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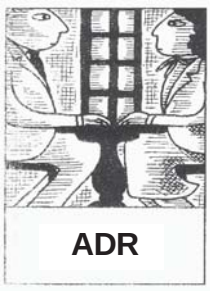
Some Mediation Contracts Need Confidentiality Aspects

By Max Factor III

In California, the State Legislature and the Supreme Court take the notion of Mediation Confidentiality quite literally. Rojas v. Superior Court (Coffin) (2004) XX Cal. 4th XX.

Unfortunately, shrewd legal counsel may turn the "public policy" goal of that confidentiality shield on its head. Their technique: prepare accurate evidence which is adverse to their client's position and introduce it as a document at Mediation, with the assurance that this "truthful writing" will be cloaked in the Invisibility Shield of Mediation Confidentiality! The truth seeking which is supposed to be an integral part of the adversary process instead morphs into a tool for hiding the truth.



How likely is this to happen? Michael S. Fields, former President of CAALA (the Consumer Attorneys Association of Los Angeles), thinks it is a very real possibility. Speaking as a member of a panel of distinguished experts in Mock Mediation, Mr. Fields stated that after *Rojas*, he would not take the risk of mediating a litigated case without first entering into a contract that would prevent opposing counsel from cloaking otherwise discoverable evidence beneath a shield of mediation confidentiality.

In *Rojas*, nearly 100 children were sickened and some hospitalized by toxic mold in their apartment building. Earlier test results had revealed potentially dangerous levels of viral infestation in the building. The test results were unquestionably relevant and material evidence. But in July 2004 the Supreme Court held that the tests were inadmissible because they were arguably conducted with the intent of being introduced into a scheduled mediation of the underlying lawsuit.

Because the tests had indicated viral infestation, the hazardous conditions were remedied by removing and replacing the infested building walls. As a result, new tests could not be done to confirm the type of infestation that had been present or the likelihood that the infestation was the culprit in the illnesses that caused the children to be hospitalized.

The state Supreme Court unanimously affirmed that material objects as used in Evidence Code Section 140 (e.g., actual physical samples) are not protected by the mediation confidentiality provisions of Evidence Code Section 1119 and held that "writings" that fall within Section 1119(b) are completely confidential, unless one of the statutory exceptions to Section 1119 apply.

The Court stated, "[U]nder section 1119, because both photographs and written witness statements qualify as 'writing[s], as defined in [s]ection 250,' if they are 'prepared for the purpose of, in the course of, or pursuant to, a mediation,' then they are not 'admissible or subject to discovery, and [their] disclosure…shall not be compelled.' The Court of Appeal also held that 'raw test data' are never 'protected by section 1119.' Insofar as it was referring to actual physical samples collected at the apartment complex – either from the air or from destructive testing — the Court of Appeal was correct; such physical objects are not 'writing[s], as defined in [s]ection 250.'(Sec. 1119,subd. (b).)"

However, insofar as it was referring to recorded analyses of those samples – for example, reports describing the existence or amount of mold spores in a sample –

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the Court of Appeal erred; because such analyses are 'writing [s], as defined an [s]ection 250,' under section 1119, if they were 'prepared for the purpose of, in the course of, or pursuant to, a mediation,'then they are not 'admissible or subject to discovery, and [their] disclosure…shall not be compelled.' "

The *Rojas* decision raises an important issue which Plaintiff and Defense counsel should consider prior to entering into Mediation in a civil case in California: how does litigation counsel prevent an opposing party from cloaking relevant and material "writings" with a shield of mediation confidentiality?

The answer is surprisingly simple. Prior to commencing mediation, the parties should enter into a written Mediation Contract that expressly disavows certain aspects of Mediation Confidentiality under Section 1119(b) for any "writings."

As a fulltime mediator, I have revised my basic contract forms to provide parties the option of preventing a "truth concealing" result, unless each party so stipulates.

This allows the parties to avoid adopting the full scope of mediation confidentiality which the Supreme Court affirmed in *Rojas v Superior Court (Coffin)* (2004) XX Cal. 4th XX and *Foxgate Homeowners Assn. V. Bramlea California, Inc.* (2001) 26 Cal. 4th 1.

I recommend the following contract language, which prevents any mediation participant from unilaterally cloaking a "writing" with a mediation confidentiality shield:

"Writing" means that which is defined in Evidence Code Section 250.

"Third party" means any individual or entity that is (a) not the mediator as defined in Section 1115, (b) not a party in the instant or any related litigation, and (c) not otherwise a mediation participant.

A "third party writing" means any "writing" authored by or attributed to a "third party." "Third party writings include, but are not limited to expert opinions, recorded witness statements, analyses of test results, notes on a medical chart from a physical examination and photographs.

To the extent that a "third party writing" does not disclose anything said or done in the course of the mediation, each mediation participant agrees that any "third part writing" is not to be treated as "confidential" pursuant to Section 1119 (b).

The downside of restricting the availability of confidentiality of "third party writings" used in mediation, as described in this article, is that some favorable third party evidence is likely to remain outside of the mediation discussions until it is "nailed down tight."

This would seem to be a small risk, since most litigation counsel do not reveal in a mediation a writing which could be used against their client, nor do they telegraph an important issue in mediation, if by doing so, there is a chance opposing counsel could turn the information to their sides' advantage because of its premature disclosure at mediation.

Counsel who want everything on the table have an additional contractual option, which would effectively state that writings of the party representative(s) and of legal counsel are not sheilded by Section 1119 (b) unless all of the mediation participants agree that the writing is subject to the confidentiality provisions of Section 1119 (b).

This is a kind of reality testing, in that everyone will know, if a party's representative writes something, that potentially serious consequences could result if that writing is lacking in truth.

This is not an option I recommend. It likely will affect the spontaneity of the communications during a mediation adversely.

Howevery, my discussions with one highly qualified litigator suggest that it may be a necessary contractual option to bring "everything-on-the-table" counsel to mediation.

Before starting mediation, counsel should consider whether opposing counsel might use mediation confidentiality under Section 1119 (b) as a weapon and try to cloak potentially adverse third party writings with the *Rojas* shield of mediation confidentiality by contending that the "third party writings" were prepared for the purpose of facilitating mediation.

Such an effort may fail if there is ultimately a finding that the "third party writings" were otherwise discoverable evidence that pre-existed the mediation and were not prepared for the mediation. Nevertheless, it would be far safer litigation practice to require opposing counsel, prior to mediation, to agree in writing to protective language similar to that set forth in this article.

Max Factor III is a full-time neutral based in Beverly Hills