

Assuring Durable Mediation Settlement Agreements

By
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The parties have put in hours and hours of emotional stress and strain in the mediation. They have negotiated in earnest. They have made concessions beyond their expectations to achieve a resolution. They have come to grips with letting go of their conflict. In many cases they are paying the mediator for a process that yields finality.

The parties *expect* finality and finality comes in the form of a lasting written settlement agreement.

To me, a durable agreement is one that is enforceable. Under California law, there are at least two issues for enforceability:

One issue is whether or not the written agreement contains certain magic language suggested by Evidence Code § 1123(b). See, Fair v. Bakhtiari (2007) 40 Cal.4th 189, 51 Cal.Rptr.3d 871 [handwritten skeletal settlement memorandum held unenforceable without a direct statement to the effect that the settlement is “enforceable or binding or words to that effect”].

Another issue is whether the agreement is admissible for enforcement purposes in light of the provisions of Evidence Code §§ 1119(b) and 1123(a) [writings prepared in the course of mediation are inadmissible unless they state that they are admissible].

Inasmuch as I believe that the mediator has the responsibility to insure the integrity of the process, I believe that the mediator also has the responsibility to help meet the parties’ expectations of finality.

I discuss with the lawyers drafting the agreement the inclusion of language to this effect: “This agreement is final, binding, enforceable, and admissible for purposes of enforcement under California Code of Civil Procedure section 664.6 or any other law.”

Because it helps both (or all) sides to secure that for which they have bargained – whether it is a release and dismissal or the receipt of money or whatever – I believe this suggestion is consistent with the principle of impartiality and the self-determined outcome.

In a multitude of mediations where this suggestion has been made, nearly every lawyer has appreciated the insight. To date, only one lawyer has objected.

The objection made me think of this question: Is it improper or unwise to make the suggestion at all?

This is a tough question, and many disagree about the answer. See, Cal. Rules of Court, Rule 3.857(h) [mediator may present possible settlement agreement terms for

discussion]; see also, Effective Use of ADR in California (C.E.B. 2007) § 12.34 [suggesting completing a Memorandum of Understanding in the presence of a mediator so that the mediator can advise of needed terms]; but see cautionary note following § 12.34 [some mediators worry that this constitutes the practice of law].

For me, the ultimate question is whether the mediator, perceived as an expert to whom the parties come for finality, should take responsibility to assure a durable agreement if an agreement is reached. I believe the mediator should; the parties to the mediation have bargained for a dispute resolution process that is not only procedurally fair, which is the province of the mediator, but yields finality.

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