Never settle for a simple settlement agreement

Don't let a defective settlement agreement imperil all of your work

By Karen Stromeyer and Tim Halloran

You have fought hard. Discovery has been intricate and contentious. You have sat through hours of depositions in airport-hotel conference rooms with poor lighting and worse air conditioning. Your client is fatigued and frustrated, and the trial date is imminent. Finally, after all the late nights, opposing motions and drafting demand letters, time away from your family and incurring a few more gray hairs, you have finally, finally, reached a settlement. Time for a glass of champagne and a long nap, right?

Not yet, there is still a lot of work to be done. Long gone are the good 'ole days where a "handshake among gentlemen" was all it took to seal a forever-binding deal that would never be revoked on pain of death, or worse, dishonor. As legal malpractice defense attorneys, we see an increase in cases that arise from settlements that went sideways. These result in unhappy clients with a worse outcome, or additional litigation for which the client seeks to hold their attorney responsible. In some cases the settlements actually result in later litigation. There is an old saying, "a lean agreement is better than a fat judgment." If that is true, then you have to make sure that the agreement is effective and enforceable. So, here is a punch list of a few things to consider in memorializing your settlement before you crack open a bottle.

Get the settlement on the record – now!

A case that made recent headlines is a perfect illustration of why settlement "on the record" is the preferred method — especially when you have a judge and a court reporter at your disposal, and the parties have reached an agreement.

Earlier this year, in Los Angeles, a very well known plaintiff's attorney represented a developmentally disabled man who had suffered brain injuries in a fall from an ambulance. At the time, plaintiff was on a 5150 psychiatric hold, and was being transported by ambulance to a mental health facility. He was loaded into the ambulance and buckled onto a gurney, but the EMTs allowed his left arm to remain free because they judged him at that time as not being combative. While on the freeway plaintiff unbuckled the remaining restraints and jumped out of the moving vehicle onto the freeway. His lawsuit alleged the ambulance company breached its duty of care to him by failing to sufficiently restrain him, which negligence resulted in severe, permanent brain injury.

At trial, the plaintiff's attorney argued for $21 million in damages. The jurors deliberated just four hours before announcing they'd reached a verdict. Since the deliberation was so quick, the attorneys for both sides presumed that the jury would return a verdict for the defense. A last minute flurry of settlement discussion followed over a 40-minute period in which plaintiff's counsel ultimately agreed to a settlement for $350,000.

The judge was informed of the settlement, and in turn told the jury that they were free to go, but that the attorneys would be happy to talk with them in the hallway outside about their views. Defense counsel, also a seasoned trial attorney who has tried over 100 cases, says that he asked to put the settlement on the record but didn't insist. And for some reason, it never happened.

Outside in the hallway, plaintiff's counsel learned that the jury had been about to render a verdict for $9 million. Then, according to the presiding judge and as reported in the Los Angeles Daily Journal, "all hell broke loose." Plaintiff's counsel "was yelling in the hallway, came into the courtroom and he was yelling in the courtroom. At one point he told me to call the jurors back and take the verdict. It was chaos."

After a 90-minute recess, plaintiff's counsel informed the court that he had made a "mistake" and never had his client's consent to settle. It was noted by defense counsel that the plaintiff and his mother were in the hallway when settlement was discussed. Plaintiff requested a new trial, which was recently granted. Plaintiff will have a new attorney and a new judge at the new trial.

Before anyone leaves, get it on the record

On the one hand, this may sound like a war story of an attorney skating out

of a bad result for his client, and getting a chance to try his case again. But this could have easily been the reverse, with your opposing counsel trying to avoid a large, verbal settlement after learning of a lower verdict. The only way to prevent repudiation of a settlement at trial is to make sure, as soon as you have a settlement and before any intervening event, the settlement goes "on the record."

When you put a settlement on the record, a summary of the settlement deal points is provided to the judge, who reads it into the record to the court reporter. The judge then voir dires *the parties* to the settlement. The judge's questions go something like this:

- Did you hear the stipulation of settlement that was just put on the record by one of the attorneys?
- Do you understand it?
- Do you have any questions for your attorney about it?
- Did you have an adequate opportunity to speak to your attorney about the terms of the settlement?
- Did anyone coerce, pressure, or threaten you into entering into the settlement?
- Has anyone made any promises to you other than what was stated in the settlement?
- Do you understand that instead of entering into this settlement, you have the right to proceed to trial but that you are waiving that right?
- Do you consent to the settlement knowingly, freely and voluntarily?
- Are you satisfied with the representation of your attorney?
- Have you taken any medications or consumed any alcohol which might impair your ability to understand what was just put on the record?

An oral settlement on the record requires all of the parties to the settlement to be present and consent. Counsel's representation to the court that they have "authority" to consent for a party is insufficient to bind that party. (See *Levy v. Superior Court* (1995) 10 Cal.4th 578.) At that point, pursuant to Code of Civil Procedure section 664.6 you have created a binding and enforceable settlement as to those terms. Why is this awesome? Because neither you or your opponent's client can claim that they did not consent to the settlement or a specific term, or that their attorney led them to believe something different.

However, the danger to avoid: Too often counsel only put the major terms on the record: who is paying who what, how, and when. The best intention is to leave the other issues to be sorted out among the parties in a formal settlement agreement at a later date. Because Code of Civil Procedure section 664.6 requires that settlements be put "in a writing signed by the parties outside the presence of the court or orally before the court" to be enforceable, verbal agreements on these issues or "understandings" not memorialized are simply insufficient in a subsequent enforcement effort. The opportunity to create this binding mechanism should not be wasted. So, you want a confidentiality agreement with a liquidated damage clause? If it is not stated in court, you cannot force the other side to abide by it in an attempt to include it in a later written release.

You are only as safe as the record

There is always the temptation late in the day to just highlight the "big" terms and leave the rest for a subsequent, formalized settlement and release. However this is very dangerous as there are often issues that you assume will sort themselves out, but have not yet been resolved, and may rear their ugly head to derail an agreement. Consider and include if possible in any settlement on the record or summary settlement writing, the following:

- ***Scope of the release*:** This is often an issue among co-defendants, especially if they will have a continuing relationship.
- ***Confidentiality*:** Not just whether there will be a provision, but the exact scope and breadth of what is being requested. Does the confidentiality clause merely provide that the fact of the agreement, and any related documents and discovery shall be kept confidential? Or is the clause broader? Will there be a liquidated damage provision and/or a prevailing party attorney fee provision? Does this include a non-disparagement provision?
- ***Liens and taxes*:** Responsibility for actual or potential tax liability or lien and/or tax-related defense obligation, indemnification and hold-harmless agreements in connection with those liens and taxes should be spelled out.
- ***Resolution of third-party claims, subrogation rights, or indemnification*:** There are often miscellaneous obligations that the parties wish to receive from the other that can result in contentious hang-ups in the final stretch.

Buyer's remorse

Code of Civil Procedure section 664.6 provides:

> If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, **upon motion**, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

In enacting section 664.6, the Legislature "created a summary, expedited procedure to enforce settlement agreements when certain requirements that decrease the likelihood of misunderstandings are met." (*Levy v. Superior Court*, *supra*, 10 Cal.4th at 585.)

Pursuant to Code of Civil Procedure section 664.6 the court can enforce settlements by use of the relatively simple motion procedures set forth in Code of Civil Procedure sections 1010, et seq. This statute is a powerful tool in any situation where an agreement requires performance over a period of time, or performance at a date some distance in the future, for example, if the sale of a

business or real property is required in order to fund the settlement, or if periodic payments are required. The first few payments may be made in a timely manner, but if those payments stop, an agreement subject to Code of Civil Procedure section 664.6 can be used as a quick way to enforce the terms of the settlement by the court by way of a motion, instead of having to institute a new action for breach of contract and incurring first filing and other fees.

Appellate courts have applied a "strict interpretation" test in disputes regarding interpretation of the statute. In *Levy,* the California Supreme Court held that a written settlement agreement had to be signed by the litigants themselves in order to be enforceable under the summary procedure specified in Code of Civil Procedure section 664.6. The term "parties" as used in Code of Civil Procedure section 664.6 means the litigants themselves – the statue does not include the parties' attorneys or other agents, subject to certain rare circumstances where the liability insurance carrier has the power to settle on defendant's behalf and its signature is effective on the settlement agreement. (See *Fiege v. Cooke* (2004) 125 Cal.App.4th 1350, 1353-1355.) The obligation of each party to join in the settlement is a requirement that will be strictly interpreted against corporations as well as natural parties. That means the principal, not a mere manager must be the signatory in a writing against the corporation. (See *Gauss v. GAF Corp*. (2002) 103 Cal.App.4th 1110.)

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., supra,* 103 Cal.App.4th at 1117-1118; *Elkenave v. Via Dolce Homeowners Assn.* (2006) 142 Cal.App.4th 1193, 1198; *Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162-1163.)

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* (1999) Cal.App.4th 299, 304-306.) In light of these decisions, you should make sure every party signs the settlement agreement. An after-the-fact declaration will not solve the problem. (See *Sully-Miller Contracting Co. v. Gledson/ Cashman Construction Inc.* (2002) 103 Cal.App.4th 30, 37.)

However, even if a settlement is not enforceable under Code of Civil Procedure section 664.6, settlements signed by counsel alone may be enforceable in separate proceedings, for example in a motion for summary judgment or in a separate action for breach of contract or a separate suit in equity. You have only lost your ability to avail yourself of the relatively easy and inexpensive enforcement procedures prescribed by Code of Civil Procedure section 664.6

Continuing enforcement

Code of Civil Procedure section 664.6 only provides continuing jurisdiction for enforcement of the settlement until dismissal is entered. At that point the court loses jurisdiction to entertain motions in your case. If your settlement is one which involves continued performance and you anticipate future problems, you may wish to be able to continue to avail yourself of Code of Civil Procedure section 664.6 enforcement.

If the parties wish that the court have continuing jurisdiction to enforce a settlement under Code of Civil Procedure section 664.6, the parties must make a specific request. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429.) Requests for retention of jurisdiction must be made prior to a dismissal of the suit, and the request must be made orally before the court or in a signed, clear, written request, and it must be made by the parties, not by their attorneys, spouses or other such agents. (*Id.* at 432.)

Further, any dismissal entered should *expressly provide* that the court retains jurisdiction to enforce the settlement agreement. In an abundance of caution, if there is any question that you may need to seek court assistance in enforcement five years after your action has commenced, consider adding language tolling the five-year statute under Code of Civil Procedure section 583.330: "The parties hereby jointly request the court to retain jurisdiction of this case and over the parties personally until final performance of the settlement agreement stated herein. This includes tolling of any applicable statute, rule, or court order affecting timely prosecution of this action, including the 5-year dismissal statute."

Enforcement issues stemming from mediated settlements

In a mediation, once the "big" terms have been agreed to, the mediator often pulls out a standard "term sheet" which states something like: "The parties intend that this settlement is enforceable pursuant to the provisions of Code of Civil Procedure section 664.6." As most attorneys know, the statutory procedure under section 664.6 provides the most efficient way to enforce settlement agreements. However, it is important to keep in mind that when there is a settlement agreement outside of court, in order to avail oneself of the benefits of Code of Civil Procedure section 664.6, the agreement must be in writing and it must be signed by *both* the party seeking to enforce the agreement and the party against whom it is to be enforced.

Section 1119 of the Evidence Code provides that no evidence of anything said, nor any "writing," is discoverable or admissible in any subsequent proceeding if the statement was made, or the writing was prepared "for the purpose of, in the course of, or pursuant to, a mediation." (Evid.Code, § 1119(a)-(b).) Further, "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation ... shall remain confidential." (Evid.Code, § 1119(c).) The Supreme Court has repeatedly said that these confidentiality provisions are clear and absolute, and that except in rare circumstances, they must

be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected. (See *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415-416.) The mediation confidentiality provisions of the Evidence Code were enacted 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* (2004) 33 Cal.4th 407, 415-416; *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14, 108; C*assel v. Superior Court* (2011) 51 Cal.4th 113, 117-118.)

However, Evidence Code section 1123 provides that a signed settlement agreement reached through mediation is exempt from this general rule if it "provides that it is enforceable or binding or words to that effect." (Evid.Code, § 1123(b).)

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. In *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, following a two-day mediation, plaintiff's counsel drafted a handwritten memorandum recording settlement terms, including that "Any and all disputes subject to JAMS arbitration rules." The memorandum was dated, and signed by the mediator and the parties. The parties informed the court that the case had settled in mediation, and a draft of a formal settlement agreement was circulated. Then, the attorneys discovered some unresolved tax issues regarding a contemplated transfer of business interests. The parties ultimately could not reach an agreement on how to resolve the issues, and defense counsel asked for the case to be returned to the active docket. Plaintiff moved to compel arbitration, in accordance with the mediation settlement memorandum, claiming that any disputes over the meaning or extent of their agreement were subject to arbitration. Defense counsel opposed the motion, objecting to the admission of the settlement memorandum and parts of opposing counsel's declarations reciting mediation discussions under Evidence Code section 1119(b).

Plaintiff's counsel argued that the arbitration provision itself was evidence that the parties intended the agreement to be binding and enforceable. The California Supreme Court noted that the "words to that effect" clause of Evidence Code section 1123 reflects a legislative concern not with the precise words of a settlement agreement, but with terms unambiguously signifying the parties' intent to be bound. Therefore, the Court held that because a clear and unambiguous intent to be bound was not set out in the memorandum, the memorandum was inadmissible, and considering policy behind the mediation privilege, intent could not be inferred from the mere inclusion of an arbitration provision in the memorandum. To get around the privilege, a settlement agreement derived from a mediation *must* use express language 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)-(b); *Fair v. Bakhtiari*, *supra*, 40 Cal.4th at 198)

Writing an Enforceable Agreement:

Therefore, best practice is to make sure that any agreements made in mediation be made:

(1) in writing[1]; (2) stating all material terms; (3) signed by the parties; and (4) include language to the effect of:

- Provisions of Evidence Code sections 1115-1128 notwithstanding, this Agreement may be enforced by any party by a motion under Code of Civil Procedure section 664.6 or by any other procedure permitted by law. The parties specifically intend that this Agreement be deemed as evidence and subject to disclosure in enforcement proceedings pursuant to California Evidence Code section 1123.
- Although they contemplate executing a formalized settlement agreement and release, this settlement agreement is binding and enforceable even if a formalized settlement agreement and release is not executed.
- All of the material terms of the settlement are set forth herein.
- The parties intent is that this agreement be fully binding and enforceable pursuant to Code of Civil Procedure section 664.6.
- Neither party shall oppose a motion under Code of Civil Procedure 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.
- 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.

Conclusion

Unlike W.C. Fields, who once said, "The best thing to break is a contract," no lawyer wants to see his client in litigation, after the case has settled, over a dispute regarding the terms of the settlement. By keeping these simple guidelines in mind we will not see you in our office (we defend lawyers) when the "simple" settlement sours before the champagne is even finished.


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Endnote

[1] If for some reason you cannot get the document written and signed at the mediation, Evidence Code section 1118 provides an alternative; it allows (1) an oral agreement recorded by a court reporter, tape recorder, or other reliable means of sound recording; (2) recited in the presence of the parties and the mediator; (3) where the parties to the oral agreement expressly state on the record that they consent to the agreement, and that they intend the agreement to be binding and enforceable. This method is not preferred as section 1118 requires a separate writing formalizing the agreement and signed by the parties within 72 hours.