

Evidence of Oral Settlement Agreement Reached in Mediation Inadmissible

September 2008

The Supreme Court of California has held that evidence of an oral settlement made in the course of mediation was inadmissible under California's mediation confidentiality statutes. *Simmons v. Ghaderi*, 187 P.3d 934 (Cal. 2008). The court emphasized that, except where certain narrowly constructed exceptions are present, the state's mediation confidentiality statutes are to be strictly enforced.

During a mediation, an insured physician gave written consent to her professional liability insurer to settle a malpractice case. The malpractice plaintiffs orally accepted the insurer's settlement offer, but the insured revoked her consent before the agreement was documented or recorded. The malpractice plaintiffs subsequently brought a motion to enforce the settlement. In opposition to the motion, the physician did not dispute the plaintiffs' factual representations regarding the mediation, but rather asserted that the agreement was not enforceable because neither she nor the insurer signed a written agreement. The court denied the motion to enforce settlement, but suggested that the plaintiffs amend their complaint to allege breach of contract. Consistent with the trial court's suggestion, the malpractice plaintiffs subsequently added a breach of contract count to their malpractice action, alleging that the physician breached the oral settlement agreement reached during mediation.

In her trial brief, the physician for the first time asserted that California's mediation confidentiality statutes precluded the malpractice plaintiffs from proving the existence of an oral settlement agreement. The trial court ruled in favor of the malpractice plaintiffs, and the intermediate appellate court affirmed, holding that the physician was estopped from asserting mediation confidentiality because she had failed to object to the malpractice plaintiffs' use of the evidence during pretrial motions.

The California Supreme Court reversed, holding that California's mediation confidentiality statutes precluded admitting evidence of the oral agreement. These confidentiality statutes, the court noted, "prohibit admissibility of evidence of settlement terms made for the purpose of, in the course of, or pursuant to a mediation unless the agreement falls within express statutory exceptions." Such exceptions, the court explained, include writings that all mediation participants agree to disclose or oral agreements that are recorded, recited on the record or reduced to a writing signed by all parties. "In the present case," the court concluded, "an oral agreement may have been reached between the defendant's insurer and plaintiffs during

the mediation; however, the parties did not follow the statutory procedures that would have made this agreement admissible."

The court further held that no judicially created exceptions to mediation confidentiality applied, and the physician was not estopped from asserting mediation confidentiality based on her prior litigation conduct. The court acknowledged prior case law in which the court had recognized exceptions to mediation confidentiality where "a supervening due process right" was implicated or "an express waiver of confidentiality" was found. Except in those narrow instances, the court explained, "we have held that mediation confidentiality is to be strictly enforced."

Accordingly, the court rejected the intermediate appellate court's determination that the physician was estopped from invoking mediation confidentiality, describing the "real issue" as "whether a party can impliedly waive mediation confidentiality through litigation conduct." The court refused to recognize such an implied waiver. Rather, the court pointed out that the language of the mediation confidentiality statutes "unambiguously requires express waiver" and that "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." The court explained, "[t]he Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process." Therefore, the court held that the physician was entitled to judgment as a matter of law on the breach of contract count, as there was no admissible evidence to prove the contract allegedly breached.