ENFORCING MEDIATED SETTLEMENT AGREEMENTS IN THE AGE OF FACEBOOK: WHERE CONFIDENTIALITY, FIDUCIARY DUTIES AND CLIENT RELATIONS COLLIDE

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Imagine, for a moment, a system that promises the intellectual opposite of lawlessness. Instead, all promises are fulfilled and whether you formulate an agreement to enter into a contract based upon fraud, duress or even incompetence, your contracts are always enforceable. It is the land of "super contracts," and it is not science fiction.

In the real world, these "super contracts" are enforced in huge commercial class action cases as well as minor impact soft tissue personal injury actions. And, nobody can set aside these contracts of the future, because they are the practical outcome of the modern mediated agreement, according to U.S. Magistrate Judge Wayne Brazil in *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d. 1110 (1999).

Because of the strict confidentiality which forms the cornerstone of mediation, recent cases have upheld settlement agreements where the parties' assent was based upon allegedly substandard legal advice (*Cassel v. Superior Court*, 51 Cal. 4th 113 (2011)), where the lawyer is alleged to have breached his fiduciary duty towards his clients (*Wimsatt v. Superior Court*, 152 Cal. App. 4th 125 (2007)) and where the defendant is accused of securities fraud in the valuation of stock (*Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d. 1034 (9th Cir. 2011)).

Practical Implications for Practical Lawyers

How can lawyers protect their clients when entering into a "super contract" in a mediation, which they know cannot be challenged even if it turns out that the contract would be set aside based upon fraud, duress or incompetence were it not the product of a mediation? The simple answer is: be prepared and prepare your client to enter into an agreement which is intended to be fully binding and nearly impossible to set aside later for any reason. This includes fully preparing your clients for settling the case on the date of the mediation.

Discuss Confidentiality

First, it begins with a dialogue about confidentiality, so that your clients understand the implications and benefits of maintaining strict confidentiality about everything involved in the mediation. Explain to your clients that nobody may ever testify about dialogue between you and your clients or anyone else at the mediation and that the reason for this is to allow the mediator to attempt to meet your interests and goals as expressed in the mediation, whether or not they are a part of the pleadings and evidence developed in the legal case.

Encourage Participation by Your Client

Encourage your clients to ask questions and to engage freely and fully in the mediation, so that when the time comes to agree to a particular set of terms, they completely understand the justification for doing so and agree voluntarily, without coercion or pressure, that their assent is in their own best interests on the terms proposed.

Ensure All Signatories are Present

Third, be fully prepared by making sure that the "party to be charged" is present for the entire negotiation and most especially for their signature at the end of the day. If you intend to enforce a mediated agreement, bring all necessary parties to the mediation and make sure they sign the agreement on the day it is written and negotiated. *Simmons v. Ghaderi*, 44 Cal. 4th 570 (2008), provides the reason why. In that case, the physician being sued for malpractice agreed to consent to a settlement only if it fell below a certain (she thought unrealistic) number. She left without signing an agreement and late into the night an agreement was reached at that amount. When she refused to execute the agreement the following day, the plaintiff sought to enforce it based in part upon a written declaration by the mediator of her intent, claiming it was enforceable as an oral agreement at the least. The court rejected the evidence submitted by the mediator on the grounds of mediation confidentiality and the settlement was never enforced.

Discuss Ranges in Advance

Fourth, fully discuss the range of potential outcomes, including specific values, with your client before including them in your confidential briefs or revealing them to the mediator or opposing counsel. Remember, mediators and lawyers negotiate for a living and understand reasonable ranges in ways that our clients may not. You may also want to discuss the pacing of the negotiations, so that your client is prepared for what is often a long, slow process to arrive at an agreement within the target range.

In a recent case arising from a claim of age discrimination, plaintiff's and defense counsel discussed the range that they both agreed to be reasonable and, based upon that conversation, agreed to retain a mediator to attempt to settle

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the case. However, the plaintiff's attorney had not brought his client into that conversation and had no authority to begin the negotiation at the higher end of that range. In reaction, the defendant became incensed and never got to the offer of the low end of the range either, a place from which he expected to begin the negotiations. This was a recipe for an early impasse and disappointed clients all around.

In another similar example, plaintiff's counsel in a personal injury action made an early settlement demand to defense counsel, leading them to engage a mediator to settle the case. When he arrived at the mediation, it was apparent that his clients had not authorized him to make that demand, and we worked many hours to get them to agree to a certain figure. When that was finally communicated to the defense lawyer, he revealed that he had come to the mediation expecting that figure as the initial demand, not the final one, since opposing counsel had made that demand two weeks before the hearing. The result was not only an early impasse, but also distrust between the two sides as negotiations proceeded through the mediator for several weeks following the hearing. What is worse, both sides' clients were upset with their lawyers for being misled in anticipation of the mediation.

It is imperative that you verify any settlement ranges with your clients before articulating them to opposing counsel. Although these off-hand conversations cannot be used as evidence in court, your clients will be forever displeased with you if they think you have either sold their case short or misled the other side by presenting an offer without first securing their authority.

Bring Your Proposed Settlement Agreement to the Mediation

Finally, be prepared to settle the case by bringing a template of the long form agreement to the mediation hearing, including all of the potential terms, even those your client may not insist upon. She who arrives at the mediation most prepared to resolve usually receives the most favorable terms.

For example, include the terms of no re-hire; converting a termination to a resignation; excluding a pending worker's compensation claim or lien; tax treatments and characterization; liens by former counsel or treating physicians; all payees and where applicable, all relevant tax identification numbers; legal description of all real property which may need to be identified; and the like. Consult with your client's accounting department or CPA and be prepared to negotiate pivotal tax issues that may be important to either side. Consult with the Human Resources Department to find out the possible ways to handle sealing personnel records, changing a termination to a voluntary resignation, limits on re-hiring, etc.

In most instances, litigators are wise to err on the side of including all conceivable nonmonetary terms, with an open-minded view towards negotiating them at key intervals to create some real concessions on those terms that are not critical to your clients. Those concessions may buy you valuable reciprocity in the negotiation, and should not be discounted for their value, even though they are typically nonmonetary. Moreover, they may jumpstart the momentum for reaching accord on minor terms, paving the way to the ultimate settlement of the case.

Another concrete advantage to bringing a template of the long form agreement is that, as the negotiation and the mediation wears on, participants become anxious to complete it, and sometimes become careless or forget important terms. It is so much harder to reinsert these forgotten terms once the case has been settled!

One issue that also arises with some degree of regularity is releasing all liens, whether formally asserted or not, before a case is settled. If the lawyers do not know of the liens during the negotiation, getting them released can be a hassle or at least a delay after the agreement has been signed. Best practice would suggest that lawyers be prepared to secure releases or satisfy all liens where applicable before the mediation hearing.

Be Prepared to Eliminate the Need to Challenge the Agreement

The opinion in *Fair v. Bakhtiari*, 40 Cal. 4th 189 (2006), suggests "magic language" which must be included in every mediated agreement to ensure its enforceability. That language is easily remembered as the old advertising slogan, "Where's the BEEF?" Always include language that states that the matter is "binding, effective on a particular date, enforceable and final." Even if you intend to prepare a more final agreement, this language will protect your right to enforce the short form agreement of the terms even if the proposed terms are never executed in a superseding long-form agreement.

The obvious way to avoid a challenge by your client or adversary is to ensure that all parties participate voluntarily and are not coerced into agreeing upon a deal which they may later second-guess. In *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th 536 (2007), the California Supreme Court specifically addressed the voluntary nature of mediation as follows: "even after a case has been ordered to mediation, the mediator must inform the parties that participation in mediation is completely voluntary, refrain from coercing a party to continue its participation in the mediation and respect the right of each party to decide the extent of its participation or withdraw from the mediation." *Id.* at 118 (citing Cal. R. Ct. 3.853).

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Minor Exceptions to the Absolute Confidentiality Privilege

Very few exceptions to the absolute privilege of all things related to mediation exist in recent case law. In Olam, the court allowed testimony of the mediator (who was, in that case, court appointed) to establish that, contrary to their later assertion, the parties were competent to sign the settlement agreement after a long, arduous day of negotiation. His testimony was allowed, but the agreement was still enforced, not set aside. *See Olam*, 68 F. Supp. 2d. at 1146-51.

Then in *Molina v Lexmark Int'l, Inc.*, 77 Fed. R. Evid. Serv. 905 (C.D. Cal. 2008), Judge Margaret Morrow allowed testimony about the mediation—not to enforce or set aside an agreement, but to help the court determine whether the amount in controversy met the jurisdictional requirements to place the matter in the United States District Court.

Finally, in *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (1998), the court found that the confidentiality privilege under Evidence Code section 1119 extended even to a juvenile delinquency proceeding, though for public policy reasons ultimately held that the privilege must yield "when necessary to ensure a minor's constitutional right to effective cross-examination." *Id.* at 160-61.

Otherwise, recent case law has disallowed evidence of any communication within mediation either to support setting aside a mediated agreement (as in *Facebook*) or to substantiate malpractice or breach of fiduciary duty (as in *Cassel* and *Wimsatt*). In other words, none of the participants can later rely upon extrinsic evidence to show that a mediated agreement should be set aside. They are, in effect "super contracts" that cannot be later challenged through any evidence of anything that occurred before, during or after the mediation.

You Can Still Win your Client's Peace and Admiration Through Mediation

Mediators know that we partner with our litigator clients every day to ensure that your clients are also satisfied with the outcome of the mediation. You can achieve that by carefully examining issues like indemnity agreements, nonmonetary demands or concessions, the legal competence of the representatives present to sign the agreement and your client's expectations before arriving and throughout the mediation hearing.

You can demonstrate your preparedness by bringing a long-form proposed agreement, making sure that the right signatories are present and remain throughout the day and reviewing all of the critical evidence which may be necessary to close the case. By this, I am not only referring to the evidence upon which you would rely at trial, but all of the necessary documentation which may be referenced in the ultimate settlement agreement as well.

Once you have carefully evaluated the range of settlement with your client, the mediator and the other side, you will be ready to fully engage in a settlement negotiation that can lead to a binding, enforceable, effective and final settlement agreement. That is a good thing, since it is not going to be easily set aside. ■

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