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

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

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BRIEF IN ANSWER TO AMICUS BRIEF BY SOUTHERN CALIFORNIA MEDIATION ASSOCIATION

==========

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Ehrlich Investment Trust and RICHARD EHRLICH

Table of Contents

Table of Authorities

Cases: **Page Number:**

Statutes:

Uniform Laws:

Secondary Sources:

Introduction

The amicus brief by the Southern California Mediation Association,while seemingly well-intentioned, misses the point. Real party in interest, Julie Coffin, has never advocated that Evidence Code section 1119[1] automatically prohibits discovery or admission of *everything* used at mediation. Such an interpretation ignores the express language in

[1] In its entirety, Evidence Code section 1119 provides: "Except as otherwise provided in this chapter: [¶] (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 a mediation consultation shall remain confidential."

Evidence Code section 1120.[2]

In addition, the statement by the SCMA that parties should be required to identify, at time of mediation, evidence that was prepared solely for mediation is hardly newsworthy. That was exactly what happened in the underlying case, *Coffin v. KSF Holdings.* After the court there ordered the parties to participate in mediation and to share the reports of their non-designated expert consultants, the participants marked their reports, which contained expert photographs and analyses, with the words "mediation privileged."

[2] Subdivision(a) of section 1120 provides: "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."

Finally, no new test or standard should be formulated by this Honorable Court that sets forth a "bright-line" test to determine when documents prepared for mediation are to be kept confidential and non-discoverable. Evidence Code section 1119 *already* provides such a test by providing absolute confidentiality to *writings* "prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation"[3] and to "*[a]ll communications* . . . by and between participants in the course of a mediation or a mediation consultation."[4] Thus, in this instance, by advocating that this Court should adopt the non-statutory test created below by the Court of Appeal, the SCMA is like a movie critic who, between arriving late and leaving early, nitpicks the film while missing its point.

1. <u>Belated Claims of Confidentiality Are Not Before this Court</u>

Creating controversy where none existed, the SCMA announces that "this case presents a paradox"[5] because there was a belated claim of mediation confidentiality. Although it is apparent that the SCMA believes that there was no invocation of mediation

[3] Evid. Code, § 1119(b).

[4] Evid. Code, § 1119(c); emphasis added.

[5] SCMA brief, p. 2.

confidentiality in the underlying case, *Coffin v. KSF Holdings,* the SCMA is wrong.[6]

As supported by the record below, by December 23, 1997, mediator Ross Hart and all the parties in *Coffin v. KSF Holdings* signed the case managementorder, which included the following provision:

[6] While acknowledging that this issue is complicated because it actually involves two separate and distinct cases, *Coffin v. KSF Holdings* and *Rojas v. Coffin,* the SCMA apparently does not fully understand the difference between the two cases. Although the SCMA boldly proclaims in its brief that "the settlement proceeding in *Rojas* was not a mediation," the settlement proceedings in *Rojas v. Coffin* are not at issue before this Court. Rather, it was in the earlier case, *Coffin v. KSF Holdings,* where the Los Angeles Superior Court, Judge Gold, ordered the parties to prepare defect reports and cost of repair reports in mediation. It is those documents that are at issue in this case.

> The mediation shall include a meeting of the experts before the mediator to discuss the nature of the damages, scope of repair and estimated cost of repair.[7]

[7] Exhibits to Ms. Coffin's answer to the petition for writ of mandate, at 57:26-27, 93:13-14.

Thereafter, on February 3, 1998, the trial court, the Honorable Arnold Gold, Judge, presiding, went through the case management order, paragraph by paragraph, and asked the parties about the purpose of the above provision.[8] After the court was assured that the purpose of the provision was to provide absolute confidentiality for the documents prepared for mediation, including show and tell presentations using defect reports and cost of repair reports, it signed the case management order.[9] Thus, from the outset of the mediation in *Coffin v. KSF Holdings,* mediation confidentialitywas assured. This gave the participants the comfort and protection of knowing that the theories of their experts, as well as their arguments, were not set in stone.

Later, when plaintiffs Genoveva Rojas et al first attempted in this case to subpoena files of non-designated experts and attorneys from *Coffin v. KSF Holdings,*[10] Ms. Coffin immediately raised the objection that the documents were protected from disclosure because they were prepared for and used in mediation. In fact, the first appearance by Ms. Coffin in this case was a motion to quash those subpoenas that asserted, as one basis, mediation confidentiality.[11]

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[8] Exhibits to answer to petition for writ of mandate, pp. 179-199.

[9] See the court order, signed by Judge Gold, on July 2, 1998, and by Mr. Kurland, the subsequent mediator, on May 22, 1998 in the exhibits to answer to petition for writ of mandate at pp. 23-55.

[10] Exhibits to answer to petition for writ of mandate, pp. 1206-1223.

[11] Exhibits to answer to petition for writ of mandate, pp. 1224-1326, 1327-1437.

And while the SCMA is undoubtedly not aware that documents shared by the participants in the mediation in *Coffin v. KSF Holdings* were marked "mediation privileged," which enabled the trial court in this case to correctly determine that they were prepared "for the purpose of, in the course of, or pursuant to, a mediation," the plaintiffs in this case do not contend that there was a "belated claim" of confidentiality. By divining a problem where none exists and pontificating about a solution, the SCMA has done nothing more than clouded the issues in its own fog of ignorance.

2. A Rule of Confidentiality, Already Practiced by Respected Mediators, Has Encouraged Mediation Throughout California and the Rest of the Nation

The approach advocated by Ms. Coffin does not, as the SCMA broods, make mediation a "tool for burying unfavorable evidence."[12] Evidence Code section 1120 already protects against that scenario.

In *Foxgate Homeowner's Association, Inc. v. Bramalea California Inc.* (2001) 26 Cal.4th 1, 25 P.3d 1117, 108 Cal.Rptr.2d. 642, this Honorable Court wisely recognized that the legislative intent underlying the mediation confidentiality protection is "to promote an

[12]See SCMA brief at p 3.

informal exchange regarding events in the past."[13] This Court added that "[t]his frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.'[Citations.]"[14]

This same logic applies to writings and communications because the Legislature included both separately in Evidence Code section 1119. Thus, it is equally correct to say that the frank exchange of information during mediation can be achieved only if the participants in the mediation know that the *writings* that they prepared for mediation will not be used later against them.

[13]*Foxgate Homeowner's Association v. Bramalea California Inc., supra,* 26 Cal. 4th at p. 14.

[14]*Ibid.*

It is with this perception, as articulated by the Legislature and supported by this Court, that participantsin mediation have been using in the mediation process over the last several years. Confidentiality in mediation has been understood by most well-reasoned litigators and mediators. And with that assumption, mediation has burgeoned throughout the State — just as the Legislature had hoped. The goal, which was to alleviate crowded courtrooms and to provide a quick and economical alternative to litigation, has been met. Therefore, the claim of the SCMA that confidentiality will "drive parties away from mediation for fear their opponents would misuse the process to put otherwise discoverable evidence out of reach"[15] is not supported by what is actually happening.

Moreover, California is not alone in providing for confidentiality during mediation.

> Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality to encourage the effective use of mediation to resolve disputes. Indeed, state legislatures have enacted more than 250 mediation privilege statutes. [Citation.] Approximately half of the States have enacted privilege statutes that apply generally to mediations in the State, while the other half include privilege within the provisions of statutes establishing mediation programs for specific substantive legal issues, such as employment or human rights. [Citation.]

[15]SCMA brief, p. 3

> The Drafters recognize that mediators typically promote a candid and informal exchange regarding events in the past, as well as the parties' perceptions of and attitudes toward these events, and that mediators encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. [Citations.] Such party-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges. [Citations.][16]

It is also recognized internationally that mediation confidentiality is of utmost importance. It has been recognized in cross-comparison of international mediation rules "[t]hat it is the confidentiality and privacy of mediation that are among the main factors promoting settlement."[17]

By way of example, the rule is as follows in the International Chamber of Commerce system:

> Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not, in any manner produce as evidence in any judicial, arbitration or similar proceedings: . . . any *documents*, *statement or communications* which are submitted by another party or by the Neutral in the ADR proceedings, unless they

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[16] West's U. Laws Ann. (2001) U. Mediation Act, Prefatory Note.

[17] Baker and Ali, *Cross-Comparison of Institutional Mediation Rules* (2002) Dispute Resolution Journal at p. 78.

> can be obtained independently by the party seeking to produce them in the judicial, arbitration or similar proceedings . . .[18]

[18] Baker and Ali, *Cross-Comparison of Institutional Mediation Rules, supra,* at p. 79; emphasis added.

Likewise, the American Arbitration Association confidentiality requirements provide that "a mediator shall not be compelled to divulge any *records, reports, or other documents* received by a mediator while serving in that capacity or to testify in regard to the mediation in any adversary proceeding or judicial forum."[19]

The Hong Kong International Arbitration Centre rules also provide for confidentiality.

> Under the HKIAC Rules, every *document, communication or other information that is disclosed, created, or produced* by any party "for the purpose of or related to" the mediation process is deemed disclosed on a privileged and without prejudice basis. No privilege or confidentiality is waived by any disclosures that a party makes in the context of or related to the mediation.[20]

Simply, the position taken by the SCMA is not supported by the vast majority of mediators. In fact, the position taken by the SCMA here directly contradicts the position that which it advocated in the letter supporting review that it filed with this Court in *Foxgate*. In that letter, the SCMA wrote:

> The Protection of Mediation Confidentiality

[19] Baker and Ali, *Cross-Comparison of Institutional Mediation Rules, supra,* at p.79; emphasis added.

[20] Baker and Ali, *Cross-Comparison of Institutional Mediation Rules, supra,* at p.80; emphasis added.

> Privileges inevitably entail some loss of "every man's evidence." In the case of the well-established privileges (attorney/client; doctor/patient; husband/wife; priest/penitent), legislatures and courts have long since decided that the protection of these relationships is crucial enough to outweigh the competing interests of the judicial system, and litigants, in access to information. Exceptions to these privileges are few, clearly defined, and always in keeping with the expectations of the parties when they engaged in the confidential communications.[21]

The fragile nature of the current position taken by the SCMA before the Court in this case is further exposed when one compares two paragraphs in its brief, seemingly written by the same author. First, the brief states:

> If a party realizes that agreeing to a mediation licenses his opponent to designate evidence as "prepared for mediation" and therefore inaccessible, mediation becomes a risky venture, not a safe haven.[22]

Later, when articulating the "new" bright-line test, the SCMA retreats:

> A party who declares that evidence was prepared solely for mediation, and thereby obtains protection against its use by other parties, should not be allowed to use that evidence in

[21] Southern California Mediation Association, Letter supporting Review (Rule 14(b)), Submitted by the California Mediation Association (May 2, 2002) p.3.

[22] SCMA brief, pp. 4-5

subsequent litigation. Further, that party should be required to identify the evidence as prepared solely for mediation when that evidence is disclosed.[23]

[23] SCMA brief, p. 9.

Respectfully, which is it? Does the SCMA actually believe that "absolute confidentiality will drive parties away from mediation"[24] or does it believe that section 1119 should be construed to "provide absolute confidentiality only to evidence prepared solely for purposes of mediation"[25]? Such anomalous positions cannot be explained.[26]

3. The SCMA Is Correct: *Foxgate* Does Not Require that So-Called "Raw Evidence" that Has Been Submitted in Mediation be Afforded Absolute Confidentiality — and Ms. Coffin Does not Contend Otherwise

In its brief, the SCMA proclaims that *Foxgate, supra,* does not require that so-called "raw evidence" "prepared for mediation" be automatically afforded absolute confidentiality.[27] Ms. Coffin does not disagree. As Justice Perluss so aptly pointed out

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[24] SCMA brief, p. 3.

[25] SCMA brief, p. 9.

[26] This is not to imply that the SCMA has intentionally taken inconsistent positions before this Court. Rather, it appears that the SCMA has not fully thought out its position here.

[27] SCMA brief, p. 6.

in his dissenting opinion below, so-called "raw evidence" is not evidence that is "prepared for" mediation because it exists independently of the mediation, i.e., spore or mold samples, or a broken window pane.[28]

Contrary to the claims of the plaintiffs here, who used the term to describe reports prepared by consultants (who were never formally designated as experts because the case settled) in *Coffin v. KSF Holdings*, there was nothing "raw" about these writings. In fact, those reports consisted of photographs, analyses, and opinions by those consultants about what they saw, what they learned from other experts, and what should be done to fix construction defect problems. As such, they were not objects or evidence that existed independently of the mediation. But for the mediation, these writings would not have existed.

This point was made clear by Lisa Ehrlich, one of the attorneys for Ms. Coffin in *Coffin v. KSF Holdings*, when questioned by the court in that case about that evidence:

THE COURT: LET ME HEAR FROM MS. EHRLICH.

[28] Appendix "B" to petition for review, p.2.

> Ms. Ehrlich: YOUR HONOR, THESE PHOTOGRAPHS WERE TAKEN FOR THE SPECIFIC PURPOSE OF PREPARING OUR PRESENTATION FOR THE MEDIATION. THEY WERE ONLY PREPARED AND TAKEN BECAUSE THE [CASE MANAGEMENT ORDER] HAD BEEN SIGNED AND APPROVED AND THE MEDIATION PRIVILEGE HAD ATTACHED. BUT FOR THE [CASE MANAGEMENT ORDER] AND THE ORDER BY JUDGE GOLD, THOSE PICTURES NEVER WOULD HAVE BEEN TAKEN, AND WE WOULDN'T BE HERE ARGUING ABOUT THIS TODAY. THERE JUST WOULDN'T BE ANY PICTURES. THE WHOLE POINT OF THEM WAS TO HAVE THEM TO PRESENT AND PREPARE AS PART OF OUR PRESENTATION IN THE MEDIATION PROCEEDINGS.[29]

Just as this Court did not address the issue of "raw" evidence in *Foxgate* because it was not in dispute there, neither should it address it here. There is no dispute about "raw evidence" before the Court.

4. The After-the-Fact Pronouncement by the SCMA That *Coffin v. KSF Holdings* Was Not Settled Through Mediation Is Nothing More than Mere Armchair Quarterbacking by an Outsider Who Didn't Even See the Game

[29] Exhibits to answer to petition for writ of mandate, 1154:10-20.

If mediation is so illusory so as to only be identified by those who profess to know exactly what it is after-the-fact, perhaps it is too unwieldy to be used at all. Yet for the parties who participated in mediation in *Coffin v. KSF Holdings*, there seems to be no disagreement that they were, in fact, participating in — and paying for — a mediation by a mediator.[30]

Further, the mediation in *Coffin v. KSF Holdings* was not only encouraged by the court, but sanctioned.[31] In a notice from the court that Ms. Coffin was required to serve with her summons and complaint in *Coffin v. KSF Holdings*, the court stated:

> The Los Angeles County Superior Court urges counsel to give early and serious consideration to settlement or disposition of cases through Alternate Dispute Resolution (ADR). Government Code Section 68607(e) commands trial judges to "establish procedures for early identification and timely and appropriate handling of cases . . . which may be amenable to settlement or other alternative disposition techniques." Early settlements can enhance the quality of justice by saving client costs and ending the aggravation and uncertainty of litigation.
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> ****
>
> JUDICIALLY MANDATED MEDIATION
>
> Mediation Pilot Program. Mediation is a form of non-binding dispute resolution. The traditional settlement conference is a

[30] Exhibits to answer to petition for writ of mandate, pp. 56-61.

[31] Exhibits to answer to petition for writ of mandate, pp. 1446-1447.

species of mediation, though some proponents urge that in "true mediation" the mediator acts strictly as a facilitator and avoid offering evaluation of the case, as some settlement judges may do. Also, in mediations the parties may, at the mediator's option, participate directly in the negotiation, whereas in the traditional settlement conference this seldom occurs. The court assumes that the most successful mediators will use that blend of facilitation and evaluation which appears best suited to achieve a settlement in the particular case.

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Senate Bill 401 ([Code of Civil Procedure section] 1775) requires Los Angeles County to implement a pilot program of judicially mandated mediation effective beginning 1994.

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Determining Which Cases To Order to Mediation. The court confers with counsel as to whether mediation, arbitration or other ADR offers the best likelihood of finally disposing of the case, and then determines which option to order. Since the program is a pilot project, part of its object is to develop experience as to what categories of cases are best suited for mediation. Accordingly, judges are encouraged to consider using mediation in *all* types of cases, rather than confining its use only to certain types.[32]

[32] Exhibits to answer to petition for writ of mandate, p. 1447; emphasis in original.

Thus, with the blessings of the court, the parties engaged Ross Hart of the American Arbitration Association to mediate their dispute.[33] They paid bills to Mr. Hart as a mediator.[34] And the parties dealt with each other with the knowledge that mediation was occurring.[35] Later, when Mr. Hart's schedule could not permit him to devote the time needed for *Coffin v. KSF Holdings*, Gerald Kurland stepped in, and replaced Mr. Hart as the mediator.[36] Notably, both Mr. Hart and Mr. Kurland, who are each well-known and well-respected in the mediation community, signed the case management orders that contain the provision that the SCMA now declares will turn a mediation into something else.[37]

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[33] Exhibits to answer to petition for writ of mandate, pp. 63-65, 76, 78.

[34] Exhibits to answer to petition for writ of mandate, p.169.

[35] Exhibits to answer to petition for writ of mandate, pp. 116-131.

[36] Exhibits to answer to petition for writ of mandate, pp. 23-55.

[37] Exhibits to answer to petition for writ of mandate, pp. 23-55, 85-111.

Three judges of the Los Angeles Superior Court believed what took place in *Coffin v. KSF Holdings* was a mediation: Judge Gold, the trial judge in *Coffin v. KSF Holdings*, who signed the proposed case management order[38] after reviewing it in detail and discussing it with the parties before him in open court;[39] second, Judge McCoy, the first trial judge assigned to this case, who reviewed the case management order and the documents from *Coffin v. KSF Holdings* that were marked "mediation privileged," while ruling on discovery motions and holding them to be confidential and not subject to disclosure;[40] and Judge Mohr, the successor to Judge McCoy, who confirmed the ruling by his predecessor.[41] Later, there was no dispute among any of the justices at the Court of Appeal that a mediation had, in fact, occurred.

Nor did the plaintiffs here ever dispute below that what occurred in *Coffin v. KSF Holdings* was anything other than a mediation. Thus, the contention by the SCMA that what occurred in *Coffin v. KSF Holdings* was not really a mediation is a new issue that is being raised for the first time by a non-party.

Nor does the law support the SCMA's narrow interpretation of the term "mediation." In *Ryan v. Garcia* (1994) 27 Cal App.4th 1006, 33 Cal.Rptr.2nd 158, the Third

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[38] Exhibits to answer to petition for writ of mandate, pp. 23-55.

[39] Exhibits to answer to petition for writ of mandate, p. 194.

[40] Exhibits to answer to petition for writ of mandate, pp. 1178-1180.

District Court of Appeal recognized that the mediation privilege should be given a broad interpretation and that the courts should resist the temptation of "judicial sifting" of information that is disclosed pursuant to the mediation process. The court there commented:

> Likewise, section 1152.5 must be interpreted broadly to serve its purpose, that is to encourage the use of mediation by ensuring confidentiality. Judicial sifting of statements made at a confidential mediation to select those which can be used as evidence of an agreement contravenes the legislative intent underlying adoption of section 1152.5. Indeed, the risk of this judicial sifting would deter some litigants from participating freely and opening in mediation.
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> ****

[41] Exhibits to answer to petition for writ of mandate, 1146:5-8.

> By using the broad phrase "in the course of the mediation," the Legislature manifested its intent to protect a broad range of statements from later use as evidence in litigation. To establish arbitrary boundaries within the general process of "mediation," with a vague delineation between what is included and what is not included, is contrary to that intent and may not be inferred from the language of the statute.[42]

As the court there aptly concluded, "[n]arrow interpretation of 'in the course of the mediation' leads to anomalous results not intended by the Legislature."[43]

Conclusion

No new "bright-line" test needs to be articulated, as the SCMA suggests, because the Legislature has already articulated a workable test in subdivision (b) of Evidence Code section 1119: "No writing . . . 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."

Further, the suggestion by the SCMA that a party should be required to identify evidence as being prepared solely for mediation when the evidence is used does nothing more than point out the obvious. In fact, documents prepared for mediation in *Coffin v.*

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[42] *Ryan v. Garcia*, *supra*, 27 Cal App.4th at p. 1011.

[43] *Ibid.*

KSF Holdings were marked "mediation privileged" or "for mediation only," and later gave Judge McCoy a foundation on which to make his rulings in the in camera review.

No edicts need to be handed down by those who profess to protect mediation but who do not yet fully understand the facts of the underlying case, *Coffin v. KSF Holdings*. As demonstrated by Judge Mohr, courts retain the remedy to exclude evidence from trial where a party claims confidentiality under Evidence Code section 1119. While Ms. Coffin's attorneys would have liked to have used the expert reports and analyses from *Coffin v. KSF Holdings* against the same contractor and sub-contractor defendants in this case, it was stipulated by counsel that such writings could never be used.[44] Thus, Ms. Coffin and her counsel already paid a price for invoking the mediation privilege: they were precluded from using the already paid-for expert reports prepared in *Coffin v. KSF Holdings*.

The adoption of the non-statutory exception advocated by the SCMA will do nothing more but create uncertainty and raise the specter of possible disclosure in every mediation. Thus, it would have an inevitable effect of undermining — not enhancing — the effectiveness of the mediation process. And it would undermine the trust of parties participating in mediation, in that the participants would have, in the back of their minds, the knowledge that what they prepared for and disclosed during mediation could possibly

[44] See exhibits to answer to petition for writ of mandate at 1159:19-1161:21.

be discoverable by third parties at some future point in time upon a showing of "good cause." Contrary to the claims of the SCMA here, the mere potential of disclosure upon an uncertain showing has coercive power that would be as detrimental to the mediation process as the threat of actual

coercion.

Dated: June 13, 2003 WATTEN, DISCOE, BASSETT & McMAINS

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BRIEF ON REVIEW

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