No. S111585

2nd Civ. No. B158391

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

GENOVEVA ROJAS, et al.,

Petitioners,

v.

SUPERIOR COURT OF 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-Respondents.

PETITION FOR WRIT OF MANDATE FOLLOWING DECISION OF SUPERIOR COURT FOR COUNTY OF LOS ANGELES, HONORABLE ANTHONY J. MOHR, JUDGE PRESIDING

AMICUS CURIAE BRIEF OF SOUTHERN CALIFORNIA MEDIATION ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

No. S111585

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BRIEF OF *AMICUS CURIAE*
SOUTHERN CALIFORNIA MEDIATION ASSOCIATION

The Southern California Mediation Association (SCMA), an organization of experienced professional mediators, submits this amicus curiae brief (accompanied by a separate application for leave to file the brief) to urge the Court to adopt the construction of Evidence Code section 1119 which will best protect the integrity of mediation in California, and thereby best advance the legislative goal of encouraging courts, the bar, and the public to have confidence in and use this important dispute resolution process.

SCMA agrees with the late Presiding Justice Lillie that it would be "disastrous" (*Rojas v. Superior Court* (2002) 102 Cal.App.4th at 1062, 1078) to construe section 1119 to impose absolute and unqualified confidentiality on raw evidence merely because it was prepared for, among other things, "the purpose of media-

tion." The victims of the disaster would be (1) the courts which rely on mediation to help manage crowded dockets; (2) careful lawyers who use mediation appropriately to serve the interests of their clients, and achieve settlements where reasonably possible; and (3) most importantly, the public, which relies on the courts to administer justice.

DISCUSSION

The Court of Appeal correctly held that Evidence Code section 1119 does not automatically prohibit discovery or admission of everything used at a mediation. The statute does not apply to raw data or "non-derivative" evidence even if that evidence is disclosed in mediation (*Rojas v. Superior Court, supra,* 102 Cal.App.4th at 1079). Further, section 1119 affords only a qualified privilege for other materials (such as charts and diagrams) prepared for use at a mediation. SCMA believes this view is consistent with mediation's central goals and values, with legislative intent, with precedent, with the realities of litigation, and even with common sense.

I.

AFFORDING ABSOLUTE CONFIDENTIALITY TO ALL EVIDENCE BELATEDLY CLAIMED TO HAVE BEEN "PREPARED FOR MEDIATION" WOULD DESTROY THE INTEGRITY OF MEDIATION AND THE INTEGRITY OF LITIGATION AS WELL.

This case presents a paradox. The defense asserts that attorneys are entitled to prepare evidence for purposes of mediation, disclose it to a litigation adversary in mediation even though disclosure would waive attorney work product protection, and then claim the evidence deserves even greater protection by dint of the disclosure. Although this anomaly flies in the face of work product jurisprudence, SCMA acknowledges that under some circumstances, Evidence Code section 1119

both does and should protect evidence prepared by an attorney for purposes of mediation from discovery or use at trial by other parties [please see §II, below].

But the Court should not construe section 1119 to allow the "heads I win, tails you lose" approach urged by defendants. Under defendants' construction, a party need not declare whether its evidence was "prepared for mediation" (and hence within the protection of section 1119) before it uses the evidence in mediation. That is unfair, because it lets a party take advantage of evidence in mediation and reserve the right to use it at a subsequent trial if the evidence turns out to be helpful, while that same party retains the unilateral power to designate the evidence as " prepared for mediation" (and therefore unavailable for discovery or use by the opponent) if some harmful effect of the evidence later becomes apparent. The detriment is even greater to those who were not parties to the mediation, and thus never even had a chance to see the evidence in the first place – just the situation of the plaintiffs in *Rojas*.

A. A RULE OF ABSOLUTE CONFIDENTIALITY CONFLICTS WITH THE LEGISLATIVE GOAL OF ENCOURAGING MEDIATION.

In short, the approach taken by defendants would make mediation a tool for burying unfavorable evidence. And that, in turn, would make litigants think twice about agreeing to mediate. Contrary to the assumption that parties will not agree to mediation unless they are assured absolute confidentiality, it is more likely that absolute confidentiality will drive parties away from mediation for fear their opponents would misuse the process to put otherwise discoverable evidence out of reach. Confidentiality carried to that extreme would thwart the Legislature's stated goal of encouraging greater use of mediation.

The danger is substantial because mediation does not function in a vacuum.

Much mediation today occurs as an adjunct to litigation, frequently in the form of "mini-trial mediation," which is "part pure mediation, part mock trial, part mini-trial, and part neutral evalution" (Van Winkle, Mediation: A Path Back for the Lost Lawyer (ABA Section of Dispute Resolution, 2001), p. 88). Some courts routinely order, at early status conferences, that a case be mediated before much discovery has taken place, and it is not unusual for a case to bounce back and forth between the courthouse and a mediator's office before there is a disposition.

The mediation of a litigated case has much in common with its potential presentation in court. Mediation briefs, trial briefs, and summary judgment points and authorities are cut and pasted into each other. Before dollar negotiations take place in a mediation, the lawyers often make presentations to opposing counsel and parties. These opening presentations can resemble opening statements at trial. Much mediation centers around refining the parties' predictions of likely court outcomes, and settlement depends on risk tolerance in light of those refined predictions.

This overlap between mediation and litigation gives rise to the problem *Rojas* addresses. How can materials prepared for mediation, which would be absolutely privileged under the defendants' view of section 1119, be distinguished from materials prepared for litigation, much of which would be subject to only a qualified work product privilege, or to no privilege at all, when mediation and litigation proceed on simultaneous, parallel tracks?

If a party realizes that agreeing to mediation licenses his opponent to designate evidence as "prepared for mediation," and therefore inaccessible, mediation becomes a risky venture, not a safe haven. It is immediately apparent that an unscrupulous party might agree to participate in mediation not out of legitimate

desire to resolve the case before trial, but in order to create a predicate for the later designation of evidence which unexpectedly turns out to be unfavorable as having been "prepared for mediation."

Worse, the problem will not be just with unscrupulous lawyers. All attorneys owe clients a duty of zealous advocacy within the bounds of the law. If the bounds of the law include creating a mechanism to make unfavorable evidence disappear, zealous advocates would be duty-bound to convene mediations so that unfavorable evidence could later be designated as "prepared for" mediation, and thus be put forever beyond the reach of one's litigation opponents, present and future. This kind of gamesmanship, and the concomitant corruption of mediation, are not what the Legislature provided, and cannot be what the Legislature intended mediation to become.

The premise for mediation confidentiality is that it enhances trust among the parties and therefore promotes the free flow of information, which should in theory promote reasonable settlement of cases [see, e.g., Coffin's Opening Brief on the Merits, 29-31]. Yet defendants' too-strict interpretation of the confidentiality rule would create the right climate for sharp practices, restrict the ultimate availability of information at trial if a case does not settle, obstruct the administration of justice, and discourage the use of mediation.

B. *FOXGATE* DOES NOT REQUIRE THAT RAW EVIDENCE PREPARED FOR MEDIATION AUTOMATICALLY BE AFFORDED ABSOLUTE CONFIDENTIALITY.

In *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal. 4th 1, the Court said that "confidentiality is essential to effective mediation" (*Id.* at 14). But while confidentiality is a legitimate concern, it is not a fetish, and there is no policy reason to interpret the Evidence Code to exalt confidentiality over all

other values. Mediation must promote rather than obstruct the administration of justice, with concern for preserving the integrity of the trials of those cases which do not settle, and with additional concern for the rights of potential third parties in subsequent litigation.

Not surprisingly, defendants seize on the statement in *Foxgate* that "there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports" [Coffin's Brief on the Merits 2, quoting *Foxgate, supra*, 26 Cal.4th at 4. See also, Deco's Brief on the Merits 19-20]. But the Court addressed an entirely different issue in *Foxgate*, a mediator's report to the court about participants' conduct at a mediation. Because the mediator must be impartial, and the parties must trust the mediator, public policy does require confidentiality in the sense *Foxgate* considered. A mediator who becomes a tattletale destroys trust and loses impartiality.

But cases are not authority for propositions they do not consider (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902). In *Foxgate*, the Court never considered limitations on the confidentiality of evidence prepared for a mediation. Accordingly, it should not feel constrained by that decision when it approaches the different question presented here.

C. EVIDENCE CODE SECTION 1119 DOES NOT APPLY BECAUSE THE SETTLEMENT PROCEEDING IN *ROJAS* WAS NOT A MEDIATION.

The settlement proceeding in *Rojas* took place after the trial court issued a 27-part Case Management Order, typical of the type used in construction litigation. That order governed the entire course of the litigation: pleadings, appointment of a special master, interrogatories, document production and service, destructive testing, expert exchanges, and trial dates. Mediation was the 19th subject covered, in

Paragraph 31 of the order:

> 31. Mediation will be held on (See Summary of Dates Exhibit "A"). Any party with an allocated demand equal to or less than $50,000. shall be a peripheral party. Counsel, experts, and insurance claim representatives with full settlement authority are required to attend each mediation session.

Paragraph 8 of the Case Management Order provides that "[a]ll settlement conferences and mediations are deemed to be ***mandatory settlement conferences*** of this court" [*Id.,* emphasis added].

A mandatory settlement conference is beyond the reach of the mediation confidentiality statutes. Evidence Code section 1117, subd. (b)(2) provides that Chapter 2 (containing section 1119) does not apply to "[a] settlement conference pursuant to Rule 222 of the California Rules of Court," i.e., the very settlement process ordered here. Evidence Code section 1152, subd. (a) makes inadmissible conduct or statements made in negotiation of settlement, but does not bar the use or discovery of evidence prepared for use in mandatory settlement conferences.

Moreover, even without its reference to mandatory settlement conferences, the hybrid process created by typical construction litigation case management orders is not mediation. The Case Management Order appointed this same "mediator" as a special master under Code of Civil Procedure section 639, subd. (e), responsible for resolution of all discovery disputes and empowered to recommend orders to the court in addition to conducting "mediation" [CMO, ¶8]. Evidence Code section 1115, subd. (a), however, defines mediation only as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." This statute recognizes the Polaris of mediation's values, the right of parties to control the outcome of the dispute resolution process.

Critically, Section 1115 does ***not*** define mediation to include processes in which a neutral person has any coercive power over the parties, and for good reason. Self-determination is hampered to an intolerable degree when the mediation is conducted by an individual who not only facilitates negotiations, but has supervisory – and even coercive – power over the litigation.

Therefore, to protect mediation's integrity, as well as its utility, SCMA urges this Court to rule that Evidence Code section 1115, subd. (a), applies only to processes in which neutrals facilitate communication only, and do not have coercive powers.

II.

A PARTY WHO INTENDS TO CLAIM MEDIATION CONFIDENTIALITY MUST IDENTIFY EVIDENCE AS PREPARED SOLELY FOR MEDIATION AT THE TIME THE EVIDENCE IS DISCLOSED AT THE MEDIATION.

SCMA suggests this bright-line approach to mediation confidentiality:

- The Court should construe Evidence Code section 1119 to provide absolute confidentiality only to evidence prepared ***solely*** for purposes of mediation. This would eliminate the problem which arises from the overlap between simultaneous preparation for mediation and for litigation.
- 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 subsequent litigation. Further, that party should be required to identify the evidence as prepared solely for mediation when the evidence is disclosed at the mediation. Allowing a party to wait until the mediation is over to decide whether material is usable at a subsequent trial is like letting a moviegoer decide whether to pay for a ticket after seeing the film.

This construction of Evidence Code section 1119 best promotes the legislative goal to encourage mediation, best protects the integrity of litigation, and is fair. Materials truly prepared for mediation are fully utilized at the mediation, and thereafter stay confidential in an even-handed way. Materials prepared for litigation and only incidentally used at mediation continue to be available for use at trial by all sides, and by parties to future cases.

If the Court disagrees, and concludes that the present wording of Evidence Code section 1119 does not permit this construction, then SCMA respectfully urges the Court to write an opinion which shows the need for the Legislature to amend section 1119 to eliminate injustice to parties who lose access to evidence which will unfairly be made unavailable as a result of the mediation process.

Date: May 20, 2003

Respectfully submitted,

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