

PROFESSIONAL LIABILITY UPDATE

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MEDIATION PRIVILEGE

California Law

By Jennifer A. Becker

*The California Supreme Court has accepted for review a decision from the Second District that holds the mediation privilege is co-extensive with the work product doctrine. The privilege does not protect purely evidentiary materials from discovery, and derivative materials can be discovered upon a showing of good cause.*

***Rojas v. Los Angeles County Superior Court (Coffin) (2002) 102 Cal.App.4<sup>th</sup> 1062***  
(rev. granted 1-15-03)

Julie Coffin and Richard Erlich (“Coffin”) owned an apartment complex built by KSF Holding, First City Properties, Inc., Fields & Silverman and other contractors (“Developers.”) Coffin sued the Developers over toxic mold issues. A special master was appointed, a document depository was established, and various materials were developed for use in mediation. After a confidential settlement, tenants of the complex sued Coffin and the Developers alleging that Coffin and the Developers conspired to conceal the toxic mold problems with the complex. The tenants requested materials produced and developed in the construction litigation.

In the context of a motion to compel, the tenants argued that purely evidentiary

materials, or “non-derivative” materials were not protected by privilege. Tenants

argued that “derivative” materials were discoverable upon a showing of good cause. In response, Coffin asserted the mediation privilege of Evidence Code § 1119 protected all material used in the mediation. The trial court ruled that the materials prepared for the mediation that consisted of a compilation of evidentiary materials were privileged.

A second trial court judge denied tenants’ motion to compel production of physical evidence such as photographs and other materials that became the basis for compilations. Coffin opposed this motion arguing that the raw materials were privileged because they were

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prepared for the mediation in the underlying lawsuit. The tenants argued they had good cause to obtain the material because the condition of the premises had changed since the raw materials were generated.

The Court of Appeal ruled that Evidence Code §§ 1119 and 1120 are clear and unambiguous. Section 1119 provides that no writing prepared in the context of mediation is discoverable. Section 1120 is an exception for evidence that would otherwise be admissible absent mediation. Because these sections are clear, the court did not need to turn to either the legislative history or common sense to interpret the language.

In *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal. 4<sup>th</sup> 1 (PL Update No. 110) the Supreme Court stressed that the confidentiality provisions of the mediation privilege are designed to promote a candid and informal exchange in mediation. This is accomplished only if the parties are confident that the information will not be used against them in later court proceedings. Reading the mediation privilege statutes together, the court concluded that they are meant to protect the substance of mediation such as negotiations, communications, admissions, and discussion, but they do not protect pure evidence. To read the mediation privilege as absolute would create a mechanism to hide evidence and obstruct fact-finding, ultimately hindering, rather than promoting, the resolution of disputes.

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Evidence is defined by Evidence Code § 140 as “testimony, writings, material objects or other things presented to the senses offered to prove the existence or nonexistence of a fact.” Evidence Code § 1119 breaks § 140 into two categories: evidence of anything said or any admission made and “writings” that are forms of tangible expressions such as pictures and sound recordings. Section 1119 does not protect hard evidence, that is, material objects presented to the senses to prove or disprove a fact.

The exception to the mediation privilege set forth in Evidence Code § 1120 of “evidence” otherwise admissible or subject to discovery outside of mediation, excludes from the privilege evidence subject to discovery as broadly defined under California’s “reasonably calculated to lead to the discovery of admissible evidence” standard.

The Court held that the mediation privilege is co-extensive with application of the work product doctrine because the work product doctrine closely mirrors the exception to the mediation privilege set forth in Evidence Code § 1120. There are three levels of work product protection. “Core” work product is material solely reflecting an attorney’s “impressions, conclusions, opinions, or legal research or theories” and is entitled to absolute protection from discovery. An amalgamation of factual information and attorney thoughts, impressions and conclusions, such as charts, diagrams, audit reports, compilations, or consultant reports is entitled to qualified protection; it is protected unless the proponent of discovery can show it would be

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prejudiced or an injustice would result absent disclosure. The court needs to balance the need for disclosure against the purposes served by the work-product doctrine. Purely evidentiary material receives no work product protection.

The court pointed out that the fact an attorney has done a lot of “work” preparing materials does not create work product protection. A witness list is not protected even if it required considerable attorney effort to compile. However, if the attorney’s list of potential witnesses reflects her evaluation of the case because it includes some witnesses and excludes others, it can qualify as work product.

Coffin argued that some raw materials, such as photographs, were entitled to protection because the materials represented the thought processes of counsel or consultants. The Court ruled that non-derivative material, such as test data, photographs, and witness statements were not protected from discovery. To the extent non-derivative materials became part of a compilation, they were to be removed from the compilation and produced. For example, photographs could be removed from a book entitled “defects” and arrows and captions could be removed.

Raw testing data was discoverable, but not any chart prepared from the test data that reflected attorney thought processes.

Because the tenants were not parties in the construction litigation, and much of the evidence was lost due to remediation efforts, materials sought that could not

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be easily removed from a protected context, such as a report, were discoverable upon a showing of good cause.

Finally, the Court ruled that the trial court was to undertake a careful *in camera* review to evaluate whether the requested information was discoverable.

*Comment:* The majority was disturbed by the potential of the mediation process to become a means to hide or protect evidence. Thus, the “absolute” mediation privilege announced in *Foxgate* has been narrowly defined to encompass the mediation process itself. Materials used in the mediation are subject to disclosure if they are raw evidence. Materials that combine both raw evidence and attorney thought processes are also discoverable upon a showing of good cause.

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