Enforcement of mediated settlement agreements

By Steven H. Kruis

Because mediation is a voluntary dispute resolution process, any settlement agreement results from the parties reaching an agreement voluntarily. What steps can counsel take in drafting a settlement agreement in mediation to enhance the ability to enforce it thereafter?

Get it in writing signed by the parties to the settlement. California Code of Civil Procedure Section 664.6 provides that if parties agree to a settlement in writing or orally before the court, the court can enter judgment pursuant to the agreement. Thus, parties should sign a stipulation for settlement or settlement agreement.

Principals must sign, not their agents. The parties themselves must sign the settlement agreement, not the corporation or a part of the settlement agreement. The corporation, not as an attorney-agent.

bans all writings prepared during the mediation from discovery and makes them inadmissible to encourage the parties to freely and candidly discuss the dispute. Rojas v. Superior Court (Coffin), 33 Cal. 4th 407 (2004). Communications are stilled if parties fear that what they say may come back to haunt them. On the other hand, if the parties reach an agreement, they normally want to rely upon and, if necessary, enforce it. Accordingly, California Evidence Code Section 1123 makes a specific exception for a settlement agreement if “it is signed by the settling parties and ... provides it is admissible or subject to disclosure or words to that effect.”

Make the settlement agreement admissible in light of confidentiality. A settlement agreement prepared in mediation is confidential. Proof of the settlement agreement is inadmissible unless certain criteria are met.

California Evidence Code Section 1119(b) bans all writings prepared during the mediation from discovery and makes them inadmissible to encourage the parties to freely and candidly discuss the dispute. Rojas v. Superior Court (Coffin), 33 Cal. 4th 407 (2004). Communications are stilled if parties fear that what they say may come back to haunt them. On the other hand, if the parties reach an agreement, they normally want to rely upon and, if necessary, enforce it. Accordingly, California Evidence Code Section 1123 makes a specific exception for a settlement agreement if “it is signed by the settling parties and ... provides it is admissible or subject to disclosure or words to that effect.”

Make sure the settlement agreement expresses an intent to make it admissible. In Fair v. Bakhouri, 30 Cal. 4th 189 (2006), the parties signed a handwritten, single-page memorandum titled “Settlement Terms.” The final provision provided, “Any and all disputes subject to JAMS arbitration rules.”

The trial court reversed, holding that the memorandum was inadmissible because the arbitration provision constituted “words to [the] effect” that the settlement agreement was not enforceable or binding.

Reversing, the state Supreme Court concluded that the terms of a settlement agreement reached must make clear that it is binding, and not simply a memorandum of terms. The agreement must be signed by the parties and include a direct statement to the effect that it is enforceable or binding. Reference to arbitration clauses, forum selection clauses, choice of law provisions and the like that are commonly negotiated in settlement discussions are insufficient.

In short, utilize declarations from counsel and the parties, not the mediator, to support a Section 664.6 motion. Liquidated damage considerations in settlement agreements reflect that a claim is for a larger sum, but the plaintiff will accept a discounted amount if timely paid, the court may be less inclined to construe the difference between the full amount and discounted sum as liquidated damages.

Reserving jurisdiction to bring motion. Section 664.6 allows parties to request that the court retain jurisdiction over the parties to enforce the terms of the settlement. This request must be made before filing a dismissal with prejudice. In Hagan Engineering, Inc. v. Mills, 115 Cal. App.4th 1004 (2003), the parties reached a settlement agreement and dismissed their claims with prejudice. Hagan then accused Mills of breach of contract, and Mills moved to reopen the case to enforce the settlement agreement. The trial court granted Hagan injunctive relief, and the appellate court reversed. Because the parties did not request the court to retain jurisdiction, the dismissal with prejudice operated as a dismissal of the trial court of subject matter jurisdiction.

Alternatively, if the entire case has been settled, and performance will require time, consider a conditional settlement under California Rules of Court Rule 3.185, and use Judicial Council Form CM-200. In that instance, the case is not dismissed until performance is complete. If a breach occurs, the aggrieved party may bring a motion to enforce the settlement since the action is still pending, even though it in no longer on the active docket.

Conclusion. By following these suggestions, counsel can make their settlement agreements reached in mediation admissible and enforceable.

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