without specific written authority never became an issue. The McRaes were willing to perform the agreement and sign the necessary deeds.

12 In my view, a perfect settlement is one where each side feels it has given up a little too much and the other side has gotten too much.

13 The other statutes requiring a party to sign certain agreements in writing do not have any corollary allowing an authorized agent’s signature to suffice. See also, MCA 37-61-401

37-61-401: “Authority of attorney. (1) An attorney has authority to:

(a) bind the attorney’s client in any steps of an action or proceeding by **agreement filed with the clerk or entered upon the minutes of the court and not otherwise...** (Emphasis added).

seller or lessor to authorize an agent to sign transfer documents in her stead, but requires that authority itself to be in writing: “The agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing and subscribed by the party sought to be charged.” M.C.A. 28-2-903(1)(d).

The Kluvers did not sign any such authorizing document. The majority of the Court forgave this omission, holding that the fact the Kluvers were in the mediation all day with the attorney who “signed” (see below) the email reciting the terms of the settlement, and Mr. Kluver’s later statement to his neighbor that the case had settled, was enough. Justice Nelson criticized the Court for this sleight of hand:

I find it utterly implausible that a person’s (Karson’s) offhand expression of relief that a case seemingly has settled is enough to remedy (1) the absence of an agreement to conduct transactions by electronic means, § 30–18–104(2), MCA, and (2) the absence of written authorization for an agent to enter into an agreement to sell real property on behalf of his principal, § 28–2–903(1)(d), MCA. If the sorts of remarks Karson made are enough to satisfy these statutory writing requirements, then these requirements are utterly meaningless.

Kluver v. PPL Montana, LLC, 2012 MT 321, ¶91.

If your case involves any hint of real estate, or an agreement to be performed over more than one year, or any other type of agreement statutorily required to be in writing, it is not hard to avoid Justice Nelson’s criticism, and to comply with the statute. The simple solution is to have the settlement document either signed by the client himself, or to have the client sign a written authorization document prior to leaving the venue, so that the lawyer’s later signature on the settlement agreement meets the statutory requirement. This authorization should contain language acknowledging the requirements of the statute and explicitly deputize the attorney to enter into the settlement agreement on behalf of the client.

The following language should do the trick:

I, _____, am a party to [identify case]. I am a participant in mediation proceedings in that case, and have retained attorney _____ to represent me in those proceedings. I understand that resolution of this case may entail agreements which the law requires to be written and signed by me. I hereby expressly authorize my attorney _____ to act as my agent, and authorize her/him to sign on my behalf any documents which are necessary to reflect and accomplish the agreement reached in this case. I intend that this authorization satisfy the provisions of Montana law requiring a writing, including but not limited to the statute of frauds relating to transfer and leasing of real property interests.

This makes clear that the client has to choose either to stay and sign off on the settlement agreement, or to entrust that responsibility to the attorney and to live with the consequences. Having a departing client sign something like this protects both her own lawyer and the opponent, and prevents a 14-hour mediation from becoming a years-long debacle.

6. You can combine electronic transmission with a single physical signature page, with strict precautions.

When the hotel’s printer refused to spit out a document which the parties could sign, the Kluvers’ lawyer’s solution was email, and all the other lawyers present agreed with this format. “The mediation lasted the entire day, concluding at approximately 10:00 p.m. with the transmission of a Memorandum of Understanding (MOU) as an email from Ruggiero to Rogers and copied to other counsel.” Kluver v. PPL Montana, LLC, 2012 MT 321, ¶ 3.

Email has become so ubiquitous in the practice of law, as in every aspect of our lives, that it is understandable that no one seemed to give this choice a second thought. That road, as Robert Frost said so famously, “made all the difference”¹⁴ and literally nearly cost PPL the farm. It is possible to use email to avoid having to hand-write a complex document, but the details of how you do this are critical.

Ideally, the electronic version of the document should be emailed to the parties themselves as well as to their lawyers while everyone is still present¹⁵ so you can gather actual signatures on a physical signature page. I recommend that you include the actual document in the body of the email, as well as attachments in common formats such as pdf and Word (see Justice Nelson’s comment in the next section), to avoid any problem with the recipient opening the document. You should show all the addressees in the “to” field, so it is clear everyone received the same version. As suggested above, the subject should be something like “Final Memorandum of Understanding” without any weaker adjectives like “draft” or “tentative.” Now you revert to pen-and-ink handwriting, but of a single signature page rather than the entire complex document. You can hand-write something like

I hereby acknowledge that I received an electronic version of the settlement agreement via email, sent to all parties at (date/time). My signature below indicates that I have reviewed the email, and that I intend to be bound by the terms it reflects.

Signed: _____
Date/Place: _____

Each party should sign this page, and for additional security, each lawyer as well. Now you have achieved both detail in the

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¹⁴ Robert Frost, “The Road Not Taken.”

¹⁵ This means that you will have to collect everyone’s email addresses. You usually will have all of the lawyers’, but are unlikely to have the address for any client other than your own.

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agreement, best done through typing, and the physical signature which will bind the party who develops buyers' remorse. Everyone can leave with assurance that the case is settled for good.

7. Before the mediation begins, circulate and obtain signatures on a physical agreement to electronic preparation and signature of any settlement agreement in accordance with the Uniform Electronic Transactions Act.

The Kluver trial court and the majority of the Supreme Court held that the email sent by the Kluvers' lawyer constituted the Kluvers' electronic signature on the MOU, relying on the Uniform Electronic Transactions Act ("UETA"), enacted in Montana in 2001. M.C.A. § 30-18-106 provides:

Legal recognition of electronic records, electronic signatures, and electronic contracts.

(1) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(2) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(3) If a law requires a record to be in writing, an electronic record satisfies the law.

(4) If a law requires a signature, an electronic signature satisfies the law.

The Kluver majority observed that the legislature meant to accommodate the transaction of business electronically, and to expand the definition of "writing" to electronic forms of memorialization; §30-18-105 explicitly states that the Act is to be applied to: "(1) to facilitate electronic transactions consistent with other applicable law; [and] (2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices..."

The catch is that the Act only applies to a transaction where both parties have agreed to the electronic format:

(2) This part applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

Mont. Code Ann. § 30-18-104. The Kluver factions disagreed on whether the parties had so agreed, and Justice Nelson also questioned, without resolving, whether the mediation there was a "transaction" within the definition provided in M.C.A. 30-18-102(18).¹⁶ The opinion does not show any express agreement by the Kluvers to conduct this settlement by electronic means, but the majority used the last phrase of 30-18-104 to hold that the context and circumstances demonstrated the Kluvers' agreement to electronically approve the MOU.

Justice Nelson spent some ink on the problems he saw with the Kluver MOU process:

¹⁶ "(18) 'transaction' means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs."

¶ 65 Lest there be any confusion about what the "Memorandum of Understanding" actually is, it is not a tangible document detailing terms and conditions of a contractual agreement and containing pen-and-ink signatures at the bottom. Nor is it the record of an electronic transaction where a purchaser entered her credit card information into a merchant's website and hit the "Submit Order" button. What we are dealing with here is an email—not a document *attached* to an email; rather, just an email. Naturally, this email does not contain a traditional pen-on-paper signature; the email itself is simply bytes retained in computer memory. **That fact is not necessarily fatal, however, because the Uniform Electronic Transactions Act (Title 30, chapter 18, part 1, MCA) may give legal validity to an "electronic record" of this nature—provided that certain conditions are met.** The problem is that there is no admissible evidence showing that the conditions were, in fact, met here.

¶ 66 For starters, the email purports to be "From" Jory Ruggiero, "To" Guy Rogers, with "Cc" to "breting engel; Thomas Stoever; McDowell, Heather A." As we now know through parol evidence, Ruggiero drafted the email on his computer at the mediation site after a daylong mediation. According to the time stamp appearing on the printout of the email, the email was sent at 9:56 p.m. on July 14, 2010. Yet, **since the email was not sent from the email account of the party sought to be charged here** (i.e., the Kluvers), the question arises whether Ruggiero had legal authority to bind the Kluvers to the terms of an email that **they themselves did not draft, did not sign, and did not transmit.** As will be seen, there is no admissible evidence that the Kluvers authorized Ruggiero to contractually bind them to the terms stated in his email. [Emphasis supplied]

Kluver v. PPL Montana, LLC, 2012 MT 321.

A. Each party must expressly agree to conduct the settlement by electronic means.

It is easy to avoid this problem and to comply with the UETA. At the outset of the mediation, if not before, the parties should sign a pen-and-ink document expressly referencing the UETA and stating that they intend to transact some or all of the conclusion of the mediation electronically, including electronic transmission and signature of any settlement agreement which results from the mediation. In fact, this small procedural agreement may serve as an auspicious beginning to a process when little else may seem agreeable. I recommend that each party (again, the clients themselves rather than the attorneys) sign and exchange a printed hard copy of a document entitled "Agreement to Conduct Settlement by Electronic Means." Its text can be fairly simple:

Agreement to Conduct Settlement by Electronic Means

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I, _____, am a party to [identify case]. I am a participant in mediation proceedings in that case. I understand that resolution of this case may entail agreements which the law requires to be written and signed by me. I consider such agreements to be “transactions” within the meaning of M.C.A. 30-18-102(18), and I hereby expressly consent that any such agreements may be accomplished by electronic means as follows:

1. Any draft of a settlement agreement shall be sent to me electronically (as well as to my counsel) _____ via email to my email address, which is:

_____ OR
_____ via text message to my text number, which is: _____ OR

_____ via [identify other electronic means].

2. That draft shall contain the following instructions: “Please read this electronically-prepared settlement agreement to be sure that it incorporates the terms to which you have agreed. If you do so agree, please ‘reply all’ with the message: “I hereby sign this agreement electronically.”

3. When I have received an agreement electronically, and “reply all” with the message “I hereby sign this agreement electronically,” I will be legally bound to the settlement agreement as if I had signed it in writing, and I agree that my reply transmission constitutes my electronic signature, per the Montana Uniform Electronic Transactions Act, in accordance with all provisions of Montana law requiring a writing signed by me.”

B. Include in the final version of the agreement language acknowledging that all parties previously have agreed to the electronic transmission and signature of the agreement, and that each intends his or her reply to serve as the electronic signature.

The final step, of course, is to actually be sure that the above language is in the electronic transmission. I suggest that when the agreement is written, it first be sent electronically to the accounts of all of the lawyers in the case for approval. Once the lawyers all agree to the wording in the settlement agreement, the final version of the agreement should be sent on to the clients for their electronic signatures. This can be done by each lawyer individually sending the agreement to his client, ccing all the other lawyers, so that all the lawyers receive the clients’ replies.¹⁷ The electronic message should be entitled “Settlement Agreement: Clients’ Electronic Signatures Required.” It should clearly instruct the lawyers to forward the electronic documents to their clients

¹⁷ Alternatively, the drafting lawyer should be sure to get the permission of all the other lawyers to send the completed document directly to their clients. MT Rules of Prof.Conduct Rule 4.2 (a): “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.”

See, M.R.Prof.Conduct 4.2: “first global document authorizing electronic transmissions should contain an additional provision allowing the drafting attorney to make a single contact with opposing represented parties.

as designated in the initial form, and clearly instruct clients how to accomplish the electronic signature. “Please have your client review the agreement, and sign it electronically by replying to this email as follows: ‘I agree with the terms of the agreement as written and this transmission constitutes my electronic signature, per the Montana Uniform Electronic Transactions Act, satisfying all provisions of Montana law requiring a writing signed by me. Agreed to by _____, on [date].”

If all this is in place, everyone can head home except the scrivener, a modern-day Bob Cratchit bent over his screen in the wee hours. The others can read and sign on their individual devices, wherever they are when the final document is produced. Once every party and every lawyer has replied to the initial transmission that he or she agrees and has signed electronically, you will have the functional equivalent of the written document.

C. As an alternative to the “sign by reply” email process above, investigate apps such as “DocuSign” which allow tablet and computer users to scan documents, physically sign them, and send their signatures back electronically.

I found 44 such programs on the Apple App Store today, designed for the iPad, and 34 for the iPhone. Many are free; the highest price is \$7.99. I am sure there are more out there for other devices. I am currently using “DocuSign” because it allows me to email a document to several people, with each of them signing and returning an electronic version of that signature. An app like this obviates the need for the cumbersome email process I described above. Note, though, that the actual signature is still being returned electronically, so I think that the UETA still applies and the party should have executed an express consent to transact business electronically.

8. The bottom line, per Kluver: Keep going until you have crossed the finish line.

Mediations can be like a marathon. After hours of hard work, you’ve finally given all you think you can give and gotten all you think you can get. You can see the end: everyone in the room has said that he or she will accept the deal. If the world were a perfect place, you could all adjourn for a well-deserved refreshment and finish up in the morning, when you are rested. Sadly, “buyer’s remorse” lurks in the heart of every settler, and allowing it any time to flourish may doom the entire enterprise. You still have to dig deeper and cross the finish line, which in our profession means getting the terms into a permanent form (written or electronic), signed by the parties themselves. The act of either putting pen to paper, or at least hitting the “reply” button from their own devices, is legally significant to both the parties and the courts who may be called on to decide whether a deal actually occurred. If you use Kluver as a guide, you may be able to avoid the pain, not to mention the time and expense, those parties suffered.¹⁸

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¹⁸ The suffering may not even be at an end as I write. The Klivers have moved the Supreme Court for reconsideration, which I predict they will not get. Unhappily compelled to deed over their property to PPL in exchange for the 99-year lease and option to purchase, they may look for some recourse from their original lawyer, which will again embroil all who participated in the original mediation.