

## HOW CONFIDENTIAL ARE YOUR MEDIATION PRESENTATIONS?

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Today is the day of your mediation. You are confident that mediation is the best approach to resolving this factually complex, high stakes piece of litigation. You have diligently researched the law and have provided the mediator with a stellar mediation brief. You have worked long and hard to put together an interesting and informative presentation to the mediator. You have photographs, expert reports, lists of witnesses and a very persuasive videotape. You have organized the information in a binder so that the mediator can easily follow your factual presentation, and so that the opposing party will be horrified at your level of preparedness.

You have made all of these preparations relying on the confidentiality of the mediation process set forth in Evidence Code section 1119, which protects writings prepared for the purpose of a mediation by prohibiting their discovery or admission into evidence. Does that code section protect everything you have assembled for your big day? That question is currently before the California Supreme Court, which has granted review of the decision of the Second Appellate District in *Rojas v. Los Angeles County Superior Court*. *Rojas* held that Evidence Code section 1119 is a non-disclosure privilege, subject to the same limitations as the work-product privilege. Under the court's analysis, "amalgamations" of factual material and attorney thoughts, impressions, and conclusions prepared for mediation are subject to discovery upon a showing of good cause.

Prior to *Rojas*, parties and mediators relied on the California Supreme Court's strident support of the mediation process. This support was most recently articulated *Foxgate Homeowners Association v. Bramalea California Inc.* In that case the Court determined that the report of a mediator in a court-ordered mediation stating that one of the parties had failed to participate in good faith could not be used in support of a subsequent motion for sanctions.

In *Foxgate*, the mediator had been appointed pursuant to a case management order. The order provided that the parties were to appear at a scheduled five-day mediation session with experts and party representatives. After the first half day, the mediator cancelled the remainder of the mediation dates and filed his report with the court. He characterized defense counsel's behavior at the mediation as "obstructive bad faith tactics." The report was later submitted in support of Plaintiff's motion for sanctions. The court granted the motion and awarded Plaintiff its costs of the mediation.

On appeal the defendant argued that the court had violated Evidence Code section 1119, as well as section 1121, which limits the content of a court-ordered mediator's report to the court. A unanimous California Supreme Court rejected the appellate court's reasoning that these sections did not shield sanctionable conduct. The Supreme Court held that sections 1119 and 1121 were "clear and unambiguous" and that no judicially crafted exception was necessary. The *Foxgate* Court emphasized that confidentiality is essential to effective mediation, and that implementing alternatives to judicial dispute resolution is a strong legislative policy. The Court opined that its ruling was consistent with that legislative policy by avoiding the threat that frank expression of viewpoints might subject participants to motions for sanctions.

Given the unequivocal support of the Supreme Court to mediation confidentiality, mediators and participants were comfortable that their presentations in mediation were protected. However, last October the Second Appellate District held in *Rojas v. Los Angeles County Superior Court*,

that Evidence Code section 1119 is a non-disclosure privilege, subject to the same limitations as the work product doctrine.

The *Rojas* matter began in December 1996, when an apartment complex owner filed a complaint against the developer of the complex alleging defective construction resulting in water leakage, toxic molds and microbe infestation. The parties determined to mediate the dispute. As part of the mediation, Plaintiff created a defect list. The developer was permitted to perform destructive testing. The parties' experts met to discuss the cost and scope of repairs. For the mediation Plaintiff prepared an "investigation binder" containing hundreds of photographs of the premises and other data taken from the premises. The parties also created a videotape, and submitted their experts' mold spore analyses.

The matter settled in April 1999, with the parties agreeing not to provide the mediation materials absent consent of counsel or by court order. Only four months later, suit was instituted against the owner and the developer by *Rojas*, and a number of other tenants and former tenants of the building. That complaint asserted numerous health problems resulting from microbe infestation. Plaintiffs then served document requests seeking production of all physical evidence, photographs, test reports, writings describing the buildings, writings evidencing the opinions of expert consultants, photographs and videotapes of the project and of current and former tenants, including those tapes and photographs utilized in the mediation.

On motions to compel, Plaintiffs argued that purely evidentiary or "non-derivative" material was not protected by work product and that "derivative" materials containing attorney interpretations or evaluations utilized in the mediation were discoverable upon a showing of good cause. Such cause existed, they argued because the property had been remediated. The Court reviewed the material in camera, held they were subject to the mediation privilege and denied the motion, ordering defendant to produce a privilege list.

On a subsequent writ, Plaintiffs relied on Evidence Code section 1120 which provides that "evidence otherwise admissible or subject to discovery outside of a mediation", is not inadmissible or protected from discovery by its use in mediation. Plaintiffs argued that the photographs and videotapes were "raw evidence" and that the mediation confidentiality statutes should not protect derivative materials either because the project had been remediated and the evidence no longer existed. Defendant asserted the photographs, videotape, and the analysis of the materials would never have existed if not for the case management order to mediate and were therefore all subject to the absolute privilege of section 1119 as articulated in *Foxgate*.

The Court of Appeal construing Evidence Code section 1119 and 1120, concluded that these sections are meant to protect only the substance of the mediation, i.e. the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand. The Court of Appeal agreed with plaintiff that the mediation privilege is co-extensive with the work-product doctrine, and should be applied to determine the admissibility of "evidence" which has been used in mediation.

Turning to the work-product distinction between "derivative" and "non-derivative" evidence, the court observed that "impressions, conclusions, opinions, or legal research or theories" utilized in mediations are entitled to absolute protection. Qualified protection exists for mediation work product which is an amalgamation of factual information and attorney thoughts, impressions and conclusions. In order to overcome this qualified mediation protection, the party seeking

disclosure must demonstrate good cause. Finally, purely factual material receives no work-product protection.

The court then held that the remediation of the project provided the good cause to overcome the qualified protection for “compilations” and ruled that where these amalgamations could not be easily separated into protected and non-protected components, the compilation should be produced.

So, how confidential are your mediation materials? *Rojas*, makes it difficult to know the answer. Some steps to protect your work are obvious: photographs should not contain arrows or markings. These indicators should be put onto the photographs after the fact. Unmarked copies of all documents and photographs should be retained. Photographs should not be computer-integrated into narrative.

Other preparation materials are more problematic. Is a videotape specifically created to record the sequence of evidence in a favorable light “raw evidence?” As defendants unsuccessfully argued in *Rojas*, a picture is worth a thousand words. Where tests are performed in specific locations, or on specific materials in order to support your theory of the case, are those tests “raw evidence”?

What other approaches might protect your future presentations? Minimize the likelihood of motions to produce mediation materials in litigation following a failed mediation by drafting a mediation agreement at the outset that specifically prevents the use of mediation materials in subsequent litigation. Define as clearly as possible what materials will be excluded. Finally, consider minimizing the likelihood of motions to compel by non-parties by inviting their participation in the mediation where follow-on litigation is highly likely.