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## WHITE PAPER ALERT

Evidence – Admissibility  
Mediation Settlement Agreement

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Fair v. Bakhtiari

**California Supreme Court – December 14, 2006**

California Evidence Code section 1119(b) makes writings prepared for, or out of, mediation generally inadmissible in civil proceedings. A settlement agreement signed during mediation is exempt from this rule, but only if the agreement's wording reflects that the agreement is binding or enforceable. (Cal. Evidence Code section 1123(b)). This case examines the type of language necessary to make a settlement agreement admissible and binding under Evidence Code Section 1123.

Fair sued Bakhtiari, and others, alleging that the Defendants wrongfully excluded him from real estate deals, denied him compensation and committed financial misconduct. The case proceeded to mediation. At the end of the second day of mediation, Plaintiff's counsel drafted a handwritten memorandum recording settlement terms. The memorandum was signed by the parties and the mediator. It included the provision: "Any and all disputes subject to JAMS arbitration rules."

Later, the parties filed case management statements informing the court the case settled at mediation. The parties also exchanged a formalized settlement and release agreement. Before the release was signed, a dispute arose as to the scope of the settlement. The parties attended the case management conference and advised the court there was a settlement, but details needed to be worked out. The parties were thereafter unable to finalize the settlement.

Defendants requested the case be put back on the trial calendar. Plaintiff moved to compel arbitration, contending the parties were bound by the memorandum signed at the mediation. Defendants opposed the motion and objected to admission of the memorandum, pursuant to Evidence Code section 1119(b). Plaintiff claimed the memorandum was an admissible settlement agreement pursuant to Evidence Code section 1123(b).

The trial court excluded the memorandum and denied the motion to compel arbitration. The Court of Appeal reversed, deciding the arbitration provision could only mean that the parties intended the settlement reached at mediation be binding. The California Supreme Court reversed the Court of Appeal.

In its ruling, the Supreme Court reiterated that mediation confidentiality provisions were enacted to encourage mediation by permitting parties to frankly exchange views without fear of disclosure in later proceedings. Evidence Code Section 1123 is an exception to the general rule of confidentiality which requires the agreement state that it is enforceable “or words to that effect.” The Court of Appeal felt that the arbitration provision evidenced the parties intent to be bound. The Supreme Court disagreed. The court held that while parties may choose their own wording in an agreement, a settlement agreement must include a statement that it is “enforceable” or “binding,” or a declaration in other terms with the same meaning. Arbitration clauses or terms contemplating remedies for breach are not sufficient.

## COMMENT

This case makes clear that an agreement signed at mediation must contain language that the settlement is binding or enforceable. I would suggest indicating it is enforceable under CCP Section 664.6. Without such language, the agreement is not deemed binding and will not be admissible under California Evidence Code section 1123(b) if a dispute later arises.

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