

Focus

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Take Steps to Ensure Mediated Settlements Can Be Enforced

By Deborah Rothman and Victoria Pynchon

Ladies and gentlemen, start your word processors. *Simmons v. Ghaderi*, 2006 DJDAR 13065 (Sept. 29), may well have you revising your settlement documents before your next mediation. In *Simmons*, a majority of the 2nd



District Court of Appeal enforced a mediated oral settlement agreement that did not comply with Evidence Code Sections 1115 et seq. The court ruled that the defendant, having divulged confidential mediation communications and having litigated the issue of the agreement's enforceability, was barred by the doctrine of estoppel from relying on the protections of mediation confidentiality.

It is questionable how long this opinion will stand, given the strong, well-reasoned dissent and the recent 2nd District decision holding that parties cannot impliedly waive their mediation confidentiality protections. *Eisendrath v. Superior Court*, 109 Cal.App.4th 351 (2003).

To help counsel avoid the pitfalls of *Simmons*, there are several ways to ensure that even hastily concluded mediated settlements can be enforced. Alternatively, counsel can resist an attempt to enforce a mediated oral "agreement" to which the client never agreed.

But first to *Simmons*. Before the mediation of this medical-malpractice action, the defendant physician, Lida Ghaderi, gave her insurance carrier written authorization to settle the case for up to \$125,000. During the mediation but in Ghaderi's absence, the carrier made the authorized \$125,000 settlement offer, and the plaintiffs accepted. Offer by an authorized representative and acceptance by the offerees: a contract was formed, right? Right, so far.

The carrier's representative went into the room where Ghaderi and her *Cumis* counsel waited. In response to the carrier's news of the settlement, Ghaderi said, "Good, because I am revoking my consent." Neither the majority nor the dissent considered this an effective revocation, because the doctor's written consent required that any revocation be in writing and Ghaderi's purported revocation came after the oral settlement contract had been formed. Notably, the carrier supported its insured's oral revocation and did not sign the settlement agreement even though the plaintiffs had.

The defendant filed a motion for summary adjudication, based in part on protected mediation communications and documentation. That motion was denied. The parties proceeded to trial, with the court bifurcating the breach-of-contract claim from the underlying malpractice claim.

At trial, Ghaderi for the first time objected under Evidence Code Section 1119 to the disclosure of communications made during the mediation. She also objected on the same grounds to the introduction of documents prepared for and during the mediation. The trial court overruled the doctor's objections and entered judgment in favor of the plaintiffs. The appeal followed.

A Waiver by Any Other Name

If you haven't been following recent appellate and Supreme Court opinions construing California's mediation confidentiality statutes, you'd naturally be perplexed. "The doctor waived her right to object to the evidence by raising it for the first time at trial," you would say. "Of course, the majority is right." You would feel even more certain of your conclusion based on the defendant's revelation of confidential mediation communications in support of her summary adjudication motion.

So she waived her right to object, right? Well, yes and no. According to the majority, if you call it estoppel, she waived her right. If you call it waiver, she didn't.

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The majority acknowledged that mediation confidentiality protections cannot be impliedly waived (citing *Eisendrath*). Nevertheless, it found that the defendant was estopped from asserting the mediation confidentiality protections by virtue of her repeated failure to object to the introduction of mediation confidences in evidence and in her pursuit of affirmative relief based on those confidences.

In other words, the same conduct that the *Simmons* majority acknowledged could not result in the waiver of the defendant's confidentiality protections nonetheless could estop the defendant from asserting those rights.

Whatever the merits of this seeming end run around *Eisendrath*, unless *Simmons* is depublished or taken up for review by the Supreme Court, it is the current law applicable to the proof and enforcement of mediated oral settlement agreements in the 2nd District.

Ensuring Enforcement

Simmons does not change the means of documenting and thereby enforcing a mediated settlement agreement. It only holds that a party can be estopped to object to an invasion of mediation confidentiality. The opinion reminds us that we ignore at our peril the requirements for properly documenting an enforceable mediated settlement agreement.

Because the parties are often tired and impatient by the time they reach a mediated agreement, you should not have to think about the law's technical enforcement requirements for the first time at the end of a lengthy mediation. Instead, we recommend that you review and, if necessary, amend your mediation term sheets and memoranda of understanding and form mediated settlement agreements today.

Assuming your client insists on orally memorializing the settlement reached in mediation, you must comply strictly with Evidence Code Sections 1118 and 1124. An oral agreement reached during a mediation can be proven and enforced only if (1) its terms are recited to a court reporter or recorded by a sound device in the presence of all parties and the mediator, (2) the parties expressly agree to those terms on the record, (3) the recording is reduced to writing and signed within 72 hours of its recordation and (4) all parties to the agreement expressly agree in a writing, in the sound recording or in the reported record that the signed written transcript may be disclosed.

Ironically, the outcome of *Simmons* would have been different had the trial court followed the Evidence Code sections governing enforcement of mediated oral settlement agreements, with which the purported oral agreement in question did not comply.

This procedure for enforcing an oral settlement is so technical and cumbersome, however (counsel and mediators rarely have court reporters standing by or tape recorders in their breast pockets), that we recommend against it.

We instead suggest that the parties document all settlements in writing, even if the writing contains only skeletal deal terms and even if someone has to begin drafting it at 2 a.m. The agreement should provide that the parties intend it to be enforceable or binding and that all parties expressly agree in writing to its disclosure. Evidence Code Section 1123. If an action is pending between the parties, the memorandum of understanding should be made enforceable under Code of Civil Procedure Section 664.6.

Mediation Confidentiality Rights

What if you find yourself having to resist your opponent's contention that your client accepted a settlement offer made during mediation? Imagine that you represent the plaintiff, and the parties agree to settle their dispute for \$100,000. Now imagine that, while dictating the deal points to the mediator in caucus, the defendant says, "Don't forget to write that it's payable over five years. I told the plaintiff in the hallway earlier that any offer I made would require a five-year payout." When the mediator brings the deal sheet to the plaintiff and her attorney, the plaintiff denies there was any such conversation. She says, "And I'm finished. Now I wouldn't accept \$200,000, let alone \$100,000 from that lying so-and-so. I'm going to trial."

Finally, imagine there is a final status conference the next day. In response to the judge's question whether the case settled during mediation, you say, "The case has not settled, and we are prepared to go to trial." Defense counsel says the case settled during mediation. The judge asks the mediator what happened. What can you, the plaintiff's counsel, do?

As long as *Simmons* remains the law, we have one word of advice: Object.

1. Object under Evidence Code Sections 703.5 (the mediator is incompetent to make any statement, declaration or testimony to the court); 1119 (no evidence of anything said during the mediation nor any writing prepared pursuant to, for the purpose or in the course of the mediation is admissible or subject to discovery); and 1121 (the mediator may not submit and a court may not consider, any report (etc.) by the mediator concerning a mediation conducted by him or her).

2. Remind the court that the parties may not waive the mediator's lack of competence to testify under Section 703.5.

3. Remind your opponent that a mediator who is compelled to attend a court proceeding may recover the attorney fees and costs incurred if the court determines his or her testimony is inadmissible. Evidence Code Section 1127.

4. Object and file a motion to strike if your opponent thereafter files a motion to enforce the settlement under Section 664.6 or to amend the complaint to allege breach of the oral agreement purportedly reached during the mediation. Cite *Simmons* for the proposition that resisting a 664.6 enforcement motion could estop your client from claiming the protection of the mediation confidentiality provisions. If you believe you must respond substantively to the plaintiff's motion, reserve your right to litigate the issue without waiving your client's mediation confidentiality protections.

5. Object to the defendant's and his or her counsel's attempts to testify as to any statements made during the mediation.

Whether you're attempting to enforce a mediated settlement agreement or taking the position that no agreement was reached, a thorough review of the statutes and the most recent case law on the mediation confidentiality statutory scheme is a must.

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