Drafting Enforceable Settlement Agreements

by HARVEY FRIEDMAN *and* RACHEL WILKES

It's one thing to settle a case, and quite another to craft an enforceable settlement agreement. The key to enforcing settlement agreements is section 664.6 of the Code of Civil Procedure. Pursuant to that section, if the parties stipulate to a settlement in writing (or orally before the court), a party may make a motion to enforce the agreement—and, if requested by the parties, the court may retain jurisdiction until there is full performance of the settlement terms.

However, the situation is more complex if the agreement is reached during mediation, because the "mediation privilege" prohibits introducing into evidence anything said or written in the course of the mediation proceedings. (*See* Cal. Evid. Code § 1119.) Not to worry. Even with a mediated settlement, a party can obtain judicial enforcement if necessary. You just need to know the governing statutory framework and then follow it to the letter.

THE MEDIATION PRIVILEGE

One of the central components of mediation is that things said, and offers exchanged, are confidential. But problems can arise when a settlement agreement comes within the mediation privilege.

Section 1119 of the Evidence Code declares in general that all communications, negotiations, and settlement discussions between participants in mediation "shall remain confidential." (*See* Cal. Evid. Code § 1119; *Fair v. Bakhtiari,* 40 Cal. 4th 189, 194 (2006).) This section bars the disclosure of such communications absent a specific statutory exception.

The reason for mediation confidentiality is obvious: It is to "encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings." (*Rojas v. Superior Court,* 33 Cal. 4th 407, 415–16 (2004).)

Any waiver of the mediation privilege will be strictly construed, and courts will not imply a waiver. To get around the privilege, the settlement agreement must use express language.

WRITTEN SETTLEMENT AGREEMENTS

The key to judicial enforcement of a mediated settlement agreement lies in section 1123 of the Evidence Code. That section provides a pivotal exception to mediation confidentiality, allowing mediated settlements to be introduced into evidence in a judicial proceeding. To be admissible in court, the settlement agreement must provide that it is: (a) admissible or subject to disclosure, or words to that effect or (b) enforceable or binding, or words to that effect. In a third option, the agreement is admissible if all parties expressly agree in writing, or orally in accordance with section 1118, to disclosure of the agreement. (See Cal. Evid. Code § 1123(a), (b), and (c).) A fourth prong to the statute makes settlement agreements admissible if they are being "used to show fraud, duress, or illegality that is relevant to an issue in dispute." (Cal. Evid. Code § 1123(d).)

Whatever wording you use, it is crucial that the settlement agreement unambiguously and directly expresses the parties' intent to be bound and to permit disclosure of the agreement in a court of law. The *Fair* case offers a good example of these requirements. In that case the parties signed a "memorandum" that set forth some settlement terms, including a provision calling for arbitration of future disputes. The California Supreme Court held that the memorandum was inadmissible because an intent to be bound could not be inferred from the mere inclusion of an arbitration provision in the memorandum (40 Cal. 4th at 198).

Therefore, one way to ensure that a written settlement agreement is admissible in court is to state unequivocally within the agreement

itself that it is enforceable or binding, and that it is admissible or subject to disclosure (Cal. Evid. Code § 1123(a) and (b); *Fair,* 40 Cal. 4th at 198).

Another way is to agree separately in writing to disclosure of the agreement (Cal. Evid. Code § 1123(c)). Although it is prudent to include such a provision within the agreement itself, a settlement agreement will nevertheless be admissible if the written agreement to disclose is a separate document—and even if that separate document is signed *before* any purported settlement agreements are prepared at mediation (*In re Estate of Thottam,* 165 Cal. App. 4th 1331 (2008)).

In *Thottam,* the parties signed a confidentiality agreement at the outset of mediation providing that matters "discussed, agreed to, admitted to, or resulting from" the mediation could be used in litigation between them "as necessary to enforce any agreements resulting from" the mediation. Later in the mediation the parties initialed a chart that detailed how various assets would be allocated among the parties (165 Cal. App. 4th at 1334).

Settlement talks in the matter ultimately fell apart, and a dispute arose as to the admissibility of the chart that was prepared during mediation. The court of appeal held that the chart was admissible because the parties had expressly agreed that matters discussed during mediation could be used to enforce "any agreements" resulting from the mediation. In short, the parties' separate agreement met the standards of Evidence Code section 1123(c).

The *Thottam* court specifically rejected the argument that the disclosure agreement must be signed after the parties have reached a settlement (165 Cal. App. 4th at 1339). Though subsections (a) and (b) of Evidence Code section 1123 do require provisions to be included in the settlement agreement itself, subsection (c) does not. Under section 1123(c) the critical point is that the parties have agreed to disclosure, not precisely when they did so.

ORAL SETTLEMENT AGREEMENTS

What if the parties reach an oral agreement? Here, too, there is an avenue to enforceability, but it is very narrow. Evidence of an oral settlement agreement is admissible only in limited scenarios prescribed by Evidence Code sections 1118 and 1124. Evidence Code section 1118 states, "An oral agreement 'in accordance with Section 1118' means an oral agreement that satisfies all of the following conditions: (a) it must be recorded by a court reporter, tape recorder, or other reliable means of sound recording; (b) the terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited; (c) the parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect; and (d) the recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded."

If the parties do not follow the statutory procedures, the court will not admit any evidence of an alleged oral agreement. A party may not waive the mediation privilege by his or her conduct; it may only be waived expressly through the strict provisions of the Evidence Code (*Simmons v. Ghaderi,* 44 Cal. 4th 570 (2008)).

The *Simmons* case involved a wrongful death action brought against a doctor by the patient's surviving spouse and son. During pretrial proceedings, the doctor stipulated to, and submitted evidence of, events that occurred during the mediation, arguing that there was no enforceable contract formed during the mediation. At trial, the physician invoked the mediation confidentiality statutes for the first time to try to prevent the plaintiffs from introducing evidence relating to the mediation proceedings. The trial court admitted the evidence over the physician's objection, and the court of appeal affirmed, holding that because the physician had presented evidence of events at the mediation and did not object to the plaintiffs' use of these facts prior to trial, the physician was estopped from asserting the mediation privilege (44 Cal. 4th at 577).

But the California Supreme Court reversed. It found that the parties had not satisfied any of the exceptions to allow an agreement reached at mediation to be admissible. It also held that the doctrines of estoppel and waiver did not apply. Notwithstanding the doctor's conduct at trial vis-à-vis the mediation-related evidence, the doctor was not estopped from asserting the mediation privilege (44 Cal. 4th at 581–82). To hold otherwise, said the court, would be to create a judicial exception to the comprehensive mediation scheme and frustrate the purposes of the mediation privilege.

ENFORCEMENT CRITERIA

Once you clear the hurdle of admissibility, the next hurdle is meeting the criteria for enforcement of the settlement agreement pursuant to section 664.6 of the Code of Civil Procedure. This section provides a summary procedure to enforce a settlement agreement as a judgment without need for a trial. In theory, this is a shortcut that is supposed to make everyone's life easier. Not surprisingly, lawyers frequently include language in settlement agreements that allows for enforcement pursuant to section 664.6.

But it's not as easy as it sounds. For the parties to take advantage of this

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procedure, they must comply *exactly* with the statutory requirements. If they don't, regardless of any statement in the settlement agreement itself, judicial enforcement will not be granted. And even if the requirements are met, the settlement agreement may still be unenforceable if it does not contain all the material terms of the settlement.

CASE LAW

In a leading case construing section 664.6, a party sought enforcement of a settlement agreement that had been signed only by the attorneys for the parties. The state supreme court held that the statutory requirement of the settlement agreement being "signed by the parties" means what it says: The agreement must be executed by the litigants themselves, not merely by their attorneys (*Levy v. Superior Court,* 10 Cal. 4th 578, 584–85 (1995)). The court reasoned: "[B]ecause the settlement of a lawsuit is a decision to end the litigation, it obviously implicates a substantial right of the litigants themselves." (10 Cal. 4th at 584.)

Since the *Levy* decision, courts have refused to enforce settlement agreements that were signed by a person acting on a party's behalf, such as a spouse or other agent. (*See Gauss v. GAF Corp.,* 103 Cal. App. 4th 1110, 1117–18 (2002); *Elkenave v. Via Dolce Homeowners Assn.,* 142 Cal. App. 4th 1193, 1198 (2006); *Williams v. Saunders,* 55 Cal. App. 4th 1158, 1162–63 (1997).)

Section 664.6 requires the signatures of all parties, not just those against whom enforcement of the settlement agreement is sought (*Harris v. Rudin, Richman & Appel,* 74 Cal. App. 4th 299, 304–06 (1999)). And the settlement documents themselves must bear the required signatures. (*See Gauss,* 103 Cal. App. 4th at 1118; *Sully-Miller Contracting Co. v. Gledson/Cashman Construction Inc.,* 103 Cal. App. 4th 30, 37 (2002).)

In light of these decisions, you should make sure every party signs the settlement agreement. If some of the parties live in distant places and it is not practicable for them to attend a mediation, make sure you obtain their signatures via facsimile or email (in PDF format). An after-the-fact declaration will not solve the problem.

MATERIAL TERMS

Failure to agree on material terms will, of course, prevent contract formation (*Bustamante v. Intuit,* 141 Cal. App. 199, 209 (2006)). Without a binding agreement to settle, there can be no entry of judgment under section 664.6.

The parties in one case signed a settlement agreement after a twelve-hour mediation session. The agreement contained a provision stating that "[a]ll parties agree that this settlement is enforceable under C.C.P 664.6" and ended with, "[t]here are no other significant terms." The trial court entered judgment pursuant to section 664.6, but the court of appeal reversed because the agreement did not contain all the material terms (*Weddington Productions, Inc. v. Flick,* 60 Cal. App. 4th 793 (1998)). The court observed that section 664.6 creates only a summary procedure for specifically enforcing certain types of settlement agreements by converting them into judgments. As the court explained, before judgment can be entered, two key prerequisites must be satisfied. First, there must be contract formation. The parties must agree to the material terms of a settlement contract before a judgment can be entered. If no meeting of the minds has occurred on the material terms, basic contract law dictates that no enforceable contract has been created. And if there is no contract, then there is no enforceable settlement agreement pursuant to section 664.6. (*See* 60 Cal. App. 4th at 797.)

The court concluded that "[n]either a mediator nor a judge may select and impose settlement terms on the authority of section 664.6 … nothing in section 664.6 authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon." (60 Cal. App. 4th at 797.)

Parties should avoid making general statements like "this agreement is enforceable" and concentrate instead on making sure the document contains all the material terms.

WRITING AN ENFORCEABLE AGREEMENT

How do you avoid these pitfalls when putting together a settlement agreement, especially within the pressure-filled context of mediation? In addition to drafting the necessary material terms, consider inserting the following language: "Pursuant to Evidence Code sections 1119–23, the parties specifically agree that: (1) this settlement agreement is admissible as evidence and subject to disclosure in enforcement proceedings; (2) although they contemplate executing a long-form settlement agreement, this settlement agreement is binding and enforceable even if a long-form agreement is not executed; (3) all of the material terms of the settlement are set forth herein; (4) this agreement is enforceable under C.C.P. section 664.6, and the court, upon motion of either party, may enter judgment pursuant to the terms hereof; (5) neither party shall oppose a motion under C.C.P. section 664.6 to enter judgment pursuant to the terms of this settlement agreement on the ground that this agreement is confidential or otherwise privileged; and (6) all parties specifically waive the mediation privilege and any other confidentiality privilege that may apply to this agreement for purposes of its enforcement in a court of law."

In an uncertain world, language like this will bring you within the parameters of Evidence Code sections 1119 and 1123, and section 664.6 of the Code of Civil Procedure. Now all you have to do is negotiate the settlement in the first place!

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1 A lawyer can sign a settlement agreement for his or her client and have it enforced under Code of Civil Procedure section 664.6.

❑ True ❑ False

2 As long as a settlement agreement states that it is enforceable under section 664.6, it can be enforced.

❑ True ❑ False

3 To be enforceable, a settlement agreement must be signed by all parties, not just the party against whom enforcement is sought.

❑ True ❑ False

4 A court cannot find that material terms are missing from a settlement agreement when the agreement states that there are no other significant terms.

❑ True ❑ False

5 If a party resides in a distant location, it's acceptable under section 664.6 for the party to sign a declaration after the fact, stating that he or she agrees with the settlement.

❑ True ❑ False

6 If a settlement is agreed to in open court, it is enforceable under section 664.6.

❑ True ❑ False

7 To enforce the agreement under section 664.6, a party must sign the settlement agreement itself, and not a separate declaration.

❑ True ❑ False

8 A settlement agreement can be enforced under section 664.6 when some parties sign the settlement agreement and others assent orally in court.

❑ True ❑ False

9 A lawyer's statement in open court is sufficient for a settlement to be enforceable under section 664.6.

❑ True ❑ False

10 An agreement can be enforced under section 664.6 even if it does not meet the basic requirements of contract formation.

❑ True ❑ False

11 There are limited exceptions to the rule that parties themselves must sign a settlement for it to be enforceable under section 664.6.

❑ True ❑ False

12 The rationale for the "party signature" requirement is that settlements implicate a substantial right of the litigants.

❑ True ❑ False

13 A husband can sign a settlement agreement on his wife's behalf and have it enforced under section 664.6.

❑ True ❑ False

14 The approach taken by the court in *Levy* has been disapproved.

❑ True ❑ False

15 There must first be contract formation before an agreement can be enforced under section 664.6.

❑ True ❑ False

16 A party can enforce a settlement agreement under section 664.6 only if he or she has signed it.

❑ True ❑ False

17 If a settlement agreement is signed during mediation, it will not be admissible in court unless the parties waive the mediation privilege.

❑ True ❑ False

18 Section 664.6 provides a summary procedure whereby a settlement agreement may be enforced without need for a trial.

❑ True ❑ False

19 The stringent requirements of section 664.6 are relaxed when an agreement is prepared in a mediation.

❑ True ❑ False

20 If you plan to enforce a settlement agreement under section 664.6, a party who does not attend a mediation should be available by fax or email to sign and return the settlement agreement.

❑ True ❑ False

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