

## Relaxed Requirements in Amended Code of Civil Procedure Section 664.6 Carry Risk of Professional Discipline.

By Elizabeth L. Bradley

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If you are a litigator, odds are you have either brought a motion to enforce a settlement agreement in a pending action, or asked a court to retain jurisdiction over the parties to a litigation to enforce the terms of a settlement agreement pursuant to California Code of Civil Procedure § 664.6 ("Section 664.6"). Section 664.6 helps to streamline the settlement process and provides an expedited procedure to enforce settlement agreements. Important new changes to Section 664.6 took effect January 1, 2021, which, if not followed, may subject a lawyer to "professional discipline."

Until December 31, 2020, Section 664.6 authorized the court to enter judgment pursuant to the terms of a settlement, if the parties to the pending litigation stipulated, in a writing signed by the "parties" outside the presence of the court or orally before the court, for settlement of part or all of the case. It further authorized the court to retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement, if requested by the "parties."<sup>i</sup>

Because of its summary nature, strict compliance with the requirements of Section 664.6 is a prerequisite to invoking the power of the court to impose a settlement agreement. California courts have uniformly and strictly construed the term "parties" as used in former Section 664.6 to mean the parties themselves, not their attorneys.<sup>ii</sup> Thus, any written settlement agreement had to be signed by the parties themselves, and any request that the court retain jurisdiction was required to be signed by the parties themselves, in order to take advantage of Section 664.6's summary proceedings.

Despite the long line of authorities interpreting the term "parties" in Section 664.6 to mean the parties themselves, lawyers have often side-stepped the "party" requirement when requesting a court to retain jurisdiction to enforce a settlement agreement. In *Mesa RHF Partners, L.P. v. City of Los Angeles*, the lawyers' request that "Court shall retain jurisdiction to enforce settlement per C.C.P. § 664.6," made directly on the request for dismissal was held insufficient to invoke Section 664.6. The trial court denied motions to enforce the settlement agreement under Section 664.6 for lack of jurisdiction. Although all parties wanted the trial court to retain jurisdiction, the order was affirmed on appeal because the trial court was without jurisdiction to even hear the motions. The request that the court retain jurisdiction was insufficient to invoke Section 664.6, because the request for dismissal on which the request was made was signed by the attorney, not a party. Because the parties did not submit to the court any settlement agreement or stipulation signed by the parties themselves, whereby they agreed that the court would retain jurisdiction, no request was made by the parties.<sup>iii</sup>

Even where a request that the court retain jurisdiction is defective, it is possible that a court may nonetheless grant a subsequent motion brought under Section 664.6 to enforce a settlement or to enter judgment pursuant to a settlement agreement, not realizing that it lacks jurisdiction to do so, particularly where the party against whom judgment will be entered fails to oppose the motion for entry of judgment or fails to otherwise challenge the court's jurisdiction. Any such judgment, based on a defective request that the court retain jurisdiction, would be void for lack of jurisdiction and subject to a motion to vacate or set aside the judgment.<sup>iv</sup> If the judgment was subsequently set aside as void for lack of jurisdiction due to a failure to strictly comply with Section 664.6, and if the statute of limitations to file a separate action for breach of the settlement agreement had already expired, the lawyer could be exposed to liability if the client was left with no remedy to enforce the settlement due to attorney error.

New changes to Section 664.6 relax the strict requirements of the statute by permitting lawyers to sign settlement agreements and to make requests that the court retain jurisdiction to enforce settlements on behalf of their clients, with limited exceptions. However, these changes come with a significant risk to lawyers who do so without the client's express authorization. As amended effective January 1, 2021, Section 664.6 added subdivisions (b), (c) and (d), and now provides:

(a) If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

(b) For purposes of this section, a writing is signed by a party if it is signed by any of the following:

(1) The party.

(2) An attorney who represents the party.

(3) If the party is an insurer, an agent who is authorized in writing by the insurer to sign on the insurer's behalf.

(c) Paragraphs (2) and (3) of subdivision (b) do not apply in a civil harassment action, an action brought pursuant to the Family Code, an action brought pursuant to the Probate Code, or a matter that is being adjudicated in a juvenile court or a dependency court.

**(d) *In addition to any available civil remedies, an attorney who signs a writing on behalf of a party pursuant to subdivision (b) without the party's express authorization shall, absent good cause, be subject to professional discipline.***

Emphasis added.

Comments in favor of Assembly Bill 2723 addressed the loss of client protections present in the prior version of the statute, the virtues of which were specifically extolled by the California Supreme Court:<sup>v vi</sup>

Legal guidelines exist in the Business and Professions Code and in the California Rules of Professional Conduct requiring attorneys to act in their clients' best interests and to avoid self-dealing, mitigating somewhat the loss of the existing protection. This bill, by allowing for counsel to make a request pursuant to Section 664.6, will streamline the

process and obviate the need for counsel to track down their clients before progressing toward a settlement of a civil dispute. However, this shifts the burden to attorneys to ‘impress[] upon [their clients] the seriousness and finality of the interpretations of the settlement.’ To ensure this responsibility is upheld, the bill provides that an attorney who signs a writing on behalf of a party without the party’s express authorization shall, absent good cause, be subject to professional discipline. ***This makes discipline resulting from such misconduct the default, absent a showing of good cause.***<sup>vii</sup>

As a result, lawyers should use great care to obtain a client’s “express authorization” before signing settlement documents on a client’s behalf or requesting that the court retain jurisdiction to enforce a settlement agreement. Note that while subdivision (b)(3) requires an insurer’s authorization of an agent to sign settlement documents on its behalf to be in writing, there is no requirement that a client’s “express authorization” of an attorney be written. Nonetheless, in order to avoid confusion or misunderstanding as to the nature and scope of the attorney’s authority, and to protect both lawyer and client, it would be prudent to obtain the client’s advance written authorization whenever feasible.

Given the potential seriousness of the consequences of noncompliance, where written authorization cannot be obtained in advance, it would be prudent for the lawyer to confirm, in writing, the specific nature and scope of the client’s express authorization, and to request the client’s written confirmation. Finally, lawyers should be prepared to establish “good cause” for signing settlement documents when done without the client’s express authorization.

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<sup>i</sup> California Code of Civil Procedure § 664.4, effective through December 31, 2020.

<sup>ii</sup> See, *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913; *Levy v. Superior Court* (1995) 10 Cal.4th 578, 586 (“[T]he term ‘parties’ as used in section 664.6 ... means the litigants themselves, and does not include their attorneys of record.”).

<sup>iii</sup> *Mesa RHF Partners, L.P. v. City of Los Angeles, supra*, 33 Cal.App.5th 913, 915.

<sup>iv</sup> *Id.*

<sup>v</sup> The unopposed bill, AB 2723, was sponsored by both the Consumer Attorneys of California and the California Defense Counsel.

<sup>vi</sup> *Levy v. Superior Court, supra*, 10 Cal.4th at 584-586 (“The litigants’ direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations of the settlement. It also protects parties from impairment of their substantial rights without their knowledge and consent.”)

<sup>vii</sup> 2019 CA A.B. 2723 (NS)2019 California Assembly Bill No. 2723, California 2019-2020 Regular Session, Versions Date Aug. 21, 2020, and Aug. 29, 2020, emphasis added.