

SEPTEMBER 2023

A convenient way to confirm a settlement

Oral mediation-settlement agreements and the use of Evidence Code section 1118

By Mark Kramer

It's nearing 11:00 p.m., PDT and 2:00 a.m., in the eastern time zone, when the 12 groups of litigants have finally reached a settlement on the second full day of mediation of an aggressively litigated case. None of the participants want the settlement to fall through because of a party's second thoughts, but at that time of night, no one wants to start preparing a written settlement agreement, and few, if any, of the participants want to wait for one to be prepared. A possible solution to this dilemma is to follow the requirements of Evidence Code section 1118 to create an oral mediation-settlement agreement regarding the settlement just reached. (Unless otherwise noted, all code citations are to the Evidence Code.)

Requirements for an enforceable oral mediation-settlement agreement

The Law Revision Commission Comments to section 1118 explain the reason for the code with the following statement: "Section 1118 establishes a procedure for orally memorializing an agreement in the interest of efficiency." Therefore, to memorialize and to make the agreement enforceable, section 1118

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



sets forth four requirements for the presentation of an oral mediation settlement agreement, as follows:

> An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:
>
> (a) The oral agreement is recorded by a court reporter or reliable means of audio recording;
>
> (b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited;
>
> (c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect;
>
> (d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

Note that this four-pronged procedure can commence by oral presentation of the parties in court "recorded by a court reporter or reliable means of audio recording." Note also that even if the first three requirements of section 1118 are met, the required writing that is presented within 72 hours after its recording must be signed by the parties. (§ 1118, subd. (d) and § 1123, subd. (c).)

Analyzing the four requirements of section 1118

To be an effective oral agreement under section 1118, the oral agreement must satisfy *all four* conditions set forth in the code, as follows:

First: "The oral agreement is recorded by a court reporter or reliable means of audio recording." (§ 1118, subd. (a).)

Despite participating in hundreds of mediations as the mediator or counsel for a party, your author has yet to see a court reporter present at mediation. The Law Revision Commission Comments note that section 1118 was amended to reflect advances in recording technology. These days most participants are likely to have a cell phone to record the oral agreement if no other recording device is available. It may be advisable to have two or more persons record the agreement on their cell phones to ensure against the possibility of a cell phone getting lost, stolen and to ward off any claims that the recording had been altered.

Second: **"**The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited." (§ 1118, subd. (b).)

This second requirement is very straightforward. However, all participants must remain at the mediation site if it is in person, or stay on the Zoom or other virtual meeting platform until the recording is made so assent can be expressed. Note also that the *mediator* must be present during the oral recording of the agreement.

Third: "The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect." (§ 1118, subd. (c).)

Once again, this is a specific requirement that must be met to overcome mediation confidentiality.

Fourth: "The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded." (§ 1118, subd. (d).)

This final section means that an available court reporter can transcript the agreement for signature. Or, if an audio recording is made, it would need to be transcribed for signature. The written agreement is required to be signed by the parties within 72 hours after the recording is made. The mediator is not a required signatory to the agreement.

Requirement for mediator participation during the oral recording of the agreement

Subdivision (b) of section 1118 requires the mediator and the parties to be present as the settlement terms are recorded. Although the mediator's presence is required, the mediator cannot opine on the agreement. See Law Revision Commission Comment to section 1123, subdivision (c) stating "[t]o facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only agreement of the parties. Agreement of the mediator and other mediator participants is not necessary." Although the code does not state the person who is to present the oral agreement for recordation, it is most likely the mediator's job to do so.

Section 1121 restricts a mediator from disclosing mediation confidentiality *unless* the parties expressly agree at the oral presentation of the agreement allowed under section 1118. The Law Revision Commission Comment to section 1121 allows the oral procedure of section 1118 to permit the mediator to report the mediation process to the court.

Enforcement of the oral mediation settlement agreement

What occurs during a mediation is confidential, as required by section 1119. However, compliance with other code sections allows disclosures of a written or oral mediation settlement agreement.

A *written* mediation settlement agreement can only be disclosed if the parties fully comply with section 1123. Disclosure of an *oral* mediation settlement agreement can only be accomplished if the parties *fully* comply with the requirements of section 1118, as set out above.

Oral admission of confidential communications

As stated above, the basic mediation confidentiality requirement is section 1119. Subdivision (a) applies to the confidentiality of *oral* communications during the mediation, and subdivision (b) applies to *written* presentations during the mediation process. Several other sections of the Evidence Code allow an *oral* revocation

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



of the confidentiality requirements, and they are set out below:

Section 1121: Restricts a mediator from disclosing confidential matters of a mediation. However, if the parties comply with the oral requirements of section 1118, the oral agreement can be presented to the court allowing the mediator to disclose confidential matters of the mediation.

Section 1122: Allows confidential communications or writings made in preparation of a mediation admissible if any of the following conditions of section 1122 is met:

(1) all parties to the agreement agree *orally* in accordance with section1118 to disclosure of the agreement; *or* (2) the agreement was prepared by some but not all of the mediation participants, but all participants state *orally* that they agree with the terms of the agreement and its disclosure in accordance with section 1118.

Section 1123: Allows all parties to the mediation to agree orally in accordance with section 1118 that a written settlement agreement is not a confidential document and can be disclosed.

Section 1124: Provides the mechanism for enforcement of an oral mediation settlement agreement memorialized under section 1118 by making the same admissible with potentially other oral agreements reached at mediation. Section 1124 provides:

> An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied.
>
> (a) The agreement is in accordance with Section 1118.
>
> (b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement, expressly agree, in writing, or orally in accordance with Section 1118, to disclosure of the agreement.
>
> (c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Absent the special circumstances of section 1124, mediation confidentiality would apply to the oral statement of settlement terms. (*Ryan v. Garcia* (1994) 27 Cal.App.4th 1006.)

Section 1125: Provides the time when mediation confidentiality ends. For an oral agreement under section 1118, the mediation terminates when the oral agreement fully resolves the dispute or partially resolves the dispute and comports with the requirements of section 1118. (§ 1125, subds. (a)(2) and (b)(2).)

Cases of note

There is a paucity of case law interpreting or relating to section 1118. However, there are some points in cases to note, generally relating to confidentiality provisions and oral agreements.

Confidentiality relating to mediation (§§ 1119-1129) and communications related to a mediation are strictly applied, as the California Supreme Court noted in *Cassell v. Superior Court* (2011) 51 Cal.4th 113 at 118:

> We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied, and do not permit judicially crafted exceptions, or limitations, even where competing public policies may be affected. (Citations omitted.)

Simmons v. Ghaderi (2008) 44 Cal.4th 570 is potentially instructive. *Simmons* involved a wrongful-death medical-malpractice action. The defendant doctor initially gave written consent to her carrier to settle for $125,000. The insurance carrier for the defendant doctor authorized a settlement in the agreed-to amount, and the plaintiff *orally* accepted the same.

The mediator prepared a written settlement agreement, and it was signed by the plaintiff. The doctor and her insurance carrier refused to honor their original written acceptance, and they refused to sign the mediation settlement agreement prepared by the mediator. Because not all parties executed the written settlement agreement, it was considered an oral agreement that did not meet the signature requirements of section 1123, and, therefore, the negotiated agreement was inadmissible as a confidential mediation communication.

The court stated, "…mediation confidentiality now clearly applies to 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. (§ 1119, subd. (a).)" (*Id*., p. 581.) The court emphasizes that the mediation – confidentiality statutes make inadmissible evidence of an oral mediation-settlement agreement that does not comport with section 1118. And, certainly, the *Simmons* parties did not conform to the requirements of section 1118 for the admissibility of an oral mediation-settlement agreement.

Conclusion

Although somewhat confusing, Evidence Code section 1118 can be a useful tool. It is important to carefully follow the code requirements and review the Law Revision Commission Comments in the sections cited within this article.


Kramer

Mark Kramer is a neutral handling both mediations and arbitrations. For the past 44 years, he has achieved a wide variety of expertise in personal injury, premises liability, medical malpractice, product liability, and construction. Mark is a member of ABOTA, and for over 25 years, he has served as an arbitrator/mediator for the Los Angeles and Ventura Superior Courts. He also serves as an MSC and VSC officer for the Los Angeles Superior Court. Mr. Kramer can be reached at mark@kramermediate.com and www.kramermediate.com.

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**