



## CENTURION MEDIATION, LLC

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### **California Supreme Court makes Confidentiality in Mediation Proceedings Iron Clad.**

**By Elizabeth A. Moreno, Esq.**

The California Supreme Court, in Simmons v. Ghaderi (July 21, 2008), has hammered in the last nail and has made confidentiality of mediation proceedings iron clad. The court held that there can be NO implied waiver of mediation confidentiality. An oral settlement agreement that is not in writing, signed by the parties and where there is no express waiver of mediation confidentiality, is not admissible and will not be upheld in court. Even if the parties engage in bad faith behavior during a mediation that would warrant sanctions, there is no implied waiver of the mediation confidentiality. By laying down clear rules, the Legislature intended, as a matter of public policy, to reduce litigation over the admissibility and disclosure of evidence regarding settlements and communications that occur during mediation.

Dr. Ghaderi, in a wrongful death medical malpractice lawsuit was at the mediation with her insurance adjuster and the defense attorneys. She had given her consent to settle, providing the settlement amount was at or below \$125,000. Plaintiff's accepted the \$125,000. However, defendant and the claims adjuster, and defense attorneys refused to sign the settlement agreement when Dr. Ghaderi walked out of the mediation and orally revoked her consent. Plaintiffs went to the trial court to enforce the "written agreement" that the mediator had drafted, and which was signed by the plaintiffs. The trial court and court of appeal awarded the settlement amount as a judgment. The Supreme Court overturned the decisions and held that the mediation confidentiality statutes made inadmissible all evidence of an oral contract between plaintiffs and defendant during mediation. Specifically, no form of recordation of the oral agreement existed which was signed by all parties.

The California Supreme court made the following points:

1. The clear language of the statutory scheme and other indications of legislative intent reflect that disallowing an implied waiver would not produce absurd consequences, but was rather an intended consequence.
2. Evidence Code section 1119 sweeps broadly and renders *all* communications and writings made during mediation inadmissible except as otherwise specified in the statutes. Evidence Code Section 1122 plainly states that mediation communications or writings may be admitted *only on agreement* of all participants. Such agreement *must be express, not implied*.

The Legislature intended Evidence code section 1122 to give litigants control over whether a mediation communication will be used in subsequent litigation.

3. Code of Civil Procedure section 128.5 allows a court to sanction bad faith behavior. There is no confidentiality statute making an exception for reporting bad faith conduct through the disclosure of mediation communications.

4. Section 1115's placement within the Evidence Code further supports the conclusion that implied waiver does not apply to mediation confidentiality. Unlike the privileges subject to implied waiver that are found in division 8, entitled "Privileges," the Legislature placed section 1115 et seq. in division 9, entitled "Evidence Affected or Excluded by Extrinsic Policies." This placement reflects that the Legislature considered the specific limitations placed on the admissibility of evidence by the mediation confidentiality statutes and endorsed those limitations to encourage mediation as a matter of public policy.

5. Finally, the legislative history of the mediation confidentiality statutes as a whole reflects a desire that section 1115 et seq. be strictly followed in the interest of efficiency. By laying down clear rules, the Legislature intended to reduce litigation over the admissibility and disclosure of evidence regarding settlements and communications that occur during mediation. Allowing courts to craft judicial exceptions to the statutory rules would run counter to that intent.

The Supreme Court held that both the clear language of the mediation statutes and the prior rulings support the preclusion of an implied waiver exception. The Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process.

### **Tips to Secure an Enforceable Settlement Agreement**

If you are a party or an advocate to a mediation proceeding, and orally agree to a settlement, **REDUCE THE SETTLEMENT TO WRITING, SIGNED BY ALL THE PARTIES.** Some mediators do not take this requirement seriously and are very sloppy with having the parties reduce it to writing.

Reduce the settlement to writing **AT** the mediation. **IF NOT, ONE PARTY WILL HAVE BUYER'S REMORSE AND will later REVOKE THE oral CONSENT TO SETTLE.**

The parties should draft the settlement agreement, not the mediator.

Make sure that there is a provision in the agreement that the settlement is enforceable pursuant to California Code of Civil Procedure section 664.6, which states that the Superior Court will retain jurisdiction to enforce the terms of the settlement. Following these few simple steps will insure that the dispute has settled and is enforceable if one party does not keep the terms of the agreement.