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Confidentiality in Insurance Coverage Mediation: Will It Survive *Rojas v. Superior Court*?

by Elizabeth Bader

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Ms. Bader's background in insurance coverage dates from 1980; she entered the field by working for a mid-sized insurance company in their legal and claims departments. Her recognized expertise in coverage issues is a result of that experience.[4] She has also successfully represented policyholders in complex insurance coverage litigation on appeal.[5] Ms. Bader now mediates insurance coverage, construction defect and a wide variety of other complex disputes.

Introduction

Mediation has come of age. Twenty–five years ago, mediation was still a relatively uncommon way of resolving litigation. Today almost every lawsuit goes through some form of mediation, either through a court-ordered program or with a private mediator.

Mediation is now old enough to get itself in trouble. And it has. In recent years, a number of courts have ruled that California's statutory rule of absolute mediation confidentiality was of no avail to mediators, who could be forced to testify in court about what happened in mediation. (Compare Evidence Code § 1115 *et seq.* with *Olam v. Congress Mortg. Co.* (N.D. Cal. 1999) 68 F. Supp.2d 1110 (mediator forced to testify about facts related to settlement of action between allegedly frail elderly plaintiff and mortgagee); *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, 74 Cal.Rptr.2d 464 (minors accused of rock throwing in juvenile proceeding may compel mediator to testify in delinquency proceeding that mediation participant admitted he did not see them throw rocks.)

In *Foxgate Homeowners Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 108 Cal.Rptr.2d 642, 25 P.3d 1117, the California Supreme Court reversed one such incursion into mediation confidentiality by an intermediate appellate court. In a strongly worded opinion, the Court instructed California courts that the mediation confidentiality statutes were clear on their face and should be enforced as they were written. Only statutory exceptions, not

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2.See e.g. *Conestoga Services Corp. v. Executive Risk Indemnity Inc.* (9th Cir. 2002) 312 F.3d 976 [Insurance]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106 [Anti-SLAPP law]; *Newsham v. Board of Permit Appeals* (1996) 46 Cal. App. 4th 930 [Administrative Law]; *Nash v. MacDonald* (2001) 92 Cal.App.4th 847; 112 Cal.Rptr.2d 230; *rev. denied; depub'n ordered,* Jan.3, 2002 [Construction defect litigation]; *Philippine Export & Foreign Loan Guar. Corp. v. Chuidian* (1990) 218 Cal. App. 3d 1058 [Commercial fraud; civil procedure]; *People v. Murtha* (1993) 14 Cal. App. 4th 1112 [Wiretapping].) Ms. Bader has also litigated cases on appeal involving family law, medical malpractice and real estate fraud, among other areas.

3.See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106; *Los Carneros Community Associates v. Penfield & Smith Engineers, review granted* October 21, 1998, S072581, and *review dismissed after settlement*; *Equilon Enterprises v. Consumer Cause* (2002) 29 Cal.4th 53; *American Academy of Pediatrics v. Lungren* (1996) 12 Cal. 4th 1007; *rehearing granted and subsequent opinion at* 16 Cal.4th 307 (1997); *Adoption of Michael H.* (1995) 10 Cal. 4th 1043; *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal. 4th 1009; *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1994) 7 Cal. 4th 860; *People v. Williams* (1992) 4 Cal. 4th 354; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal. 4th 992.

4.See Bader, "*Strategies for Defeating and Defending the 1973 Pollution Exclusion,*" 11(3) Insurance Litigation Reporter, March 1989: 75 – 87; Bader, "*Automobile Insurance;*" California Insurance Law & Practice, Chapter 50; and Bader, "*California Insurer's Duty to Defend: How Far Does It Extend?*" (1985) 52 Ins. Counsel J. 252, cited in: *Garvey v. State Farm* (1986) 191 Cal.App.3d 1248, 1255 fn. 6; *rev'd* 48 Cal.3d 395 (1989).

5.See e.g. *Conestoga Services, supra,* [insurance broker entitled to indemnity and defense from errors and omissions insurer because third party's claim "arose out of" covered conduct].

judicially created ones, are permissible. (*Foxgate, supra,.*) Otherwise, the rule of mediation confidentiality is absolute. (See § 1119.)

Then, just last year, Division Seven of the Second District Court of Appeal published *Rojas v. Superior Court*. (See *Rojas v. Superior Court* (2002) 102 Cal.App.4th 1063, *review granted,* January 15, 2003.) In *Rojas*, the Court of Appeal announced that henceforth the statutory mediation confidentiality rules would provide only a qualified "privilege" coextensive with the work product privilege. (*Id.* at p. 1079.) The Court's opinion was largely based on the Court's perception of the possibilities for abuse of mediation confidentiality. (*Id.* at p. 1078.)

A huge uproar resulted, and the Supreme Court promptly granted review. Numerous mediators and professional associations filed amicus briefs arguing for mediation confidentiality.[6] Others filed briefs arguing against it. The question now is whether the Supreme Court will hold to its decision in *Foxgate* or whether it will affirm *Rojas*.

Given the Court's unequivocal statements in *Foxgate*, it seems likely that *Rojas* will be reversed. But *Rojas* was a case with bad facts: in the minds of many people, the appellate court's overhaul of mediation confidentiality was justified because the mediation statutes do not provide enough protection against abuse. Others, even some mediators, strenuously disagree.

Unfortunately, many people on both sides of the issue have skipped the important step of trying to discern the true limits of statutory framework. California's statutory rule of mediation confidentiality is indeed absolute. (See Evidence Code § 1119.)[7] Absent an express statutory exception, there is no exception to mediation confidentiality. (*Foxgate,* supra, 26 Cal.4th 1, 15.) However, as discussed in detail below, the rule is not nearly as sweeping as the parties in *Rojas* or the Court of Appeal's majority ("the majority") believed. Most of the concerns raised by *Rojas* can be resolved by interpreting the plain text of the statutes in a commonsense manner. This article suggests several ways that can be accomplished. It also analyzes some specific ways that *Rojas* might impact insurance coverage mediations.

Confidentiality Is Essential To Mediation.

As defined by the Legislature, mediation is "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (Evidence Code, § 1115(a).)

But it is also more than that. Mediation is "all about trust."[8] It requires trust between specific individuals. It requires "trust in the very process taking place around the table at specific moments in time." (Gill-Austern, *Faithful*, 2002 J. Disp. Resol. 343, 349.)

"Mediation *demands,*" as the Supreme Court recognized in *Foxgate*, "that the parties feel free to be frank not only with the mediator but also with each other." (*Foxgate, supra,* 26 Cal.4th at p.14, emphasis supplied, citation omitted.)

Accordingly, "to carry out the purpose of encouraging mediation by ensuring confidentiality," (*Foxgate, supra,* 26 Cal.4th at p.15) the Legislature has enacted Chapter 2 of Division 9 of the Evidence Code, Evidence Code sections 1115 to 1128.

6. Among the amici were the author of this article and Ron Kelly, a mediator who served as Expert Advisor to the California Law Revision Commission during the drafting of the California mediation statutes and who was instrumental in drafting the statutes. A joint brief raising many of the issues discussed in this article was filed by the author on behalf of both. The author wishes to gratefully acknowledge the contribution of Ron Kelly to the development of many of the ideas presented in the amicus brief, many of which are also discussed here.

7. All statutory references in this brief are to the Evidence Code unless otherwise specifically stated. The complete text of Evidence Code sections 1115 to 1128 are attached to the end of this article.

8. Spring 2003 Symposium, *Panel 1: Alternative Dispute Resolution Strategies in Medical Malpractice* (2003) 6 DePaul Journal of Health Care Law, 249, 253; see also Note, *Protecting Confidentiality in Mediation* (1984) 98 Harv. L. Rev. 441, 459 [trust is "essential to mediation"]; Schmedmann, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, 9 Indus. Rel. Law J. 523, 595 n. 18 [noting "the first of seven stages of mediation is creating trust," citation omitted]; Paulk, *Why Mediation Works* (2001) 36 Tulsa Law J. Summer 2001 Symposium, 861, 864 ["The parties in a mediation proceeding trust that the proceeding is confidential. They can literally, 'bare their soul,' to a mediator."].)

California's Rule of Absolute Confidentiality Is Articulated in Section 1119.

Evidence Code section 1119 is the core of California's mediation confidentiality scheme. Section 1119(a) provides in pertinent part that "no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery. . . ." Mediation confidentiality thus applies to all (1) statements made in or pursuant to a mediation and (2) to statements made 'for the purpose of . . . a mediation."[9]

Under section 1119(b), "[n]o writing as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery. . . ."

(§ 1119(b).) This is a very far-reaching provision because Section 250 contains an expansive definition of the term "writing." [10] A "writing" specifically includes photographs. (*Id.*) Thus, writings and photographs (1) prepared in or pursuant to a mediation and/or (2) prepared "for the purpose of . . . a mediation" must, by statute, be kept absolutely confidential.

Section 1119(c) states: "All communications, negotiations or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." The scope of this rule is not limited to litigation. Mediation confidentiality thus applies across the board, even outside of the courtroom.

Section 1119 applies "except as otherwise provided in this chapter" that is, except as provided in the confidentiality statutes themselves.

The Supreme Court Has Instructed Courts Not To Create Their Own Exceptions to The Mediation Confidentiality Statutes.

In *Foxgate Homeowners Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, the Supreme Court forbid California courts from creating their own exceptions to California's mediation confidentiality statutes. As the Court said: "California's statutory scheme . . . unqualifiedly bars disclosure of communications made during mediation *absent an express statutory exception*." (*Foxgate*, *supra,* 26 Cal.4th at p.15, emphasis supplied.)

In *Foxgate* a motion for sanctions was granted against a construction litigation defendant and its attorney for allegedly misusing the mediation process. In a report sent to the Court, the mediator accused the defendant and its attorney of "trying to derail the mediation," arriving late to the mediation, appearing without experts, and taking certain objectionable negotiating and legal positions. (*Foxgate, supra,* 26 Cal.4th pp. 6–7.) The plaintiff's counsel also filed a declaration setting forth the allegedly objectionable conduct. (*Foxgate, supra,* 26 Cal.4th at p. 5.)

The defendant objected to the mediator's report on the ground that it violated Evidence Code section 1121, which prohibits mediators from making reports concerning a mediation other than those mandated by court rule or other law. (*Id.* at p. 8.)[11] In particular, disclosure of mediation communications is prohibited by law by Evidence Code sections 1115 *et seq,* including section 1119.

The Court of Appeal in *Foxgate* was troubled by what it perceived to be the defendant's failure to participate in good faith in the mediation process. (*Foxgate, supra,* 26 Cal.4th p.17 (quoting court of appeal opinion.) It therefore created an exception to the rule of absolute mediation confidentiality which it described as "narrow:" a mediator or party could report to the court "only information that is

9. Mediation consultations are discussed in detail below.

10. Section 250 provides: "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail, or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."

11. Evidence Code sections 1115 to 1128 became effective during the dispute in *Foxgate.* (*Foxgate, supra.* at p. 8; compare *Foxgate, supra,* pp. 4–5 with Stats. 1997, c. 771 (A.B. 939).

reasonably necessary to describe sanctionable conduct and place that conduct in its context." (*Id* at p. 9.)

The Supreme Court reversed. It acknowledged the Court of Appeal's perception that the defendant may not have participated in good faith in the mediation process. (*Id.* at p. 17.) However, since the Legislature had declined to insert a bad faith exception into the mediation confidentiality statutes, courts were not free to do so. (*Id.*) Absent an *express statutory exception*, there simply is no exception to mediation confidentiality. (*Foxgate,* 26 Cal.4th 15 (emphasis supplied).)

This did not, however, leave the plaintiffs without a remedy. The Supreme Court noted that although plaintiffs could not introduce evidence of communications made during the mediation, they could introduce evidence that the defendant "engaged in *conduct* that warrants sanctions." (*Id.* at p. 18, emphasis supplied.) The statutory scheme, properly interpreted, still left room for disclosure of conduct evidence.

Rojas v. Superior Court: Hard Facts Tempt the Court of Appeal to Judicially Revise the Mediation Confidentiality Statutes.

Rojas, supra, like *Foxgate,* arose out of construction defect litigation. Two suits were involved in *Rojas*: one which was mediated and settled, and the second, in which the plaintiffs sued the parties who had settled the first suit. The issue was whether the plaintiffs in the second suit could discover evidence prepared for and used in the mediation of the first suit.

In suit number one, the owner of an apartment complex sued the builders and developers of the complex, alleging toxic molds existed on the property due to the builders' negligent construction. As part of a case management order, the superior court decreed, among other things, that the builders would be permitted to conduct destructive testing, the case would be submitted to mediation and the parties' experts would meet to discuss the cost and scope of repair. (*Rojas, supra,* 102 Cal.App.4th at p. 1067.) In connection with the mediation, the owner prepared an "investigation binder" which contained hundreds of photographs of the complex and other data taken from the premises. This binder was shared with the other mediation participants for a nominal fee. (*Id.* at p. 1067, n. 1.) Other information, such as test data, was allegedly also shared. The owners and the builders ended up remediating the building and settling their lawsuit. (*Id.* at p. 1067.)

Shortly after the settlement the tenants sued the owners and the builders. The tenants sought discovery of the investigation binder used in the mediation, and a wealth of other evidence including test samples, test reports, and expert reports. (*Id.* at pp. 1068–1069 and 1070.) The superior court denied the tenants' motion to compel discovery of the material, relying on the statutory rule of absolute mediation confidentiality.

The Second District Court of Appeal (Division Seven) granted the tenants' writ. The Court was apparently troubled by the possibility for collusion among the defendants: it carefully noted that in their settlement agreement the settling parties in the first suit had jointly agreed not to assist tenants in prosecuting claims relating to the building or the mold. (*Id.* at p. 1068.) The Court was also concerned that some of the evidence, e.g. photographs of buildings that were later remediated, would effectively disappear from the record if discovery was not compelled. (*Id.* at p. 1080.) Although not emphasized in the opinion, there was also one other very hard fact: most of the tenants were children. (*Id.* at p. 1068.)

The defendants have countered with the argument that at least one of the plaintiff's attorneys had entered the building while it was being remediated—with his expert. They argue that the plaintiffs simply played a waiting game: deliberately not doing discovery until the builder/owner lawsuit had settled. The merit or lack of merit of these arguments is difficult to gauge because the Court of Appeal did not discuss them in its opinion.

The Court of Appeal's majority refused to enforce the statutory rule of absolute mediation confidentiality. To do so, the majority said, would "obstruct the fact-finding process of litigation [and] would be, in our view, disastrous . . . . " (*Rojas, supra*, 102 Cal.App.4th at p. 1078.)

The majority held that the mediation confidentiality statutes were never intended to protect "evidence." (*Id.* at p. 1074.) They were only "meant to protect the substance of the negotiations and communications in furtherance of the mediation, not

the factual basis for those negotiations." (*Id.* at p. 1077.)

This raised the question of whether *any* evidence would ever be subject to mediation confidentiality. (*Rojas, supra*, 102 Cal.App.4th at p. 1077.) In response to this problem, the majority decided that the mediation confidentiality is co–extensive with the work product doctrine. (*Id.* at p. 1079.) In the work product area, "core" work product, such as an attorneys' notes, or analytic materials reflecting an attorney's reasoning, are not discoverable and admissible. (*Id.* at p. 1077.) But "nonderivative" materials—such as photographs—are discoverable and admissible. (*Id.*) The same or similar analysis should be used to determine the scope of mediation confidentiality. (*Id.* at pp. 1077 *et seq.*)

What about documents which contained both factual information and analytic material, perhaps even the parties' negotiating positions? According to the majority, those should be discoverable (1) upon a showing good cause and (2) after the trial court had conducted a balancing test in which it weighed the benefit of the mediation "privilege" against the need for materials before deciding the materials should be disclosed. (*Id.* at p. 1079.) If it was not possible to break such "amalgamated" materials into protected and nonprotected components, even protected materials could be subject to discovery. (*Id. at p. 1080.*)

In dissent Justice Perluss objected that the majority had "effectively eradicated any significance from the mediation privilege in California. (*Id.* at p. 1081.) The Supreme Court granted review on January 15, 2002.

The After-Effects of Rojas

Rojas has sent shock waves through the mediation community in California. If the Court of Appeal is correct, all evidence prepared for a mediation is subject to discovery under certain circumstances, even writings which convey the negotiating positions of the parties. (See *Rojas v. Superior Court* (2002) 102 Cal.App.4th 1063, 1079–1080, *review granted,* January 15, 2003.) As a result, parties in mediation can no longer know when evidence can be disclosed with safety or if indeed it is ever safe to make any disclosures at all.

At the same time, there is a legitimate concern that mediation must not become a litigation weapon, an easy way to avoid discovery. Is it true, as the Court of Appeal's majority suggests, that if the statutory rule of absolute confidentiality is enforced unscrupulous parties may be able to hide all of the evidence in a case merely by using it in mediation? If so, mediation could degenerate into a tool for discovery abuse. Ultimately this would destroy mediation.

Evidence Code Section 1119 Circumscribes the Scope of Mediation Confidentiality.

While the *Rojas* majority opinion held that the mediation confidentiality statutes do not cover "evidence," this is the shakiest part of the opinion. (*Rojas, supra,* 102 Cal.App.4th at pp. 1076–1077.) Sections 1119 and companion statutes refer repeatedly to "evidence." [12]

The majority reasoned that if the statutory rule were enforced as it is written, "parties could simply agree to mediate, introduce all their evidence, and then refuse to settle and claim privilege. What then?" (*Rojas, supra,* 102 Cal.App.4th at pp. 1078–1079.) The majority's assumption that if the mediation confidentiality statutes are not judicially limited virtually all evidence could be insulated from discovery merely by the device of using it in a mediation is incorrect. A wide range of evidence is never protected from disclosure by section 1119, including the following:

- *Underlying Facts Of The Litigation:* Section 1119 does not purport to protect the facts of the underlying litigation from disclosure. It extends to evidence of certain writings and statements or admissions, and nothing more. A fact and the evidence of a fact are obviously not the same.[13] The underlying facts of the dispute are simply never protected from disclosure under sections 1119 or its

12. While the majority may not have agreed with the Legislature's decision to protect certain types of "evidence," obviously that is not the issue. It is the province of the Legislature, not the courts, to determine whether a law is wise. (*Foxgate, supra,* 26 Cal.4th at p. 17.)

companion statutes.

• *Calculations and Information Known To Parties Or Witnesses, Even If Developed In Mediation:* Similarly, section 1119 does not purport to exclude facts within a party's or a witness's knowledge. Witnesses must testify to those facts—even if they were discussed within the mediation or developed during the mediation.[14] In *Rojas,* for example, if asked, witnesses would have to testify truthfully regarding the mold found in the building, the cost of repairing the building, and any other facts relevant to the litigation.

• *Physical Objects*: Sections 1119 does not mention physical objects. The admissibility of objects therefore remains untouched by the statutory scheme. (Code Civ. Proc., § 1858.) Evidence such as petrie dishes, molds, and the like was both discoverable and admissible. This is evidence of the highest order in mold litigation. (See Cross, "*Litigation à la Mold: Mold-Related Indoor Air Quality Claims May Eventually Generate More Litigation Than Asbestos* (January 2002) Los Angeles Lawyer 28, [noting the importance of the "[m]any different microbial sampling techniques [which] are available for use in litigation"].)[15]

• *Conduct of Parties and Other People:* Evidence of a party's conduct is also not excluded from discovery or admissibility by section 1119. (*Foxgate, supra,* 26 Cal.4th at pp. 17–18.) Evidence that the defendants remediated the building at issue *Rojas*, moved the tenants out of their apartments, removed mold from the building, signed contracts and applied for permits related to the remediation — all this is admissible and discoverable evidence.[16]

• *Statements By Strangers To the Litigation and To The Mediation Not Given For The Purpose Of The Mediation*: Section 1119 applies to statements and writings made for the purpose of the mediation, not to statements by the entire world outside the mediation. (See § 1120 and discussion of that statute below; § 1122(a)(1) [other than mediators only *participants* can provide agreement necessary to override confidentiality protection of § 1119].)

To effectuate the purpose and practical application of the statute, statements or writing speaking for a party in mediation such as the party's attorneys, employees, and experts are protected as statements by participants as long as those statements were in fact made for the purpose of the mediation. (§ 1119(a).) These people are in effect participants in the mediation. All *participants,* not just all parties, are covered under the rule of mediation confidentiality. (See State of California, California Law Revision Commission, *Recommendation: Mediation Confi-*

13. See, e.g., Evidence Code section 140 which provides: "'Evidence' means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

14. This point seems to be so obvious that there does not seem to be any published decision which has dealt with it directly. For an unpublished opinion, which is obviously without any precedential value but which discusses this point *see American Construction & Environmental Services, Inc. v. Mosleh* (1993) A093541, 2002 WL 31480282 at p. 18 (Cal.App. 1 Dist.) [party could not refuse to disclose cost of repair of property even though calculations were made in mediation].)

15. The majority recognized that physical objects are not rendered confidential by section 1119 but failed to recognize the scope and importance of that limitation. (*Rojas, supra,* 102 Cal.App.4th at p. 1075.)

16. Evidence Code section 1151, the rule barring use of repair evidence at trial, would present only a very limited legal obstacle to the use of this evidence. Section 1151 does not apply to discovery. (§ 1151; *Bank of the Orient v. Superior Court* (1977) 67 Cal.App.3d 588, 598–599.) It does not apply when strict liability is alleged against a developer. (*Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 117.) Repair evidence is also admissible as impeachment evidence. (*Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 615.)

dentiality (1996) 26 Cal. L. Revision Comm'n Reports 407, 425 ["parties, as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."])

To participate, it is *not* necessary that a person making a statement physically attend the mediation, nor is it necessary that all discussions occur in the mediator's presence. (*Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 364–365; see also Law Revision Commission, *Mediation Confidentiality, supra,* 26 Cal. L. Revision Comm'n Reports at p. 420 [noting definition of mediation in § 1115(a) includes a mediation "conducted as a number of sessions, only some of which involve the mediator."].)[17]

On the other hand, statements or writings by persons who stand outside the litigation and outside the mediation are most often not made "for the purpose of . . . a mediation" since those persons are not even tangentially involved in the mediation. (§ 1119.) The statement of a third party witness in an accident case, for example, or, perhaps, statements by the plaintiffs here, should not be deemed to have been prepared for the purpose of a mediation merely because the party recording the statement would like to use it in mediation. (*Id.*) *It is the "purpose" of the person who is giving the statement not the mere fact that the statement is later used in the mediation which renders it inadmissible.* (See § 1120, discussed in detail below.)

It could be argued that when a participant in a mediation takes a third party witness's statement and transcribes it, the transcript is itself a "writing" prepared for the mediation and thus protected under section 1119(b). That hypertechnical argument should be rejected. It would in effect allow a litigant to use section 1119(b) (the writing provision) to circumvent section 1119(a) (the statement provision). Such a dismembering of section 1119 would be impermissible.[18]

After all, the purpose of mediation confidentiality is to promote candor amongst those making statements in mediation. (*Foxgate, supra*, 26 Cal.4th at p. 14.) The Legislature never intended to make the statement of a person who was *unaware* of the mediation inadmissible.

Photographs Prepared For The Purpose Of A Mediation Are Protected By the Express Language of Section 1119.

On the other hand, the *Rojas* majority's statement that photographs are not subject to mediation confidentiality is clearly misguided. (See *Rojas, supra,* 102 Cal.App.4th at p. 1079.) It is contradicted by (1) the plain language of section 1119(b), which specifically includes photographs due to its cross-reference to section 250, and (2) by the history of the 1997 amendments which enacted the current statutory scheme.

Current section 1119 replaces (now repealed) section 1152.5. Under old section 1152.5, only "documents" and certain statements were subject to mediation confidentiality. (See California Law Revision Commission, *Mediation Confidentiality, supra,* pp. 414–415.) The phrase "writing[s] as defined in Section 250" was inserted into current section 1119 precisely so that the word "writing" would not be interpreted "more narrowly than document." This is reflected in the Legislative History. (See California Law Revision Commission, Revised Staff Draft Recommendation, January 1997, p. 9 [on file with author].)

A reference to *both* documents and writings was also inserted in section 1122(a)(2). Obviously both documents and "writings as defined in section 250" are meant to be covered by the mediation confidentiality statutes.

A deliberate choice was also made to allow the party who took a photograph to decide whether it was admissible—even if the photograph depicted evidence that was later destroyed. This came up during the drafting of section 1122(2) which permits a party who has paid for the preparation of a writing to control how it is used later. As the Law Revision Commission's staff noted in a memo regarding the

17. Indeed, parties often meet over the phone and often never physically meet the mediator at all. Parties also enjoy— and often need—the privacy and convenience of caucusing at certain points even when the mediator is not present. The "process" of mediation is broad enough to encompass a wide variety of mediations sessions. (§ 1115(a).)

18. See *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468 [courts should not read statutory scheme in a way which causes one section to contradict another].

enactment of what is now section 1122:

> For example, it would allow a mediation participant to introduce a photograph that a participant took for a mediation but later decided would be useful at trial. *Although in many instances it would be possible to take another photo, in some cases that could not be done, as when a building has been razed or an injury has healed.* . . . The staff's proposed revision would give the participant who took the photo control over whether it is used . . .

(See Legislative History, on file with author, emphasis supplied.)[19]

While courts may refuse to enforce the express language of a statute when to do so would lead to absurd results, there is no question of an absurd result here. (*Foxgate, supra,* 26 Cal.4th at pp. 14 & 17.) Photographs are quite properly and commonly used in mediation. Because they are easy to take and portable, they can be transported to the mediation table and reviewed by multiple parties at the same time. Because they are "worth a thousand words," they may change the position of an intransigent party in a way that no volume of argument could do. Accordingly, photographs prepared for the purpose of a mediation should be protected by the statutory rule of absolute confidentiality stated in section 1119. (*Foxgate, supra,* 26 Cal.4th at p. 17.)

Evidence Does Not Become Inadmissible Merely Because It Is Used In A Mediation (Section 1120).

Perhaps the single most surprising aspect of the *Rojas* majority's decision is that it makes no mention at all of the most basic facts regarding the parties' mediation. When did the mediation occur? When did it end? The opinion does not contain specific answers to these questions. But these questions are essential to analyzing any claim of mediation confidentiality.

Evidence Code section 1120(a) provides in pertinent part:

> "Evidence otherwise admissible or subject to discovery *outside of a mediation* . . . shall not be or *become* inadmissible or protected from disclosure *solely by reason of its introduction or use in a mediation or a mediation consultation*."

Under Evidence Code section 1120, evidence "admissible or subject to discovery outside of a mediation" does not "become" inadmissible — it does not *change its character* so that it becomes inadmissible when it was previously admissible — solely because it has been introduced or used in a mediation. It is therefore a question of first importance when the mediation began or ended, and whether particular items of evidence existed prior to ("outside") the mediation.

Consider the following hypothetical. A plaintiff in a personal injury case was rear-ended by the defendant. The plaintiff's attorney has obtained a photograph from the police which shows the condition of the plaintiff's car after the collision. During a mediation, the attorney shows the photograph to the defendant's insurance adjuster. The case does not settle. The attorney then refuses to produce the photograph in discovery, arguing it has become confidential because it was used in the mediation.

The majority's opinion loudly decries the potential for this kind of abuse. (See *Rojas, supra,* 102 Cal.App.4th at p.1077 [first full sentence].) But the Legislature has already considered the problem and decided how to remedy it. Under section 1120, the photograph did not "become inadmissible" merely because it was used or introduced in a mediation. The photograph would remain discoverable.

The Problem of Amalgamated Materials

The problem of "amalgamated materials," which also troubled the Court of Appeal majority, can be resolved with the help of section 1120. (*Rojas, supra,* 102 Cal.App.4th at pp. 1079–1080.) An investigation binder or any other amalgamation of materials "prepared for the purpose of" a mediation is inadmissible. On the other hand, if some of the materials in the binder would otherwise fall within

19. The author is particularly indebted to Mr. Kelly for this point.

section 1120, then they are independently discoverable and admissible.

Hypothetical: Tenants in *Rojas* demand discovery of the "investigation binder" and all photographs within the binder. Discovery should be denied since the request is a direct attempt to discover a document used in mediation. A privilege log of the individual items should *not* be required since the party seeking discovery does not have the right to view the binder in whole or in part. (Section 1119.)

Hypothetical: Attorney for owners of building in *Rojas* took photographs of mold prior to instituting litigation. The photographs were later inserted into the investigative binder used by the parties during the mediation. The tenants' counsel later propounds discovery which seeks "all photographs of the building." Here, mediation confidentiality does not bar discovery because (1) pre-existing photographs not prepared for the purpose of a mediation are not covered by mediation confidentiality even if used in a mediation (section 1120); and (2) the discovery request does not demand discovery on a basis connected to the mediation.

Similarly, petitioners in *Rojas* suggested that the parties collected an extensive amount of evidence in this case prior to the Case Management Order ("CMO") or before the parties even considered mediation. (Petitioners' Brief in the California Supreme Court, pp. 30–32.) If that were true, the evidence which was in existence prior to the CMO and prior to the time the mediation was actually pending is admissible and discoverable. Even if the defendants had placed that evidence in the investigative binder, it would still be discoverable.

Can a party who claims shelter under the statutory rule of mediation confidentiality still oppose discovery on other grounds if the mediation confidentiality claim is rejected? Certainly. A party might oppose discovery on the basis of the attorney/client privilege, the settlement privilege, the work product privilege or any other legitimate basis. Mediation confidentiality, however, cannot be *reduced* to those privileges. Otherwise, courts will have "effectively eradicated any significance from the mediation privilege in California. (*Dissenting op'n* by Perluss, J. 102 Cal. App. 4th at p. 1081.)

The Interpretation Adopted By The Court of Appeal's Majority Misread Section 1120.

The majority recognized the importance of section 1120 in general terms.[20] But the majority did not recognize the temporal and spatial connotations of the phrase "outside of mediation" in section 1120. Focusing instead on whether "evidence" would be discoverable in the abstract, the majority deduced that since *all* (or virtually all) evidence is discoverable even when there has never been a mediation, all "evidence" is unprotected by mediation confidentiality. (*Rojas, supra,* 102 Cal.App.4th at pp. 1075–1077.)

This logic eviscerates section 1120 and the mediation confidentiality statutory scheme. While the phrase "subject to discovery outside of a mediation" in section 1120 may not be a model of clarity, clearly it does not mean mediation confidentiality only applies when a party shows that the evidence at issue would be subject to discovery "inside" a mediation. There is no discovery in mediation.

Conversely, section 1120 also does not mean that all evidence potentially subject to discovery in some general sense falls outside the mediation confidentiality statutes. On the contrary, the statutes were enacted precisely *because* evidence used in mediation would otherwise be subject to discovery or use at trial. (§ 1119(a) and (b).)

The Legislature Did Not Intend to Permit General Discovery Statutes To Abrogate The Rule of Absolute Confidentiality.

The drafters of the mediation confidentiality statutes specifically rejected the notion that the discovery statutes work a blanket limitation on section 1119. In the initial stages of drafting, the bill which ultimately enacted sections 1119(a) and (b) stated that those sections applied "except as provided by statute." (See Legislative History materials on file with the author.)

While section 1119 was being drafted, the

20. As the majority said: "This language [in section 1120] ... implies that the scope of the mediation privilege does not cover absolutely everything that might happen to be used during a mediation." (*Rojas, supra,* 102 Cal. App.4th at p. 1076.)

concern was expressed to the Law Revision Commission that an early version of the mediation confidentiality statute might be misinterpreted as allowing the discovery statutes or other disclosure statutes to override mediation confidentiality. (*Ibid*, p. 7.) This was unacceptable. As stated in a Law Revision Commission staff memo, *"it [was] not the intent ... to have general discovery statutes override mediation confidentiality."* (Legislative history on file with the author.)

After several iterations, section 1119 was revised to provide that it applies except as provided in *Chapter 2,* that is, except as provided in the mediation confidentiality chapter itself. (See § 1119, first sentence.) Absent an express *statutory* exception, the rule of confidentiality stated in section 1119 is indeed absolute. (*Foxgate, supra,* 26 Cal.4th at p.15.)

Unlike The Work Product Rule, California's Statutory Mediation Confidentiality Rule Does Not Allow A Party To Shield Evidence From Disclosure Merely On the Basis of A Unilateral Anticipation of a Possible Mediation.

Ironically, the majority's proposal that mediation confidentiality be equivalent to the work product privilege would cause exactly the kind of abuse the majority was trying to prevent. Under the work product rule, evidence is inadmissible if developed merely "in anticipation of" litigation. An actual, pending lawsuit is not required. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371, citation omitted.)

An analogous rule in the context of mediation confidentiality would be disastrous. A party could create evidence such as a photograph, make a unilateral decision that the evidence might be used at a mediation some time in the future, toss the evidence into a "Mediation" file—and argue forever after that everything in the file is barred from disclosure under section 1119.

Alternatively, two or more parties could decide in retrospect after a mediation ended that all of their evidence must have been prepared "for the purpose of . . . a mediation" and must be absolutely confidential. (§ 1119(a) and (b).) That could allow them to collude to make it difficult at a later date for third parties to obtain evidence about their conduct. Apparently petitioners in *Rojas* claimed that happened in *Rojas.* (See Petitioners' Answer Brief on the Merits, pp. 30–31.)

That the drafters of the current statutory scheme did not have such an open-ended conception of the phrase "prepared for the purpose of . . . mediation" is evidenced by their enactment of section 1115(c). That section extends mediation confidentiality to mediation consultations, which are defined as

> a "communication between a person and a mediator for the purpose of initiating, considering or reconvening a mediation or retaining the mediator."

Mediation consultations by definition take place "for the purpose" of a potential mediation, and antecedent to an actual mediation,[21] and they may be unilateral. (See Law Revision Commission, *Mediation Confidentiality, supra,* 26 Law Revision Comm'n Reports, pp. 427–428.) If a merely unilateral expectation that a mediation might take place some time in the future were enough to invoke mediation confidentiality, the statutory protection for mediation consultations would have been wholly unnecessary.

This does not mean, of course, that writings or statements must be prepared during the mediation. Writings or statements antecedent to the mediation are also confidential so long as they are prepared *for the purpose of* a mediation, but not merely for the purpose of merely a hypothetically possible mediation which exists only in the mind of one party. (§ 1119(a) and (b).)

Trial courts considering this issue could look at any of the following factors: (1) whether there was a mediation consultation and if so when, (2) when the parties agreed in writing or orally to mediate (3) whether the nature of the statement or document is such that it was probably prepared for the purpose of the mediation and (4) the parties' testimony about their intents and purposes.

To the extent this raises questions of fact about when a mediation began or ended or the parties'

21. With one exception: they may take place after an actual mediation for the purpose of considering 'reconvening' the mediation. (Section 1115(b).)

actual expectations, trial courts should—and do—have the power to decide whether as a factual matter a given item of evidence was or was not actually "prepared for the purpose of . . . a mediation." (See § 1119(a) and (b).) The trial court is the proper and the best place to guard against abuse of the rule of absolute mediation confidentiality.

The Case of the Never-Ending Mediation?

As noted above, a detailed statement of when the mediation began and ended was not provided by the court in *Rojas*. Some of the language in the opinion suggests that the parties may have attempted to treat the remediation and destructive testing of the building as part of the mediation and therefore covered by mediation confidentiality. (See the chronology stated in *Rojas, supra,* 102 Cal.App.4th at pp. 1067–1068.) Could the parties, by agreeing to extend a mediation indefinitely until the building was remediated, agree that every document used for the purpose of the remediation was also prepared for the purpose of the mediation?

Under section 1115, mediation is a process in which a neutral person facilitates communication between disputants. That section should be construed to facilitate the purpose of the mediation statutes. (Code of Civ. Proc., section 1858.) While perhaps a walkthrough of a building to develop negotiating positions might qualify as being a part of a mediation, the actual physical demolition or rebuilding of a piece of real property process should not. Evidence of the demolition or renovation is conduct evidence "outside" the mediation, and is therefore not covered by mediation confidentiality. (Section 1120.)

The Mere Fact That A Court Has A Standing Order Directing All Cases Into Mediation Is Not Enough To Establish That All Documents Prepared Prior To The Mediation Are Confidential.

Although one of the principal reasons the present statutory scheme was adopted in 1997 was to insure that court-ordered mediations would be covered by the rule of absolute mediation confidentiality,[22] court-ordered mediations may pose special problems. For example, it may be more difficult to tell when a mediation actually began if, as often happens, the court has a standing order requiring *all* cases to go mediation.

Just as a document prepared on the basis of a mere subjective "anticipation" of a possible private mediation is insufficient to require mediation confidentiality, so too a document prepared by a party merely on the assumption that a mediation *might* take place in the future pursuant to a standing order also fails to meet the requirements of section 1119.[23]

In this regard it is important that the mediation confidentiality statutes articulate a statutory rule of confidentiality, not a mere privilege. (*Eisendrath v. Superior Court, supra,* 109 Cal.App.4th at pp. 362–363 [distinguishing between privileges and statutory mediation confidentiality statutes].) Accordingly, even in a CMO a court can therefore neither limit nor expand the scope of the statutory confidentiality rule. (*Id.* at p. 363.)

Rojas shows the mischief that can occur when there is no reasonable demarcation between the processes of discovery and mediation. The CMO apparently "managed" the case for the purpose of discovery, but it also sent the case to mediation. From the summary of the court's order in the majority's opinion, it appears the processes were intermingled to a great extent. (*Rojas, supra,* 102 Cal.App.4th at p. 1067.) The apparent efficiency achieved initially has resulted in years of litigation.

Precisely in order to try to prevent the

22. See the Legislative Counsel's Digest for AB 939 [noting intent of bill "to apply to a mediation ordered by a court or other adjudicative body."] (Law Revision Commission, *Mediation Confidentiality, supra,* p. 420.) To accomplish this, the definition of mediation in section 1115(a) does not include a requirement that a "mediation" be voluntary at the inception. (*Id.* at pp. 419–420.)

23. In most cases, parties know perfectly well when a case is actually set for a court-ordered mediation since they receive an order directing them to appear at a given time or place at a specific location. It is that order which should be used as a benchmark in determining whether a document is protected under section 1119.

intermingling of mediation and discovery, the Judicial Council has recently amended the rules of court to forbid the practice of allowing discovery referees to operate as mediators. (Cal. Rules of Court 244.1(b) and 244.2(b).) The Supreme Court should instruct trial courts to be aware of the problem of mixing discovery with mediation, and to avoid it.

Trial Courts Considering Mediation Confidentiality Issues Should Issue Statements of Decision And Writ Review Should Be Available On The Merits Of The Court's Decision.

In summary, when a litigant objects to the disclosure of evidence on the ground of mediation confidentiality, a trial court should first consider whether the evidence is of the type described in Section 1119. If it is, the court should specifically consider and make findings on when the mediation at issue occurred, when it began and when it ended, and the specific relationship that each item of evidence has to the mediation. Due to the ex parte nature of the *in camera* hearings which the trial court will conduct on these issues, trial courts should be required to issue statements of decision upon appropriate request by a party.[24]

To the extent the trial court's decision rests on questions of fact or mixed questions of fact and law about when a mediation began or ended or the parties' expectations, the usual standards of review of course apply.[25] However, due to the fact that the party who does not prevail will in most cases lack another adequate legal remedy, a court of appeal should not deny a writ petition seeking review of an order ruling on mediation confidentiality merely because the writ petition presents no important issue of law or because the court of appeal considers the case less worthy of its attention than other matters. (See *e.g. Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114.) This will help to encourage faith in mediation and will insure that the law develops with appropriate guidance from this Court and other courts.

Lessons From *Foxgate* and *Rojas* For Insurance Coverage Mediation.

Rojas and *Foxgate* contain many important lessons for insurance coverage mediations, as follows.

- *An Insurer's Conduct During Mediation Is Probably Not Confidential Under Evidence Code section 1115 et seq.* Conduct of an insurer in refusing to appear for a mediation, or perhaps in refusing to send an authorized representative to a mediation, is probably admissible and discoverable and not covered by the statutory mediation confidentiality rules. It is instead conduct evidence which is admissible under *Foxgate.*[26] *On the other hand, specific communications between an insurance representative and her supervisor probably are not discoverable or admissible if they occur in mediation.*[27]

- *An Insurer's Communication of a Settlement Offer During a Mediation Is Inadmissible Unless Subject to Evidence Code Section 1152.* As a communication made during a mediation, an insurer's settlement offer is generally not admissible. (Section 1119.) However, when an insured argues an insurer acted in bad faith by rejecting or refusing to accept a reasonable

24. This is so even though statements of decision are generally not required where a trial court decides an issue of fact on a motion. (*Lavine v. Hospital of The Good Samaritan* (1985) 169 Cal.App.3d 1019, 1026.)

25. On when a mediation ends, see section 1125 [articulating rules for termination of confidentiality protection].)

26. *Foxgate, supra,* 26 Cal.4th at pp. 17–18; [conduct of party not confidential under mediation confidentiality statutes]; *Nick v. Morgan's Foods,* 99 F. Supp.2d 1056, 1062 (E.D. Mo. 2000) *affd* 270 F.3d 590 (8th Cir. 2001) [court imposed sanctions for failure to send a representative with authority to mediation or to file a mediation brief]; *In re Daley,* 29 S.W.3d 915 (Tex. App. 2000) [insurance representative forced to testify about whether he left mediation early, and whether he had mediator's permission to do so].) See generally "*Alternative Dispute Resolution: Sanctions for Failure to Participate In Good Faith In, Or Comply With Agreement Made In Mediation,*" 43 ALR5th 545.

27. *Foxgate, supra,* 26 Cal. 4th at p. 17 [statements made in mediation by party inadmissible]; *In re Acceptance Insurance Company,* 33 S.W.3d 443 (Tex. App. 2000) [insurance representative could not be forced to testify about what she discussed with her supervisor on the telephone during a mediation]).

settlement offer, Evidence Code section 1152(b) may allow the insurer to introduce evidence of its own settlement offer. Section 1152(b) provides that "[i]n the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code [which prohibits certain claims handling practices], then at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement."

• *Rojas Will Impact Mediations Through The Department of Insurance For Earthquake and Auto Policies.* Insurance Code section 10089.70 *et seq.* establishes a mediation program through the Department of Insurance for complaints arising out of the Northridge earthquake, subsequent earthquakes and disputes arising under automobile collision policies or under automobile physical damage coverage policies. Insurance Code section 10089.79(c) provides that the mediation confidentiality statutes are applicable to those mediations. The Supreme Court's decision in *Rojas* will therefore directly affect — and could potentially negate — the confidentiality of those mediations.

• *Rojas Will Impact Calderon Act Mediations.* The Calderon Act requires mediation of disputes between homeowners' associations and builders, developers or general contractors. (Cal. Civil Code section 1375 *et seq.*) The statutory scheme contemplates extensive involvement by insurers in mediations. (See e.g. Civil Code section 1375(e)(2)(A) & (B) and (f)(1) [providing for involvement of insurers in Calderon mediations].) The Calderon Act specifically provides that all defect lists and demands, communications, negotiations and settlement offers made in the course of Calderon mediations are inadmissible pursuant to the mediation confidentiality statutes, specifically Evidence Code section 1119 to 1124. (Civil Code section 1375(l).) If the Supreme Court adopts the Court of Appeal's lessened standard of protection, *Rojas* will effectively negate this confidentiality protection.

• *Pleadings And Other Pre-Existing Documents May Discoverable Even if Shared By the Parties To a Mediation*: In complex insurance coverage mediations, parties often desire to share pre-existing documents, such as expert reports, claims information, or pleadings in an underlying action against the insured. To the extent these are pre-existing documents, they may not be protected by mediation confidentiality since they were prepared *outside* the mediation. Section 1120.[28]

• *Not All Mediators Support Mediation Confidentiality.* One of the most surprising things about the Supreme Court briefing in *Rojas* was that a number of mediators, including the Southern California Mediation Association, supporting the plaintiffs in *Rojas.* Many are apparently opposed to mediation confidentiality on principle, or believe that at a minimum confidentiality should be regarded as merely a necessary evil which can be dispensed with on occasion.

There is no particular requirement that a mediator who is unenthusiastic about mediation confidentiality must disclose that fact before accepting employment. Almost all

28. It is worth noting, however, that section 1119 also provides that "[n]o writing . .. prepared . . . in the course of, or pursuant to . . . a mediation" is admissible. This language could suggest that some documents that are merely prepared "pursuant to" a mediation are protected. There may be a tension between section 1119 and section 1120 in some cases.

mediators, including those who have serious reservations about confidentiality, include references to confidentiality in their employment agreements. Candid conversations with prospective mediators on the subject of mediators' views of confidentiality are therefore a must for parties who wish to secure — and keep — confidentiality protection for their mediation information. Parties should seek to find mediators who support but who also maintain a balanced view of the scope of mediation confidentiality.

• *Parties Should Use Contractual Agreements To Augment The Scope of Confidentiality Offered By The Evidence Code.* Parties seeking to preserve mediation confidentiality should agree by contract to keep mediation information confidential, and should not rely solely on the mediation confidentiality statutes. Counsel should also be aware of and safeguard the use of any alternative applicable privileges, such as the attorney-client, work product, settlement privilege, and joint interest privilege which pose complex problems in the more sophisticated insurance coverage and reinsurance cases.[29]

• *Parties Should Agree in Advance That The Mediator Will Never Be Called As A Witness.* Parties should specifically agree in writing not to call the mediator as a witness, and to defend the mediator if anyone attempts to compel the mediator to testify. In that regard, Evidence Code section 703.5 would appear to forbid parties from calling a mediator as a witness. It provides that: "no mediator *shall be competent to testify,* in any subsequent civil proceeding. . . ." In spite of this unequivocal language, *Olam, supra,* held a mediator can be compelled to testify if the parties to the mediation both agree to waive confidentiality protection. (*Olam, supra,* 68 F.Supp.2d 1134–1139.) *Olam* was apparently cited with approval in *Foxgate.* (See *Foxgate, supra,* at 16.) If the result in *Rojas* further lowers the standards for admissibility of "confidential" information, mediators will be at even greater risk of being compelled to testify, and parties may be subject to greater pressure to consent to such testimony in order to attempt to appear "candid" in later litigation. Revoking such consent in advance—and agreeing to protect the mediator's stance of confidentiality if the issue arises—should now become an essential part of confidentiality agreements.[30]

CONCLUSION

The *Rojas* opinion is difficult to reconcile with the plain meaning of the mediation confidentiality statutes; it is impossible to reconcile with the Supreme Court's own precedent in *Foxgate.* For these reasons, it may be expected that *Rojas* will be reversed. But in view of the evident confusion regarding the scope of the statutes in the minds of many, the Supreme Court should go farther. It should use *Rojas* as an opportunity to instruct lower courts, litigants and mediators about the uses and limits of mediation confidentiality. In the meantime, counsel and mediators must thoroughly familiarize themselves with the law of mediation confidentiality and use it carefully in order to preserve mediation confidences.

29. See e.g. *2,002 Ranch LLC v. Superior Court,* 113 Cal.App.4th 1377 (2003) (considering and rejecting application of attorney work product privilege and attorney-client privilege to claims investigation information); White, "*Protecting the Attorney-Client And Work Product Privileges In Reinsurance Communications,* Prepared for the Mealey's Environmental Reinsurance Conference, West Palm Beach, Florida, November 19–20, 1998 [discussing privileges applicable in reinsurance context].

30. In *Olam, supra,* for example, the Court decided to assume the mediator would object to testifying but did not or was unable to compel the parties to provide independent counsel for the mediator, who was a court employee. (*Olam, supra,* at 1130–1131.) The Court was accordingly forced to analyze the mediation confidentiality issues on its own, without the benefit of counsel who opposed the mediator's testimony.