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Enforceable, written mediation-settlement agreements

AN EXCEPTION TO MEDIATION CONFIDENTIALITY

To understand the requirements for an enforceable mediation settlement agreement, becoming familiar with California's mediation law in Evidence Code sections 1115-1129 is important. Section 1115, subdivision (a) defines mediation as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement. Communication during the mediation process is *confidential* until the parties reach an enforceable mediation settlement agreement."

Although this article aims to set out the requirements for a *written* mediation settlement agreement, note that an *oral* mediation settlement agreement can be recorded in open court so long as the requirements of Evidence Code section 1118 are followed.

Confidentiality

The goal of the Evidence Code's confidentiality requirement is to encourage candid and open communications without fear of disclosure if the parties fail to enter into a settlement agreement. "Section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation." (*Foxgate Homeowners' Assn. v. Bramalea Calif.* (2001) 26 Cal.4th 1, 14.)

Confidentiality includes all phases of the mediation, including communications with one's party, conferences with the mediator, the time during the mediation session, and post-mediation sessions while the parties continue negotiations.

While the confidentiality requirements of section 1119 are the dominating protectors for mediation confidentiality, written mediation settlement agreements that follow the requirements of section 1123 are admissible and enforceable. An agreement signed by *all* parties waives the confidentiality of a mediation session. (See *Rael v. Davis* (2008) 83 Cal.App.3d 745 [negotiated agreement was not enforced and remained confidential because a mediation session party failed to sign the agreement].)

The parties can jointly waive the confidentiality guarantee under the Evidence Code mediation sections, including a waiver statement in the mediation settlement agreement. For example, in *Stewart v. Preston Pipeline* (2003) 134 Cal.App.4th 1565, the parties in a personal-injury mediation memorialized and executed a settlement agreement that "waived" statutes ensuring the confidentiality of communications made during mediation. The agreement was signed by the plaintiff, the plaintiff's counsel, and the defendant's counsel. The defendant was not a signatory to the mediation settlement agreement, although the defendant wanted the agreement upheld. Subsequently, the plaintiff refused to accept the settlement check and refused to proceed with the settlement because the defendant failed to sign the mediation settlement agreement.

The court upheld the confidentiality of the agreement because it was *not* the nonsigning party who claimed confidentiality, and section 1123 "does not require that an effective mediation confidentiality waiver be signed by each of the parties, so long as the written waiver is signed by each of the settling parties or their respective counsel." (*Id.* at p.1583.)

The California Supreme Court has decided the following cases concerning mediation confidentiality:

- The agreement needs to affirmatively provide it is admissible [1123(a)], or enforceable or binding [1123(b)]. (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189,199.);
- The statutory scheme "unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception" to encourage mediation by ensuring confidentiality. (*Foxgate Homeowners' Assn. v. Bramalea Calif.* (2001) 26 Cal.4th 4, 15.);
- There are no exceptions to mediation confidentiality other than those provided by statute. (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 416.);
- There can be no judicially created exceptions or implied waivers to mediation confidentiality. (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582-583.); and
- Mediation confidentiality [privilege] may be waived only by express agreement under mediation confidentiality statutes. (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 586.).

Written settlement agreement requirements of Evidence Code § 1123

As mentioned above, confidentiality of a mediation session is primary to the Evidence Code, but a written settlement agreement ironed out during a mediation session is enforceable

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if the requirements of section 1123 are met. "A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." (*Waddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810.)

Three requirements in a mediation settlement agreement that overcome confidentiality

To be a binding settlement agreement under section 1123, the (1) *settling parties* need to sign the agreement, (2) the agreement satisfies *any one of* the three section 1123 *quoted* conditions below, and (3) *any one* of the three quoted conditions is *set out* within the agreement. The three alternate conditions of section 1123 are:

> "(a) The agreement provides that it is admissible or subject to disclosure, or *words to that effect*. [or]
>
> "(b) The agreement provides that it is enforceable or binding *or words to that effect*. [or]
>
> "(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure."

Note that sections (a) and (b) *do not* require an exact code quotation. The code only requires "words to the effect" that the agreement is either (1) admissible, (2) subject to disclosure, (3) enforceable, or (4) binding. The "*words to that effect*" in sections (a) and (b) allow for various expressions of the agreement. (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 200.) [i.e., make the settlement agreement abundantly clear that the parties have come to a consensus and it is enforceable in court.]

The goal of the Legislature in enacting Evidence Code section 1123 (a) and (b) is to allow parties to express their intent to be bound by words they commonly use rather than requiring a legalistic formulation. (See *Marriage of Daly and Oyster* (2014) 228 Cal.App.4th 505,510-511 [holding the parties can demonstrate that the agreement should not remain confidential using their own words, not statutory words].)

Fourth requirement that overcomes confidentiality

Section 1123 has a fourth requirement. It allows *disclosure* of confidential mediation information to dispute an otherwise valid mediation settlement agreement. The fourth requirement states: "(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue of dispute."

Mediation settlement agreement signatures

Section 1123 requires the mediation settlement agreement to be signed by the "settling parties." Note that the definition of "settling parties" is *not* set out in the Evidence Code.

Logically, a named party in a dispute should sign the agreement. Further note the signature of an attorney representing a party is *not* a party, and, consequently, the attorney's signature alone, with some exceptions, does not have a binding effect on a mediation settlement agreement.

The requirement that a litigant party must sign the settlement agreement "tends to ensure that the settlement is the result of their mature reflection and deliberate assent." (*Williams v. Saunders* (1997) 55 Cal.App.4th 1158; *Rael v. Davis* (2008) 83 Cal.App.3d 745 [negotiated agreement was not enforced and remained confidential because a mediation session party failed to sign the agreement].)

Defining the settlement parties

The California Supreme Court in *Levy v. Superior Court (Golant)* (1995) 10 Cal.4th 578, defined a "party" signature on a Code of Civil Procedure section 664.6 settlement stipulation. It held "the party" to the action must sign the agreement, not the attorney representing the party. The *Levy* holding is no longer enforced because section 664.6 was amended in 2021 to allow attorney signatures and further amended in 2025. Section (b) of the 2025 amended code states: "For purposes of this section [664.6], a writing is signed by a party if it is signed by any of the following: (1) The party. (2) An attorney who represents the party. (3) If an insurer is defending and indemnifying a party to the action, an agent who is authorized in writing by the insurer to sign on the party's behalf. …"

Importantly, the recent amendments to section 664.6 have *no* application to Evidence Code section 1123's mediation settlement agreements. Section 1123 requires the agreement to be "signed by the settling parties." (It is likely legislation will amend section 1123 to comport with the recent signature amendments to Code of Civil Procedure section 664.6.)

Attorney signature

Although section 1123 requires the "settling parties" to sign the mediation settlement agreement, cases have recognized an attorney's signature to be valid. In *Stewart v. Preston Pipeline, Inc.*, (2005) 134 Cal.App.4th 1565, 1587, the court found the *defendant's attorney's* signature on the mediation settlement agreement did not violate the confidentiality provisions of Evidence Code section 1119 and enforced the agreement.

Agent signature

A corporate representative or qualified employee can be designated and authorized to sign a settlement agreement on behalf of the principal. (*Provost v. Regents of the University of California* (2011) 201 Cal.App.4th 1289.)

Insurance company representative

A written settlement agreement signed by an authorized representative of a defendant insurance company is valid, and the defendant party does not need to sign the agreement so long as the settlement amount is within the policy limits. (Code Civ. Proc., § 664.6, subd. (3); also see *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1586 [holding the settlement agreement was enforceable even though the defendant was not a signatory in that "execution of the agreement was authorized by defendants' insurance carrier"].)

Class actions

In class-action matters, unnamed class members are not required to consent to an agreement negotiated by the class

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representative. (*Reed v. United Teachers of Los Angeles* (2012) 208 Cal.App.4th 322.)

Signing electronically

An "electronic signature" needs to comport with Code of Civil Procedure section 17(b)(3). Also, emails may be evidence of the settlement terms. (*J.B.B. Inv. Partners, Ltd. v. Fair* (2019) 37 Cal.App.5th 1.)

Zoom

The Zoom platform and other platforms have provisions where documents can be emailed to all parties for signature during the Zoom meeting.

Mediator proposal

To be an enforceable mediation settlement agreement, the proposal should have words that indicate it is a binding agreement, enforceable, subject to disclosure, or words to that effect. Acceptance of the proposal must be signed by the parties or designated representative. (See above.)

The mediation session

The parties must execute the mediation settlement agreement *during* the mediation session. The definition of a "mediation session" is unclear, but Evidence Code section 1125 provides that the mediation session remains open for 10 days or a shorter or longer period as agreed upon by the parties. Consequently, the parties can execute the settlement agreement at any time the mediation session remains open and the agreement remains viable. Section 1126 states:

> Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

All written or oral communications remain confidential after the mediation session ends, regardless of whether a mediation settlement agreement is entered into. (Evid. Code, § 1126.)

Section 1125 has several subsections that explain when a mediation session ends. For a discussion of mediation session time limits, see this author's September 2021 Advocate magazine article entitled *"When does the mediation process begin and end."*

Terms included in a written mediation settlement agreement

The complexity of the potential terms to be decided during the mediation session is the foundation for any mediation settlement agreement. For example, a mediation to determine the value of an injured personal-injury plaintiff should have a mediation settlement agreement that settles the case value. The agreement should detail the various items of the settlement such as medical bills, earnings, future medical care, lien claims, and other items.

Complex cases: The parties must resolve terms not required to be discussed during the mediation session but designed to be included in the parties' final agreement.

Multiple-party mediations: Not all parties need to execute a settlement agreement, especially where a nonsignatory requires further negotiations before agreeing to a settlement.

Insurance companies: Where an insurance carrier requires certain terms to be included in the settlement agreement, the carrier should produce those terms *before* the mediation session commences to allow the parties to resolve any conflict.

Liens: Liens should be negotiated before the parties enter into a mediation settlement agreement.

Attorney fees: The mediation settlement agreement should acknowledge a claim for contractual or statutory attorney fees. Otherwise, an obligatory party will likely claim a waiver. (*Rael v. Davis* (2008) 166 Cal.App.4th 1608.)

Provider association mediation settlement agreement forms: It is most likely that a mediation service provider such as JAMS will have a form for the parties to use to prepare the mediation settlement agreement.

Post-agreement terms: Before finalizing a settlement, it is wise to discuss and negotiate the terms of a potential "release" agreement, sure to be requested by an insurance company or others after the basic terms of the mediation settlement agreement have been finalized.

Mediation settlement agreement basic terms: A recently published AI-generated article provides the following non-exhaustive checklist requirements for a mediation settlement agreement [plus a few more from the author]:

- Explicit party and attorney representation identifications
- Purpose of the agreement
- Terms of the agreement that are specific and detailed
- Multiparty settlement amounts and allocations
- Liens
- Conditional terms
- Time requirements
- Future obligations of the parties
- Necessity for confidentiality
- Costs and fees
- Enforceability
- Structured settlements
- Future execution of release terms
- Tax consequences
- Mediator's future role
- Necessity for future court action, such as judgement and future enforcement Code of Civil Procedure section 664.6
- Signatures and date of signatures

Enforcement of a written mediation settlement agreement

Generally, a mediation settlement agreement is enforceable by summary judgment, separate suit in equity, or a motion to enter judgment under Code of Civil Procedure section 664.6. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, fn. 5.) A nonbreaching party can also seek an action for breach of contract, estoppel to deny enforceability, or an opposition motion for summary judgment if all submitted papers show no triable issue of fact.

Summary judgment: Summary judgment can be granted if all submitted

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papers show no triable issue of fact. (*J.B.B. Inv. Partners, Ltd. v. Fair* (2019) 37 Cal.App.5th 1; also see *Stewart v. Preston Pipeline* (2005)134 Cal.App.4th 1565, 1585, where summary judgment was a defense to prove an enforceable agreement.)

Estoppel: Available to enforce a previously agreed settlement after a denial of the agreement. (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39.)

Breach of contract: A properly executed mediation settlement agreement is a valid and enforceable contract. An agreement objected to by one party can be enforced by a breach of contract action. (*J.B.B. Inv. Partners, Ltd. v. Fair* (2019) 37 Cal.App.5th 1, 8; Code Civ. Proc., § 437c, subd. (f)(1).)

Motion for entry of judgment under Code of Civil Procedure section 664.6:

This code provides an expeditious proceeding to enforce a mediation settlement agreement, so long as the agreement meets the requirements of Evidence Code section 1123. (*Levy* at p. 585.)

Section 664.6 has been revised several times in the past five years to include the signature procedures mentioned above for attorneys and insurance company representatives.

In essence, section 664.6 provides a summary procedure allowing a judge to enforce the mediation settlement agreement by entering a judgment according to the terms of the settlement agreement. (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174.) Only a single motion is required. (*Machado v. Myers* (2019) 39 Cal.App.5th 779, 790.) The requirements for enforcement of an Evidence Code section 1123 settlement agreement are discussed in above sections.

The 2025 amendment to section 664.6 states the court may "… retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." At the behest of the Legislature in the 2025 amendment, the Judicial Council amended the "Request for Dismissal" form, CIV-110. The amended form provides a box. When the box is checked, the court is to retain jurisdiction for future enforcement of settlement matters.

The box states:

(3) I__I Without prejudice and with the court retaining jurisdiction (Code Civ. Proc., § 664.6)

The box *must* be checked before the judge signs the dismissal. *CAUTION:* Inconsistent past case decisions make the issue of court advisement confusing. It appears that the law requires the court to be explicitly advised in open court and/or in the moving papers that it is to retain jurisdiction to enforce settlement terms. *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, sets out three requirements for a court to retain jurisdiction: (1) the request is made during the pendency of the case, (2) the parties make the request to the court, and (3) the request is made orally to the court or in a memorandum signed by the parties. Further reading should include *Greisman v. FCA US, LLC* (2024) 103 Cal.App.4th 1310; *Madrigal v. Hyundai Motor America* (2025)17 Cal.5th 592, fn.3.); *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913; and *Saya v. Chu* (2017) 17 Cal.App.5th 960.

Conclusion

This article is non-exhaustive of the issues. Recommended reading of other sources, such as those written by ADR Services, Inc., mediator Caroline C. Vincent, Esq., for the September 2012 and December 2014 Advocate issues, should be explored. As for tax consequences of a mediation settlement agreement, see the 2017 Advocate article by Joseph M. Lovretovich, Esq., and Jennifer A. Lipsinski, Esq., entitled "Tax Considerations in settling the case at mediation."

Attorney Michael S. Fields has over three decades of experience as a mediator and arbitrator. He has been an active author and contributor to numerous publications on ADR issues. His first Advocate article was written in 1992, explaining party arbitrations. He was the primary contributor and editor for the California Contract arbitration section of Matthew Bender's book entitled "California Alternative Resolution Practice." He has served in many bar association leadership positions. In 2003, Mr. Fields served as CAALA's president. Before his retirement in 2015, he had a 47-year active personal injury practice. Mr. Fields can be retained as a mediator, arbitrator, or discovery referee by contacting him at msflf@aol.com or 562-597-5399. For additional information concerning Mr. Fields' experience, see his website at www.michaelsfieldslaw.net.