One Person's Opinion Approving of
the SCMA's Common Sense Position on Confidentiality Issues

Can mediation confidentiality be used to hide otherwise discoverable evidence? And if so, under what circumstances?

The mediation community is a-buzz. The California Supreme Court has granted review of the California Court of Appeals, 2nd District, decision in Rojas v. Superior Court (2002) 102 Cal.App.4th 1062.

A series of public forums is anticipated to be conducted by the California Dispute Resolution Council and the Southern California Mediation Association to air these issues prior to the Supreme Court issuing a written Opinion on Rojas.

Many mediators believe that if the Rojas decision is left standing, the concept of broad confidentiality will be severely eroded for all documents and communications prepared for, or used at, a confidential mediation.

Many others believe that the express statutory limitations on mediation confidentiality set forth in California Evidence Code §1120 et. seq., and the two implied limitations on mediation confidentiality described in Foxgate, are essential exceptions to mediation confidentiality. And, without sensible exceptions to mediation confidentiality, the very integrity of the mediation process itself, the interests of fairness to affected third-parties not present at the mediation, and the interests of justice for the public at-large, may each be irreparably and unfairly harmed by an unnecessarily broad interpretation of the Mediation Confidentiality provisions set forth in California Evidence Code §1119.

Where Did it Start?

In March, 2001, the Los Angeles Superior Court, Judge Anthony Mohr presiding, ruled in Rojas v. Coffin, et al., that the trial court would not order production of or admission into evidence of important documents, photographs and an expert opinion as to the presence of toxic mold and other safety defects in a construction defect lawsuit filed in August 1999, by nearly 200 tenants (including many young children who may have health problems) of the Burlington Apartment complex in Los Angeles against their Landlords. Judge Mohr relied heavily upon the confidentiality provisions of Evidence Code §1119.

Judge Mohr excluded this evidence from the tenants' lawsuit because the evidence was first introduced two years earlier, in 1998, as part of a "mediation" in the Underlying Case by the Landlords against the Original Developers and Contractors. The Underlying Case settled after a mediation with a "confidentiality" agreement that provided the consent of the Landlord was absolutely necessary for a release of the defect reports, repair reports and photographs of the allegedly hazardous defects and toxic mold conditions, unless a party obtained a Court Order.

The parties to the earlier case of Landlord against the Original Developer each realized it was in their economic interest to keep this evidence out of the hands of the tenants who may have been injured by the safety problems created by the presence of toxic mold when they were living at the Burlington Apartment complex. The "mediation" settlement agreement achieved that purpose when Judge Mohr would not allow the tenants access to the evidence the Landlord had made "confidential" by first introducing it into a mediation.

At the hearing, before making his ruling, Judge Mohr was clearly troubled about excluding such important evidence of health and safety violations from use by the potentially injured tenants who did not participate in the Underlying Case, or its mediation process, or the Confidentiality Agreement that settled the Underlying Case.

Judge Mohr stated:

> "Those photographs trouble me because…. this is not a summary of impressions of an expert or anything…. This is just… a representation, fixed representation… of the state of a particular place a particular time, and if there is really no other way for the Plaintiff to get it – I have a concern that the mediation and litigation privilege were not meant as a device or a subterfuge to block evidence." Judge Mohr went on to point out that you "can't just put a piece of evidence in a mediation and make it disappear." Rojas 102 Cal.App.4th at 1071.

Nevertheless, Judge Mohr concluded that Evidence Code §1119 and the Mediation Confidentiality provisions contained therein required that the tenants in Rojas not be permitted to use as evidence the original photographs, investigation binder, and expert studies that had been prepared in the Underlying Case and first introduced in the mediation of the Underlying Case.

Naturally, Judge Mohr's decision was appealed, and one year later, Justice Lilley, on behalf of a divided panel of the California Court of Appeals, 2nd District, reversed the trial court's exclusion of this important evidence based upon the Appellate Court's belief that the photographs, documents and expert opinion were created before the mediation and were, at the time of creation, and at the time of their subsequent use at the mediation in the earlier case, precisely the type of evidence that was intended to be admissible in a trial of the litigated action in the event the case did not settle.

When evidence is otherwise admissible in a court proceeding, the California Appellate Court reasoned it should not be made inadmissible simply because it is also used in a mediation of a related case. The Court of Appeals pointed out that their reasoning was expressly supported by California Evidence Code §1120.[1]

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

What's Happening on the Road to the Supreme Court?

Rojas vs. Superior Court (2002) 102 Cal. App. 4th 1062 is now on appeal to the California Supreme Court, and it is expected to be decided later this year. The Supreme Court is expected to decide whether the type of important evidence involved in the Rojas case that was developed in a prior case, and submitted to all the parties during a mediation in the prior case, may be kept confidential from others who would benefit from using it in a later case in which there are additional parties (the tenants) who were not present at, and not invited to, the prior mediation.

In essence, the California Supreme Court is expected to decide the extent to which the provisions of Evidence Code §1120 are an exception to the confidentiality provisions of Evidence Code §1119 so that this important information may be used by the tenants who may have been injured by the toxic mold that was fully abated from the Burlington Apartment complex.

In December, 2002, members of the Southern California Mediation Association met at the Board of Directors Annual Retreat. During the Retreat, and during a December, 2000, meeting of the SCMA Professional Development Committee, among the matters discussed was considering taking a position on the Rojas case in the event it was to be heard by the Supreme Court of California.

Shortly thereafter, the Supreme Court accepted the Petition for Review.

On January 31, 2003, the SCMA Board of Directors established an Amicus Curiae Committee. The Committee was given instructions by the Board to proceed with the drafting of a brief which supported the essential principles of: (a) a truly neutral mediator, (b) informed and consensual self-determination by each of the parties in the outcome of the mediation, and (c) a level of confidentiality sufficiently high to encourage meaningful communications without jeopardizing the parties' rights of self-determination (including the right to choose not to settle a mediation, and to go forward and obtain a fair trial without any litigant being prejudiced by having participated in the mediation process.

The Amicus Curiae Committee met twice and the Professional Development Committee met twice, including the December, 2002, meeting. Each meeting was attended by several individuals, either telephonically or in person. Numerous viewpoints were expressed about whether confidentiality at a mediation should be "absolute" or subject to certain exceptions; and if so, what were the allowable statutory and implied exceptions to mediation confidentiality?

The members of the Amicus Curiae Committee identified five (5) basic principles which define the discussion of when and whether evidence first introduced into a mediation should be made confidential under California law and, therefore, precluded from any subsequent trial or civil proceeding.

1. A Mediation Requires a Neutral Facilitator. In the Rojas case, the facilitator was not truly a neutral because the person conducting the mediation also served in a dual capacity of a Case Management Officer. As CMO, he had the power to affect meaningfully the outcome of the case by deciding, preliminarily, what information would or would not be likely to be admitted into evidence at the time of the trial. As a result, the Rojas case did not involve a "true mediation" as understood by professionals in the business and defined by California law. The concept of a truly neutral mediator is codified in Evidence Code §1115[2]. It provides that a mediator is to be a neutral person who acts to facilitate the participants' consensual, and presumably informed, self-determination of their conflict. It is difficult, although not impossible, to regard a mediator as a true "neutral" when the mediator is also a decision-making CMO who may inadvertently use a confidential communication told to the CMO/mediator by one litigant party against another litigant, without the latter party even knowing of the existence of this confidential communication. See also, Uniform Mediation Act, Prefacatory Note at page 6.

   At this point, it is useful to note the first two standards of the ABA's Model Standards of Conduct for Mediators:

   I "Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.

   Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

   II Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.

   The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw."

2. Mediations are Intended to be a Reality Check and Assist in Informed Self-Determination. Virtually all of the information communicated at a mediation is about public information or readily discoverable information that is always intended by the

[2] " For the purposes of this chapter: (a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement. (b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designate by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation. (c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator. [Under subdivision (b) a mediator must be neutral….]."

participants to be used at trial in the event the matter does not settle. The exception to this rule is that an apology or conciliatory remarks or an admission against interest may be made in a mediation by a party moved to be particularly candid. All such mediation statements are clearly intended to be confidential – that is, the apology may not be used against the person proffering it during subsequent non-criminal proceedings.

Thus, Evidence Code §1120 states, in effect, that photographs, documents, or conversations, which would otherwise be admissible evidence at a trial, created or occurring before a mediation will be admissible evidence at a subsequent trial even if also introduced at a "mediation" of the litigated case.

It seems intuitively unjust for parties to keep entirely confidential, and hidden from use by other affected parties not present, information that is the only memorialization of a safety hazard repaired or health matter remediated. It may be that if Evidence Codes §1119 and §1120 are read to permit litigants to make such confidentiality agreements and enforce them against innocent third-party individuals (such as the Burlington Apartments tenants) when such individuals were neither invited to the mediation, nor had any opportunity to participate in the mediation, that the California State Legislature may need to re-visit the scope of confidentiality to assure that no manifest injustice is caused to innocent third-parties.

Clearly, the matter of having otherwise discoverable evidence that is meaningful to the outcome of a particular litigation being "sealed" is one that the California Judicial Council, Chief Judge Ronald George presiding, has considered during the past few years. And in doing so, the California Judicial Council created a strong presumption in favor of making court records public, except where expressly made confidential by law.

The California Rules of the Court, CRC243.1 through CRC243.4, effective January 1, 2001, enacted into law through the California Judicial Council, greatly limited the ability of litigants to seal court records and great a presumption in favor of open records. Perhaps, standards similar to CRC243.1(d) may be needed to be promulgated by the Legislature in order to protect the interests of the public and innocent third-parties from inappropriately-brought confidentiality agreements created to benefit only the private parties who are settling a litigated case at the potential expense of third parties who may subsequently be harmed by an agreement to keep evidence "secret."

3. Confidentiality is Not Absolute in a True Mediation. Even if the Underlying Case were determined to be a mediation to which the California laws of confidentiality apply, the confidentiality laws for mediations have always included certain common sense exceptions. For example, were one party to commit an assault and battery on another person at the mediation, clearly the participants would be permitted to testify at a criminal proceeding. Also, were one party to make an entirely reasonable sounding threat of future harm to an individual who was not present at the mediation,

common sense suggests that there may be circumstances in which a participant at the mediation could warn an intended victim of that clear and present danger. See Uniform Mediation Act, Sections 5(c), 6(a)(3) and 6(a)(4).

It is useful to emphasize that "mediation confidentiality" under Evidence Code §1119 is not the same as keeping a "secret" or creating private facts that are to be no one else's business. The Mediation Confidentiality provisions of the Evidence Code are included in the specific section relating to "Evidence Affected or Excluded by Extrinsic Policies." "Mediation confidentiality" is not identified as any of the special privileges, such as Privilege Against Self-Incrimination, Lawyer-Client Privilege, Confidential Marital Communications, Physician-Patient Privilege, Sexual Assault and Victim-Counselor Privilege, each of which are governed by different rules.

Information being unavailable as admissible evidence in a trial is not the same as that evidence being a private "secret" of a small group of confidants, such as a doctor and her patient. This is a distinction that is not satisfactorily explained by the language of Evidence Code §1119(a) and the seemingly broader protections of §1119(c).

4. Confidentiality is Assumed to Encourage Candor and Facilitate a Fuller Exchange of Information. Essentially, the purpose of confidentiality in mediation is to protect the communications between the parties so that people may make an apology or express emotions, or brainstorm about possible motives, interests or solutions without such expressions being used against them in a subsequent proceeding. It is the fact of those communications of apologies and of admissions against interest and of statements of conciliation or of contrition which are protected. However, if the information itself existed before the mediation and would otherwise have been discoverable, the introduction of this information (i.e., a prior admission against interest) into the mediation does not convert an earlier publicly made admission against interest into a "confidential" one that may not be later disclosed to anyone. One cannot dump discoverable information into a mediation in order to make such information privileged, even though the fact of communication at the mediation remains privileged. Evidence Codes §1119 and §1120.

5. Belated Claims of Confidentiality Must be Carefully Scrutinized. The Committee felt strongly that the particular photographs, documents and expert opinion that had been created before the mediation, and had not been designated as being intended by the party offering them to be treated confidential either before or during the mediation, should not be converted into "confidential" documents after the Underlying Case is no longer pending. Indeed, had there been no settlement of the Underlying Case, the Landlord's evidence on the presence of toxic mold and construction defects would surely have been used by the Landlord, in a public trial, in order to gain insurance monies from the Developer's insurance carrier by proving that there had been health and safety defects at the Burlington Apartment complex.

Simply put, the materials produced were almost certainly not intended at the time of the mediation to be confidential because the landlord intended to receive a very large

amount of money in damages by using them, as evidence, and did so to obtain a settlement. It would seem gravely inappropriate when the tenants sued in order to get some of that money because of the health problems they were experiencing, quite possibly from the toxic mold, that the Landlord who did not treat the information as confidential when it was used to generate money for itself, would be allowed belatedly to treat the information as confidential and "seal these evidentiary records" in order to prevent the tenants from sharing in the receipt of the monies that would have rightfully been theirs. See CRC 243.1.

Conclusion

The SCMA Board met and agreed to have noted mediator and Board member, Jeff Kichaven, and experienced appellate advocate, Wendy Lascher, prepare and file an Amicus Brief on behalf of the SCMA. The submission of this brief occurred on May 20, 2003.

The SCMA now expects to undertake a series of public forums, one or more of which are to be with the California Dispute Resolution Council. The purpose of these forums is to discuss with mediators throughout Southern California and with participants at mediations, including interested members of the business, healthcare, legal professions, insurance and real estate industries, the scope of the confidentiality of materials presented at a mediation, and the countervailing interests of justice and fairness to the participants in a mediation and to third-parties who may be hurt if that information is not made public.

The first such forum is scheduled for June 28, 2003, at Pepperdine University's Strauss Institute of Dispute Resolution.

The SCMA encourages its members to contact the SCMA by e-mail or snail mail with any input or suggestions on this important topic. SCMA will be sending out by e-mail and announcing in a newsletter the dates of upcoming forums on this delicate balance between the issue of confidentiality at mediations, assuring the self-determination of the parties, and the protection of the interests of third-parties who may be injured by the use of absolute confidentiality during a mediation.

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(This article is a reflection of my person opinions and is not the "Official Position" of SCMA.)

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