

## Assuring Admissibility and Enforcement of Mediation Settlement Agreements

By Douglas H. Barker, Esq.  
[dbarker@westcoastresolution.com](mailto:dbarker@westcoastresolution.com)  
619-238-7282

You go to mediation, negotiate a settlement, and are now ready to sign a mediation settlement agreement. Often, the mediator provides the lawyers and parties with a skeletal form for that agreement, and the lawyers (or parties) fill in blanks and add any terms not contemplated in the form. If each party faithfully performs under the terms of the mediation settlement agreement (which is most often the case), then “enforceability” terms absent from that agreement are moot. However, if a party fails to comply with terms of the settlement agreement, “enforceability” becomes an issue. **KNOW THIS: A mediation settlement agreement will not be enforceable unless certain provisions appear in that settlement agreement.**

Consider the following excerpts from statutes that bear on mediations and mediation settlement agreements:

- “No writing...prepared...in the course of...a mediation...is admissible or subject to discovery...in any arbitration...[or] civil action[]...” Evidence Code section 1119(b). Therefore, we begin with a presumption that **no writing** (i.e., no settlement agreement) is admissible for seeking enforcement of that agreement.
- However, Evidence Code section 1123 creates an exception for the admissibility of mediation settlement agreements, but under the following conditions, only:

“...if the agreement is **signed by the settling parties** and any of the following conditions are satisfied:

- (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- (b) The agreement provides that it is enforceable or binding or words to that effect...” (Emphasis added.)

One more consideration: Lawyers typically want settlement agreements to be enforceable under Code of Civil Procedure section 664.6, which provides that, upon motion, judgment may be entered pursuant to the terms of the settlement **if** the settlement is “...in a writing **signed by the parties** outside the presence of the court...” (Emphasis added.)

**The Issues:** Both Evidence Code section 1123 and Code of Civil Procedure section 664.6 require “signature by the parties;” but what if one or more of the named-parties is not present at the mediation? Does signature on the settlement agreement by an absent party’s lawyer or by an insurance adjuster suffice to meet the requirements of 1123 and/or 664.6?

**A perspective and recommendations:**

A signature on behalf of a party by that party's lawyer or insurance claims adjuster may, as a practical matter, suffice to satisfy the requirements of Evidence Code section 1123 for a couple of reasons:

Section 1123 pertains to mediations, exclusively, and, as a practical matter in the culture of California mediations, named parties are often not present at mediations, especially if insurance is present (and without a reservation of rights) to defend and indemnify the named party. The same is true in employment cases where the employer entity and one or more individual employees are named defendants, but the employer entity is assuming the responsibility of defending and indemnifying the named individual employee defendants. In such cases, the insurance carrier is the true "real party in interest" in the mediation, and the signature of individual named parties would be entirely ceremonial and without influence on the settlement or settlement agreement.

California public policy favors settlement, and, as a practical matter, to deem all settlement agreements inadmissible and unenforceable if those settlement agreements are not actually signed by individual named parties who have no financial exposure in the case would defy that public policy. Signature by a party's lawyer or insurance adjuster or company representative should satisfy the requirement of "signed by the settling parties" as provided for in Evidence Code section 1123.

The same reasoning could be applied to enforcement of a written settlement agreement under CCP section 664.6 but, to date, the courts been generally unwilling to acknowledge signatures **on behalf of a party** (rather than by the party his/her/itself) as satisfying the stated requirement in CCP section 664.6. That may be because 664.6 is an expedited enforcement vehicle that applies to **all** written settlement agreements, and not just those arising from a mediation. Beyond a literal interpretation of the plain language of 664.6, the courts may be unwilling to differentiate between a written settlement agreement developed during mediation from those executed outside the mediation process. Thus, the expedited 664.6 enforcement procedure may not be available if a named party has not actually signed the mediation settlement agreement.

To best cope with the "signed by the parties" requirements of 1123 and 664.6, the written settlement agreement should recite or otherwise clearly indicate that the lawyer, claims adjuster, or company representative is **the authorized agent** of the named party(ies).

- Further, the written settlement agreement should clearly state that the agreement may be enforced under CCP section 664.6 **or as a contract executed by the parties or their authorized agents**. Thus, if the court refuses to proceed under CCP section 664.6 for lack of one or more named parties' signatures, the written settlement agreement can nonetheless be enforced as a contract.

**Conclusion** – Sometimes, there is a temptation to accept from the mediator a form settlement agreement and fill in the basic terms of settlement. However, the careful practitioner should first confirm (1) that the form provides for admissibility and enforceability under Evidence Code section 1123, (2) that lawyers, adjusters, and/or company representatives are identified and

acknowledged to be authorized agents of absent named parties, (3) that the parties stipulate that the written agreement shall be enforceable under CCP section 664.6, and, if the written settlement agreement is not deemed enforceable under section 664.6, (4) that the written agreement shall be enforceable as a contract executed by the named parties or their authorized agents.