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California's Opportunity to Create Historical Precedent Regarding a Mediated Settlement Agreement's Effect on Mediation Confidentiality and Arbitrability

Susan Nauss Exon*

I. INTRODUCTION

Mediation and arbitration are individual, separate dispute resolution processes. Yet circumstances may allow them to become intermingled such as when a mediated settlement agreement includes a provision to arbitrate any future disputes. Problems may arise when parties cannot finalize the mediated settlement agreement as they attempt to memorialize it in a formal writing. Mediation confidentiality can exacerbate the problems. This scenario was addressed by the California Court of Appeal for the First District in *Fair v. Bakhtiari*.¹

Fair v. Bakhtiari involved two main issues relating to a mediated written agreement signed by the parties and mediator, called "Settlement Terms" (Settlement Terms Document). The first issue was whether the Settlement Terms Document complied with a statutory exception to mediation confidentiality of written settlement agreements, and therefore, was discoverable.² Specifically, could the wording of the arbitration clause within the agreement be construed to mean that the Settlement Terms Document was binding or enforceable pursuant to California Evidence Code section 1123(b)?³ The second issue examined whether the arbitration clause of the Settlement Terms Document, stating "all

* © 2005 Susan Nauss Exon, Associate Professor of Law, University of La Verne College of Law; J.D. 1989, University of Wyoming College of Law. I owe much appreciation and gratitude to Jack McCrory for encouraging me to write this article and for the countless hours that he spent reviewing and discussing earlier drafts with me. I also gratefully acknowledge Juanda Lowder Daniel for her helpful comments.

1. 19 Cal. Rptr. 3d 591 (Ct. App. 2004).

2. CAL. EVID. CODE § 1123 (West 2005) sets forth exceptions to mediation confidentiality when a settlement agreement is involved.

3. CAL. EVID. CODE § 1123(b) (West 2005) provides that a written mediated settlement agreement that is signed by all parties may be admissible, and hence not subject to mediation confidentiality, when it "provides that it is enforceable or binding or words to that effect."

future disputes subject to JAMS arbitration,” constituted a valid agreement to arbitrate. The court of appeal responded affirmatively to both issues.

On January 12, 2005, the California Supreme Court granted review of *Fair* and depublished the court of appeal’s opinion.⁴ The forthcoming decision will have important implications for dispute resolution professionals because the California Supreme Court will have an opportunity to construe California Evidence Code section 1123 for the first time. The decision should provide helpful guidance regarding the confidentiality of mediated settlement agreements and the impact that such agreements have on other dispute resolution processes such as arbitration. The confidentiality issues raised in *Fair* are so critical for dispute resolution professionals that it is necessary to call attention to them now rather than wait a year or more for the California Supreme Court to speak.

Confidentiality serves as a cornerstone of mediation. The public policy underlying confidentiality is the promotion of candid communications between disputing parties.⁵ As explained in this article, mediation confidentiality affects more than just communication. It affects other important mediation values, such as party self-determination and mediator impartiality. Mediation confidentiality affects parties’ ability to enforce their mediated agreements. Finally, confidentiality affects multiple dispute resolution processes, as seen by the interrelated nature of mediation and arbitration in *Fair*.

The purpose of this article is to summarize, analyze, and critique the two issues of *Fair* with an emphasis on mediation confidentiality. Part II of this article examines background legal authorities that surround the issues of the principal case, including the interpretation of settlement agreements, mediation confidentiality, and the validity of arbitration clauses. Part III follows with a summary of the *Fair* court of appeal’s factual description and legal analysis. Part IV then sets forth a complete analysis and critique of the *Fair* issues.

As discussed in Part IV, the court of appeal’s holding was correct. Despite the correct result, this author offers suggestions for a more thorough analysis. In particular, the sequence of the analysis could be improved and the court could have addressed the tension between mediation confidentiality and the public policy implications of the enforceability of settlement agreements. Additionally, the court of appeal should not have depublished the second issue, because it has precedential value.

Of paramount concern, however, is the effect of the court’s finding that an agreement to arbitrate was found within the Settlement Terms Document. The court’s analysis cannot stop with that finding because an arbitrator needs authority to act if an arbitration agreement is found to exist. An arbitrator will not be

4. *Fair v. Bakhtiari*, 23 Cal. Rptr. 3d 295 (Cal. Jan. 12, 2005).

5. See *infra* notes 22 - 23 and accompanying text.

able to examine communications and evidence offered at the mediation due to California's narrow interpretation of its mediation confidentiality statutes.

The solution, then, is to treat mediated settlement agreements different from other aspects of the mediation process; Evidence Code section 1123 seeks to do this. However, section 1123 does not go far enough to aid parties who attempt to enforce mediated settlement agreements. If mediation parties are willing to sign a final agreement, they should be able to rely on general contract law principles to prove the intent of the agreement. The parties should be able to enforce their mediated settlement agreement by piercing mediation confidentiality. Without the signed settlement agreement, however, the confidentiality of mediations should remain intact.

The California Supreme Court has an opportunity to impact the field of dispute resolution in a significant manner. The *Fair* appeal provides the first opportunity for the Supreme Court to interpret Evidence Code section 1123 and set forth a sound standard for confidentiality of mediated settlement agreements. The Supreme Court's opinion will affect not only mediations, but also arbitrations inasmuch as the two processes become interrelated through the execution of a mediated settlement agreement.

II. BACKGROUND LEGAL AUTHORITY

A. *What Constitutes a Valid Settlement Agreement*

California law treats settlement agreements as contracts; legal principles that apply to contracts, such as "reasonably certain" and "definite" terms, apply equally to settlement agreements.⁶ The parties to a contract must mutually consent to its terms.⁷ The existence of mutual intention should be determined as of "the time of contracting . . ." ⁸ Courts look at objective criteria rather than subjective criteria when determining whether parties had mutual consent to contract.⁹ This objective test is "what the outward manifestations of consent would

6. *Weddington Prods., Inc. v. Flick*, 71 Cal. Rptr. 2d 265, 276-77 (Ct. App. 1998) (noting such contract provisions as the requirement for "reasonably certain" and "sufficiently definite" terms).

7. CAL. CIV. CODE §§ 1550, 1565 (West 2005).

8. CAL. CIV. CODE § 1636 (West 2005).

9. *Weddington Prods., Inc.*, 71 Cal. Rptr. 2d at 277.

lead a reasonable person to believe.”¹⁰ In making such determinations, courts focus primarily on the acts of the parties.¹¹

Courts take varying positions when analyzing negotiated contracts that have not yet been formally signed. When the contract itself as well as other evidence shows that the contract becomes operative only when signed by the parties, the failure to sign it means that no binding contract is created.¹² If the parties orally agree to all terms of a proposed written contract, the oral contract may constitute mutual assent, and therefore, the failure to sign a formalized written contract will not destroy the binding effect of the oral contract.¹³ Moreover, when parties enter into an initial agreement that contemplates subsequent documentation, the initial agreement remains valid even though the parties fail to follow through with the documentation in good faith.¹⁴

Because settlement is considered a critical process, parties must have full knowledge and consent to the settlement terms.¹⁵ A written settlement agreement, including party signatures, tends to illustrate “reflection and deliberate assent.”¹⁶

10. Meyer v. Benko, 127 Cal. Rptr. 846, 848 (Ct. App. 1976).

11. *Id.*

12. Beck v. American Health Group Intern., Inc., 260 Cal. Rptr. 237, 241-42 (Ct. App. 1989) (holding that a signed letter did not constitute a binding contract because it merely outlined a proposed future agreement and served as evidence that no binding contract would be created until drafted and approved by all parties); see Banner Entm't, Inc. v. Superior Court, 72 Cal. Rptr. 2d 598, 603 (Ct. App. 1998).

13. Columbia Pictures Corp. v. DeToth, 87 Cal. App. 2d 620, 629 (Ct. App. 1948) (affirming the trial court's holding of the binding effect of an oral agreement of employment as a director for a motion picture company even though never formally reduced to a writing because the writing was not a condition precedent to the validity of the oral agreement); see *Banner Entm't, Inc.*, 72 Cal. Rptr. 2d at 603-04.

14. See *ERSA GRAE Corp. v. Fluor Corp.*, 2 Cal. Rptr. 2d 288, 295 n.3 (Ct. App. 1991) (discussing a situation where parties agreed to initial terms to create a valid, enforceable agreement even though a subsequent counteroffer contemplated further documentation regarding additional terms).

15. *Weddington Prods., Inc. v. Flick*, 71 Cal. Rptr. 2d 265, 276 (Ct. App. 1998) (discussing the serious nature of settlement agreements within the summary procedures of Code of Civil Procedure section 664.6).

16. *Id.* (discussing the serious nature of settlement agreements within the summary procedures of Code of Civil Procedure section 664.6).

B. Mediation Confidentiality

1. Purpose and Intent Regarding Mediation Confidentiality

Confidentiality forms a fundamental value of mediations. This is evidenced by the Model Standards of Conduct for Mediators,¹⁷ the Uniform Mediation Act,¹⁸ and various codes and written standards of conduct for mediators that are being promulgated throughout the United States.¹⁹ Some states incorporate confidentiality standards into statutes, court rules or rules of evidence.²⁰ No uniform confidentiality standard exists, however. As a result, the coverage of confidentiality may be narrow or broad, limited or extensive, depending on the jurisdiction. One scholar has delineated the types of mediation confidentiality into five distinct categories: 1) complete confidentiality; 2) narrow exception for memorialized settlements (which California and the Uniform Mediation Act follow); 3) case-by-case approach; 4) broad exception for settlement enforcement; and 5) no statutory coverage.²¹

Confidentiality is vital to mediations for several reasons. First, confidentiality helps foster open communication by the disputants. For example, if the disputants cannot rely on the confidential nature of the proceedings, they may feel constrained to lay out the cards of their dispute or make statements that might be construed as admissions. Most courts uphold the confidentiality of mediations for public policy reasons.²² Courts, legislative bodies, and scholars

17. Model Standards of Conduct for Mediators, Part V, available at <http://www.abanet.org/dispute/modelstandardsof-conduct.doc> (last visited Mar. 12, 2005).

18. Uniform Mediation Act, National Conference of Commissioners on Uniform State Laws (2003), available at <http://www.law.upenn.edu/bl/ulc/mediat/2003finaldraft.htm>.

19. See, e.g., Colorado Dispute Resolution Act, CRS § 13-22-301; Mediation Council of Illinois Professional Standards of Practice for Mediators, Standard II (April 2003), available at <http://www.mediationcouncilof-illinois.org/standardspractice.htm>; Mississippi Court Annexed Mediation Rules for Civil Litigation, Rule VII (June 27, 2002), available at <http://www.mssc.state.ms.us/rules>.

20. See, e.g., CAL. EVID. CODE § 1119 (West 2005); California's Ethical Standards for Mediators, Part 1, Rule 1620.4, available at <http://www.mediate.com/articles/calmedrules.cfm> (Jan. 1, 2003); Georgia Commission on Dispute Resolution: Ethical Standards, Part VII, available at <http://www.ganet.org/gadr/appendxc.html> (Sept. 20, 2000); Rules Adopted by the Kansas Supreme Court Relating to Mediation, Rule 901(b)(1) (July 1, 1996), available at <http://www.kscourts.org/ctruls/adrruls.htm>; see also *supra* note 19.

21. See Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 45-51 (2001).

22. *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, 25 P.3d 1117, 1126 (Cal. 2001); *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158, 160-61 (Ct. App. 1994).

uniformly agree that the mediation process would be eroded but for its confidential nature.²³

Second, if mediation confidentiality promotes candid discussion among participants, it may actually reinforce and strengthen the concept of party self-determination. Party self-determination is seen as a “fundamental principle of mediation”²⁴ because parties decide whether or not to enter into a consensual settlement. As confidentiality vies for supremacy among all of the mediation values and becomes predictable, it will actually encourage party autonomy.

A third important function of confidentiality relates to the mediator’s role as a neutral and impartial facilitator. A mediator’s neutrality relates to her ability to be objective while facilitating communication among negotiating parties.²⁵ Impartiality relates to a mediator’s ability to serve all participants concurrently without exhibiting partiality or bias based on any party’s background, personal characteristics or performance during the mediation.²⁶ Some scholars refer to the terms, neutrality and impartiality, interchangeably.²⁷ Others equate neutrality to the mediation process, including the outcome, and equate impartiality to the relationship between the mediator and participants.²⁸ No matter how the terms are interpreted, a mediator must be both neutral and impartial. A mediator may infringe on these important qualities if she subsequently testifies as to what transpired during a mediated session.²⁹ In such a situation, the participants also may lose confidence in the mediator’s role.³⁰

23. Deason, *supra* note 21, at 36.

24. PHYLLIS BERNARD AND BRYANT GARTH, *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* 73 (American Bar Association 2002).

25. See JAMES J. ALFINI *et al.*, *MEDIATION THEORY AND PRACTICE* 12 (2001 LEXIS Publishing).

26. BERNARD & GARTH, *supra* note 24, at 68.

27. See Carol L. Izumi & Homer C. La Rue, *Symposium: Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 83-87 (2003) (using the terms “neutrality” and “impartiality” interchangeably as the authors discuss the standard of conduct for mediator impartiality).

28. Allison Balc, *Making it Work at Work: Mediation’s Impact on Employee/Employer Relationships and Mediator Neutrality*, 2 PEPP. DISP. RESOL. L. J. 241, 254-55 (2002) (discussing the potential impact on a mediator’s neutrality based on such issues as funding sources, professional ties or previous relationships); Karen A. Zerhusen, *Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator*, 81 KY. L.J. 1165, 1169-70 (1993) (noting that a mediator’s impartiality applies to all aspects of the mediation process, from the arrangement of furniture to the way the mediator poses positioning statements).

29. While the problem of subsequent mediator testimony may take place in some jurisdictions, it does not pose a problem for mediators in California. California mediators are specifically precluded from testifying in subsequent civil proceedings regarding statements or conduct occurring at or in conjunction with a mediation, “except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under” Code of Civil Procedure section 170.1(a)(1) or (a)(6). CAL. EVID. CODE § 703.5 (2005).

30. Deason, *supra* note 21, at 37.

Inasmuch as confidentiality poses a central value of mediations, it may compete with other essential values. Many mediations, for example, have a goal to reach settlement, especially when connected to a court proceeding. The tension between confidentiality and enforceability of a settlement may infringe upon one another because confidentiality rules may prevent one party from attempting to show that an enforceable agreement was created.³¹ This tension is a central issue of *Fair v. Bakhtiari*.

Although confidentiality may foster party autonomy, the exceptions to mediation confidentiality may begin to undermine party autonomy. For example, if parties cannot be assured of predictability of mediation confidentiality, including its exceptions, they may hesitate to engage in candid discussions or participate in the mediation process at all.

Finally, if confidentiality principles are allowed to erode the mediation process, the overall struggle between various aspects of mediations may have far reaching effects. Hence, confidentiality may adversely affect society's view of mediations and settlement agreements in general. It may taint the whole notion of the credibility of an individual's word.³²

The public policy aspects of mediation confidentiality have far reaching implications. As discussed herein, confidentiality promotes candid discussions that promote successful resolution of mediated disputes. If one is allowed to undermine this critical mediation value, however, severe disruptions may occur to mediations and their value in the field of dispute resolution.

2. California's Mediation Confidentiality Provisions

California has enacted statutes to govern mediation confidentiality.³³ In particular, California Evidence Code section 1119 specifies that written and oral communications made during the mediation process are deemed confidential if

31. See *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158 (Ct. App. 1994) (confronting the tension between mediation confidentiality and enforcement of a mediated settlement agreement and holding that evidence of statements made during a mediation are not admissible in a subsequent court proceeding to prove the existence of a mediated settlement agreement); see also *Deason*, *supra* note 21, at 37.

32. *Deason*, *supra* note 21, at 38 ("When a party to a mediation alleges that she did not agree to a settlement, or challenges the mediated agreement for fraud, duress, or lack of authority, she essentially claims that her consent was not genuine as understood in contract law. To the extent contract principles embody society's view of appropriate consent, applying them to avoid unjust enforcement of agreements can be crucial to maintaining party autonomy and keeping informed consent at the heart of mediation.").

33. CAL. EVID. CODE §§ 1115 - 1128 (West 2005).

made within specified parameters.³⁴ Section 1119 became effective in 1997 to take the place of former section 1152(a). Section 1119(a) applies to evidence offered during a mediation. Section 1119(b) applies to written communications. Finally, section 1119(c) applies to settlement negotiations and discussions made during a mediation. Subparagraphs (a) and (b) of section 1119 specifically extend the confidentiality provisions to subsequent civil proceedings such as arbitration, administrative adjudication and other civil actions.³⁵

The legislative intent behind these provisions of the Evidence Code is “to promote ‘candid and informal exchange regarding events in the past . . . This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment in later civil court proceedings and other adjudicatory processes.’”³⁶ Because of the importance of mediation confidentiality, only express legislative exceptions are permitted.³⁷ Waiver of mediation confidentiality cannot be implied.³⁸ These principles are consistent with the maxim of statutory construction, *expression unius est exclusion alterius*, which means that a court cannot expand legislative exemptions unless there is a clear legislative intent to the contrary.³⁹

Thus, in *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.*, the California Supreme Court held that it had no authority to create judicial excep-

34. CAL. EVID. CODE § 1119 (West 2005). That statute provides:

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

35. CAL. EVID. CODE § 1119(a) & (b) (West 2005).

36. *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.*, 25 P.3d 1117, 1126 (Cal. 2001) (quoting Nat. Conf. of Comrs. On U. State Laws, U. Mediation Act (May 2001) § 2, Reports Working Notes, ¶ 1).

37. *Foxgate Homeowners’ Ass’n*, 25 P.3d at 1126 (holding that the court of appeal improperly considered a mediator’s report regarding one party’s attempts to thwart the mediation process and in doing so, had created a judicial exception to confidentiality outside of the provisions of Evidence Code sections 1119 and 1121).

38. See *Eisendrath v. Superior Court*, 134 Cal. Rptr. 2d 716, 724-26 (Ct. App. 2003) (refusing to allow introduction of mediation communications despite petitioner’s declaration regarding conversations between the parties, especially in light of the express waiver provision of Evidence Code section 1122).

39. *Rojas v. Superior Court*, 93 P.3d 260, 270 (Cal. 2004).

tions to Evidence Code section 1119 because the statutory language was “clear and unambiguous.”⁴⁰ A court or other adjudicatory proceeding may not admit or consider evidence of communications made during a mediation.⁴¹ As a result, a mediator violated the confidentiality provisions of section 1119 by filing a report with the court regarding one party’s bad faith tactics during the mediation process. That action violated the plain meaning of the Evidence Code.⁴²

Three years later, the California Supreme Court addressed mediation confidentiality again. This time the court faced the difficult question of whether or not to admit photographs in a lawsuit when the photographs had been prepared for a previous mediation and no other evidence existed to show the damaged property. Again, the Supreme Court took a hard line in favor of mediation confidentiality, noting that it was “essential to effective mediation.”⁴³ The court also held that the attorney work product privilege, even when considered as a qualified privilege, did not apply to section 1119.⁴⁴ The court was not willing to extend the legislative purpose of the mediation confidentiality statutes, implying that if the legislature wanted the work product doctrine to apply to a mediation, it would have incorporated such exception into section 1119.⁴⁵

The California Supreme Court asserts a very strict interpretation of the mediation confidentiality statutes, refusing to expand beyond the legislature’s findings. The court’s practice is particularly apparent as it strictly construes the legislative exceptions to mediation confidentiality. For example, parties may expressly agree, whether orally or in writing, to disclose a “communication, document or writing” that relates to a mediation.⁴⁶ Legislation also permits discovery of protected communications and writings if they are prepared by less

40. *Foxgate Homeowners’ Ass’n*, 1117 P.3d at 1126-29.

41. *Id.* at 1129.

42. *Id.* at 1128.

43. *Rojas*, 93 P.3d at 269. The *Rojas* court specifically held that “the Court of Appeals erred in holding that photographs, videotapes, witness statements, and ‘raw test data’ from physical samples collected at the complex—such as reports describing the existence or amount of mold spores in a sample—that were ‘prepared for the purpose of, in the course of, or pursuant to, [the] mediation’ in the underlying action are not protected under section 1119.”

44. *Id.* at 270.

45. *Id.*

46. CAL. EVID. CODE § 1122(a)(1) (West 2005) (“A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.”).

than all of the mediation participants, the parties expressly agree to the disclosure, and the disclosure would not reveal admissions or communications said or done during the mediation.⁴⁷

The California Legislature has specifically addressed settlement agreements and created limited exceptions to the confidentiality provisions of section 1119.⁴⁸ If any of the following four provisions is met, a signed settlement agreement entered into pursuant to, or during the course of, a mediation may be discoverable:

- (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- (b) The agreement provides that it is enforceable or binding or words to that effect.
- (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
- (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.⁴⁹

Even if a mediated settlement agreement fits into one of the four categories of section 1123, it may be deemed inadmissible based on some other authority.⁵⁰ As a result, section 1123 should not be read to the exclusion of other evidentiary principles.

C. What Constitutes an Agreement to Arbitrate

The principal case involves a mediated settlement agreement and an arbitration clause within that agreement. It is necessary, therefore, to address general contract law principles that govern both types of agreements. As noted in Part II.A. of this article, California law interprets settlement agreements based on contract law principles.⁵¹

47. CAL. EVID. CODE § 1122(a)(2) (2005) (“A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.”).

48. CAL. EVID. CODE § 1123 (West 2005).

49. *Id.*

50. *See* Law Review Commission Comments to CAL. EVID. CODE § 1123 (West 2005).

51. *See supra* notes 6 - 16 and accompanying text.

California's Arbitration Act treats arbitration agreements similarly.⁵² For example, a written agreement to submit a specified controversy to arbitration "is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."⁵³ In other words, general contract law provisions control determinations regarding the validity of arbitration agreements,⁵⁴ including party intent.⁵⁵

The petitioner has the burden to prove the existence of a valid arbitration agreement; the party opposing the petition must show by a preponderance of evidence facts necessary for a defense to enforcement.⁵⁶ California's legislation satisfies federal law, and in particular the Federal Arbitration Act.⁵⁷

California courts analyze the enforceability of arbitration agreements by focusing on whether they implicate public or private rights.⁵⁸ For example, public rights include statutory rights and allegations of wrongful employment termination in violation of public policy (otherwise known as *Tameny* claims).⁵⁹ Five requirements must be satisfied, although a detailed explanation is beyond the scope of this article since public rights are not implicated in *Fair v. Bakhtiari*.⁶⁰ With respect to private rights, courts analyze arbitration agreements based on conscionability standards.⁶¹

52. See CAL. CIV. PROC. CODE § 1280 *et seq.* (West 2005).

53. CAL. CIV. PROC. CODE § 1281 (West 2005).

54. *Platt Pacific, Inc. v. Andelson*, 862 P.2d 158, 161 (Cal. 1993) (involving agreement to engage in private arbitration); *Blake v. Ecker*, 113 Cal. Rptr. 422, 432 (Ct. App. 2001) ("[U]nder California law, as under federal law, an arbitration agreement may only be invalidated for the same reasons as other contracts.") (quoting *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 679 (Cal. 2000)).

55. *Crowell v. Downey Community Hospital Foundation*, 115 Cal. Rptr. 2d 810, 813 (Ct. App. 2002) (noting that contract law provisions are used to give effect to the parties' intentions regarding arbitration agreements).

56. *Banner Entm't, Inc. v. Superior Court*, 72 Cal. Rptr. 2d 598, 602 (Ct. App. 1998).

57. 9 U.S.C. §§ 1-6 (2000).

58. *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 432 (Ct. App. 2004).

59. *Abramson*, 9 Cal. Rptr. 3d at 433 (referring to *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980)).

60. Agreements to arbitrate public policy rights must satisfy five requirements: 1) provide for discovery; 2) require a written decision allowing limited judicial review; 3) permit types of relief available in court; 4) limit the employees' forum costs; and 5) provide for a neutral arbitrator. *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000); *Abramson*, 9 Cal. Rptr. 3d at 433-44.

61. *Abramson*, 9 Cal. Rptr. 3d at 435.

Thus, courts may refuse to enforce arbitration provisions that are “unconscionable or contrary to public policy.”⁶² The notion of unconscionability is both procedural and substantive,⁶³ and California courts must make a finding of both before they will refuse to compel arbitration.⁶⁴ One need not prove procedural and substantive unconscionability to the same degree. If evidence is greater to support one type of unconscionability, less may be needed to establish the other.⁶⁵

Procedural unconscionability focuses on “oppression or surprise due to unequal bargaining power.”⁶⁶ In this context, oppression occurs when there is no “meaningful choice” for, or opportunity to negotiate by, one party.⁶⁷ The surprise element occurs when the arbitration provision is hidden in the agreement by the one who prepared it.⁶⁸ The issue of procedural unconscionability is not dispositive simply because a form contract is used.⁶⁹ An example of a procedurally unconscionable clause is a contract of adhesion whereby a party of superior bargaining power presents the contract on a take-it-or-leave-it basis.⁷⁰ California courts have held as procedurally unconscionable, certain mandatory arbitration clauses in employment contracts because the clause may stand in the way of necessary employment.⁷¹

Courts are less willing to find the same type of pressure for a contract in which economic necessity is not at issue. Hence, in *Crippen v. Central Valley RV Outlet, Inc.*, the court held that an arbitration clause in a contract to purchase a used motor home was not procedurally unconscionable, even when presented on a preprinted form.⁷² Moreover, that arbitration clause was included on a

62. *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 303 (Ct. App. 2004) (quoting *Abramson*, 9 Cal. Rptr. 3d at 432).

63. *Nyulassy*, 16 Cal. Rptr. 3d at 305.

64. *Crippen v. Central Valley RV Outlet, Inc.*, 22 Cal. Rptr. 3d 189, 190 (Ct. App. 2004) (“It is now blackletter law that a motion to compel arbitration must be denied if the arbitration agreement is both procedurally and substantively unconscionable.”) (emphasis in original).

65. *Armendariz*, 6 P.3d at 690; *Crippen*, 22 Cal. Rptr. 3d at 192.

66. *Nyulassy*, 16 Cal. Rptr. 3d at 305 (quoting CAL. CIV. CODE § 1670.5(a) and *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 435-36 (Ct. App. 2004)). In *Abramson*, the court held that an arbitration clause was procedurally unconscionable due to the high degree of oppressiveness because an arbitration agreement was presented on a take it or leave it basis. *Abramson*, 9 Cal. Rptr. 3d at 441-42.

67. *Crippen*, 22 Cal. Rptr. 3d at 193.

68. *Id.*

69. *Id.*

70. See *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 983-84 (Cal. 2003) (involving an employment contract prepared by the employer that necessarily creates economic pressure for a prospective employee who is seeking necessary employment); *Crippen v. Central Valley RV Outlet, Inc.*, 22 Cal. Rptr. 3d 189, at 194 (Ct. App. 2004); *Abramson*, 9 Cal. Rptr. 3d at 441-44.

71. *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 307-12 (Ct. App. 2004); *Little*, 63 P.3d at 983-84.

72. *Crippen*, 22 Cal. Rptr. 3d at 194.

separate page that made it easily identifiable and the plaintiff failed to show any extrinsic evidence to establish the unconscionability.⁷³

Substantive unconscionability focuses on the terms of the agreement⁷⁴ and whether they have an “overly harsh or one sided” result.⁷⁵ The paramount considerations are mutuality and whether the terms of a contract are one-sided.⁷⁶ An arbitration provision, therefore, will be deemed unconscionable where only the weaker party’s issues are subject to arbitration with no reasonable basis for the lack of mutuality.⁷⁷ For example, in *Abramson v. Juniper Networks, Inc.*, the court held that a provision was substantively unconscionable where it required both parties to arbitrate any dispute or controversy arising out of an agreement, subject to the company’s unilateral right to seek injunctive relief regarding specified issues.⁷⁸

One must keep in mind that public policy favors arbitration.⁷⁹ “[D]oubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration.”⁸⁰

Relying on the foregoing authorities, several cases illustrate the tension between the public policy in favor of arbitration and strict adherence to basic contract law. In *Banner Entertainment, Inc. v. Superior Court*, the issue was whether a proposed written agreement was binding on a party who had not yet signed it; the agreement included an arbitration clause.⁸¹ The parties exchanged drafts of a written agreement although they made no comments regarding the arbitration clause. In the meantime, the parties operated pursuant to an oral

73. *Id.* at 193.

74. *Nyulassy*, 16 Cal. Rptr. 3d at 306.

75. *Id.* at 305 (quoting CAL. CIV. CODE § 1670.5(a) and *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 435-36 (Ct. App. 2004)). In *Abramson*, the court held that an arbitration provision was substantively unconscionable because it lacked mutuality. *Abramson*, 9 Cal. Rptr. 3d at 443-44.

76. *Abramson*, 9 Cal. Rptr. 3d at 436.

77. *Id.* at 436-37; compare with *Oakland-Alameda County Coliseum Auth. v. CC Partners*, 124 Cal. Rptr. 2d 363, 369 (Ct. App. 2002) (holding that an arbitration agreement was not unconscionable because it was mutual in all respects, was made by parties of apparently equal bargaining power, and did not appear to be a contract of adhesion).

78. *Abramson*, 9 Cal. Rptr. 3d at 443-44 n3.

79. *Reigelsperger v. Siller*, 23 Cal. Rptr. 3d 249, 253 (Ct. App. 2005) (quoting *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 678 (Cal. 2000)); *Abramson*, 9 Cal. Rptr. 3d at 432; *Nyulassy*, 16 Cal. Rptr. 3d at 303.

80. *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 303 (Ct. App. 2004) (quoting *Ericksen, Arbutnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oaks Street*, 673 P.2d 251, 257 (Cal. 1983)).

81. *Banner Entm't, Inc. v. Superior Court*, 72 Cal. Rptr. 2d 598, 603-04 (Ct. App. 1998).

agreement for limited services. The oral agreement did not address the issue of arbitration. Despite the oral agreement, the court held that the written agreement was never finalized because the parties never had a meeting of the minds regarding the written agreement.⁸² Without mutual consent, an enforceable written contract did not exist. As a result, no evidence existed, oral or written, that the parties agreed to arbitrate any future dispute.⁸³

Similarly, an agreement to agree does not constitute a binding contract.⁸⁴ In *Beck v. American Health Group International, Inc.*,⁸⁵ a hospital sent a letter to plaintiff psychiatrist outlining a proposed business arrangement. The letter specifically stated that it was an “outline of our future agreement” and concluded with a statement that once the psychiatrist signed the letter, the hospital would forward it on to corporate counsel to prepare a draft contract for discussion.⁸⁶ The court relied on general contract principles. Preliminary negotiations do not constitute a binding contract.⁸⁷ “A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.”⁸⁸ The court also noted that it must look at the written document to ascertain the ordinary meaning – an objective test – to interpret the parties’ intent. The court held that the letter evidenced an intent that a binding contract would not be created until corporate counsel drafted a formal contract.⁸⁹

None of the foregoing opinions relates to mediated settlement agreements. One must, therefore, analyze the principal case to ascertain how the California judiciary applies the preceding legal principles within the context of a mediation.

III. THE COURT’S ANALYSIS OF *FAIR V. BAKHTIARI*

A. Factual and Procedural Background

Plaintiff R. Thomas Fair filed a complaint against several defendants alleging causes of action for breach of contract, various torts, and wrongful and retaliatory termination in violation of public policy.⁹⁰ The parties stipulated to a

82. *Id.*

83. *Id.* at 606.

84. *Beck v. Am. Health Group Int’l, Inc.*, 260 Cal. Rptr. 237, 242 (Ct. App. 1989).

85. 260 Cal. Rptr. 237 (1989).

86. *Id.* at 240.

87. *Id.* at 241.

88. *Id.* (quoting *Duran v. Duran*, 197 Cal. Rptr. 497, 150 Cal. App. 3d 176, 180 (1983)).

89. *Id.* at 241-42.

90. *Fair v. Bakhtiari*, 19 Cal. Rptr. 3d 591, 592 (Ct. App. 2004).

private mediation, which was held on March 20 and 21, 2002.⁹¹ The parties concluded the mediation by signing, along with the mediator, the Settlement Terms Document. It included nine numbered paragraphs.⁹² The final paragraph and the one about which the present dispute arose stated, "9. Any and all disputes subject to JAMS arbitration rules."⁹³

Based on the Settlement Terms Document, the parties attempted to memorialize their agreement in a formal Settlement Agreement and General Release. Some complicated tax issues ensued, and then there was some dispute about the inclusion of additional terms in the final settlement agreement. In the meantime, counsel for both parties filed Case Management/ADR Conference Questionnaires, indicating that the case had settled after two days of mediation and notifying the trial judge that a formal settlement agreement and general release was being circulated for approval.⁹⁴

Counsel for defendants prepared the draft Settlement Agreement and General Release ("Settlement Agreement"), indicating that it should take effect as of March 21, 2002, the final day of the mediation.⁹⁵ The Settlement Agreement also confirmed the parties' agreement to arbitrate as follows: "[a]ny dispute regarding any aspect' of the settlement agreement, including 'its interpretation,

91. *Id.*

92. The nine numbered paragraphs are:

"1. Cash payment of \$5.4 mm to T. Fair w/in 60 days.

"2. Payment treated as purchase of all T. Fair's stock & interests (as capital gain to Fair)[.]

"3. [Defendants] will not look to Fair for reimbursement or indemnification of any phantom income paid by them to date.

"4. This provision relates solely to Fair's right to indemnity and does not preclude other rights of the parties. Fair will be indemnified as a former officer, director & employee by SFC/SMC/SC, according to applicable law, against all 3rd party claims, including LPs [limited partners] or IRS, arising from the operation of SFC/SMC. Fair will not make any adverse contacts with IRS [or] LPs re: SFC/SMC, at risk of loss of indemnity and will not suggest, foment or encourage litigation by LPs or any individual against defendants, at risk of loss of indemnity.

"5. Maryann Fair disclaims any community prop[erty] interest in settlement proceeds.

"6. Parties will sign mutual releases and dismiss with prejudice all claims. Am't of settlement will be confidential with appropriate exceptions.

"7. All sides bear their own attorneys fees and costs, including experts.

"8. If Fair needs to restructure cash payments for tax purposes, defendants will cooperate (at no additional cost to defendants).

"9. Any and all disputes subject to JAMS arbitration rules."

Fair, 19 Cal. Rptr. 3d at 591.

93. *Id.* at 592-93.

94. *Id.* at 593.

95. *Id.*

or any act that allegedly has or would violate any provision' of the settlement."⁹⁶ Due to differing opinions, the parties could not finalize the Settlement Agreement.

On June 6, 2002 defendants obtained new counsel. The new counsel filed a Case Management/ADR Conference Questionnaire indicating that the parties were not able to settle the case through mediation.⁹⁷

Unable to come to a consensus regarding the final Settlement Agreement, plaintiff invoked paragraph nine of the Settlement Terms Document and attempted to arbitrate the unresolved issues. Defendants, however, refused. Thereafter, on June 20, 2002, plaintiff filed a motion to compel arbitration and stay proceedings. The trial court denied the motion and the plaintiff appealed.⁹⁸ The plaintiff argued that pursuant to Code of Civil Procedure section 1281.2, the trial court erred in denying his motion.⁹⁹

The case involved two issues:

1. Do the terms of a mediated settlement agreement satisfy California Evidence Code section 1123's exceptions to the confidentiality rule of Evidence Code section 1119?
2. If yes to the first issue, does an arbitration provision of a hand-written mediated settlement agreement constitute a valid agreement to arbitrate future disputes?¹⁰⁰

The California Court of Appeal for the First Appellate District engaged in a de novo review and answered both issues in the affirmative. As a result, it reversed the trial court.¹⁰¹

B. Appellate Court's Analysis of Confidentiality Exceptions

As noted above, mediations are deemed confidential,¹⁰² subject to express legislative exceptions.¹⁰³ The trial court refused to admit the Settlement Terms Document because it relied on the confidentiality of mediations and held that no exceptions applied and no waiver existed.¹⁰⁴

The *Fair* appellate court quoted the provisions of both Evidence Code sections 1119¹⁰⁵ and 1123¹⁰⁶ and relied extensively on the California Supreme Court's analysis of those statutes in *Foxgate Homeowners' Ass'n v. Bramalea*

96. Appellant's Opening Brief at 7, *Fair v. Bakhtiari*, 19 Cal. Rptr. 3d 591 (Ct. App. 2004).

97. *Fair*, 19 Cal. Rptr. 3d at 593-94 (Ct. App. 2004).

98. *Id.* at 593.

99. *Id.* at 594.

100. *Id.*

101. *Id.* at 594-95.

102. CAL. EVID. CODE § 1119 (West 2005).

103. CAL. EVID. CODE §§ 1122, 1123 (West 2005).

104. *Fair v. Bakhtiari*, 19 Cal. Rptr. 3d 591, 594 (Ct. App. 2004).

105. See *supra* notes 34 - 35 and accompanying text.

106. See *supra* notes 48 - 50 and accompanying text.

*California, Inc.*¹⁰⁷ Like *Foxgate*, the *Fair* court relied on the maxims of statutory interpretation, holding that since both sections 1119 and 1123 were clear and unambiguous, the judiciary was precluded from construing them. The court acknowledged that the legislature carefully had carved out explicit exceptions to the mediation confidentiality requirements, and therefore, courts were not at liberty to create additional exceptions.¹⁰⁸

The court of appeal also examined the legislative purpose of Evidence Code section 1123(b). Specifically, the Law Revision Commission Comments to section 1123 indicate that subdivision (b) was added in 1997 so that parties who intended to be bound by a mediated settlement agreement were likely to use words such as “enforceable” or “binding” rather than the language of subdivision (a) – “admissible” or “subject to disclosure.”¹⁰⁹ The court explained that this comment and the language of section 1123 established that the legislature was concerned with the parties’ intent to be bound by an agreement rather than focus on precise words of a settlement agreement.¹¹⁰

The *Fair* appellate court then applied the exception of section 1123(b) to its facts. As noted above, subdivision (b) refers to a signed, “written settlement agreement prepared in the course of, or pursuant to, a mediation” as long as the agreement specifies it is “enforceable or binding *or words to that effect.*”¹¹¹ The court acknowledged that the Settlement Terms Document did not include the words, “enforceable” or “binding.”¹¹²

But the court held that paragraph nine satisfied the requirement of “words to that effect.”¹¹³ The court rationalized that paragraph nine – “any and all disputes subject to JAMS arbitration rules” – meant that the parties intended for JAMS to arbitrate any dispute related to the Settlement Terms Document. The parties’ intent, according to the court, was to create a binding and enforceable settlement agreement.¹¹⁴ Since a clear legislative intent existed to make such a settlement agreement admissible, the court held that the Settlement Terms Document fell within the statutory exception of Evidence Code section 1123(b).¹¹⁵ As a result,

107. 25 P.3d 1117 (Cal. 2001).

108. *Fair*, 19 Cal. Rptr. 3d at 595.

109. *Id.* at 596.

110. *Fair v. Bakhtiari*, 19 Cal. Rptr. 3d 591, 596 (Ct. App. 2004).

111. *See supra* note 49 and accompanying text (emphasis added).

112. *Fair*, 19 Cal. Rptr. at 596.

113. *Id.* (referring to the language of paragraph 9 that said “[a]ny and all disputes subject to JAMS arbitration rules”).

114. *Id.*

115. *Id.*

the appellate court held that the trial court erred because the Settlement Terms Document should not be deemed confidential.¹¹⁶

C. Appellate Court's Analysis of a Valid Agreement to Arbitrate

Notwithstanding the court's holding on the first issue, the defendants argued that the Settlement Terms Document did not constitute an agreement between the parties for purposes of Code of Civil Procedure section 1281.2. Therefore, the petition must be denied.¹¹⁷ The trial court never addressed this issue because it held that the Settlement Terms Document was confidential.¹¹⁸

The *Fair* appellate court relied on the general contract principles cited in *Weddington Productions, Inc. v. Flick*¹¹⁹ and *Meyer v. Benko*,¹²⁰ to the effect that a settlement agreement is a contract that requires mutuality.¹²¹ Mutuality is determined objectively by examining the parties' conduct. The *Fair* appellate court engaged in this same type of objective analysis.

First, the court held that the Settlement Terms Document set forth "all of the material terms of the settlement."¹²² It included provisions regarding payment, indemnification, waiver of community property interest, mutual releases, confidentiality, dismissal of suit, and attorneys' fees and costs.¹²³

Second, all parties signed the Settlement Terms Document. In the absence of fraud and imposition, a party who signs an agreement is deemed to have read and understood its terms.¹²⁴

Third, upon signing the Settlement Terms Document the parties acted consistently with the fact that they understood its terms.¹²⁵ The court cited examples such as the filing of Case Management/ADR Conference Questionnaires that indicated that the case had settled at mediation and that a settlement agreement was being circulated for approval and signatures. They also specified that the case would be dismissed with prejudice.¹²⁶ Counsel reiterated the same basic information at an April 17, 2002 hearing. As a result, the trial court granted a sixty-day continuance to allow the parties to finalize the settlement. The court

116. *Id.* at 597.

117. *Fair v. Bakhtiari*, No. A100240, slip op. at 11 (Cal. Ct. App. Oct. 12, 2004).

118. *Id.* at 12.

119. 71 Cal. Rptr. 2d 265 (Ct. App. 1998).

120. 127 Cal. Rptr. 846 (Ct. App. 1976).

121. *Fair v. Bakhtiari*, No. A100240, slip op. at 12 (Cal. Ct. App. Oct. 12, 2004).

122. *Id.* at 13.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

noted that defendants' subsequent denials of a settlement contradict the other behavior.¹²⁷

Fourth, the court examined the content of the proposed Settlement Agreement, which included "virtually all of the terms of the settlement terms document nearly verbatim."¹²⁸ In particular, the court noted the following provision: "It is now the desire and intention of the Parties to settle and resolve, *as of and effective March 21, 2002*, all disputes, differences and claims which Fair may have against Defendants and Defendants may have against Fair."¹²⁹ The court emphasized that this provision illustrated the parties' understanding that the settlement would take effect as of the date of the signed Settlement Terms Document.¹³⁰ The court rejected defendants' contention that the Settlement Terms Document was only an agreement to agree.¹³¹

Instead, the court relied on *Ersa Grae Corp. v. Fluor Corp.*¹³² for the proposition that as long as parties have agreed to existing terms, their agreement is not made invalid simply because it contemplates subsequent documentation.¹³³ The court specifically stated:

The circulation of the draft agreement merely reflects the parties' desire, ascertainable from the settlement terms document, to flesh out some of the details, including, for example, more specific provisions regarding mutual release and confidentiality. While it is true that the draft agreement is considerably longer than the settlement terms document, the settlement terms document contained, albeit in a minimalist way, all of the crucial elements of the agreement, every one of which was incorporated into the draft agreement. Contemplation of a formal signed agreement thus is entirely consistent with mutual assent to and intent to be bound by the material terms of the settlement terms document.¹³⁴

Fifth, the court recognized the importance of paragraph nine as an enforcement mechanism. A binding agreement was created because the parties agreed that JAMS arbitration rules would be used to resolve any dispute.¹³⁵

Finally, the court addressed defendants' contention that the Settlement Terms Document did not constitute a final agreement since the parties could not

127. Fair v. Bakhtiari, No. A100240, slip op. at 13-14 (Cal. Ct. App. Oct. 12, 2004).

128. *Id.* at 14.

129. *Id.* (emphasis in original).

130. *Id.*

131. *Id.*

132. 2 Cal. Rptr. 2d 288 (Ct. App. 1991).

133. Fair v. Bakhtiari, No. A100240, slip op. at 14 (Cal. Ct. App. Oct. 12, 2004).

134. *Id.* at 14-15.

135. *Id.* at 15.

agree on several remaining terms – the very reasons for which plaintiff sought arbitration. The court held that the purpose of paragraph nine was to help resolve ambiguity when finalizing the formal Settlement Agreement.¹³⁶

As a result of the foregoing findings and analysis, the *Fair* appellate court held that a valid agreement to arbitrate disputes under the Settlement Terms Document did exist between the parties. Based on the court's analysis of both issues, it reversed and remanded the trial court's order denying plaintiff's motion to compel arbitration.¹³⁷

IV. ANALYSIS AND CRITIQUE OF *FAIR V. BAKHTIARI*

Both the *Fair* trial court and the court of appeal divided the opinion into two basic issues: 1) whether the confidentiality exception of California Evidence Code section 1123(b) applied to the Settlement Terms Document; and 2) whether a provision within the Settlement Terms Document constituted a valid agreement to arbitrate. Each of the issues will be discussed separately.

A. Mediation Confidentiality

The *Fair* court of appeal concluded correctly that the Settlement Terms Document was not confidential pursuant to Evidence Code section 1123(b), and therefore, was subject to disclosure. Unfortunately, the court of appeal short-circuited its analysis regarding mediation confidentiality.

To decide whether the confidentiality exceptions of Evidence Code section 1123 apply, one must first analyze whether a mediated settlement agreement exists. Respondents attempted to focus the court in this direction by arguing that no settlement agreement was actually approved as a result of the mediation.¹³⁸ The court of appeal, however, glossed over that fundamental analysis and instead focused on the confidentiality exceptions of section 1123; it simply stated that it would engage in the confidentiality exception analysis "assuming [the Settlement Terms Document] did in fact constitute an agreement between the parties."¹³⁹

The first issue should have been broken down into two sub-issues. The court of appeal should have first determined whether the Settlement Terms Document constituted a settlement agreement made pursuant to, or during the course of, a mediation. If yes, then the court could engage in an analysis of

136. *Id.* at 15-16.

137. *Id.* at 16.

138. Respondent's Brief at 1-2, *Fair v. Bakhtiari*, 19 Cal. Rptr. 3d 591 (Ct. App. 2004) (arguing that no binding settlement agreement or agreement to arbitrate was entered into since the parties had failed to agree to complete terms).

139. *Fair v. Bakhtiari*, 19 Cal. Rptr. 3d 591, 594 (Ct. App. 2004).

section 1123 to determine whether any of the confidentiality exceptions applied. This two-step analysis of the first issue is necessary since section 1123's confidentiality exceptions are limited to settlement agreements.

1. Existence of a Mediated Settlement Agreement

As noted previously, settlement agreements are governed by general contract law provisions.¹⁴⁰ Mutuality of consent, a requirement of all contracts, is determined based on objective criteria. To determine such mutuality, courts focus primarily on the acts of the parties.¹⁴¹

In *Fair*, the parties' actions illustrated that they entered into a settlement agreement as part of their mediation. The court of appeal appropriately analyzed their actions, albeit regarding the second issue – the validity of an arbitration clause. In doing so, the court of appeal examined the material terms of the Settlement Terms Document. It noted the offer and acceptance in terms of giving up of stock in return for \$5.4 million, the payment provisions, indemnification, Maryann Fair's waiver of community property interest in the settlement proceeds, the confidential nature of the amount of the settlement, defendants' agreement to cooperate if the payment schedule had to be restructured for tax purposes, and the agreement to sign mutual releases and dismiss all claims with prejudice.¹⁴² The court acknowledged the parties' signatures as evidence that they read and understood the terms of the Settlement Terms Document.¹⁴³

The court of appeal discussed at length activities of the parties taken subsequent to the two-day mediation. For example, the provisions of the Settlement Terms Document were reiterated almost verbatim in the draft Settlement Agreement; the Settlement Agreement specified that it would be effective as of March 21, 2001, the date of the Settlement Terms Document; and, the parties made representations on Case Management/ADR Conference Questionnaires and in open court that the case had settled and final documents were being prepared.¹⁴⁴ These subsequent actions demonstrated the parties' understanding that a settlement had been reached pursuant to the mediation.¹⁴⁵

140. *Weddington Prods. Inc. v. Flick*, 71 Cal. Rptr. 2d 265, 276-77 (Ct. App. 1998).

141. *See supra* notes 9 – 11 and accompanying text.

142. *Fair v. Bakhtiari*, No. A100240, slip op. at 13 (Cal. Ct. App. Oct. 12, 2004).

143. *Id.*

144. *Fair*, 19 Cal. Rptr. 3d at 592-93 (Ct. App. 2004); *Fair*, No. A100240, slip op. at 13-14.

145. Although not mentioned by the court of appeal, *Fair*, in his Appellant's Opening Brief, stated that on April 23, 2002, counsel for defendant Stonesfair Entities sent a letter to plaintiff's

The court of appeal's analysis, however, could have been more thorough. The court should have acknowledged the parameters of the mediation forum – the very forum in which the parties agreed to settle their dispute.

A mediation forum is important to help establish that parties knowingly and willingly entered into a settlement agreement. For example, a mediation involves more than counsel of record. The parties also participate. The mediation forum serves as an intimate setting in which the parties, counsel, and a neutral third party mediator may communicate fully and confidentially with one another. At the conclusion of a mediation in which settlement is reached, the parties typically work together with their respective counsel to negotiate the finite details of a settlement agreement.

A different dynamic occurs during settlement negotiations in a litigated case. Typically an attorney and client discuss a proposal, and then the attorney reduces the proposal to a writing to forward on to opposing counsel. Once opposing counsel receives the proposal, he or she takes the necessary time to discuss it with his or her client. Then the proposal is either accepted or a counter-proposal is made. The proposals may go back and forth between counsel for weeks or even months. By the time a settlement agreement is finalized, the parties may sign it, forgetting the rationales for some of the important provisions that were negotiated early in the process.

In *Fair*, the mediation lasted two days. The parties and attorneys could devote their undivided attention to the specific dispute and work tenaciously toward a final resolution.

Furthermore, the substance of their negotiations resulted in nine short paragraphs in the Settlement Terms Document. The brevity of the document lends itself to the conclusion that the parties knew the meaning and intent of each of the nine paragraphs, including the arbitration provision.

Before a court can decide whether a mediated settlement agreement fits into one of the confidentiality exceptions of Evidence Code section 1123, it must first determine whether a settlement agreement actually exists. When the *Fair* court of appeal analyzed the mediation confidentiality exceptions, it failed to first analyze whether the Settlement Terms Document constituted a settlement agreement. Instead, the court of appeal waited to discuss the existence of a mediated settlement agreement with respect to the second issue regarding arbitration. If the court had engaged in the analysis of this first sub-issue and determined that the Settlement Terms Document in fact constituted a settlement agreement, then, and only then, should it have engaged in its analysis regarding exceptions to confidentiality, the second sub-issue of the mediation confidential-

counsel, confirming that the parties had an “agreed settlement of 5.4 million dollars.” Appellant’s Opening Brief at 7, *Fair v. Bakhtiari*, 19 Cal. Rptr. 3d 591 (2004).

ity issue.¹⁴⁶ The sequence of the court's analysis, however, does not diminish the correctness of the final result.

2. Analysis of Mediation Confidentiality Exceptions

Even though the *Fair* court of appeal failed to address whether a mediated settlement agreement actually existed with respect to the first issue, it did analyze the confidentiality exceptions regarding a mediated settlement agreement. The court's holding was correct and should be adopted by the California Supreme Court.

California's mediation confidentiality statutes encourage disputants to participate in mediations based on predictability. The California Supreme Court consistently has applied a strict interpretation of these statutes by refusing to carve out judicial exceptions.¹⁴⁷

The California Supreme Court's practice is consistent with some jurisdictions that have mediation confidentiality statutes. For example, several courts have upheld mediation confidentiality in the absence of some writing to substantiate a mediated settlement.¹⁴⁸ The rationale was that without some writing, courts would have to breach the confidentiality of the mediation to determine whether a settlement had been reached¹⁴⁹ and this procedure could have a chilling effect on the settlement process.¹⁵⁰ Nevertheless, some complex matters cannot be mediated to a final conclusion; parties may be able to agree to specific terms or to an outline of the settlement terms but contemplate the preparation of a detailed settlement agreement or some type of stipulated judgment and release. In these latter situations, as long as the writing reflects the material terms of a final settlement agreement and is signed by the parties and the mediator, such

146. Interestingly, the *Fair* court of appeal discussed the creation of a valid settlement agreement when it analyzed the second issue. In doing so, it noted that "[c]ontemplation of a formal signed agreement thus is entirely consistent with mutual assent to and intent to be bound by the material terms of the settlement terms document." *Fair*, No. A100240, slip op. at 14-15.

147. See *Rojas v. Superior Court*, 93 P.3d 260, 269-70 (Cal. 2004); *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, 25 P.3d 1117, 1126 (Cal. 2001).

148. *Capano v. State*, 832 A.2d 1250 (Del. 2003) ("Courts should not enforce a mediation agreement absent a written document signed by the parties and the mediator."); *Wilmington Hospitality, L.L.C. v. New Castle County*, 788 A.2d 536, 542 (Del. Ch. 2001) ("Where, as here, there is no written agreement signed by anyone, it is impossible for the parties to litigate over the terms of the putative agreement without breaching the confidentiality of the mediation process in a substantial way.") (emphasis in original).

149. *Wilmington Hospitality, L.L.C.*, 788 A.2d at 542.

150. *Capano*, 832 A.2d at 1250.

writing should be enforceable without violating mediation confidentiality provisions.¹⁵¹

The *Fair* court of appeal adhered to well-founded rules regarding mediation confidentiality. It acknowledged the public policy implications that are so strong in California – to preserve confidentiality as a means to encourage participants to enter into candid mediation discussions.¹⁵² Section 1123(b), which the *Fair* court examined, allows disclosure of a signed mediated settlement agreement if it specifies it “is enforceable or binding or words to that effect.”¹⁵³ All parties and the court of appeal acknowledged that the Settlement Terms Document did not include words that it was enforceable or binding.¹⁵⁴ Moreover, party signatures alone do not meet the legislative definition of “enforceable or binding.”¹⁵⁵

The *Fair* court of appeal focused on paragraph nine to hold that it complied with a portion of the phrase, “words to that effect.” In doing so, the court of appeal analyzed the parties’ intent and correctly held that the “inclusion of the arbitration term demonstrates that the parties necessarily intended the settlement terms document to be ‘enforceable or binding.’”¹⁵⁶ The court of appeal followed the California Supreme Court’s strict interpretation of the mediation confidentiality statutes by limiting itself to the specific statutory exceptions of Evidence Code section 1123.¹⁵⁷

The holding makes sense because parties have the right to agree to private contractual arbitration. Such contractual provisions contemplate that the parties do not need nor want court involvement to resolve a dispute.¹⁵⁸ Rather, their intent is to use an arbitrator to enforce the Settlement Terms Document. Any

151. See *Wilmington Hospitality, L.L.C.*, 788 A.2d at 542 n.8; *Few v. Hammack Enters., Inc.*, 511 S.E.2d 665, 669-70 (N.C. Ct. App. 1999) (holding that mediation confidentiality was not breached by allowing the admission of evidence before a judge to determine the outcome of a mediation settlement conference based on a draft mediated settlement agreement proposed by the mediator and signed only by the plaintiff); see also Peter Robinson, *Symposium: Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. Disp. Resol. 135, 143 – 48 & n.48-93 (2003) (discussing numerous cases that interpreted issues in proceedings to enforce mediated agreements).

152. *Fair v. Bakhtiari*, 19 Cal. Rptr. 591, 595 (Ct. App. 2004).

153. CAL. EVID. CODE § 1123(b) (West 2005).

154. *Fair*, 19 Cal. Rptr. at 596.

155. The main paragraph of Evidence Code section 1123 requires that parties sign the agreement. Then the statute includes four specifically enumerated exceptions. See CAL. EVID. CODE § 1123(a) – (d) (West 2005).

156. *Fair*, 19 Cal. Rptr. at 596.

157. See *Rojas v. Superior Court*, 93 P.3d 260, 269-70 (Cal. 2004); *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, 25 P.3d 1117, 1126 (Cal. 2001).

158. *Brennan v. Tremco Inc.*, 105 Cal. Rptr. 2d 790, 793 (Ct. App. 2001) (holding that a malicious prosecution claim cannot be based on a previous matter resolved in a privately contracted arbitration).

expectation of finality is consistent with parties' choice of arbitration rather than litigation.¹⁵⁹ "The arbitrator's decision should be the end, not the beginning, of the dispute."¹⁶⁰ Hence, the parties' intent to add finality to the dispute should be honored. That finality necessarily means that the arbitration provision of the Settlement Terms Document creates a binding and enforceable settlement agreement.

The court of appeal's holding also makes sense because when a document refers to another document, it incorporates by reference the terms of the referenced document.¹⁶¹ Since the Settlement Terms Document referred to the JAMS Arbitration Rules, it incorporated the terms of the JAMS Arbitration Rules, including their purpose – to "govern . . . 'binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules.'"¹⁶² The purpose of the JAMS Arbitration Rules governs binding arbitrations. If the arbitration is deemed binding, it should be equated to a final and enforceable matter.

Fair's holding focused on the notion of confidentiality. Yet it had a far greater impact because confidentiality affects other core values of mediation, including party self-determination and facilitation by a third-party neutral. As explained below, all of these values are so interrelated to one another that it is difficult to affect one without affecting the others.

First, mediation, especially court-connected mediation, offers a unique forum in which disputants take charge of a litigated case. Scholars and legislators alike have coined party self-determination as the "fundamental principle of mediation."¹⁶³ Within the mediation forum, the parties must be confident of their ability to control the process, and especially the final outcome. If, as in the present situation, the parties have difficulty resolving the finite details of the overall settlement, they should have the power to designate another dispute resolution process such as arbitration and feel assured that their decision will be honored.

159. *Id.* ("This expectation of finality strongly informs the parties' choice of an arbitral forum over a judicial one.") (quoting *Moncharsh v. Heily & Blasé*, 10 Cal. Rptr. 2d 183, 187 (Ct. App. 1992)).

160. *Brennan*, 105 Cal. Rptr. 2d at 793 (quoting *Moncharsh*, 10 Cal. Rptr. 2d at 187).

161. *See King v. Larsen Realty, Inc.*, 175 Cal. Rptr. 226, 232 (Ct. App. 1981) (noting that arbitration provisions of an Arbitration Manual were incorporated by reference into a contract as long as all parties had ready access to the incorporated document); *Applera Corp. v. Roche Molecular Systems, Inc.*, 2004 WL 2361794, at *2 (Cal. Ct. App. Oct. 21, 2004) (noting that an agreement's reference to the American Arbitration Association Rules incorporates all the powers specified in those rules, including the scope of the agreement to arbitrate) (not certified for publication).

162. *Fair v. Bakhtiari*, 19 Cal. Rptr. 3d 591, 596 (Ct. App. 2004). (emphasis added).

163. *BERNARD & GARTH*, *supra* note 24, at 73.

Their decision acknowledges the value of party-self determination because the parties will be assured that they control the dispute resolution process by keeping their dispute out of the court system. Furthermore, history has shown that parties are satisfied more by a mediated settlement than one imposed by a judicial officer.¹⁶⁴

Second, mediation confidentiality is equally important and is not limited just to the parties; it applies to everyone involved in the mediation. If a mediator is forced to testify about party behavior and statements communicated during a mediation, her neutrality suffers.¹⁶⁵ California Evidence Code section 703.5 specifically precludes a mediator from testifying in subsequent civil proceedings absent extraordinary circumstances,¹⁶⁶ emphasizing the importance of absolute confidentiality by mediators.

A mediator's role in confidentiality plays into the third essential aspect of mediation – a neutral facilitator. A mediator must be unbiased and evenhanded in her approach; she must not take sides with any party. As a facilitator, a mediator can only be effective and earn the trust and loyalty of the parties if he or she remains impartial. Mediator loyalty is at the center of California's legislative intent to preserve mediation confidentiality.¹⁶⁷

Confidentiality is a critical component of a mediation because it affects other essential, interrelated mediation values such as party self-determination and mediator impartiality. Confidentiality also affects the entire dispute resolution process because, as seen in *Fair*, mediations can tie directly to, and affect, arbitrations. As a result, mediation professionals and participants must be assured that mediation confidentiality, subject to specific exceptions, is predictable. The California Supreme Court has an opportunity to set the record straight and confirm the value and predictability of confidentiality when it renders its opinion in *Fair*.

164. See e.g., Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1764 (1997) (noting that parties to community-enabling mediation "may be happier with an outcome that they have not yet been able to contemplate."); see Izumi & La Rue, *supra* note 27, at 83-87) (acknowledging that party self-determination results in "parties [who] are happier with and more likely to honor an agreement . . ."); Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 730 (1996) (noting that disputants are "happier and more compliant with an agreement they have forged themselves").

165. See Izumi & La Rue, *supra* note 27, at 84 ("The appearance of mediator neutrality is dependent on the protection of confidentiality.").

166. CAL. EVID. CODE § 703.5 (allowing a mediator to testify in subsequent civil proceedings only where the "(a) testimony relates to civil or criminal contempt, (b) constitutes a crime, (c) is subject to investigation by the State Bar or Commission on Judicial Performance, or (d) gives rise to disqualification proceedings under Civil Procedure Code section 170.1(a)(1) or (a)(6).").

167. See *supra* note 166 and accompanying text for a discussion of California Evidence Code section 703.5.

B. Enforceability of Mediated Agreement to Arbitrate

Fair's second issue was whether paragraph nine of the Settlement Terms Document constituted a valid agreement to arbitrate future disputes. This issue created a tremendous breakthrough for California courts inasmuch as no California opinion exists that addresses enforcement of an arbitration provision in a mediated settlement agreement.¹⁶⁸ Unfortunately, that portion of the *Fair* court of appeal opinion was not certified for publication.¹⁶⁹

The lack of certification for publication was a poor decision for several reasons. The issue is directly connected to the first issue dealing with the confidential nature of a settlement agreement entered into pursuant to, or in the course of, a mediation. As previously discussed, parties to a mediation need predictability. They need to know that, subject to legislative exceptions, what is said and communicated in a mediation will remain confidential, including mediated settlement agreements.

Furthermore, parties to a mediation need guidance with respect to the substantive terms they may insert into their mediated settlement agreements. When parties agree to certain terms and provisions, they need to know that the assent to which they mutually intend will be given effect. Otherwise, mediated settlement agreements will become a mockery of the entire mediation process.

For example, in *Fair* the parties included the arbitration provision in paragraph nine of the Settlement Terms Document. Arbitration provisions are common clauses in settlement agreements. That fact should not change when applied to mediated settlement agreements. Yet, California courts have not yet construed arbitration provisions within mediated settlement agreements, and therefore, precedent is not available.

168. One California court of appeal was faced with issues surrounding a purported mediated settlement agreement. See *Weddington Prods., Inc. v. Flick*, 71 Cal. Rptr. 2d 265 (Ct. App. 1998). In *Flick*, the court held that since the parties never had a meeting of the minds regarding essential terms of the settlement agreement, a contract had not been formed. *Id.* at 280. Additionally, when the ADR session changed from mediation to one in which a private judge determined the terms of settlement and issued an order to that effect, such proceeding could not be treated as a mediation. Hence, the mediation confidentiality provisions of California Evidence Code section 1152.5 (the predecessor to section 1123) did not apply. *Id.* at 282 n.6.

169. The caption of the court of appeal opinion states that “[p]ursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of footnote 5, the second paragraph of part I and footnote 6, and part III.”

The *Fair* appellate court had an ideal opportunity to make an historical decision to provide guidance to the developing field of dispute resolution. It fell short of that precedential value.

Even though the court of appeal's depublication was ill advised, its substantive analysis of issue two was correct. *Fair* correctly decided that the Settlement Terms Document included a valid agreement to arbitrate. The phrase, "any and all disputes subject to JAMS arbitration rules," is clear on its face. It is part of a private contractual agreement to arbitrate. Any failure to recognize the agreement to arbitrate infringes on parties' right to choose.

In *Fair*, there is no allegation of any contract defense, such as fraud, duress, coercion, illegality or unconscionability in signing the Settlement Terms Document.¹⁷⁰ No party alleged they misunderstood what was signed. The Settlement Terms Document was a simple, handwritten settlement agreement consisting of nine short paragraphs. The final paragraph constituted an enforcement mechanism as the parties attempted to memorialize the agreement into a formal settlement agreement and general release. As previously explained, the parties' intent was clear and should be enforced based on general contract law provisions.¹⁷¹

Additionally, strong public policy exists that favors arbitration as an alternative to litigation. Private arbitration is speedier and more economical than litigation.¹⁷² It is a private process that parties can control. Contractual provisions to arbitrate contemplate that the parties do not need nor want court involvement to resolve a dispute.¹⁷³ In fact, paragraph nine as well as the Settlement Terms Document as a whole, implicate the simple theory of a gentleman's handshake based on terms that were negotiated and bargained for.¹⁷⁴ Without any finding of a contract defense, the agreement to arbitrate should be enforced. It represents a means to promote the very essence of a conciliatory proceeding. The *Fair* court of appeal, therefore, correctly held that paragraph nine of the Settlement Terms Document constituted a valid agreement to arbitrate. The analysis should not end there, however.

If a court decides that the arbitration clause constitutes a valid arbitration agreement, then what can an arbitrator do? What authority does an arbitrator

170. In their appellate brief, defendants contend that plaintiff's tax structuring was unlawful, although defendants do not explain this contention and the court does not address it. Respondents' Brief at 7, *Fair v. Bakhtiari*, 19 Cal. Rptr. 3d 591 (Ct. App. 2004).

171. See *supra* notes 119 - 137 and accompanying text.

172. *Brennan v. Tremco Inc.*, 105 Cal. Rptr. 2d 790, 793 (Ct. App. 2001) (noting that when parties select arbitration, they "voluntarily trade [away] the safeguards and formalities of court litigation . . .").

173. *Id.*

174. See *Bd. of Educ. of the County of Berkeley v. W. Harley Miller, Inc.*, 236 S.E.2d 439, 447 (W. Va. 1977) (noting that the issue of whether an arbitration provision is bargained for is a question of law for the court to decide and that in most jurisdictions there is a strong presumption that an arbitration provision is part of the bargain).

possess? Irrespective of the admissibility of the Settlement Terms Document, including the arbitration clause, mediation confidentiality extends to more than just a written agreement. It applies to the entire mediation process, and in particular, all evidence, communications, and negotiations leading up to the settlement agreement.¹⁷⁵ Even if a court determines that an arbitration clause exists in a mediated settlement agreement, how can an arbitrator decide whether or how to resolve the dispute in light of mediation confidentiality? The confidential nature of mediations precludes the arbitrator from delving into the minds and thought processes of the participants, attempting to discern their intent to finally resolve the mediated dispute.¹⁷⁶ This scenario creates a conflict between mediation confidentiality and the right to enforce settlement agreements. *Fair*, unfortunately, never addressed the reality of this ultimate dilemma.¹⁷⁷

Several alternatives exist to address the dilemma. The parties can agree to waive confidentiality.¹⁷⁸ The express waiver allows the arbitrator to examine and analyze facts inherent to a finding of party intent.

Or, the California Legislature can create a new confidentiality exception – the arbitral or ADR exception of a mediated settlement agreement. The purpose behind the arbitral/ADR exception is that if parties include an agreement to arbitrate or engage in some other dispute resolution process in their mediated settlement agreement, certainly they intend to carry out the terms of the mediated settlement agreement through some self-selected form of dispute resolution as an alternative to litigation.

The purpose of the arbitral/ADR exception is easy to rationalize. The parties need a neutral outsider to make a final decision since they may not be able to do so during the mediation. The parties elect to stay out of the judicial system. And, the arbitrator or other neutral facilitator needs authority to act in order to carry out party intent.

A third alternative rests with the judiciary. The California Supreme Court could rely on public policy to create the arbitral/ADR exception rather than wait for legislative action. In light of the California Supreme Court's strict construc-

175. CAL. EVID. CODE § 1119 (West 2005).

176. See CAL. EVID. CODE §§ 1119, 1122 (West 2005).

177. *Fair* is distinguishable from *Regents of the Univ. of California v. Sumner*, 50 Cal. Rptr. 2d 200 (Ct. App. 1996), in which the Court of Appeal for the First District held that communications surrounding a transcribed mediated settlement agreement were discoverable because the creation of the transcript occurred after the parties had concluded their mediation. *Id.* at 202. It is also noteworthy that *Sumner* was decided under the previous Evidence Code section 1152.2 which barred evidence of a settlement agreement reached *during* the mediation session. *Id.*

178. CAL. EVID. CODE §§ 1122(a), 1123(c) (West 2005).

tion of the mediation confidentiality statutes, however, this alternative is unlikely.

Finally, the California Legislature could revise section 1123 to simply permit the discovery and admissibility of any agreement signed by all of the parties to the mediation. This would preclude protracted litigation to determine the meaning of “words to that effect.” Through the *Fair* appeal, the California Supreme Court has an opportunity to make a strong suggestion that the legislature should revise section 1123 accordingly.

In reality, California’s law regarding mediation confidentiality is too rigid. As illustrated in *Fair*, the rigid nature of the statutes actually has created more problems than solutions. Confidentiality serves as the backbone of the mediation process, and the public policy reasons that promote candid and unfettered communication is sound. Confidentiality of mediated settlement agreements, however, poses different constraints.

When parties sign a settlement agreement at the end of a mediation, they are knowingly entering into a contract. If one party seeks to repudiate the contract, then the aggrieved party should have the right to enforce the agreement based on general contract law principles. Likewise, if the terms of mediated settlement agreements are deemed vague or ambiguous, the parties should be permitted to prove their intent. Aggrieved parties should have the opportunity to prove the intent of the settlement agreement even if that means delving into the confidential communications of the mediation.

The inclusion of an arbitration clause in a mediated settlement agreement confirms that the parties select to keep the matter out of the public records of the judiciary, within the confines of another private dispute resolution process. Having control over a private contractual arbitration, the parties can stipulate that the proceeding remain confidential, thus preserving the confidential nature of the mediation yet permitting another informal process – arbitration – to create and enforce finality.¹⁷⁹

One might argue that the confidential nature of mediations will be shattered and the entire mediation process impacted adversely if parties are allowed to use mediation communications to prove the terms of a mediated settlement agreement. That argument lacks merit as long as the mediated settlement agreement is treated independently from the communications leading up to the agreement. The focus of concern, therefore, shifts from the rigid interpretation of mediation confidentiality toward acknowledgement of a self-determined settlement. This new policy should not affect the public policy aspects of mediations because their confidential nature remains intact. Rather, the new policy should discour-

179. See, e.g., *Layne-Minnesota Co. v. Regents of the Univ. of Minnesota*, 123 N.W.2d 371, 375 (Minn. 1963) (acknowledging that parties may control a private contractual arbitration by the language of their agreement to arbitrate).

age parties from signing a settlement agreement at the conclusion of a mediation unless they have an intent to finally and conclusively resolve the dispute; in such a situation, then all matters communicated during or pursuant to a mediation should be admissible to prove the intent of the mediated settlement agreement.

The suggestion posed in this article is not new. The Uniform Mediation Act was carefully crafted to exempt from the confidentiality privilege all agreements "signed by all parties to the agreement."¹⁸⁰ Many states have adopted similar provisions as well.¹⁸¹ The simple reference to "signed agreements" is easy to understand and easy to construe. The simplicity of such a provision diminishes, rather than increases, the potential for confusion that results in litigation, as evidenced by *Fair*.

Furthermore, if parties refer to another dispute resolution process in their mediated settlement agreement, it is clear that the parties are searching for alternatives to litigation. To the extent that mediation and arbitration become inter-related such as in the *Fair* scenario, we need to encourage, not discourage, the use of alternatives to litigation. This rationale also is consistent with California's strong public policy favoring arbitration over litigation because arbitration is speedy, cost effective for the parties, and eases court congestion.¹⁸²

Fair's significance goes deeper than the existence of a valid arbitration agreement. The court must analyze the impact that such a finding has on the arbitrator's authority to delve into the mediated information in order to give effect to the parties' intent. Otherwise, any finding that an arbitration agreement exists will have no meaning and effect on the parties.

V. CONCLUSION

Fair v. Bakhtiari represents a case of first impression for the California courts, and the novelty of the issues lends itself to creating precedent for future decisions. *Fair's* issues are critical for the *Fair* participants as well as the de-

180. Uniform Mediation Act, § 6(a)(1) (2003), available at <http://www.law.upenn.edu/611/ulc/mediat/2003final-draft.htm>.

181. See, e.g., Neb. Rev. Stat. § 25-2935(a)(1) (2004); N.C. Gen. Stat. § 7A-38.1(l) (2005) (acknowledging that mediation confidentiality shall not apply "in proceedings . . . to enforce a settlement of the action" and that such settlement must have been reduced to a writing and signed by the parties); see also *Uniform Mediation Act Symposium: Uniform Mediation Act*, 2003 J. Disp. Resol. 1, 37 (2003) (citing to many state statutes to support the statement that "[w]ritten agreements are commonly excepted from mediation confidentiality protections . . .").

182. *Pietrelli v. Peacock*, 16 Cal. Rptr. 2d 688, 689 (Ct. App. 1993) (involving medical malpractice claims).

veloping field of dispute resolution. It is hoped, therefore, that every portion of the Supreme Court's decision is certified for publication.

The California Supreme Court's inaugural interpretation of Evidence Code section 1123 serves as the backbone for the entire opinion. Any discussion of section 1123 must be preceded by a finding that a settlement agreement was actually entered into in the course of, or pursuant to, a mediation. Only then will the exceptions of section 1123 apply.

This author believes that the Supreme Court should affirm the First District Court of Appeal and answer both issues in the affirmative. First, it should confirm that a signed document, entitled "Settlement Terms," constitutes a mediated settlement agreement because it complies with general contract law principles. It also comports with the mediation confidentiality exception of section 1123(b) because the reference to JAMS arbitration illustrates the parties' intent to create a binding or enforceable document. Second, the reference to JAMS arbitration constitutes a valid agreement to arbitrate.

The Supreme Court's analysis needs to go further as it construes Evidence Code section 1123 for the first time. Rather than blindly accept the legislation as written, the Supreme Court needs to recognize the public policy implications inherent in mediation confidentiality and party self-determination, as well as general contract law principles. As explained in this article, the supreme court should recognize and declare that Evidence Code section 1123 is too narrow. As such, it should send a strong message to the California Legislature that section 1123 needs to be revised so that any *signed* settlement agreement entered into during, or pursuant to, a mediation is not subject to the general mediation confidentiality rules. This analysis will foster the intent of the mediation participants and provide confidence that their enforcement mechanism – a signed mediated agreement – will have meaning, be recognized, and be upheld.

The California Supreme Court has never construed section 1123. It does not have to agree with the legislature. It does, however, need to create a sense of predictability and consistency regarding the significance of signed mediated settlement agreements. The new analysis posed in this article will ensure that parties sign a final agreement only when they have finally resolved their dispute; it will prevent one party from hiding behind the rigid nature of mediation confidentiality, attempting to avoid his obligations.

Moreover, it is imperative for courts to encourage parties' willingness to engage in private dispute resolution processes, whether arbitration or otherwise. Mediation confidentiality should not be used to thwart the positive aspects and public policy reasons behind parties' right to contract for the dispute resolution process of their choice. As a result, if a mediated agreement refers to another dispute resolution process, such as arbitration, the ability to pierce mediation confidentiality will provide authority for an arbitrator or other neutral facilitator to act according to the parties' intent.

The California Supreme Court has an opportunity to create historical precedence when it renders its opinion in *Fair*. In doing so, it will affect two separate dispute resolution processes and create predictability and consistency as the dispute resolution processes become interconnected.

