"Deal or No Deal"

Prevent Your Mediated Settlement from Being Just Another Round of Litigation

by William J. Caplan

True or false? Most mediated cases end in settlement. The common wisdom is that, by far, most mediations end in settlement. If that is true, it stands to reason that lawyers acting as advocates at mediation should come prepared to finalize the settlement so that it is enforceable. The most important elements of having an enforceable settlement are to make sure that everyone who is to be a party to the settlement expressly agrees to the deal, that all material terms are included, and that the settlement memorandum is admissible to prove the deal. While these notions sound fairly basic, recent reported cases show that getting this done is not as easy as it looks.

In *Rael v. Davis* (166 Cal. App. 4th 1608, 1611 (2008)), a plaintiff sought enforcement of a settlement agreement resulting from mediation of a prior conservatorship battle. At the end of the fourth of four mediation sessions during the conservatorship, a settlement agreement was signed, either by the parties present, or their attorneys. (*Id* at 1613.) However, although his lawyer signed the mediation memorandum, one party, Mark Rael, refused to sign the more formal settlement documentation prepared after the mediation was completed. (*Id.*) Years later, after the conservatee's death, his former spouse sued to enforce the settlement agreement. (*Id* at 1615.)

At trial, Mark Rael's attorney testified that "she had no authority to bind her client or waive mediation confidentiality," notwithstanding the attorney's signature on the memorandum. (*Id* at 1616.) The court held that "the settlement memorandum was not just unenforceable, it was inadmissible" under California Evidence Code Section 1119. (*Id* at 1622.) The court rejected the plaintiff's claim that there was an implied waiver of the mediation privilege by the attorney's execution of the mediated settlement document, ruling that the legislature had expressly rejected any notion of implied waiver or judicial estoppel. (*Id* at 1623.) The court determined that, because the settlement document was inadmissible, the court would not even entertain the issue advanced by the plaintiff – that the settlement terms were severable and could be enforced independently by each of the parties. (*Id* at 1620.) In so ruling, the court distinguished *Stewart v. Preston Pipeline, Inc.* (134 Cal. App. 4th 1565 (2005)). In Stewart, the settlement agreement signed by an attorney and not the party was upheld as enforceable, because the party seeking to avoid the effect of the settlement agreement was a signing party, not the non-signing party, and because it was undisputed that the attorney was authorized to sign for his client. (*Id* at 1583-1584.)

The immediate reaction is that the *Rael* case would have come out differently if, before finalizing the deal, someone had obtained an agreement signed by Mark Rael giving his attorney authority to enter into an agreement on his behalf. Not so fast. *Simmons v. Ghaderi* (44 Cal. 4th 570 (2008)) seems to hold otherwise. In that case an oral settlement agreement was reached at mediation based on negotiations between a plaintiff, on the one hand, and the attorney and the insurer for a doctor defendant, on the other hand. (*Id* at 574-575.) It was held unenforceable, notwithstanding that, before the mediation, the defendant doctor had signed a written "standard consent to settlement form" giving the insurer the right to negotiate a settlement up to $125,000. (*Id* at 575.) After a deal was struck between the insurer and the plaintiff within the authorized limits, and the terms of the deal were memorialized in writing by the mediator, the defendant doctor refused to sign. (*Id.*) At trial, the trial court held that the defendant had breached the terms of the settlement agreement by not accepting the settlement and failing to dismiss the case. (*Id* at 577.) The Court of Appeals affirmed, but the Supreme Court reversed, holding that, because the defendant doctor had not expressly waived mediation confidentiality, the oral agreement and the "deal sheet" were inadmissible. (*Id* at 577, 588-589.) The court reaffirmed that there can be no implied waiver or judicial estoppel to avoid the effect of the mediation privilege. (*Id* at 584-585, 588.) The absence of an express waiver of the mediation privilege under Cal. Evid. Code Section 1123 was fatal to the admissibility or enforceability of the authorized settlement, regardless of the pre-mediation express authorization to enter into a settlement. (*Id* at 582.)

In each of the above-mentioned cases, a

settlement that at least one party expected to be enforced, ended up being held unenforceable based on the application of the mediation privilege. In the following case, the court found a way to get around the mediation privilege. In *Thottham v. Thottam* (165 Cal. App. 4th 1331 (2008), three siblings, Peter, Jameson and Elizabeth, participated in a mediation to resolve disputes about their deceased father's estate. (*Id* at 1333.) At the mediation, a deal was reached and a chart was prepared that showed the division of property. Each of the siblings signed the chart. (*Id* at 1334.) A few days later Peter prepared more formal agreements which the other siblings refused to sign. (*Id.*) Peter sued to enforce the settlement, and the other siblings filed related actions for breach of fiduciary duty. (*Id* at 1334-1335.) During discovery, Elizabeth refused to answer questions about the chart, citing the mediation privilege. (*Id* at 1335.)

The trial court granted Peter's motion to compel answers about the chart, based on the terms of the mediator's agreement, signed before the mediation began, which provided that "all matters discussed, agreed to, admitted to in the mediation would be kept confidential and not disclosed, and not used in any litigation among them '(*except as may be necessary to enforce any agreements resulting from the meeting*)' . . . ". (Emphasis added) (*Id* at 1336.) However, at trial, the court disagreed with itself (o.k., the case was tried before a different superior court judge), ruling that the chart and the conversations about it were privileged under Cal. Evid. Code 1119, and that no exception to the mediation privilege under Cal. Evid. Code Section 1123 had been satisfied. (*Id* at 1337.) The chart and any testimony about what happened at the mediation were excluded, and Peter was held to have breached his fiduciary duty by putting real estate in his own name and collecting the rent from it (notwithstanding that the chart showed the property as belonging to him). (*Id.*)

On appeal, the court reversed, holding that the mediation agreement's parenthetical satisfied the statutory exception to mediation confidentiality under Cal. Evid. Code Section 1123 (c), where "[a]ll of the parties agree in writing...to its disclosure." (*Id* at 1339, 1342.) The Court of Appeal held that the fact that this clause was in an agreement signed *before* the chart came into existence did not preclude it from satisfying the express written agreement requirement. (*Id* at 1341.) The legal effect of this ruling was that, because of the unusual language in the mediator's form, once there was a claim that there was an agreement made at the mediation, all of the mediation communications relevant to enforceability of the claimed agreement were no longer clothed with the mediation privilege. (*Id* at 1339.) The case was remanded to the trial court to be retried, this time with the chart and the testimony about it to be admitted. (*Id* at 1344.)

It is worth mentioning that, unless your mediated settlement agreement expressly includes the terms that it is "binding, enforceable, or admissible... or words to that effect," it will probably be unenforceable as privileged. (*Fair v. Bakhtiari*, 40 Cal. 4th 189, 197 (2006).) It is also the case that a mediated settlement agreement that is not signed by all of the parties is not enforceable under Code of Civil Procedure section 664.6 regardless of whether his or her attorney was expressly authorized to enter into the settlement agreement. (*Levy v. Superior Court*, 10 Cal.4th 578, 586 (1995).) It is also noteworthy that, where the settlement memorandum does not include all material terms, the agreement will not be enforceable, like any other contract, because there was "no meeting of the minds." (*Weddington Productions Inc. v. Flick*, 60 Cal. App. 4th 793, 797 (1998).)

What lessons come from these cases? (1) If you mediate an agreement without a party present, notwithstanding the representation of the attorney that he or she has authority or "client control," you run the risk that the deal will be unenforceable. (2) Even with written authority signed by the client authorizing an agent to make a deal, without the client's express agreement waiving the mediation privilege respecting any deal reached, the deal may be unenforceable. (3) The mediator's submission agreement must be read carefully, because it might have a parenthetical that waives the mediation privilege. (4) Any mediated settlement agreement should include terms that say it is admissible, binding and enforceable under Code of Civil Procedure section 664.6 (5) The settlement agreement should also state that all material terms are included in the memorandum.

Does this mean that you should *never* go to a mediation unless everyone needed will be present and never leave a mediation without a writing signed by everyone? (And should you require notary jurats for each signature?) Probably not because, in most cases, mediated settlements are later finalized without incident and result in a settlement that advances your client's interests. However, if you fail to get the proper writings signed by the people who need to sign, you should be aware of the risks involved and make an informed choice.

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