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Mediation Confidentiality: What Litigators Need to Know After *Rojas v Superior Court*

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Introduction: The Rule of *Rojas v Superior Court*

In a case that sparked heated argument among lawyers and mediators throughout the state, the California Supreme Court has ruled that communications and writings prepared for the purpose of, in the course of, or pursuant to mediation enjoy absolute immunity from disclosure absent an express *statutory* exception. *Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643. See Evid C §§1115–1128. Many hoped the court would rule otherwise given the bad facts at issue in *Rojas:* many of the plaintiffs were children who alleged they had been injured by exposure to toxic mold. Instead, the court departed not one iota from its previous strong statements on mediation confidentiality. See *Foxgate Homeowners Ass'n v Bramalea Cal., Inc.* (2001) 26 C4th 1, 15, 108 CR2d 642 (mediation confidentiality applies even in sanctions motion). The court did, however, clarify certain limits to mediation confidentiality: the underlying facts of a case are never protected from disclosure, even if the case is mediated; physical objects are never subject to mediation confidentiality; and evidence that would otherwise be admissible is not insulated from disclosure merely because it has been placed on the table in mediation.

The *Rojas* Facts and Opinions

Rojas involved two suits: in the first, an apartment complex owner sued the complex builders and developers, alleging that their negligent construction had produced toxic molds on the property. The parties mediated and settled the suit. In the second, the tenants, including many children, sued the owners and the builders, alleging that defective construction had produced toxic mold and that the defendants had conspired to conceal the defects from the tenants. 33 C4th at 412. Denied discovery of photographs and other materials received in the mediation, the tenants sought a writ. In a split decision, the court of appeal held that the work product principles of CCP §2018 govern the mediation confidentiality provisions in Evid C §1119.

The supreme court rejected the lower court's analysis. Confidentiality is essential to effective mediation. See 33 C4th at 415. See also *Foxgate,* 26 C4th at 14. Thus, the statutory scheme in Evid C §§1115–1128 "unqualifiedly bars disclosure of specified communications and writings associated with a mediation absent an express statutory exception." 33 C4th at 415, citing *Foxgate*. The mediation confidentiality statutes, not the discovery statutes, embody the principles that govern application of the attorney work product privilege.

To support its conclusion, the court in *Rojas* carefully analyzed the legislative history of Evid C §1119 and measured the lower court opinion against that history. For example, in response to the argument that there is a "good cause" exception to mediation confidentiality, the court stated that the legislature "clearly knows how to establish a 'good cause' exception to a protection or privilege if it so desires." 33 C4th at 423. Because the legislature provided a "good cause" exception for some work product when it adopted CCP §2018(b), but made no such exception when it passed the mediation confidentiality statutes, no such exception applies to material protected by the mediation confidentiality statutes. 33 C4th at 423.

What Does Statutory Mediation Confidentiality Protect?

The protection of California's mediation confidentiality scheme is far-reaching. As long as the requirements of Evid C §1119 are met and no express statutory exception to confidentiality exists, mediation confidentiality protects communications, charts, diagrams, reports, photographs and videotapes, witness statements, information compilations, expert opinions and reports, and "raw test data" gathered from physical samples. See 33 C4th at 422.

The core of the mediation confidentiality scheme is Evid C §1119. Section 1119(a) provides in 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.

Evidence Code §1119(b), the section of primary focus in *Rojas,* provides:

> No writing, as defined in [Evid C] 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, . . .

The definition of a "writing" in Evid C §250 is very broad. It is:

> 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.

As part of its careful examination of the legislative history of the confidentiality scheme, the supreme court in *Rojas* concluded that the legislature had specifically considered and rejected discoverability of both expert reports and photographs. "[I]n passing section 1119, subdivision (b), the Legislature specifically intended to extend protection to all types of writings, including photographs." 33 C4th at 421. A mediation participant who unilaterally prepares a writing (*e.g.,* takes a photograph or pays for preparation of a writing) for the purpose of the mediation, can decide unilaterally to use the photo in later litigation so long as it does not disclose "anything said or done or any admission made in the course of the mediation." Evid C §1122(a)(2); 33 C4th at 423. The mediation participant can also decide *not* to use it, even if the photograph depicted evidence that was later destroyed. 33 C4th at 420. (Other protected material can be disclosed if all participants in the mediation expressly agree to disclosure. Evid C §1122(a)(1).)

The *Rojas* court also concluded that the legislature sought to expand protection for oral communications beyond the limits of the mediation itself, and make the protection for oral communications as broad as that for documents. The protection extends to "'evidence of anything said or of any admission made for the purpose of, or in the course, of or pursuant to,' a mediation." 33 C4th at 422. The protection for participant communications is not confined to the actual mediation but applies across the board, to communications outside of the mediation room. See Evid C §1119(c) ("all communications, negotiations or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential").

Thus, California's statutory mediation confidentiality extends to all (1) statements, writings, or photographs made "for the purpose of, in the course of, or pursuant to" a mediation and (2) statements, writings, or photographs prepared "for the purpose of, in the course of, or pursuant to" a mediation. See Evid C §1119.

Any writing that is inadmissible, protected from disclosure, and confidential under the mediation confidentiality provisions "before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends." Evid C §1126; 33 C4th at 416.

What Is *Unprotected* by Statutory Mediation Confidentiality?

Evidence Code §1120 serves as a limit on the scope of §1119 by preventing parties from using a mediation as a pretext to shield materials from disclosure. 33 C4th at 417, citing Comment to Evid C §1120. 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.

Section 1120(a) ensures that a party cannot "'immunize from admissibility documents otherwise discoverable merely by offering them in'" the mediation. 33 C4th at 418 n5. This interpretation is consistent with that used by federal courts when interpreting Fed Rule of Evid 408. See *Ramada Dev. Co. v Rauch* (5th Cir 1981) 644 F2d 1097, 1107, cited in *Rojas,* 33 C4th at 418 n5. According to the reasoning of *Ramada,* if the documents would never have existed but for the mediation, then they are "inside" the mediation and §1120 would not apply to make them discoverable. See 644 F2d at 1107 (if document or statement would not have existed but for negotiations, negotiations "are not being used as a device to thwart discovery by making existing documents unreachable"). Of course, although the supreme court cited *Ramada* by analogy, it did not endorse a "but/for" test for inadmissibility. In some circumstances, the parties may choose to make documents admissible even though they are "within" the mediation. See Evid C §1122, discussed above. The exact standard for determining when documents fall within Evid C §1120 has yet to be articulated by the high court.

What is certain is that mediation confidentiality has some important limits. Section 1119 does not protect from disclosure *facts* known to parties or witnesses. For example, even if witness statements prepared "for the purpose of, in the course of, or pursuant to, a mediation" are protected from discovery under §1119, *the facts* set forth in the statements are not. 33 C4th at 423 n8. Facts known to percipient witnesses are "evidence otherwise admissible or subject to discovery outside of a mediation" under Evid C §1120(a) and thus unprotected. 33 C4th at 423 n8. The underlying facts of the dispute thus are not protected from disclosure under §1119 or its companion statutes.

Similarly, §1119 applies only to statements and writings made for the purpose of the mediation. 33 C4th at 417. As the supreme court said,

> a party cannot secure protection for a writing—including a photograph, a witness statement, or an analysis of a test sample—that was not "prepared for the purpose of, in the course of, or pursuant to, a mediation" . . . simply by using or introducing it in a mediation or even including it as part of a writing—such as a brief or a declaration or a consultant's report—that was "prepared for the purpose of, in the course of, or pursuant to, a mediation."

33 C4th at 417.

Physical objects are not "writings" under the Evid C §250 definition that is incorporated into §1119. Thus, physical objects are not protected by mediation confidentiality. 33 C4th at 416. In *Rojas,* the actual physical samples that were "collected at the apartment complex—either from the air or from destructive testing"—were not protected, although the recorded analyses of those samples, such as reports describing the existence of mold spores, were protected. 33 C4th at 416.

Evidence of a party's conduct is also not expressly excluded from discovery or admissibility by §1119, unless it might be considered a "communication" in the course of the mediation. See *Foxgate,* 26 C4th at 17. Evidence that the defendants remediated the building at issue in *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 was arguably admissible and discoverable evidence.

The Problem of Compilations or Amalgamated Materials

The supreme court did not directly address the problem of "amalgamated materials," but its analysis of §1120 left little doubt that those materials are subject to mediation confidentiality. 33 C4th at 417. As discussed above, under §1120 a particular writing or photograph or other material cannot be protected from disclosure simply by including it in a writing that was prepared for the mediation. On the other hand, an investigation binder or any other compilation or amalgamation of materials "prepared for the purpose of" a mediation should be inadmissible, even if it contains some material that falls within §1120. The individual materials in the binder that would otherwise fall within §1120 would be independently discoverable and admissible. Trial courts will have to determine these questions document by document. See 33 C4th at 424 n9 (in light of parties' settlement, unnecessary to remand case to determine whether any of the documents had not been "prepared for the purpose of, in the course of, or pursuant to, a mediation").

For example, if the tenants in *Rojas* demanded discovery of the "investigation binder" and all photographs within the binder, discovery should be denied because the request is a direct attempt to invade mediation confidentiality. If, however, the attorney for the owners of the building in *Rojas* took photographs of mold before instituting litigation and later inserted the photos into the investigative binder used by the parties during the mediation, and the tenants sought discovery of "all photographs of the building," mediation confidentiality would not bar discovery. The preexisting photographs not prepared for the purpose of a mediation are not covered by mediation confidentiality even if used in a mediation (Evid C §1120) and the discovery request does not conflict with mediation confidentiality.

Similarly, the tenants in *Rojas* suggested that the parties collected an extensive amount of evidence before the case management order (CMO) or before the parties even considered mediation. Petitioners' Brief in the California Supreme Court at 30–32. If that were true, the evidence that was in existence before the CMO and before the time the mediation was actually pending should have been admissible and discoverable. Even if the defendants had placed that evidence in the investigative binder, it would still be discoverable.

A Model for Analyzing Mediation Confidentiality

When a litigant seeks to discover evidence related to a mediation or objects to the disclosure of evidence on the ground of mediation confidentiality, a trial court should first consider and make findings on whether a mediation occurred, when it began and when it ended, and the specific relationship that each item of evidence bears to the mediation. Then the court should consider and make findings on whether the evidence is of the type described in §1119, *i.e.,* whether it was "for the purpose of, in the course of, or pursuant to, a mediation."

Did a Mediation Take Place? When?

The court of appeal majority in *Rojas* did not mention the most basic facts about the parties' mediation. When did the mediation occur? When did it end? Did the particular item of evidence exist before the mediation?

These questions are important because, under Evid C §1120, a statement or writing or other type of evidence does not "become inadmissible" merely because it was used or introduced in a mediation. It is protected only if it was "prepared for the purpose of, in the course of, or pursuant to, a mediation." Evid C §1119(b). *Rojas,* 33 C4th at 417. Without knowing when the mediation began or ended, it is impossible to know whether the evidence was prepared "for the purpose of, in the course of, or pursuant to, a mediation" under Evid C §1119(a).

Moreover, a threshold inquiry may arise as to whether there was a mediation at all. The parties in *Rojas* assumed that a mediation took place in the first suit. Thus, the supreme court did not address the argument of amicus Southern California Mediation Association (SCMA) that Evid C §1119 did not apply because (1) the CMO stated that all "conferences and mediations are deemed to be mandatory settlement conferences of this court" and (2) under Evid C §1117(a), the mediation confidentiality provisions do not apply to settlement conferences under Cal Rules of Ct 222. *Rojas,* 33 C4th at 417 n4. The legislature intended the mediation confidentiality provisions to apply to mediation ordered by a court or other body, as well as

to voluntary mediation. See Legislative Counsel's Digest for AB 939 (noting intent of bill "to apply to a mediation ordered by a court or other adjudicative body"). Even in a CMO, a court should not be able to limit or expand the scope of the statutory confidentiality rule. See *Eisendrath v Superior Court* (2003) 109 CA4th 351, 363, 134 CR2d 716 (distinguishing between privileges and statutory mediation confidentiality statutes). If confronted with the SCMA argument, it might be necessary for the trial court to make a factual determination whether the CMO did, in fact, transform the mediation into a settlement conference as defined in Cal Rules of Ct 222.

The facts surrounding the mediation may also be important to establish the confidentiality of communications (as opposed to writings) that were "made for the purpose of, or in the course of, or pursuant to" the mediation under Evid C §1119(a). Parties to a mediation often meet over the phone and may not physically meet the mediator at all. As defined in Evid C §1115(a), 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." The "process" of mediation is broad enough to encompass a wide variety of mediation sessions.

The protection of Evid C §1119(a) extends to communications by the actual participants in the mediation, including the mediator, and to those who write or speak for a party in mediation such as the party's attorneys, employees, and experts, as long as those statements were in fact made for the purpose of the mediation. See Evid C §1119(a). Although not directly at issue in *Rojas,* all *participants,* not just all parties, are covered under the rule of mediation confidentiality. See State of California, California Law Revision Commission, *Recommendation: Mediation Confidentiality* (1996) 26 Cal L Rev'n 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"). Moreover, 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 CA4th 351, 364, 134 CR2d 716; see also Law Revision Commission, *Mediation Confidentiality,* 26 Cal L Rev'n Comm'n Reports 420 (noting definition of mediation in Evid C §1115(a) includes a mediation "conducted as a number of sessions, only some of which involve the mediator").

When Were the Statements or Writings Made or Prepared? For What Purpose?

Writings or statements or other evidence need not necessarily have been prepared *during* the mediation to be protected, as long as they were prepared "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation." Evid C §1119. Whether they are prepared before, during, or after the mediation, writings or statements must be prepared for the *purpose of a mediation* in order to be protected.

Thus, mediation confidentiality extends to mediation consultations, defined in Evid C §1115(c) as communications "between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." Such consultations can be unilateral, in preparation for a mediation that never takes place, and yet be protected. They may also take place after an actual mediation to consider "reconvening" the mediation, and be protected. Evid C §1115(c).

That the legislature found it necessary to extend mediation confidentiality to such consultations implies, however, that it did *not* intend mediation confidentiality to extend to *all* writings or statements whenever one party had a unilateral expectation that a mediation might take place some time in the future. Had that been sufficient to invoke Evid C §1119, §1115 would have been unnecessary. Although these are issues not directly addressed in *Rojas,* it appears clear that parties may not merely create evidence, toss it into a "for mediation" file, and argue forever after that Evid C §1119 bars everything in the file from disclosure. Nor may the parties agree between themselves after mediation that all their evidence must have been prepared for the purpose of a mediation and thus is forever confidential.

Although the court in *Rojas* had no need to address how a trial court might evaluate whether writings or statements created or made before the mediation were prepared for the purpose of mediation, trial courts considering this issue should evaluate, *e.g.:*

- Whether there was a mediation consultation and if so, when;
- When the parties agreed in writing or orally to mediate;
- Whether the nature of the statement or writing is such that it was probably prepared for the purpose of the mediation; and
- The parties' testimony about their intentions in making the writing or statement.

In any given case, questions of fact may exist about when a mediation began or ended or the parties' actual expectations that would be within the trial court's power to decide.

Is it Necessary to Request a Statement of Decision or Seek a Writ?

If any question of fact exists about the mediation, the trial 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. Because the hearings the trial court will conduct on these issues will probably be ex parte and in camera, the court should be required to issue statements of decision on appropriate request by a party. See CCP §632; Cal Rules of Ct 232.

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 should apply. However, because the party who does not prevail will in most cases lack another adequate legal remedy, that party should decide whether to seek a writ from the court of appeal. To encourage faith in mediation and insure that the law develops with appropriate judicial guidance, courts 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 C4th 85, 114, 40 CR2d 839.

Special Problems

Effect of Court's Standing Order or Case Management Order

Court-ordered mediations may pose special problems. Although one of the principal reasons the present statutory scheme was adopted in 1997 was to insure that court-ordered as well as voluntary mediations would be covered by the rule of absolute mediation confidentiality (see Legislative Counsel's Digest for AB 939, Law Revision Commission, *Mediation Confidentiality,* 26 Cal. L. Rev'n Comm'n Reports 407, 420), 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 to mediation. A footnote in *Rojas* suggests that in any given case the question of whether a court-ordered conference is a "mediation" may be an open question. See *Rojas,* 33 C4th at 417 n4.

As a factual matter, in most cases the parties know perfectly well when a case is actually set for a court-ordered mediation because they receive an order directing them to appear at a given time or at a specific location. This order, not a standing court order directing all cases to mediation, should be the benchmark for determining whether a document is protected under Evid C §1119 because it is prepared "for the purpose of, in the course of, or pursuant to, a mediation."

Moreover, because the supreme court in *Rojas* clarified that the mediation confidentiality statutes articulate a statutory rule of confidentiality, even in a CMO a court should be unable to either limit or expand the scope of the statutory confidentiality rule. See *Eisendrath v Superior Court* (2003) 109 CA4th 351, 363, 134 CR2d 716 (distinguishing between privileges and statutory mediation confidentiality statutes). That is, the court in a CMO should not be able to alter or destroy the mediation confidentiality protection.

A Never-Ending Mediation?

As noted above, the lower courts in *Rojas* did not provide a detailed statement of when the mediation began and ended. The supreme court also did not address the issue of whether the parties might attempt to agree to extend a mediation indefinitely, so that every action taken or document created, *e.g.,* the repair of the mold-damaged buildings in *Rojas,* is "for the purpose" of the mediation.

Evidence Code §1115 should be the touchstone for construing when a mediation begins and ends. Under §1115, mediation is a process in which a neutral person facilitates communication between disputants. If that facilitation is not occurring, the parties should not be able to artificially extend the mediation.

Distinguishing Discovery From Mediation

Trial courts should avoid mixing discovery and mediation. The CMO in *Rojas* apparently "managed" the case for the purposes of discovery and also sent the case to mediation. To prevent the intermingling of mediation and discovery, the Judicial Council has recently amended Cal Rules of Ct 244.1(b) and 244.2(b) to forbid the practice of allowing discovery referees to operate as mediators.

Is Mediation Confidentiality Fair?

Although many mediators and litigators were pleased with the supreme court's conservative approach to statutory construction in *Rojas,* others were convinced that the broad sweep of the opinion would invite abuse by litigants seeking to withhold or conceal evidence. The Consumer Attorneys of California filed an amicus brief in *Rojas* that supported the court of appeal's decision. The CAC has gone on record as stating that the mediation confidentiality statutes as interpreted by the supreme court are overbroad and should be amended by the legislature.

To those critical of the supreme court's opinion, the broad protection afforded to expert reports is an invitation to the parties to prepare their expert reports for mediation so that they can be hidden from later scrutiny. In addition, as *Rojas* demonstrates, the problems related to mediation confidentiality become particularly difficult when the rights of third parties outside the mediation are at issue. Depriving third parties of evidence used during the mediation when those parties never had the benefit of the mediation can raise troubling issues. The fight about mediation confidentiality is far from over.

Conclusion

Rojas was a relatively easy case on the law. The court of appeal's analysis effectively abrogated the mediation confidentiality statutes; it is hardly surprising that this supreme court chose to enforce the will of the legislature over that of the court of appeal, the plaintiffs, or the host of amici who urged them to do otherwise.

Rojas was a much harder case on the facts. Denying discovery to children with toxic illnesses is not an easy call. The court's willingness to do so, even in the hardest of cases, shows that if revisions to the mediation confidentiality statutes must indeed be made, the changes will have to be made by the legislature, not the courts.