



CALIFORNIA LITIGATION ALERT

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California Supreme Court Finds That Documents and Evidence Prepared in Anticipation of Mediation Receive Absolute Privilege in Subsequent Litigation

The California Supreme Court recently allayed lingering concerns regarding the confidentiality of documents and other evidence exchanged in settlement mediation by adopting a broad interpretation of the California Evidence Code's rule against discoverability of such mediation records. In *Rojas v. Superior Court*, the Supreme Court held that all documents and evidence "prepared for the purpose of, in the course of, or pursuant to a settlement mediation or mediations" are absolutely privileged against discovery in future litigation regardless of whether the documents or evidence contain any so-called "nonderivative" materials such as raw test data, photographs, and witness statements. 2004 WL 1542239, Case No. S111585 (July 12, 2004).

In *Rojas*, plaintiffs/appellees sought discovery of materials created for a settlement mediation in a related case. These materials included mediation briefs and opinions as well as expert reports, photographs, videotapes, and witness statements. Defendants/appellants sought protection of these documents under the mediation privilege contained in Evidence Code § 1119(b), which states that no document or evidence "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 [document or evidence] shall not be compelled"

The trial court held that all categories of documents requested by the plaintiffs were protected by the mediation privilege and were not discoverable. The Court of Appeal reversed the trial court, holding instead that, by analogy to the attorney work-product privilege, certain of the settlement mediation records were entitled only to a qualified privilege while others of these records were entitled to no protection at all. Specifically, the Court of Appeal held that all documents consisting of attorneys' legal impressions were absolutely privileged. However, according to the Court of Appeal, documents constituting "raw data" — such as photographs, test results, and witness statements — had no privilege. Finally, documents that fell in-between those two categories — for example, "derivative" materials such as

charts, diagrams, or compilations of other records — could be discovered upon a showing of "good cause," according to the Court of Appeal.

The California Supreme Court granted review and reversed the Court of Appeal, holding that all materials prepared for mediation were absolutely privileged regardless of whether they constituted "nonderivative" evidence. The court held that broad construction of the mediation privilege contained in Section 1119(b) is essential to advance the "overall purpose of the mediation confidentiality provisions," which is to eliminate ambiguities and ensure candor in the mediation process "to further the effective use of mediation."

The Supreme Court also assessed the plain language of Section 1119 and found that the wording of the statute, which "unqualifiedly bars disclosure of" any mediation documents, undermined the Court of Appeal's tiered approach to applying privilege to documents based on their content. Furthermore, the Supreme Court found that the plain language of Section 1119 was inconsistent with the Court of Appeal's theory that the statute does not protect "raw data."

The Supreme Court found that the legislative history also supported the statutory interpretation that Section 1119(b) provides an absolute privilege for any documents and materials created for a mediation. In its review of Section 1119's legislative history, the Supreme Court found that the California Law Review Commission — which drafted the provision — "specifically considered the discoverability of both expert reports and photographs" and rejected such discoverability.

Finally, the Supreme Court rejected the Court of Appeal's

application of work-product rules to Section 1119. Because the work-product privilege is statutory, the Supreme Court held that its provisions do not control the application of Section 1119 in the absence of some indication from the Legislature that such work-product provisions should apply.

As a result of the California Supreme Court's broad decision in *Rojas*, parties engaging in settlement mediation can do so with greater confidence than before that documents or other evidence prepared for the purpose of, in the course of, or pursuant to such a mediation will remain absolutely privileged from disclosure in any subsequent proceeding or lawsuit.

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