



Where's the BEEF?

If you mediate, don't forget to add the BEEF to your settlement agreement.

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Like the old hamburger stand advertisement, the parties came up empty in the recent case of *R. Thomas Fair v. Karl E. Bakhtiari, et al.* (2006) Supreme Court of California, S129220, when the Court found their written settlement agreement entered into during a mediation was non-binding and unenforceable. Even though it was carefully "sandwiched" in a writing which was subject to enforcement pursuant to an arbitration clause, the Court found it did not comply with Evidence Code section 1123 and refused to enforce the settlement.



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So, be sure you *BEEF* up your settlement agreement when you settle your case during mediation!

At the conclusion of a mediation, counsel must remember not only the

rules of evidence, but the rules of court, the judge's particular idiosyncratic rules, names, dates and be ever mindful of possible sabotage by opposing counsel. Yet this is not enough: There is one more rule that counsel should commit to memory to be certain their settlement agreements are enforceable and will not come unraveled. That rule is to remember to include the *BEEF* in every mediated settlement agreement.

In the course of mediation, trial counsel may become complacent in the informality of the setting, the lack of rules of evidence and the relaxed atmosphere that bears little resemblance to other courtroom decorum. What makes it even more challenging, is that many mediators will carefully and specifically refrain from preparing the terms of the settlement in writing, offering the parties the chance to fully articulate all terms they believe are necessary to memorialize an enforceable settlement after the agreement is finally negotiated in principal. Many attorney/mediators are concerned that they should not take the legal liability or responsibility for preparing the settlement agreement, as that

arguably constitutes the practice of law.

Especially after a long and difficult negotiation, counsel and their clients are often ready to leave the mediation hearing with the most basic of writings, subject to a further, more fully drafted and considered document to follow. This is precisely the moment when it is most critical to be ever vigilant in protecting your clients and ensuring that the settlement agreement entered into is final and binding.

Documentation counts

Documentation counts in litigation, and the settlement agreement drafted at a mediation hearing is no different. After going to all of the trouble of drafting, filing and serving a complaint, or responding to one, *and then* engaging in months of discovery disputes and law and motion, *and then* finding yourselves sitting in mediation, finally coming to terms with your adversary, you want to have a settlement agreement that is binding and enforceable.

To do this, you must add *BEEF* to the basic ingredients for a satisfying mediation outcome.

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R. Thomas Fair v. Karl E. Bakhtiari, et al

That is not what happened recently in *R. Thomas Fair v. Karl E. Bakhtiari, et al*, *supra*.

In *Fair*, plaintiff sued his former business partner and ex-wife, claiming that they had excluded him from certain real estate syndications and denied him compensation, misappropriated profits and otherwise engaged in financial misconduct. He also accused one of the defendants of physically assaulting him on more than one occasion. After suit was filed and defendants had responded and engaged in discovery, the parties decided to mediate their dispute. The mediation occurred over the course of two days and at the end of the second day, plaintiff's counsel handwrote a memorandum reflecting the settlement terms that set forth who was to pay whom what, when, etc.; that mutual releases would be signed; and that the parties would bear their own attorneys' fees and costs. The memorandum's last term provided that "any and all disputes subject to JAMS arbitration rules."

Thereafter, the parties reported back to the Superior Court and filed a Case Management Report indicating that the matter had been settled and that they were in the process of drafting a settlement agreement. Needless to say, the parties could not agree upon final language for a settlement agreement.

Pursuant to the handwritten memorandum drafted at the mediation, plaintiff's counsel requested that defendants submit to arbitration with JAMS, but defendants refused. When plaintiff subsequently moved to compel arbitration and attached the handwritten memorandum that was created at the mediation, the defendants objected to the introduction of the memorandum as evidence of the parties intent, on the grounds that it constituted evidence arising out of protected mediation discussions. The trial court found that the requirements of Evidence Code section 1123 were not met, it excluded the memorandum, and denied plaintiff's motion to compel arbitration.

Evidence Code section 1123 provides in pertinent part as follows:

A written settlement agreement prepared in the course of, or pursuant to, mediation, is not made inadmissible, or protected from disclosure, if the agreement is signed by the settling parties and any of the following conditions are satisfied: (b) the agreement provides that it is enforceable or binding or words to that effect. (Emphasis added)

On appeal, the Court of Appeal reversed the trial court, finding that the provision in the handwritten memorandum which provided "any and all disputes subject to JAMS arbitration rules" meant that the parties intended the settlement terms to "be enforceable or binding." Thus, the Court held that the handwritten memorandum under Section 1123(b) included "words to that effect" and was admissible.

The California Supreme Court granted defendants' petition for review and reversed the Court of Appeal. The Supreme Court held that:

To satisfy section 1123(b), a settlement agreement must include a statement that it is "enforceable" or "binding", or declaration in other terms with the same meaning. The statute leaves room for various formulations. However, arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically negotiated in settlement discussions do not qualify an agreement for admission under section 1123(b).

The court found that a sentence simply stating that any future disputes would be submitted to arbitration did not constitute words to the effect that the agreement was enforceable and binding. Thus, plaintiff was unable to compel arbitration pursuant to the written memorandum. The matter was remanded to the trial court, and the case remained unresolved.

The lesson of *Fair* is to *BEEF* up your mediation settlement agreements. Although no magic language is required for a mediated settlement agreement to be

enforceable under Evidence Code section 1123(a), *BEEF* is a helpful way to remember what you should consider when reviewing your final settlement agreement: **B**inding **E**ffective **E**nforceable **F**inal.

It may be overkill, but it should do the trick if your mediated settlement agreement recited language to the effect that:

This mediation settlement agreement is intended to be binding and enforceable and is effective this ___ day of ___, 2007, and represents the final agreement between the parties to this dispute, and each of them, pursuant to Evidence Code section 1123.

The mediation process offers a unique and sometimes singular opportunity to bring the parties to terms, resolve their disputes and settle the case. It is a good idea to take full advantage of that opportunity and clearly set forth the terms of the settlement agreement by concluding with unambiguous language ensuring that the agreement is enforceable pursuant to Section 1123. Under the *Fair* case, best practice suggests you always remember to add the *BEEF*.

It can make the difference between a satisfied client or an empty sandwich, and save your client much time, energy and money if enforcement of the settlement agreement becomes necessary.

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