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Confidentiality in Mediation: Is It Encouraging Good Mediation or Bad Conduct?

*Rojas v. Superior Court of Los Angeles County*¹

I. INTRODUCTION

Mediation has long been used in the judicial system of the United States to offer an alternative to litigation which can save time and money.² Not only have its cost-effective and time efficient attributes contributed to its use, but the judiciary and legislature have often encouraged its use in order to mitigate the number of cases in the court system. In some states, the legislature has enacted statutes to make mediation mandatory before certain adjudications will even take place.³ Furthermore, to encourage these mediations to settle, many legislatures and jurisdictions have enacted statutes to protect the confidentiality of the mediation.⁴ Many courts have upheld these statutes to continue to encourage mediation while some have made exceptions based on other conflicting legal issues. In *Rojas v. Superior Court of Los Angeles County*, the California Supreme Court sought to encourage mediation by protecting the confidentiality of many types of evidence used in mediation from being admissible in subsequent litigation. The court overturned an appellate court decision that made policy arguments contrary to the California Supreme Court's interpretation. This Note addresses whether the California Supreme Court's policy arguments for protecting confidentiality in mediation outweigh the policy arguments against protection outlined in the appellate court's decision.

II. FACTS & HOLDING

A. Trial Court Decision

Julie Coffin owned an apartment complex in Los Angeles.⁵ In 1996, Coffin sued the contractors and subcontractors who built the complex including Deco Construction Corporation.⁶ She "alleg[ed] that water leakage due to construction defects . . . produced toxic molds and other microbes" in the apartment complex.⁷ In 1998, Deco and Coffin mediated the case after the court issued a comprehensive Case Management Order (CMO) with the parties' consent.⁸ The order stipu-

1. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260 (Cal. 2004).

2. See *infra* Part III.A.

3. See JUDGE H. WARREN KNIGHT ET AL., CAL. PRAC. GUIDE: ALT DISP. RES. ch. 4 (West 2004).

4. See *infra* Part III.B.

5. *Rojas*, 93 P.3d at 262.

6. *Id.*

7. *Id.*

8. *Id.*

lated that, "Evidence of anything said or any admission made . . . [in the mediation proceeding] and any document prepared for the mediation proceeding shall be deemed privileged pursuant to [California] Evidence Code section 1119 and shall not be admissible as evidence at trial or for any purpose prior to trial."⁹ In April 1999, the litigation settled as a result of the mediation.¹⁰ The settlement agreement specified that the materials protected by the CMO, and code sections 1119 and 1152 would not be published or disclosed in any way without the prior consent of the plaintiff or by court order.¹¹

The present case began in August 1999, when several hundred tenants of the apartment complex sued Deco and Coffin.¹² The tenants "alleged that defective construction allowed water to circulate and microbes to infest the complex [which caused] numerous health problems" and that the defendants "had conspired to conceal the defects" from the tenants.¹³ The tenants, including many children,¹⁴ did not become aware of the defects until April 1999.¹⁵

In November of 1999, the plaintiff tenants served deposition subpoenas on attorneys, experts, and consultants involved in the mediation between Coffin and Deco.¹⁶ The defendants sought a protective order to suppress the subpoenas.¹⁷ The court ordered the plaintiffs to withdraw the subpoenas and directed the plaintiffs to instead file a motion to compel production.¹⁸ The tenants filed a motion to compel production of:

- (1) discovery exchanged between the parties to the underlying litigation;
- (2) physical evidence of the condition of the buildings, including photographs, videotapes, test samples and reports, and any physical evidence that was removed from the buildings and saved, such as drywall, plumbing, and framing;
- (3) writings describing the buildings, including written notes of observations made during inspections and witness interviews;

9. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 262 (Cal. 2004). The code directs:

(a) 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, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No 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, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or mediation consultation shall remain confidential.

CAL. EVID. CODE § 1119 (West 2004).

10. *Rojas*, 93 P.3d at 262.

11. *Id.* See CAL. EVID. CODE §§ 1119, 1152 (West 2004).

12. *Rojas*, 93 P.3d at 262.

13. *Id.*

14. *Rojas v. Super. Ct.*, 126 Cal. Rptr. 2d 97, 101 (Cal. Ct. App. 2002).

15. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 262 (Cal. 2004).

16. *Id.*

17. *Id.*

18. *Id.* at 263.

and (4) writings evidencing experts' opinions and conclusions, whether or not communicated to the defendants in the underlying action.¹⁹

The defendants argued that the requested documents were undiscoverable under section 1119 because they were prepared for the mediation in the underlying action.²⁰ Judge Charles McCoy, of the Superior Court of Los Angeles County, ruled that an item prepared for the underlying motion could be discoverable if it was prepared before the mediation process began.²¹ However, anything prepared after the mediation process began was undiscoverable pursuant to section 1119.²² The date used to determine when the process began was the date the CMO (where the parties expressly agreed to mediate) was signed.²³ Judge McCoy ordered the parties to submit the documents for an in camera review.²⁴ After they complied, he ruled the compilation of documents, including photographs, were undiscoverable under section 1119.²⁵ However, Judge McCoy specified that he was not deciding whether an individual document submitted separately could be discoverable.²⁶

The case was transferred to Judge Mohr.²⁷ The plaintiffs tried again to discover information in the mediation by serving interrogatories on defendant Alper Development, which objected to the discovery request relying on section 1119.²⁸ Judge Mohr ruled that Alper Development "did not have to disclose documents already held to be undiscoverable by Judge McCoy under section 1119."²⁹ Judge Mohr agreed with Judge McCoy that the mediation compilations were undiscoverable but ruled that individual photographs contained in the compilations were discoverable.³⁰

This ruling sparked the plaintiffs to serve yet another request for production of all photographs, negatives, and videotapes from the underlying action.³¹ The defendants objected to the request and the tenants moved to compel production, arguing that Judge Mohr had ruled that individual photographs in the compilations were discoverable.³² Judge Mohr decided that his earlier ruling—that individual photographs would be discoverable—was incorrect.³³ He told the tenants' counsel, "I've done a lot of thinking since then."³⁴ Judge Mohr concluded that the pictures were documents under the interpretation of section 250.³⁵ As a result, the

19. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 263 (Cal. 2004).

20. *Id.* See CAL. EVID. CODE § 1119 (West 2004).

21. *Rojas*, 93 P.3d at 263.

22. *Id.* See CAL. EVID. CODE § 1119.

23. *Rojas*, 93 P.3d at 263.

24. *Id.*

25. *Id.* See CAL. EVID. CODE § 1119.

26. *Rojas*, 93 P.3d 260 at 263.

27. *Id.*

28. *Id.* See CAL. EVID. CODE § 1119.

29. *Rojas*, 93 P.3d at 263. See CAL. EVID. CODE § 1119.

30. *Rojas*, 93 P.3d at 263.

31. *Id.*

32. *Id.*

33. *Id.* at 263-64.

34. *Id.* at 264 n.2.

35. *Id.* at 264. The code specifies:

"Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangi-

pictures were subject to the mediation privilege under section 1119.³⁶ He supported the conclusion with Judge McCoy's previous findings.³⁷ Judge Mohr determined that rules of discovery concerning evidence subject to a qualified work product privilege do not govern evidence covered by the mediation privilege.³⁸ Judge Mohr went on to say that his decision was difficult because there may have been no other way for the plaintiffs to get the unique material.³⁹ But he also emphasized the importance of protecting the mediation privilege so people will continue to mediate disputes.⁴⁰

B. Appellate Court Decision

The plaintiffs next sought a writ of mandate from the Court of Appeal, Second District, Division Seven of California.⁴¹ The court concluded that "sections 1119 and 1120 are meant to protect the substance of mediation, i.e., the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand."⁴² Furthermore, it concluded that sections 1119 and 1120, of the California Evidence Code, "do not protect pure evidence."⁴³

In deciding how to interpret sections 1119 and 1120, the court outlined three steps to evaluate the statute.⁴⁴ The court must first look at the words of the statute, then at legislative history, and finally, if a meaning is still not found, it can apply reason, practicality, and common sense to the language at hand.⁴⁵

The appellate court used four main arguments to support its conclusion that the words of the statute do not protect all evidence. First, it argued that if section 1119 was meant to protect all types of evidence, then section 1119 would have stated that it applies to all evidence, instead of separately defining the types of evidence in three subsections.⁴⁶ According to the court, the evidence that section 1119 seeks to protect includes oral statements and writings, and the definition of writings under section 250 includes pictures.⁴⁷ The court determined that raw evidence is not included in the language of 1119.⁴⁸

Second, the appellate court argued that using the word "evidence" in section 1120 instead of limiting the language to "writings, statements and communica-

ble 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.

CAL. EVID. CODE § 250 (West 2004).

36. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 264 (Cal. 2004). See CAL. EVID. CODE § 1119 (specifying that documents defined by section 250 are privileged).

37. *Rojas*, 93 P.3d at 263-64.

38. *Id.* at 264.

39. *Id.* See *Rojas v. Super. Ct.*, 126 Cal. Rptr. 2d 97, 104 (Cal. Ct. App. 2002). The plaintiffs contended there is no other way to obtain the evidence because most of it was destroyed or removed from the premises during the remediation process. *Id.*

40. *Rojas*, 93 P.3d at 264.

41. *Id.*

42. *Rojas*, 126 Cal. Rptr. 2d at 106.

43. *Id.*

44. *Id.* at 105.

45. *Id.*

46. *Id.* at 106-07.

47. *Id.* at 106; CAL. EVID. CODE § 250.

48. *Rojas*, 126 Cal. Rptr. 2d at 106-07.

tions” showed that the legislature meant to leave something unprotected which is still “evidence” and otherwise admissible.⁴⁹

Third, the appellate court argued that section 1120 further limits the amount of evidence that is protected.⁵⁰ The court determined that section 1120 indicates that some evidence is discoverable.⁵¹ Section 1120 states that, “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.”⁵² The court said that this choice of words—that “evidence otherwise discoverable”—is not protected, indicates that the legislature intended for some evidence to remain discoverable.⁵³

Fourth, the appellate court also believed section 1120 further limits the confidentiality of certain evidence because “it does not protect from disclosure evidence ‘solely by reason of its introduction or use in a mediation’”⁵⁴ The court asserted that this phrase “reinforces our interpretation that mediation confidentiality is meant to protect the substance of the negotiations and communications in furtherance of the mediation, not the factual basis of those negotiations.”⁵⁵

Alternatively, the appellate court argued that the legislative intent supports its conclusion. The court supported its finding by citing the Law Revision Commission Comments on section 1120 which state that it “is designed to prevent materials from being introduced in mediation solely to protect them from later discovery or use in litigation.”⁵⁶

The appellate court rejected the defendant’s interpretation of sections 1119 and 1120, that all materials introduced at the mediation are privileged.⁵⁷ Instead, the court found the defendant’s interpretation would “render section 1120 complete surplusage and foster the evils it is designed to prevent: namely, using mediation as a shield for otherwise admissible evidence.”⁵⁸ The court then applied the work-product privilege.⁵⁹ The court noted that the analytic framework for distinguishing materials for admission as evidence under the work-product doctrine involves separating material into two categories: derivative and non-derivative.⁶⁰ The court recognized three “levels of protection” between derivative and non-derivative material in the California work-product privilege.⁶¹ The first type is core work product, which is completely protected from discovery.⁶² Core work product is “material solely reflecting an attorney’s ‘impressions, conclu-

49. See *Rojas v. Super. Ct.*, 126 Cal. Rptr. 2d 97, 107 (Cal. Ct. App. 2002). “Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation 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.” CAL. EVID. CODE § 1120(a) (West 2004).

50. *Rojas*, 126 Cal. Rptr. 2d at 107. See CAL. EVID. CODE § 1120(a).

51. *Rojas*, 126 Cal. Rptr. 2d at 107.

52. *Id.* (quoting CAL. EVID. CODE § 1120(a)).

53. *Id.* at 107-08.

54. *Id.* at 107 (quoting CAL. EVID. CODE § 1120(a)).

55. *Id.*

56. *Id.* at 108.

57. *Id.*

58. *Id.* at 107-08.

59. *Id.* at 108.

60. *Id.*

61. *Id.* at 108-09.

62. *Id.* at 108.

sions, opinions, or legal research or theories.”⁶³ The second type is an “amalgamation of factual information from an attorney’s thoughts, impressions, or conclusions.”⁶⁴ The second type would include “charts and diagrams, compilations of entries in documents, and reports of experts employed as non-testifying consultants.”⁶⁵ The court called this information “derivative”⁶⁶ and it is protected, unless the party seeking the material demonstrates good cause.⁶⁷ The third type is purely factual material and receives no protection.⁶⁸

The appellate court applied California’s work-product privilege because “the framework of discoverable materials under the work-product doctrine closely mirrors the express statutory privilege exception of section 1120, which applies to ‘evidence otherwise admissible’ or items ‘subject to discovery outside of a mediation.’”⁶⁹ The court read section 1120 to protect materials in the same manner as the work-product doctrine.⁷⁰ Therefore, non-derivative materials in this case, such as raw test data, photographs, and witness statements, are not protected by section 1119, because section 1120 is interpreted like the work-product privilege and does not protect non-derivative materials.⁷¹ The court also concluded that some amalgamated material may be discoverable because the plaintiff may have good cause for requiring access to the materials.⁷² The court directed the trial court to make the determination of good cause after an *in camera* inspection of the material.⁷³

The appellate court also stated public policy concerns that influenced its decision to apply the work-product privilege to the case.⁷⁴ The court believed it would be disastrous to give the parties the ability to conceal evidence and obstruct the fact-finding process of litigation by allowing parties to hide their evidence in the mediation.⁷⁵

C. California Supreme Court Decision

The California Supreme Court reversed the appellate court’s decision and “conclude[d] that the Court of Appeal’s interpretation of section 1119, subdivision (b), [was] contrary to both the statutory language and the legislature’s intent.”⁷⁶ The court held that the appellate court erred when it applied the work-product privilege to evidence that is protected under section 1119.⁷⁷ The court remanded the case with instructions to dismiss the petition for writ of mandate and to dis-

63. *Rojas v. Super. Ct.*, 126 Cal. Rptr. 2d 97, 108 (Cal. Ct. App. 2002) (quoting *Izazaga v. Super. Ct.*, 285 Cal. Rptr. 231 (Cal. 1991)).

64. *Id.* at 108-09.

65. *Id.*

66. *Id.*

67. *Id.* at 109.

68. *Id.*

69. *Id.* at 110.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 109.

75. *Id.*

76. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 262 (Cal. 2004). See CAL. EVID. CODE § 1119 (West 2004).

77. *Rojas*, 93 P.3d at 271.

charge the peremptory writ.⁷⁸ It found no other directions were necessary because the parties had settled the case.⁷⁹

III. LEGAL BACKGROUND

A. *Emergence of Confidentiality in Mediation*

Mediation first surfaced in the United States in the late nineteenth century in response to conflict between labor and management.⁸⁰ Labor mediation continued into the twentieth century and forms of non-labor mediation began to develop.⁸¹ As early as 1923, the advantages of mediation were realized when the American Bar Association (ABA) assessed various mediation programs.⁸² The ABA realized the cost-effectiveness of mediation and the ability of mediation to produce greater satisfaction to the parties involved.⁸³

“Dispute resolution,” as an alternative to litigation, began to receive widespread attention in the mid-1970s.⁸⁴ An increase in federal court case loads in the 1970s created a “renewed interest among jurists” in mediation.⁸⁵ “Commentators suggested that the growth of alternatives might provide more appropriate remedies and standards of decision than adjudication, particularly for parties with long-term relationship and disputes involving complex trade-offs.”⁸⁶ Mediation also emerged as a way for people in communities to settle disputes and still maintain relationships after the conflict.⁸⁷

Another benefit parties receive from mediation is confidentiality. Many courts believe confidentiality in mediation encourages settlements.⁸⁸ Parties are more likely to be frank with each other,⁸⁹ and are more likely to settle, when they know the agreement reached will be excluded from evidence in later litigation.⁹⁰

78. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 271 (Cal. 2004).

79. *Id.* at 264 n.3 (explaining that although the tenants’ claims against Coffin, Ehrlich and Deco settled after the California Supreme Court granted review, the court exercised its discretion to retain jurisdiction to address the issues because no motion to dismiss review had been filed, no cross claims had been filed against Coffin and Ehrlich in connection to the discovery product request at issue, and the case raised issues of continuing importance).

80. SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* 5-1 (2d ed. 2001).

81. *Id.*

82. *Id.* at 5-2.

83. *Id.* at 5-3.

84. *Id.* at 5-4.

85. *Id.*

86. *Id.* at 5-6.

87. *Id.* at 5-7.

88. *Id.* at 9-6.

89. *Id.* at 9-6 to 9-7 (quoting *Lake Utopia Paper, Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (Cal. Ct. App. 1979)) (arguing that a lack of confidentiality will cause “[the parties to] feel constrained to conduct themselves in a cautious, tight-lipped, noncommittal manner more suitable to poker players in a high stakes game than adversaries attempting to arrive at a just solution of a civil dispute”). The court also notes that confidentiality in mediation encourages frankness. *Id.*

90. *Id.* at 9-9. Cole asserts that “[t]he evidentiary exclusion for compromise negotiations serves both to encourage settlement discussions and to exclude evidence generally of low probative weight” *Id.*

B. Protecting Confidentiality in Mediation

Jurisdictions vary greatly as to the extent confidentiality in mediation is protected. Most jurisdictions protect communications made in mediation from discovery, to some extent. There are three main categories of statutory protection for mediation communications:

(1) blanket confidentiality, whereby no disclosure of any mediation communications may be made (absolute confidentiality); (2) nearly absolute confidentiality, subject to enumerated exceptions, which vary by state statute, or disclosure only upon consent by all parties, including the mediator (enumerated confidentiality); or (3) qualified confidentiality, providing mediation confidentiality but expressly recognizing judicial discretion to order disclosure in individual cases where needed to prevent a manifest injustice or to enforce court orders.⁹¹

An example of the first category—where no disclosures of mediation communications are allowed—is found in Ohio. “In Ohio, the legislature enacted a statute that renders all mediation communications confidential whether the mediation is court-annexed or arranged by the parties themselves.”⁹² California is another jurisdiction following absolute confidentiality of mediation communications.⁹³

An example of the second category—where almost all mediation communications are protected, subject to a few exceptions—is found in states that have adopted the Uniform Mediation Act (UMA).⁹⁴ The UMA was created by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association (ABA) to clarify the issue of “inconsistent [state] mediation confidentiality provisions.”⁹⁵ Generally, the UMA is thought to significantly protect confidentiality in mediation. Confidentiality in mediation is protected by the UMA through the prevention of compelled disclosure of communications in subsequent litigation.⁹⁶ The UMA also prevents mediators from making disclosures to judges specifying that “[a] mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, agency, or other authority that may make a ruling on the dispute that is the subject of the mediation”⁹⁷ The UMA has exceptions to confidentiality for threats of bodily injury, communications used to plan or commit a crime, evidence of abuse or neglect, evidence of professional misconduct or

91. Maureen A. Weston, *Confidentiality's Constitutionality: The IncurSION on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 49 (2003).

92. COLE ET AL., *supra* note 80, at 9-33.

93. CAL. EVID. CODE § 1119 (West 2004).

94. Weston, *supra* note 91, at 49; Unif. Mediation Act (2003), available at www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm.

95. Ellen E. Deason, *Uniform Mediation Act: Law Ensures Confidentiality, Neutrality of Process*, 2002 DISP. RESOL. MAG. 7, 8 (2002).

96. Unif. Mediation Act § 4. The UMA specifies, “A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.” *Id.*

97. *Id.* § 7.

malpractice by the mediator, or evidence of professional misconduct or malpractice involving a party, nonparty participant, or party representative.⁹⁸

The final main category, wherein states have other exceptions to their mediation statutes, may include judicial discretion. For example, in Wisconsin mediation communications are generally protected.⁹⁹ But the Wisconsin statute expressly recognizes judicial discretion to make exceptions.¹⁰⁰

C. California and Confidentiality in Mediation

As a state, California is a strong advocate of mediation, statutorily mandating mediation in several instances. Under the California Civil Action Mediation Program courts may require parties to mediate.¹⁰¹ There are also several voluntary court mediation programs in California.¹⁰²

Many of California's statutes also protect the confidentiality of mediation. The statutes governing admissibility of evidence in California provide almost complete protection to participants. Section 1119 of the California Evidence Code protects communications and documents introduced in mediation. Sub-section (a) specifically protects anything said or any admission made "for the purpose of, in the course of, or pursuant to, a mediation."¹⁰³ Sub-section (b) of 1119 protects writings that are prepared for the mediation¹⁰⁴ and sub-section (c) protects all communications and settlement discussions in the mediation.¹⁰⁵ Section 1121, also in the evidence code, prevents the mediator from reporting to a court any evaluations or findings concerning the mediation unless all parties to the mediation agree to a submission.¹⁰⁶ Unless otherwise agreed between the parties in a mediation, a mediator may only submit a verification that the parties either did or did not reach an agreement.¹⁰⁷ The protection of evidence by section 1119 is balanced by section 1120. Section 1120 provides that evidence that is otherwise

98. *Id.*

99. *Id.*

100. WIS. STAT. § 904.085(4)(e) (2001) (permitting disclosure "if necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally").

101. See KNIGHT ET AL., *supra* note 3, § 4:206. Courts may order mediation in cases where the amount in controversy is less than \$50,000 per plaintiff. *Id.*

102. *Id.* § 4:234.

103. See CAL. EVID. CODE § 1119 (West 2004) (protecting anything said or any admission made "for the purpose of, in the course of, or pursuant to, a mediation").

104. *Id.* (specifically protecting any writings "prepared for the purpose of, in the course of, or pursuant to, a mediation").

105. *Id.*

106. See *id.* § 1121. Section 1121 states:

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with [s]ection 1118.

Id.

107. *Id.*

admissible outside of a mediation will not become inadmissible just because it is introduced in the mediation.¹⁰⁸

The courts in California have generally interpreted these statutes to protect confidentiality in mediation substantially; however, some exceptions have developed. In *Rinaker v. Superior Court of San Joaquin* the California Court of Appeal, Third District, limited confidentiality in mediation when a defendant's constitutional rights were at stake.¹⁰⁹ In *Rinaker*, the court held that "the confidentiality provision of section 1119 must yield when necessary to ensure the minors' constitutional right to effective cross-examination and impeachment of an adverse witness in a juvenile delinquency proceeding."¹¹⁰ As a result, a juvenile was allowed to use his accuser's testimony from the juvenile delinquency proceeding—which is protected under section 1119—to impeach the accuser at trial.¹¹¹

Another California case that limited the protection of the confidentiality mediation privilege was *Olam v. Congress Mortgage Co.*¹¹² In *Olam*, a federal district court addressed the issue of whether there was an exception to section 1121 that compelled a mediator to testify concerning a privileged mediation.¹¹³ The mediator's testimony was necessary to determine whether the plaintiff signed an agreement under undue influence during the mediation.¹¹⁴ The court held that, in order to promote fairness, the mediator must testify concerning the agreement reached during mediation.¹¹⁵

The California Supreme Court has since disagreed with *Olam* in *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*¹¹⁶ In *Foxgate*, the court held that the confidentiality of mediation communications, along with the confidentiality of reports prepared by mediators, were completely protected.¹¹⁷ The court overturned the appellate court's decision that a mediator may report to a court a party's failure to make a good faith effort in a mediation in order to allow the court to place sanctions on the party.¹¹⁸ The sanction claim arose when the defendant arrived late to the first mediation and failed to bring his experts, contrary to the parties' agreement.¹¹⁹ The plaintiff filed a motion to impose sanctions reflecting the amount of money the plaintiff's counsel wasted on the mediation.¹²⁰

The California Supreme Court rejected the appellate court's argument that an exception to confidentiality under sections 1119 and 1121 was necessary to avoid the "absurd result" that a party could not be punished with sanctions for bad behavior during the mediation.¹²¹ The court held that section 1119 protected the confidentiality of the mediation; thus, the defendant's bad behavior in the media-

108. *See id.* § 1120(a).

109. *Rinaker v. Super. Ct. of San Joaquin County*, 74 Cal. Rptr. 2d 464 (Cal. Ct. App. 1998).

110. *Id.* at 466.

111. *Id.* at 466-67.

112. *Olam v. Cong. Mortgage Co.*, 68 F. Supp.2d 1110, 1128 (N.D. Cal. 1999).

113. *Id.* *See* CAL. EVID. CODE § 1121 (West 2004).

114. *Olam*, 68 F. Supp.2d at 1128.

115. *Id.*

116. *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1119 (Cal. 2001).

117. *Id.*

118. *Id.*

119. *Id.* at 1120.

120. *Id.* (stating that the cost reflected the plaintiff's expenses incurred in preparation for the mediation including payment of its experts for the planned mediation).

121. *Id.* at 1125.

tion was not allowed to be addressed by the court via sanctions.¹²² The court also noted that the statutes were clear and unambiguous and the statutes carried out the legislature's intent by completely protecting the confidentiality of the mediation.¹²³ Therefore, in order to carry out the legislature's intent to promote confidentiality in mediation, an exception to limit confidentiality when a party acts in bad faith is not allowed.

IV. INSTANT DECISION

A. *Statutory Interpretation*

In *Rojas*, the California Supreme Court disagreed with the Court of Appeal's holding that section 1119 did not apply to photographs or witness statements.¹²⁴ The court stated that the appellate court's holding "directly conflict[ed] with the plain language" of the statutes.¹²⁵ The court held that photographs and witness statements should be protected because, under section 250, photographs and witness statements are considered writings.¹²⁶ Thus, they are protected under section 1119 if they are prepared for mediation.¹²⁷

The Supreme Court of California agreed with the appellate court's holding that raw data is not protected by section 1119.¹²⁸ The court believed that raw data in this case would be actual physical samples collected at the apartment complex.¹²⁹ However, reports describing the existence of the physical samples would be considered a "writing" under section 250 and would not be discoverable under section 1119.¹³⁰

The Supreme Court of California also disagreed with the appellate court's interpretation of section 1120.¹³¹ The court determined that section 1120 allows evidence introduced in a mediation that is otherwise discoverable¹³² to be discoverable only if it was not "prepared for the purpose of, in the course of, or pursuant to, a mediation."¹³³ The court further disagreed with the appellate court's conclusion that its interpretation would "render section 1120 'surplusage' or permit parties 'to use mediation as a shield to hide evidence.'"¹³⁴

The California Supreme Court instead argued that the appellate court's interpretation of section 1119 makes "subdivision (b) of section 1119 essentially useless."¹³⁵ The court argued that if the Court of Appeal's interpreted section 1119 to

122. *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1119 (Cal. 2001).

123. *Id.* at 1126.

124. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 265 (Cal. 2004).

125. *Id.*

126. *Id.* at 265. See CAL. EVID. CODE § 250 (West 2004).

127. *Rojas*, 93 P.3d at 265. See CAL. EVID. CODE § 1119.

128. *Rojas*, 93 P.3d at 265.

129. *Id.*

130. *Id.*

131. *Id.* at 266.

132. *Id.* The court quotes section 1120 that: "[e]vidence 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 . . ." *Id.* See CAL. EVID. CODE § 1120.

133. *Id.* (quoting CAL. EVID. CODE § 1119).

134. *Id.*

135. *Id.*

only protect “the substance of mediation,” then subsection (a) (which protects the substance of the mediation) suffices without subsection (b).¹³⁶

B. The Legislature’s Intent

The California Supreme Court also argued that the appellate court’s interpretation of the provisions was inconsistent with the purpose of the California legislature and its legislative history.¹³⁷ The court used the California Law Revision Commission’s (CLRC) rejection of the California State Bar Committee on the Administration of Justice’s (CAJ) argument—that documents such as photographs created for mediation should not become inadmissible in later litigation—to support its argument.¹³⁸ The commission rejected the argument because it would not protect documents prepared for the mediation and could adversely affect the mediation process.¹³⁹ The CLRC chose the language of the statute to expressly give the person who took the photograph control over whether it is used in subsequent litigation, even if there is no other way for the parties to obtain a similar photograph.¹⁴⁰ The court further supported its holding with the commission’s recommendation to the legislature to use the broader definition for “documents” stated in section 250, instead of the previous language of the statute which referred to “documents” without a particular definition.¹⁴¹ The court, following the CLRC, also recommended that “oral statements” should be broadly protected to encourage frankness in mediation discussions, which prompted the legislature to protect it in sub-section (a) of section 1119.¹⁴²

C. The Purpose of the Statutes

The California Supreme Court found the appellate court’s interpretation of the statutes was inconsistent with “the overall purpose of the mediation confidentiality provisions.”¹⁴³ The court restated its findings in *Foxgate* that “confidentiality is essential to effective mediation.”¹⁴⁴ The court emphasized that the CLRC recommendations, as adopted by the legislature, focused on eliminating statutory ambiguity in an effort to encourage successful mediations by encouraging “candor” by involved parties in mediation.¹⁴⁵

The California Supreme Court also disagreed with the appellate court’s finding that there is a “good cause” exception from the work-product privilege.¹⁴⁶ It

136. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 266 (Cal. 2004). See CAL. EVID. CODE § 1119(a): “No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the evidence shall not be compelled” *Id.*

137. *Rojas*, 93 P.3d at 269.

138. *Id.* at 267.

139. *Id.*

140. *Id.* at 268.

141. *Id.* at 269.

142. *Id.* at 270.

143. *Id.*

144. *Id.* at 269 (citing *Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001)).

145. *Id.* at 269-270.

146. *Id.* at 270.

argued there is no “good cause” exception because “the legislature did not enact such an exception when it passed . . . section 1119 and the other mediation confidentiality provisions.”¹⁴⁷ The court argued that the legislature “clearly knows how to establish a ‘good cause’ exception to a protection or privilege if it so desires.”¹⁴⁸ The court concluded that without evidence of a legislative intent to have a “good cause” exception to the statute, the exception cannot be read into the statute—as the appellate court did in order to apply the “good cause” exception in its opinion.¹⁴⁹

The California Supreme Court also argued that the appellate court’s interpretation went against its public policy stated in *Foxgate*, “[t]o carry out the purpose of encouraging mediation by ensuring confidentiality”¹⁵⁰ It further supported its public policy view by quoting Judge Mohr’s observations in the superior court’s ruling of the *Rojas* case. Judge Mohr observed, “the mediation privilege is an important one, and if courts start dispensing with it by using the . . . test [governing the work-product privilege] . . . you may have people less willing to mediate.”¹⁵¹ The court concluded that the appellate court erred when it created an exception to section 1119(b) allowing discovery of “derivative material” upon a “good cause” showing.¹⁵²

V. COMMENT

The California Supreme Court ignored important policy issues that the appellate court raised in its opinion. These policy issues should have been given greater weight, especially considering the ambiguity of the statute and conflicting legislative intent. The court should have upheld the appellate court’s decision and allowed the work-product privilege to apply to the documents in the case. Both courts examined three main factors in order to adequately interpret the evidence statutes: (1) the words of the statute; (2) the legislative intent; and (3) policy issues.¹⁵³ The factors are outlined below to show that both courts made adequate arguments for the first two factors. However, the court’s policy arguments for protecting the evidence from discovery are inferior to the stronger policy arguments presented by the appellate court to allow the evidence to be subject to the work-product privilege.

147. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 270 (Cal. 2004).

148. *Id.*

149. *Id.* (relying on *Sierra Club v. State Bd. of Forestry*, 876 P.2d 505 (Cal. 1994), where the court noted that, “[u]nder the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary”).

150. *Id.* at 271.

151. *Id.*

152. *Id.*

153. *See Rojas v. Super. Ct.*, 126 Cal. Rptr. 2d 97, 105 (Cal. Ct. App. 2002). The appellate court specifically listed three factors to assist in statutory interpretation. The third factor was to apply “reason, practicality, and common sense to the language at hand,” only if the court is “unable to ascertain the statute’s meaning” after application of the first two factors. *Id.* Appropriately, the appellate court mainly focused on the first two factors (legislative intent and the words of the statute), as did the California Supreme Court. *See infra* Part IV. However, both courts also listed policy reasons in their decisions. *See infra* Parts II.B, III.C.

A. Ambiguity in the Statute?

The California Supreme Court found that sections 1119 and 1120 are clear and unambiguous.¹⁵⁴ The court made plausible arguments that section 1119 is unambiguous. However, the court failed to make an argument as compelling as the appellate court that section 1120 is unambiguous. The court's interpretation of sections 1119 and 1120 did not render either section as "surplusage"—contrary to what the appellate court argued.¹⁵⁵ The court did take into effect both sections. Section 1120 is not obsolete because the court gave meaning to 1120(a) when it used this section to conclude that raw evidence is admissible.¹⁵⁶ Section 1120(a) says "evidence that is otherwise subject to discovery is admissible"¹⁵⁷ and the court believed that raw evidence is an example of "evidence that is otherwise subject to discovery . . ."¹⁵⁸ Thus, it is admissible under the language of section 1120 and the court did not render this phrase of section 1120 obsolete.

Although the California Supreme Court's interpretation did not render either section obsolete, it is not clear that its interpretation is the only logical one. It is ambiguous that the language of section 1120, stating that "evidence that is otherwise subject to discovery is admissible,"¹⁵⁹ is only limited to raw evidence, as the court held.¹⁶⁰ It is possible that the legislature intended this phrase to allow the work-product privilege to apply as well. Although the court argued correctly that for the work-product privilege to apply, by looking solely at the words of the statute, the legislature would need to expressly write this exception into the statute¹⁶¹ this does not mean that the statute clearly takes the opposite approach. Because the phrase in section 1120 that "evidence that is otherwise subject to discovery is admissible" does not identify what specific evidence "is otherwise subject to discovery," the former phrase is ambiguous. The statute is ambiguous because the legislature did not identify within the terms of the statute what evidence exactly is "otherwise discoverable." The legislature's intent should have been examined to find the best interpretation of the statute.

B. Conflicting Legislative Intent

The California Supreme Court's decision provided some evidence that the legislature intended the statutes to protect all documents that were prepared for the mediation. However, the appellate court also provided evidence that the legislature's intent was contrary to the intent found by the California Supreme Court. The supreme court referenced the CLRC Report to show that the language of the statute was chosen so that a party taking a photograph in preparation for mediation would have complete control over whether the photo was used in subsequent liti-

154. See *infra* Part III.C.

155. See *infra* Part II.B.

156. See *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 266 (Cal. 2004).

157. See CAL. EVID. CODE § 1120(a) (West 2004).

158. *Id.*

159. *Id.*

160. See *infra* Part IV.A.

161. *Id.*

gation.¹⁶² This is true even if the adverse party had no other way to obtain a similar photo.¹⁶³

In contrast, the court of appeals argued that the legislative intent of the CLRC comment supported their interpretation that the work product privilege should apply so as to prevent parties from hiding work product in mediation solely for the purpose to prevent future litigants from overcoming the work product privilege on some basis. The CLRC language supports this contention by stating that section 1120 “is designed to prevent materials from being introduced in mediation solely to protect them from later discovery or use in litigation.”¹⁶⁴ The California Supreme Court’s contention is, however, that the work product privilege is unnecessary to prevent this evidence shielding loophole because section 1119 states only that documents “prepared for the mediation” will be protected.¹⁶⁵ The court’s reasoning is flawed because it does not explain how this statute can effectively prevent a party from claiming its work product was produced solely for mediation when in fact it was produced for both mediation and anticipated litigation. It is difficult to determine how the legislature intended, if at all, to address the problem of abusing the mediation privilege in this way. And it appears that the legislative history could arguably support either court’s interpretation. Despite the legislature’s clear intention to “prevent” such abuse of the mediation privilege, the ambiguous text of the statute fails to uncover an answer. Therefore, it is prudent for a court to consider the policies underlying the legislation and public policy at large to decide how it believes the legislature would have determined the issue had it expressly considered it.

C. Policy Concerns

Both the California Supreme Court and the appellate court raised significant policy arguments for their holdings. However, the appellate court policy arguments outweighed the importance of the supreme court’s policy arguments. The supreme court argued that confidentiality in mediation needs to be protected to encourage mediation.¹⁶⁶ Many scholars have argued that this is true.¹⁶⁷ Logically, it seems to follow that if mediation is confidential, parties are more likely to participate. However, the Southern California Mediator Association argued in its amicus brief in support of the plaintiffs that protecting evidence too much in mediation could lead to discouraging parties to mediate.¹⁶⁸ The amicus brief stated, “In short, the approach taken by defendants (now appellants in *Rojas*) would make mediation a tool for burying unfavorable evidence. And that, in turn, would make litigants think twice about agreeing to mediate.”¹⁶⁹ This would be true in a case where a plaintiff was afraid the defendant would use mediation to hide its evi-

162. See *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 268 (Cal. 2004).

163. *Id.*

164. See *Rojas v. Super. Ct.*, 126 Cal. Rptr. 2d 97, 108 (Cal. Ct. App. 2002).

165. See *infra* Part IV.A.

166. See *infra* Part IV.

167. See *infra* Part III.A. See also Greg Dillard, *The Future of Mediation Confidentiality in Texas: Shedding Light on a Murky Situation*, 21 REV. LITIG. 137, 139 (2002).

168. Brief of Amicus Curiae S. Cal. Mediation Ass’n at 3, *Rojas v. Super. Ct.*, 126 Cal. Rptr. 2d 97 (Cal. Ct. App. 2002).

169. *Id.*

dence before the plaintiff was able to use discovery to obtain the evidence. Others argue that mediation will thrive regardless of whether evidence is protected in sections 1119 and 1120.¹⁷⁰

The more plausible argument for protecting confidentiality is that a higher percentage of mediations will be successful. A party does not want to worry about whether a statement or document it uses in mediation is protected.¹⁷¹ A party is less likely to be frank and candid in mediation, which is one of the goals of mediation, when threatened with future use of materials against the party.¹⁷² It is arguable that the mediation will be less likely to settle without the parties' candid exchange that would be possible in a confidential mediation.

Although the policy arguments for protecting confidentiality do have merit, when they are weighed against policy arguments that confidentiality will obstruct justice, it is hard to support the arguments for confidentiality. The appellate court argued that parties will use the mediation privilege in sections 1119 and 1120 "as a shield to hide [otherwise admissible] evidence."¹⁷³ The appellate court believed "[to] give the parties one more avenue where they could hide evidence and obstruct the fact-finding process of litigation would be . . . disastrous and would not foster resolution of disputes, but hinder them."¹⁷⁴

The California Supreme Court argued that this will not happen because the language of section 1119 requires that the evidence be "prepared for the purpose, in the course of, or pursuant to a mediation."¹⁷⁵ But the court failed to state whether it is possible to accurately determine this. Even if it can be accurately determined when evidence is prepared, it seems objectively impossible to discern whether the evidence was prepared "solely" for mediation or for both litigation and mediation. Even if it is possible to show that the evidence was prepared solely for the mediation, to protect the evidence from future disclosure could still lead to an unjust result if the work-product privilege is not applied.

In a case such as *Rojas*, where the plaintiffs have no means to obtain the evidence without undue hardship,¹⁷⁶ it is unjust to prevent a party from using the work-product privilege to obtain the evidence. This is especially true when the party did not know of the problem until after it was too late for them to conduct tests on the raw evidence, as in *Rojas*.¹⁷⁷ The injustice is greater when the party in need of the evidence had no notice from the adverse parties that the parties were going to mediate concerning a problem that affected them as well. Because of the possibility of injustice to a party such as the *Rojas* plaintiffs, and because this injustice should outweigh the importance of encouraging mediation, the California Supreme Court should have upheld the appellate court's decision.

170. Joel M. Grossman, *Clarifying the Confidentiality of Mediation Evidence*, 27 L.A. LAW. 14, 20 (2004) (arguing that even if confidentiality in mediation is limited, mediation will still "thrive" because of its lower cost compared to litigation).

171. *Id.* at 14.

172. *Id.*

173. *See Rojas v. Super. Ct.*, 126 Cal. Rptr. 2d 97, 109 (Cal. Ct. App. 2002).

174. *Id.* at 109.

175. *Rojas v. Super. Ct. of L.A. County*, 93 P.3d 260, 266 (Cal. 2004).

176. *See id.* at 264. *See also Rojas*, 126 Cal. Rptr. 2d at 104.

177. *See Rojas*, 93 P.3d at 262.

VI. CONCLUSION

Although the California Supreme Court adequately supported its conclusion that sections 1119 and 1120 protect all evidence—excluding raw evidence—from discovery, if the evidence was prepared for mediation, the court failed to address key policy arguments against its decision that were raised by the appellate court. Because the appellate court adequately supported its conclusions as well, its policy arguments should be weighed against the California Supreme Court’s policy arguments. Although the court made plausible arguments concerning the importance of encouraging mediation and maintaining the ability of mediation to hasten settlement, it failed to address the consequences the decision may have when parties in bad faith seek to hide evidence that was not necessarily produced “solely” in preparation of mediation. Because the concerns that injustice will be allowed to prevail in cases such as *Rojas* outweighs the importance of encouraging mediation, the work-product privilege should apply.

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