Case No.: S111585

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

GENOVEVA ROJAS, et al.

Petitioners

vs.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent

JULIE COFFIN, Trustee of the 1979 Ehrlich Investment Trust, and RICHARD EHRLICH, et al.

Real Parties in Interest

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN
CASE No. B158391

BRIEF OF THE CALIFORNIA DISPUTE RESOLUTION COUNCIL AMICUS CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST

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I. SUMMARY OF ARGUMENT

Mediation is increasingly important to the resolution of disputes, both in and out of litigation.

Candor, which is vital to the success of mediation, is protected by confidentiality, i.e., assurance that what is said or written in or for a mediation will not be used against a party.

In California, this assurance is provided by the broad prohibition established by the Legislature in Evidence Code Section 1119 against the discovery or admissibility in litigation of mediation statements and writings.

Contrary to the limited exceptions to discovery and admissibility provided by Evidence Code Sections 1120(a) and 1117(b)(2), the Court of Appeal decision would eviscerate Section 1119 by reducing it to nothing more than a restatement of the issues raised by work product protection claims.

II. INTEREST OF THE CALIFORNIA DISPUTE RESOLUTION COUNCIL

The California Dispute Resolution Council ("CDRC") is a statewide nonprofit membership corporation which was organized in 1994 to represent mediators, arbitrators and alternative dispute resolution provider organizations before the Legislature, administrative agencies and the courts in the interest of making mediation, arbitration and other alternative dispute resolution processes fair, accessible and effective.

The membership of the CDRC consists of several hundred individual arbitrators and mediators and numerous organizations which make mediators and arbitrators available for the resolution of disputes.

The CDRC has adopted and published a set of Dispute Resolution Principles which govern its advocacy. These Principles provide, among other matters, that no oral or written statements made in connection with a mediation should be admissible in any adversary proceeding. Based on these Principles, the CDRC worked actively with the California Law Revision Commission in drafting what became the mediation chapter in the Evidence Code, including Sections 1119, 1120, 1117 and 1122, and in persuading the Legislature to adopt them. A copy of the CDRC Dispute Resolution Principles is attached as an Appendix to this brief.

Mediation is an increasingly important dispute resolution process, and, as this Court recognized in Foxgate Homeowners Association, Inc. v. Bramalea California, Inc., (2001) 26 Cal.4th 1, 15, confidentiality is "essential" to the resolution of disputes through mediation. Mediators rely upon Section 1119 to assure participants in mediation that the statements they make and the writings they create in connection with a mediation will not be admissible and cannot be discovered in a later civil proceeding, whether the dispute is resolved in mediation or not. The Court of Appeal decision creates significant doubt whether parties can rely upon such assurances by mediators. Thus, the CDRC has a substantial interest in the present case.

III. ARGUMENT

A. THE CANDOR THAT IS INDUCED BY CONFIDENTIALITY IS VITAL TO THE CONTINUING SUCCESS OF MEDIATION

Over the past 20 years, mediation has come into increasing use in the resolution of disputes. Although litigants frequently agree to mediation, mediation is not used merely in an effort to settle pending lawsuits. It is not uncommon for disputants to undertake mediation even in the absence of litigation or arbitration.

Countless mediations take place in California every year without any of the disputes involved ever reaching any court. Many of these are conducted by agencies established under the

Dispute Resolution Programs Act ("DRPA") that is codified in Business and Professions Code Sections 465, et seq. Others are administered either by the nonprofit American Arbitration Association or by various for-profit dispute resolution provider organizations.

Mediation offers several advantages over other dispute resolution processes. If litigation has been initiated, timely mediation may not only minimize lawyer fees, but also provide relief from congested court calendars and limit the demand upon public budgets to fund court services. In addition, participants may be more satisfied with outcomes in mediation than in other dispute resolution processes.

Much has been written about how candor in mediation discussions maximizes the potential for resolving disputes. E.g., Note, Protecting Confidentiality in Mediation, 98 Harv. L. Rev. 441, 445 (1984).

Candor on the part of parties is founded on two factors. One is trust in the mediator's neutrality or impartiality. This makes it possible for a party to focus on negotiating a settlement without being concerned that the mediator will use something that is said or done against it. This Court addressed that concern in Foxgate Homeowners Association, Inc. v. Bramalea California, Inc., (2001) 26 Cal. 4th 1.

The second factor is confidentiality, the assurance that whatever is said, done or written in or for mediation may not be used against a party in litigation. This assurance is provided in California by the broad prohibition in Evidence Code Section 1119 against discovery or admissibility in civil proceedings of mediation statements and writings.

The CDRC urges this Court to reject the pending challenge to mediation confidentiality just as it did the challenge in Foxgate.

B. THE DECISION OF THE COURT OF APPEAL IS CONTRARY TO THE PLAIN MEANING AND PURPOSE OF EVIDENCE CODE SECTION 1119 AND, IF UPHELD, WOULD CRIPPLE MEDIATION.

Evidence Code Section 1119(a) prohibits the discovery or compelled admission in any non-criminal proceeding of "evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation . . . ."

Evidence Code Section 1119(b) similarly prohibits the discovery or compelled admission of "any writing, as defined in Section 250, prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation . . . ."[1]

Evidence Code Section 1119(c) separately makes confidential "all communications, negotiations or settlement discussions by and between participants in the course of a mediation or mediation consultation . . . ."

The Court of Appeal for the Second District held that disputes over the protection of particular writings by these prohibitions on discovery and admissibility are to be decided as if the statutes did nothing more than restate work product doctrine. Nowhere in Section 1119 is there any support for such a holding.

Section 1119 is plain in its prohibitions. See Foxgate, supra at 14.[2] Except to the extent otherwise provided by Chapter 2 of Division 9 of the Evidence Code, no evidence of any oral statement and no writing shall be "admissible or subject to discovery" if it is "for the purpose of, in the course of, or pursuant to" a mediation.

The purpose of these provisions in promoting the candor essential to effective mediation has been well recognized by this Court. Ibid.

[1] Writings are defined broadly in Evidence Code Section 250 to include "every. . . means of recording on any tangible thing . . . ."

This Court has also recognized that in enacting broad prohibitions against the later use in litigation of mediation statements, including writings, the Legislature has made a policy decision to encourage mediation by ensuring confidentiality. See id. at 14-15. Thus, the bar of Section 1119 operates "unqualifiedly . . . absent an express statutory exception." Id. at 15. (emphasis added.)

To the extent pertinent to this case, the only two exceptions to the prohibitions in Evidence Code Section 1119 are those contained in Evidence Code Section 1120(a) and 1117(b)(2).

C. UNDER SECTION 1120(A), "EVIDENCE OTHERWISE ADMISSIBLE OR SUBJECT TO DISCOVERY OUTSIDE OF A MEDIATION . . . SHALL NOT BECOME INADMISSIBLE OR PROTECTED FROM DISCLOSURE SOLELY BY REASON OF ITS INTRODUCTION OR USE IN A MEDIATION . . . ."

Both the Court of Appeal and at one point in their brief Rojas, et al., focus on use of the word "evidence" in Section 1120(a) as if it were absent from Section 1119 and its absence was enough to allow discovery of any evidence that is not protected work product.

However, although Section 1119(a) uses the specific word that no "evidence" of anything said shall be subject to discovery, Section 1119(b) functionally is no different. No litigant would seek to admit any "writing," as referred to in Section 1119(b), unless that writing also constituted evidence.

In context, as Rojas, et al., acknowledge elsewhere in their brief, what is excluded by Section 1120(a) from the prohibition of Section 1119 is only evidence "otherwise admissible or subject to discovery outside of a mediation."

[2] Section 1119 is a prohibition, not a privilege. It is located in Chapter 2 of Division 9, which deals with evidence excluded by external policies, not in Division 8, which provides for privileges.

What is now Section 1120(a) was added to former Section 1152.5 as a result of passage of SB 401 in 1993. This bill became Chapter 1261 of the Statutes of 1993, effective January 1, 1994. As this Court discussed in Foxgate, supra, 26 Cal.4th at 10-12, the provisions of former Section 1152.5 were carried over into Sections 1115, et seq., effective January 1, 1998.

Searching for a committee analysis or similar legislative history about the addition to SB401 of what is now Section 1120(a) will yield nothing. Thus, we are left with construing it according to its apparent intent, which was to prevent a lawyer from using mediation to hide pre-existing evidence.

At best, the Court of Appeal may have been struggling to articulate a distinction between writings that are prepared for mediation and the physical matter on which the writings may have been based. If so, its formulation is not only too abstract to be helpful to a trial court, but, if allowed to stand, would divert a trial court from the pivotal inquiry commanded by Evidence Code Sections 1119 and 1120(a)---does a writing pre-exist the mediation or was it prepared for the mediation?

The CDRC is not urging that the existence of cracks in concrete, leaks in pipes, rust on steel and the like cannot be proven by admissible evidence. As almost any dispute arises, a certain amount of fact investigation is undertaken before any means of resolving the dispute is considered, let alone mediation.

Under Evidence Code Section 1120(a), the subsequent use of evidence developed in such preliminary investigation would not make it inadmissible or protected from disclosure. As Rojas, et al., point out, evidence that is not protected from disclosure by the attorney-client privilege cannot be shielded by placing it in the hands of a lawyer. See Grand Lake Drive In, Inc. v.

Superior Court, (1960) 179 Cal.App.2d 122. Similarly, a writing that was not prepared for mediation cannot be shielded simply by using it in mediation.

On the other hand, as Real Parties in Interest urge and as Rojas, et al., appear on page 26 of their brief to agree, if the writings would not have existed but for the mediation, Section 1119 prohibits their discovery and use in evidence. Cf. Ramada Development Co. v. Rauch, (5th Cir. 1981) 644 F.2d 1097 (construing analogous Federal Rule of Evidence 408).

Amicus curiae the Southern California Mediation Association ("SCMA") expresses concern that, if a mediation fails to resolve a dispute, a party might seek to suppress adverse evidence by claiming falsely that a writing was created for the mediation. However, whether a writing was created for a mediation is nothing more than a fact issue that a trial court is well-prepared to address.

Although it may be necessary to resolve credibility issues in order to decide whether a particular writing is shielded by Section 1119 or discoverable under Section 1120(a), resolving credibility issues is everyday business for trial courts.

The CDRC assumes that the trial court made such inquiry in this case, but takes no position on the ultimate issue of whether the production of any particular item should or should not have been compelled.

D. THIS COURT SHOULD DISTINGUISH BETWEEN MEDIATION AND A SETTLEMENT CONFERENCE TO WHICH EVIDENCE CODE SECTION 1117(B)(2) APPLIES.

Evidence Code Section 1117(b)(2) provides the second exception to the prohibitions of Section 1119 that might be pertinent to this case. Section 1117(b)(2) provides that Chapter 2 does not apply to a "settlement conference pursuant to Rule 222 of the California Rules of Court."

The case management order in the underlying case was drafted and entered long before the adoption, effective July 1, 2001, of Rules of Court 244.1 and 244.2, which prohibit a court from appointing a referee to conduct a mediation, provided only that, after a reference has been concluded, the same individual who served as referee may then be made a mediator.

Accordingly, as amicus SCMA points out, the CMO in the underlying case appointed a "special master," i.e., referee, made the referee responsible for mediations and provided that "[a]ll . . . mediations are deemed to be mandatory settlement conferences."

The use in the CMO of "mediation" in combination with "settlement conference" could well have created confusion about what transpired in the underlying case.

Pursuant to Section 1117(b)(2), if the proceedings in the underlying case involved a judicial settlement conference and not a mediation, the Court of Appeal would have been correct in holding that the trial court should have decided the motion to compel on work product criteria.[3]

However, all concerned---the parties to the underlying case, the parties to this case and the courts below---regarded the proceeding as involving a mediation.

Mediation is not an adjunct to litigation. It is an alternative. When parties that are engaged in litigation want to talk settlement with the aid of a neutral other than a sitting judge, i.e., outside of court, they have a choice between mediation and a process that is an adjunct to litigation.

If the parties prefer an adjunct to litigation, their case management order should provide for the appointment of a referee either with authority to conduct a judicial settlement conference

[3] If this Court concludes that the outcome in the Court of Appeal was correct because the proceeding in the underlying case involved a settlement conference and not a mediation, it could simply order that the Court of Appeal decision not be published in the Official Reports.

in addition to managing discovery or solely for the purpose of conducting a judicial settlement conference. Rules of Court 244.1 and 244.2 do not preclude such an arrangement.

By virtue of Evidence Code Section 1117(b)(2), Section 1119 would not apply to the settlement conference in such an event. Whatever is said or written would be fair game for discovery or use in trial. Settlement offers would still be protected by Evidence Code Section 1152.

If, however parties choose mediation, Evidence Code Section 1119 does apply. Neither party is free unilaterally to generate something with the intent of using it both for the purpose of mediation and also for trial if the case does not settle in mediation. Evidence Code Section 1122 would allow the use of such matter as evidence only if both parties and also the mediator expressly consented. See Eisendrath v. Superior Court, (2nd Dist. 2003) 134 Cal. Rptr. 2d 716, 720.

IV. CONCLUSION

The CDRC urges this Court to preserve the usefulness of mediation and the clear distinction between a mediation and a judicial settlement conference by upholding in this case the prohibitions of Evidence Code Section 1119 against discovery of writings prepared for mediation.

Dated: July 7, 2003

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