"WE DECLINE TO ADDRESS": RESOLVING THE UNANSWERED QUESTIONS LEFT BY *ROJAS V. SUPERIOR COURT* TO ENCOURAGE MEDIATION AND PREVENT THE IMPROPER SHIELDING OF EVIDENCE

Laura A. Stoll*

In Rojas v. Superior Court *the California Supreme Court demonstrated its clear intent to encourage mediation by providing absolute privilege to evidence and materials "prepared for the purpose of, in the course of, or pursuant to, a mediation." However, the Court declined to address the important question of how to determine when materials are prepared for mediation. The Court's failure to provide guidance on this issue may actually threaten its goal of encouraging mediation by allowing parties to use mediation as a forum for improperly shielding damaging evidence under the auspices of the mediation privilege. This Comment examines the dangers of the uncertainty left by the* Rojas *decision and proposes a solution that courts can adopt in order to ensure that the Court's goal is realized, and that will allow parties to engage in mediation without fear that it will be used as a means to improperly shield evidence.*

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* Executive Editor, UCLA Law Review, Volume 54. J.D. Candidate, UCLA School of Law, 2007; B.A., Westmont College, 2002. I would like to thank Professor Steven Derian and my parents for their invaluable support. I would also like to thank Scott L. Gilmore for introducing me to the topic of mediation.

INTRODUCTION

Mediation[1] is an important form of alternative dispute resolution[2] that is growing in importance nationwide. As the use of mediation increases, so does the debate regarding the level of confidentiality that should be applied to evidence and materials introduced in mediation.[3] This debate centers on the conflicting policies of allowing protection of communications and evidence in an effort to encourage mediation, and the policy of ensuring that relevant and truthful evidence is made available for parties involved in litigation.[4]

In *Rojas v. Superior Court*,[5] the California Supreme Court recently weighed in on this debate by broadly construing sections of the California Evidence Code (CEC) in order to provide near absolute privilege to writings, evidence, and materials "prepared for the purpose of, in the course of, or pursuant to, a mediation"[6] (hereinafter referred to as "the Preparation Clause").

However, in its attempt to promote mediation by expanding mediation privilege, the Court declined to address important questions and concerns raised by its decision. In particular, the Court failed to provide guidance on how to determine when materials are *prepared* for mediation within the boundaries of CEC section 1119.[7] Without a clear explanation of when the Preparation Clause applies, some commentators are concerned that parties will use mediation to hide damaging evidence by simply introducing that evidence at mediation and then asserting privilege later at trial.[8]

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1. Unless otherwise indicated, this Comment defines "mediation" as a "method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." BLACK'S LAW DICTIONARY 1003 (8th ed. 2004).

2. Alternative dispute resolution is a "procedure for settling a dispute by means other than litigation, such as arbitration or mediation." *Id.* at 86.

3. *See infra* Part I.

4. *See infra* text accompanying note 60; *see also infra* note 144 and accompanying text.

5. 93 P.3d 260 (Cal. 2004).

6. CAL. EVID. CODE § 1119(b) (West Supp. 2006).

7. *See Rojas*, 93 P.3d at 271 n.9.

8. *See* Peter Blumberg, *Justices Limit Use of Files After Mediation*, L.A. DAILY J., July 13, 2004, at 1 ("[*Rojas*] could allow gamesmanship, in which parties could potentially introduce adverse evidence in mediation and then claim it cannot be introduced thereafter. . . . If a party wants to bury adverse evidence, they are going to do it under this opinion.") (quoting Bruce Brusavich, attorney for the tenants in *Rojas*).

This Comment argues that the significant questions left unanswered by the *Rojas* decision may in fact discourage mediation, contrary to the Court's intent.[9] Part I discusses the growing importance of mediation and the need for confidentiality protections in order to encourage its use. Part II discusses the *Rojas* decision and the difficulties associated with the Court's failure to define the Preparation Clause. Part III argues that in order to encourage mediation and prevent the improper shielding of evidence, the Court should define this phrase narrowly. More specifically, Part III.A argues that the definition of "mediation" for purposes of privilege should be narrowly defined. Part III.B then discusses different approaches that have been suggested for interpreting the language of the Preparation Clause. Lastly, Part III.C argues for the adoption of one of these approaches along with additional procedural safeguards.

I. THE GROWING IMPORTANCE OF MEDIATION AS AN ALTERNATIVE TO LITIGATION

Mediation has become an increasingly popular alternative to traditional litigation since it was first used to resolve labor disputes in the late nineteenth century.[10] As the benefits of mediation over traditional litigation are increasingly recognized, parties often look to mediation as a potentially less-costly and faster way to resolve disputes.[11] Even when litigation is contemplated, parties will sometimes use mediation as a form of low-cost discovery.[12] Mediation has

9. *See* Justin M. Norton, *Mediation Evidence Is Secret, Court Rules*, RECORDER, July 13, 2004, at 1, 9 ("If mediation is used to frustrate rather than serve justice, people will use mediation less.") (quoting Jeff Kichaven, attorney from the Southern California Mediation Association (SCMA)).

10. *See* Sarah Williams, Note, *Confidentiality in Mediation: Is It Encouraging Good Mediation or Bad Conduct?*, 2005 J. DISP. RESOL. 209, 215.

11. *See* Laura A. Miles, Comment, *Absolute Mediation Privilege: Promoting or Destroying Mediation by Rewarding Sharp Practice and Driving Away Smart Lawyers?*, 25 WHITTIER L. REV. 617, 619 (2004) ("Mediation is desirable from a public policy perspective because it can be less expensive and result in a quicker resolution of disputes, without the need to burden the court system or incur the substantial costs involved in a full-blown litigation."); Rebecca M. Owen, Note, *In re Uncertainty: A Uniform and Confidential Treatment of Evidentiary and Advocatory Materials Used in Mediation*, 20 OHIO ST. J. ON DISP. RESOL. 911, 913 (2005) ("Individuals choose to participate in mediation rather than litigation or other forms of alternative dispute resolution (ADR) because of the substantial benefits it affords. Cost effectiveness, prompt resolution of disputes, and mutually beneficial outcomes encourage individuals to participate in all forms of ADR, but the confidentiality that surrounds mediation procedures separates it from other techniques."); Williams, *supra* note 10, at 215 (noting that as early as 1923, the American Bar Association realized the cost-effectiveness of mediation"); Scott L. Gilmore, *Mediation Confidentiality After* Rojas*: An Unintended Shield?* (2004), http://www.mediate.com/ScottGilmore/pg6.cfm.

12. *See* Gilmore, *supra* note 11 ("As a mediator I want to encourage parties to mediate as early as possible in order to avoid the time and expense of lengthy discovery.").

also been seen as a way for parties to obtain a mutually satisfactory resolution to a dispute and as a way of preserving relationships after a conflict is resolved.[13]

Courts are also beginning to recognize the benefits of mediation and often encourage mediation as a way of reducing the number of cases on their dockets.[14] Judges can order parties to mediate at the inception of a case or even after substantial proceedings have already begun.[15] Court-ordered mediation is mandatory, and sanctions can be levied against a party who fails to participate.[16] However, even if a judge does not order mandatory mediation, a strong suggestion to the parties that they attempt to mediate can have a similar effect as forced mediation, because the parties will not want to appear uncooperative to the judge presiding over their case. In addition to ordering parties to mediate in a particular dispute, some courts have implemented mandatory mediation procedures for entire classes of cases. For example, the U.S. District Court for the District of Delaware requires mandatory mediation for all appeals from the Delaware Bankruptcy Court to the U.S. District Court.[17]

Legislatures are also seeking to advance mediation as an alternative to litigation, and some states have even enacted statutes mandating mediation before court proceedings can take place.[18] The California Legislature, in particular, has embraced the use of mediation as an alternative to traditional

13. *See* Williams, *supra* note 10, at 215; *see also supra* notes 1, 11 and accompanying text.

14. *See, e.g.*, CAL. CIV. PROC. CODE § 1775(c) (West 2005) ("Mediation may also assist to reduce the backlog of cases burdening the judicial system."); Williams, *supra* note 10, at 209, 215. Williams notes that "[a]n increase in federal court case loads in the 1970s created a 'renewed interest among jurists' in mediation." *Id.* at 215 (quoting SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE 5-1 (2d ed. 2001)); *see also* Miles, *supra* note 11, at 619.

15. *See* Miles, *supra* note 11, at 633–34 ("[M]any courts routinely order mediation early in the litigation process, and it is not uncommon 'for a case to bounce back and forth between the courthouse and the mediator's office' before final disposition.") (quoting Amicus Curiae Brief of Southern California Mediation Association in Support of Petitioners at 4, Rojas v. Superior Court, 126 Cal. Rptr. 2d 97 (Cal. Ct. App. 2003) (No. S111585) [hereinafter SCMA Brief]). Additionally, courts can order parties to mediate after a judgment, before allowing the parties to appeal a decision.

16. *See, e.g.*, ALA. CODE § 6-6-20(c) (2005) ("If any party fails to mediate as required by this section, the court may apply such sanctions as it deems appropriate pursuant to Rule 37 of the Alabama Rules of Civil Procedure.").

17. Sue L. Robinson, Chief Judge, Order In Re: Procedures To Govern Mediation Of Appeals From The United States Bankruptcy Court For This District 1 (D. Del. July 23, 2004), *available at* http://www.ded.uscourts.gov/announce/MedAdminOrder.pdf ("[I]t is hereby ordered that the following mandatory mediation procedures shall apply to all appeals to this Court from the Bankruptcy Court.").

The court's order states: "[I]n order to more efficiently and expeditiously administer justice and assist the parties to amicably resolve the disputes which are the subject of appeals before the Court, it is appropriate and necessary for there to be mandatory mediation of all appeals to this Court from the Bankruptcy Court." *Id.* The court also sought to protect the confidentiality of the mediations by protecting communications made during the mediation and by prohibiting the parties "from using any information obtained as a result of the mediation process as a basis for any motion or argument to any court." *Id.* at 3.

18. *See* Williams, *supra* note 10, at 209.

litigation.[19] For example, "California passed the first mandatory mediation statute in child custody cases in 1980."[20] California has also enacted Labor Code sections 1164 through 1164.13,[21] which permit either party to file a petition and invoke mandatory mediation procedures whenever a certified union and an agricultural employer fail to reach an original collective bargaining agreement, provided that certain statutory requirements are met.[22]

The increase in the amount and importance of mediation has led to questions about how to regulate and implement mediation policies and procedures. In particular, courts, legislatures, and commentators have struggled with determining the appropriate level of confidentiality to extend to mediation proceedings. It is widely held that at least some level of confidentiality is necessary in order for mediation to be effective.[23] The basis for this view is that mediation is designed to be a forum for "cooperation," where the parties can come together and resolve their dispute through "open and honest" communication without the fear that what has been said or revealed during mediation

19. The California Legislature stated:

> In appropriate cases, mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.

Rojas v. Superior Court, 93 P.3d 260, 265 (Cal. 2004) (citing CAL. CIV. PROC. CODE § 1775(c) (West 2005)).

20. Leonard P. Edwards, *Mediation in Child Protection Cases*, 5 J. CENTER FOR FAMILIES CHILD. & CTS. 57, 63 (2004). Judge Edwards also notes that many court systems and legislatures have begun to recognize that mediation is the "best practice" in the area of child custody. *Id.* As a result, the use of mediation in child-protection proceedings has grown over the past ten years. *Id.* If, as Sarah Williams notes, mediation is a way of preserving relationships after the resolution of a conflict, child-custody cases would provide a clear example of a situation where traditional adversarial proceedings may not be the "best practice" and should be avoided. *See* Williams, *supra* note 10. Parents involved in a custody dispute may be interested in trying to maintain a civil relationship for the benefit of their child, and mediation may further this goal better than litigation.

21. CAL. LABOR CODE §§ 1164–1164.13 (West 2003 & Supp. 2006).

22. *See* ABA, SUB-COMMITTEE REPORT ON STATE AGRICULTURE LABOR LAW (Feb. 24–26, 2005), *available at* http://www.bnabooks.com/ababna/stdev/2005/roy.doc.

23. *See* Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc., 25 P.3d 1117, 1126 (Cal. 2001) ("[T]he purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past. . . . This 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 adjudicatory processes.'") (quoting UNIF. MEDIATION ACT, 7A U.L.A. pt. II, 127, 119, prefactory n.1 (Supp. 2006)); *see also, e.g.*, Michael A. Perino, *Drafting Mediation Privileges: Lessons From the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1, 5–8 (1995) (arguing that some level of confidentiality is required in mediation because it encourages parties to be candid without fear that facts and statements will be used against them in litigation). *But see* J. Brad Reich, *A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure*, 2001 J. DISP. RESOL. 197, 199 (arguing that privilege should not be applied to create confidentiality in mediation because that application would be contrary to the common-interest relationships traditionally protected by privilege).

will be used against them in later proceedings.[24] This may be a somewhat unrealistic view of the mediation process,[25] but if mediation is truly to be an alternative to litigation, it is clear that the traditional adversarial nature of a lawsuit is inappropriate.

In litigation, parties will not reveal information detrimental to their case unless they are required to, or unless they have a good strategic reason to do so. However, in order for a mediation to be effective, parties may need to reveal detrimental information if it is relevant to resolving the dispute.[26] Without clearly defined limits on how information obtained during mediation can be used against them in the future, parties will not be forthcoming with relevant information, and the mediation process will break down.[27]

Although there is general agreement that some level of mediation confidentiality or privilege is necessary to prevent the mediation process from breaking down,[28] there is considerable disagreement on where this line should be drawn. Different jurisdictions provide varied levels of protection for information revealed in mediation proceedings.[29] There are three general categories of protection that legislatures have provided for communications made during mediation proceedings.

The first category of mediation protection is "absolute confidentiality," where no disclosures of mediation communications are allowed.[30] California is an example of a state that has adopted absolute confidentiality for mediation communications.[31] The second category is "enumerated confidentiality," which provides for absolute confidentiality except for certain enumerated exceptions or by agreement of all parties including the mediator.[32] The best example of enumerated confidentiality is the Uniform Mediation Act (UMA),[33]

24. Owen *supra* note 11, at 911–12.

25. At least one commentator has noted that mediation requires a certain amount of cooperation that may not be present between the parties, especially in the case of court-ordered mediations. *See* Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 IDAHO L. REV. 57, 59 (2002) ("Trying to compel uncooperative parties to mediate is reminiscent of the old proverb about leading a horse to water but being unable to make it drink.").

26. *See* Perino *supra* note 23, at 7 ("A successful mediation may require the parties to admit facts that would be adverse to their positions if the mediation failed and litigation ensued.").

27. *See id.* at 6–7 ("The mediation process involves drawing out of the parties a list of all relevant issues and encouraging compromise and accommodation. . . . The participants, of course, need to be candid with each other as well as with the mediator. Such candor is facilitated by a credible and consistent application of a mediation privilege.").

28. *See supra* note 23 and accompanying text.

29. *See* Williams, *supra* note 10, at 216.

30. *See id.*

31. *See id.*

32. *See id.*

33. UNIF. MEDIATION ACT, 7A U.L.A. pt. II, 117 (Supp. 2006).

which was drafted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association to address the lack of consistency in statutes addressing "mediation confidentiality provisions."[34] The UMA is generally thought to protect confidentiality in mediation, due in large part to its implementation of mediation privilege, which prevents "compelled disclosure of communications in subsequent litigation."[35] The third category of mediation protection is "qualified confidentiality," which allows judges to order disclosure where it is necessary to prevent a "manifest injustice or to enforce court orders."[36]

In addition to protection of statements made during mediation, some have gone further and argued that mediation requires the protection of not just communications, but also the protection of documents and materials used in the mediation.[37] Parties often prepare written briefs and reports to be used in mediation, which may contain impressions about the strengths and weaknesses of their respective cases.[38] Common sense dictates that a party will not be open and honest in mediation if his verbal communications are protected from being used against him at a later trial, but any of the writings, evidence, or other materials he provides are available for use at future proceedings.

Recognizing the importance of protecting written materials and evidence used in mediation, the California Supreme Court broadly construed CEC section 1119 in *Rojas* to find that the California Legislature created a sort of "super-privilege"[39] for materials "prepared for the purpose of, in the course of, or pursuant to, a mediation."

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34. *Id*; *see also* Owen, *supra* note 11, at 931 (noting that the Uniform Mediation Act (UMA) was developed to "promote mediation and to further 'prompt, economical, and amicable [dispute] resolution, integrity in the process, self-determination by parties, candor in negotiations, societal needs for information, and uniformity of law.'") (quoting UNIF. MEDIATION ACT, 7A U.L.A., pt. II, at 124, prefactory n.6).

35. Williams, *supra* note 10, at 216. The UMA "acknowledges that the free flow of information essential to a successful mediation can be achieved only if the participants are provided a guarantee that what they disclose will not be used to their detriment in later court proceedings." Owen, *supra* note 11, at 933.

36. Williams, *supra* note 10, at 216 (quoting Maureen A. Weston, *Confidentiality's Constitutionality*, 8 HARV. NEGOT. L. REV. 29, 49 (2003)).

37. *See, e.g.*, CAL. EVID. CODE § 1119(b) (West Supp. 2006); Owen, *supra* note 11, at 920–21 ("It is equally, if not more, important to protect materials and writings prepared in contemplation of mediation as it is to guarantee the confidentiality of statements and admissions made during the course of a mediation.").

38. *See* Owen, *supra* note 11, at 920.

39. Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege*, 38 LOY. L.A. L. REV. 537, 588 (2004).

II. *ROJAS V. SUPERIOR COURT*

A. Underlying Action

Rojas arose out of an underlying dispute between Julie Coffin, the owner of an apartment complex, and the contractors and subcontractors who built the complex.[40] Coffin alleged that water leakage due to construction defects produced toxic molds on the property.[41] The court issued a case-management order, which included a provision stating that CEC section 1119 would apply to any mediation proceedings in the case.[42] CEC section 1119(b) provides:

> 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.[43]

The case-management order stated that "[e]vidence of anything said . . . and any document prepared for the purpose of, or in the course of, or pursuant to any mediation proceeding shall be deemed privileged pursuant to Evidence Code section 1119 and shall not be admissible as evidence at trial or for any purpose prior to trial."[44]

Coffin prepared a structural defect and mold infestation list for the property. She also began air testing in April 1998.[45] A few months later, one of the buildings was closed for demolition and repairs, including mold abatement.[46] In April 1999, the court stated that the litigation between Coffin and the contractors and subcontractors settled "as a result of mediation."[47]

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40. Rojas v. Superior Court, 93 P.3d 260, 262 (Cal. 2004).

41. *Id.*

42. *Id.*

43. CAL. EVID. CODE § 1119(b) (West Supp. 2006) (emphasis added). Section 250 defines a "writing" to "mean[ ] handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." *Id.* § 250.

44. *Rojas*, 93 P.3d at 262.

45. *Id.*

46. *Id.*

47. *Id.* The settlement agreement provided that

> throughout this resolution of the matter, consultants provided defect reports, repair reports, and photographs for informational purpose[s] which are protected by the Case Management Order and Evidence Code [section] 1119 . . . and it is hereby agreed that

B. Trial Court

In August 1999, tenants of the apartment complex sued Coffin and numerous entities involved in the building, alleging that the mold and microbes in the complex were causing health problems and that the defendants conspired to hide the defects from the tenants.[48] The tenants demanded production of the "entire files" relating to the underlying action.[49] The defendants objected to the request and the tenants filed a motion to compel, requesting numerous documents including physical evidence, photographs, videotapes, test samples, reports, witness statements, and writings evidencing experts' opinions and conclusions.[50] The court denied the tenants' motion, holding that the materials were "clearly protected by the mediation privilege."[51] The tenants sought a writ of mandate in the court of appeal.[52]

C. Court of Appeal

The court of appeal granted relief to the tenants after finding that CEC section 1119 "does 'not protect pure evidence,' but protects only 'the substance of mediation, i.e., the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand.'"[53] The court of appeal also applied work-product doctrine principles[54] to find that "raw test data, photographs, and witness statements" are "non-derivative" and are therefore discoverable.[55]

The court of appeal also found that "derivative material"[56] is "qualifiedly protected" and is "discoverable only upon a showing of good cause, which requires a determination of the need for the materials balanced against the

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such materials and information contained therein shall not be published or disclosed in any way without the prior consent of plaintiff or by court order.

Id.

48. *Rojas*, 93 P.3d at 262.

49. *Id.*

50. *Id.* at 262–63. For a definition of "writing" under section 250, see *supra* note 43 and accompanying text.

51. *Rojas*, 93 P.3d at 263–64.

52. *Id.* at 264.

53. *Id.* (quoting Rojas v. Superior Court, 126 Cal. Rptr. 2d 106 (Cal. Ct. App. 2002)).

54. The work-product standard balances a showing of need against the public policy benefit of withholding the requested discovery. *See* Miles, *supra* note 11, at 644.

55. *Rojas*, 93 P.3d at 264 (quoting *Rojas*, 126 Cal. Rptr. 2d at 110).

56. The court of appeal defined "derivative material" as "'amalgamation[s] of factual information and attorney thoughts, impressions, [and] conclusions,' such as 'charts and diagrams, audit reports, compilations of entries in documents, records or other databases, appraisals, opinions, and reports of experts employed as nontestifying consultants.'" *Id.* (quoting *Rojas*, 126 Cal. Rptr. 2d at 108–09).

benefit to the mediation privilege obtained by protecting those materials from disclosure."[57] In particular, the court ordered that any factual information that could be removed from the "derivative material," such as photographs and test data, must be separated and produced whenever possible.[58] The only material provided absolute protection by the court of appeal was material that solely reflected an attorney's "impressions, conclusions, opinions, or legal research or theories."[59]

The court of appeal attempted to balance the two competing policies of promoting mediation as an alternative to litigation and ensuring that litigants have access to information through the discovery process.[60] The court relied largely on the statutory language in CEC section 1120(a), which states: "[E]vidence otherwise admissible or subject to discovery outside of a mediation . . . 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."[61] The court of appeal stated that the legislative history of section 1120 clearly indicates that it was designed to prevent parties from using mediation to introduce work product so that an opposing party could not overcome work-product privilege in a later proceeding.[62]

D. Supreme Court

The California Supreme Court reversed the court of appeal and held that mediation privilege for "writings" extended to witness statements, analyses of raw test data, and photographs that were prepared for use during the mediation.[63] The Court relied on the legislature's broad definition of "writing" in CEC section 250[64] to reject the court of appeal's holding that photographs and witness statements were never protected under section 1119.[65]

The Court also rejected the court of appeal's determination that mediation privilege allows for a "good cause" exception.[66] The Court purported to

57. *Id.* (quoting *Rojas*, 126 Cal. Rptr. 2d at 110).
58. *Id.*
59. *Id.* (quoting *Rojas*, 126 Cal. Rptr. 2d at 108).
60. *See* June Lehrman, *'Rojas' Doesn't Resolve All ADR Confidentiality Issues*, L.A. DAILY J., July 14, 2004, at 7.
61. CAL. EVID. CODE § 1120(a) (West Supp. 2006).
62. *See* Williams, *supra* note 10, at 223. The California Law Revision Commission stated that section 1120 "is designed to prevent materials from being introduced in mediation solely to protect them form [sic] later discovery or use in litigation." *Id.* (quoting *Rojas*, 126 Cal. Rptr. 2d at 108).
63. *Rojas*, 93 P.3d at 262.
64. For a definition of "writing" under section 250, see *supra* note 43.
65. *Rojas*, 93 P.3d at 265.
66. *Id.* at 270.

rely largely on the "plain language" of CEC sections 1119 and 250 to conclude that the legislature intended to afford near absolute protection to writings "prepared for the purpose of, in the course of, or pursuant to, a mediation."[67]

The Court believed that a narrow interpretation of the language in section 1119 would "significantly undercut the Legislature's efforts to ensure the confidentiality necessary to effective mediation."[68] However, the Court did draw the line at protecting the underlying facts found in the writings.[69] It believed that allowing the underlying facts to still be admissible at trial sufficiently protected against the danger of parties using mediation to hide evidence.[70]

E. Life After *Rojas*: Failure to Define the Preparation Clause May Discourage the Use of Mediation in California

The *Rojas* decision has come under considerable attack, and many commentators believe that the Court should have affirmed the ruling of the court of appeal.[71] However, this Comment does not address the correctness of the *Rojas* decision or the reasoning of the Court. Instead, this Comment recognizes that *Rojas* is the "law of the land" and attempts to bring to light the effects of the decision so that attorneys and parties are fully informed before they decide to utilize mediation as an alternative to litigation.

Rojas is a particularly important decision in the world of mediation, not only because it is a strong statement in favor of mediation privilege, but also because of the uncertainty left by the decision. It is clear that *Rojas* places confidentiality and privilege in mediation on a pedestal in the hopes of encouraging its use, but it is less clear that the decision will in fact achieve this desired result, at least until certain significant questions are resolved. In fact, the

67. *Id.* at 268 (quoting CAL. EVID. CODE § 1119(b) (West Supp. 2006)).

68. *Id.* at 270.

69. *Id.* at 270 n.8 ("Of course, that witness statements 'prepared for the purpose of, in the course of, or pursuant to, a mediation' are protected from discovery under section 1119 does not mean that *the facts* set forth in those statements are so protected.").

70. *Id.*

71. *See generally* Miles, *supra* note 11 (arguing prior to the disposition in *Rojas* that the Court should uphold the court of appeal's decision to govern mediation privilege under the same rules of discovery as other evidence and types of privilege); Scallen, *supra* note 39 (discussing the *Rojas* decision in light of the distinction between relational and informational privileges); Williams, *supra* note 10 (arguing that balancing the importance of encouraging mediation with the potential for bad faith and gamesmanship should have led the Court to uphold the application of the work-product privilege to mediation confidentiality in light of evidence of conflicting legislative intent); Gilmore, *supra* note 11 (arguing that *Rojas* left questions unanswered that require counsel involved in mediation to take precautions when deciding to mediate); California Dispute Resolution Council, 2004 News Articles – Rojas, http://www.cdrc.net/pg52.cfm (last visited June 13, 2006) (providing various articles that discuss positive and negative reaction to the *Rojas* decision).

Court may inadvertently be discouraging the use of mediation through its interpretation of CEC sections 1119 and 250 and through its failure to define the Preparation Clause.

The most profound impact of *Rojas* is that evidence that would otherwise be discoverable at trial may become undiscoverable if a party claims that it was "prepared for the purpose of, in the course of, or pursuant to, a mediation."[72] The court of appeal recognized this as a potential problem when it noted that allowing evidence used in mediation to be unqualifiedly protected would "permit the parties to use mediation as a shield to hide evidence."[73] In its analysis, the court of appeal relied on the language of CEC section 1120, which states that evidence that would be otherwise admissible or discoverable outside of mediation is not protected from disclosure solely because it is used in a mediation.[74] It is puzzling how sections 1119 and 1120 are to be read together and reconciled,[75] which is why the court of appeal did not find the absolute privilege that the Supreme Court believed was so clearly the legislature's intent.

The Court, however, read sections 1119 and 1120 to mean that evidence is not protected "solely" because it is used or introduced in mediation, but is protected only when it is "prepared for the purpose" of mediation.[76] Therefore, it concluded that the concern of the court of appeal was unfounded.[77] Despite concerns from amicus curiae,[78] the Court failed to more clearly define the "prepared for the purpose" of mediation language of section 1119, at least in part because the parties settled the case and the issue had become moot.[79]

72. The attorney for the tenants in *Rojas* lamented that "[i]f [the companies] can say, 'I did this for mediation only,' they can make it disappear. . . . They can take perfectly admissible evidence, claim it was for mediation . . . and then it's gone." Norton, *supra* note 9, at 9 (quoting Bruce Brusavich, attorney for the tenants in *Rojas*).

73. *Rojas*, 93 P.3d at 264 (quoting Rojas v. Superior Court, 126 Cal. Rptr. 2d, 106, 109 (Cal. Ct. App. 2002)).

74. *Id.* (quoting CAL. EVID. CODE § 1120(a) (West Supp. 2006)).

75. *See* Miles, *supra* note 11, at 633 ("What is not clearly defined in either code section is how to differentiate evidence that is 'otherwise subject to discovery' from evidence that may have been 'prepared for' mediation, as such evidence is frequently the same.").

76. *Rojas*, 93 P.3d at 265. Almost all states agree that "materials prepared for mediation that would be otherwise discoverable and evidence that is not prepared solely for the purpose of mediation are not privileged." Owen, *supra* note 11, at 926.

77. *Rojas*, 93 P.3d at 266.

78. *See* SCMA Brief, *supra* note 15, at 9 (arguing that parties should be required to identify at the time of mediation that evidence has been "prepared solely for mediation" as opposed to claiming mediation confidentiality in a subsequent court proceeding); *see also infra* Part III.B–C.

79. *Rojas*, 93 P.3d at 271 n.9. The Court noted that the court of appeal sent the case back to the trial court without addressing the argument that many of the documents in question had not been "prepared for the purpose of, in the course of, or pursuant to, a mediation." *Id.* (quoting CAL. EVID. CODE § 1119(b)). The Court likewise declined to address the issue, claiming that "in light of the parties' settlement, it is unnecessary to remand the case for consideration of this issue." *Id.* Nevertheless, the Court did decide to exercise its jurisdiction in order to review the holdings of the

While the Court believes that "the scope of Section 1119 . . . prevent[s] parties from using a mediation as a pretext to shield materials from disclosure,"[80] others are not so convinced. In addition to the court of appeal, the Southern California Mediation Association (SCMA) argued in its amicus brief in *Rojas* that allowing for absolute confidentiality of all evidence that could later be claimed to have been "prepared for mediation" would destroy the integrity of mediation as well as the integrity of litigation.[81] The brief states that "the approach taken by [the appellants in *Rojas*] would make mediation a tool for burying unfavorable evidence. And that, in turn, would make litigants think twice about agreeing to mediate."[82]

Although the Court apparently believes that absolute confidentiality will promote mediation, if attorneys and parties fear that unfavorable evidence will be buried under the auspices of the Preparation Clause, they may be less inclined to use mediation as an alternative to litigation.[83] The Court correctly noted that evidence is not protected *solely* because it is used in mediation.[84] However, the Court's failure to define what exactly constitutes a piece of evidence that is "prepared for the purpose" of mediation is difficult to reconcile with its conclusion that parties cannot misuse mediation confidentiality to hide unfavorable evidence from discovery at trial.[85] Therefore, it is particularly important to provide a clear definition of what constitutes a piece of evidence that is "prepared for the purpose of, in the course of, or pursuant to, a mediation" if the policy of encouraging effective mediation is to be achieved.

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court of appeal after the parties had already settled because the case "raise[d] issues of continuing public importance." *Id.* at 264 n.3 (citing Lundquist v. Reusser, 875 P.2d 1279 (Cal. 1994)); *see also* Scallen, *supra* note 39, at 587.

80. *Rojas*, 93 P.3d at 266 (quoting CAL. EVID. CODE § 1120).

81. SCMA Brief, *supra* note 15, at 2.

82. *Id.* at 3; *see also* Norton, *supra* note 9, at 9 ("I would be reluctant to go into mediation if I thought my opponents would use it to hide evidence.") (quoting Bruce Brusavich, attorney for the tenants in *Rojas*).

83. Some commentators have suggested that *Rojas* could have a substantial impact on mediation and may deter its use as a form of alternative dispute resolution. *See, e.g.*, Gilmore, *supra* note 11. Gilmore notes that the Los Angeles County Bar Association scheduled a Minimum Continuing Legal Education seminar entitled "The Impact of Rojas: Are Mediations Still Viable?" *Id.* at n.2. Gilmore considers these concerns to be somewhat overstated, but he does recognize that the decision leaves open the possibility for the misuse of mediation confidentiality. *Id.*; *cf.* Williams, *supra* note 10, at 224 n.170 (noting that some commentators believe that mediation will thrive regardless of whether or not evidence is protected because of its lower cost compared to litigation).

84. *See supra* note 76 and accompanying text.

85. *See* Rojas v. Superior Court, 93 P.3d 260, 266 (Cal. 2004).

F. The Difficulty in Defining the Preparation Clause

Attempting to define what is prepared for mediation raises questions about the nature of mediation and litigation itself. One problem is the fact that the knowledge of why a particular document was really prepared is exclusively in the hands of the party claiming (conveniently) that it is undiscoverable. But aside from the difficulty of knowing whether a party and his attorney are really being forthright or truthful about their motivation to prepare a particular document, is anything ever really prepared *solely* for mediation? It is risky and foolhardy to assume that any mediation is not done with at least some eye toward litigation, or at least the possibility of litigation. Moreover, parties are often represented by attorneys during a mediation,[86] which strengthens the argument that anything introduced in mediation is not really prepared just for mediation. The danger of *Rojas* is that, if the mediation breaks down, a party could then simply invoke *Rojas* to claim that damaging evidence introduced at mediation is undiscoverable in the continuing or subsequent litigation. Lawyers may really be attempting to resolve an issue through mediation, but surely the possibility of litigation, and the use of materials at litigation, is going to cross their minds—they are lawyers![87]

Imagine the following scenario. In the spirit of cooperation and in an attempt to reduce legal costs, an attorney accepts another party's suggestion to mediate an issue. The accepting attorney is optimistic that the mediation can solve his client's problem, but he tells his client that if it does not work out, he always has the option of litigating the matter. The mere existence of litigation as an option may itself be a strong argument against a broad interpretation of the Preparation Clause. This hypothetical demonstrates why the Court's failure in *Rojas* to adequately define this phrase provides an attorney with a greater opportunity to manipulate a claim of mediation confidentiality and privilege when it is in his client's best interest to do so.

The inextricable link between mediation and litigation was recognized by the SCMA in its amicus brief, when it aptly stated that "mediation does not function in a vacuum."[88] Parties prepare briefs, arguments, and summary judgment points and authorities that are used interchangeably between mediation

86. *See* SCMA Brief, *supra* note 15, at 4 (noting that "lawyers often make presentations to opposing counsel and parties" in mediation).

87. Attorneys have a duty to represent their clients competently and zealously within the bounds of the law. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmts. 1–2 (2002). An attorney who carelessly ignores the possibility of litigation or all possible avenues to resolve his client's claim is arguably in violation of his duties to his client.

88. SCMA Brief, *supra* note 15, at 3–4.

and trial.[89] Perhaps even more problematic is the fact that mediation and litigation can occur simultaneously. Courts may order the parties to mediate after litigation has already commenced.[90] "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."[91] Given these facts, how can one determine what was prepared for mediation and what was prepared for litigation after the fact, when parties are attempting to keep potentially damaging evidence from being introduced at trial?

In fact, the SCMA argued in its amicus brief that CEC section 1119 did not apply to the underlying action in *Rojas* because it was a mandatory settlement conference and not mediation.[92] While the Court declined to address this issue (because the parties failed to raise the objection) and "assumed that a mediation took place in the underlying action,"[93] this distinction remains a serious concern. Once a lawsuit has been filed and court proceedings have begun, how can *anything* introduced in mediation be exclusively "prepared for the purpose of, in the course of, or pursuant to, a mediation"?

After *Rojas*, the court of appeal also recognized the difficulties that can arise once litigation has begun. In *Doe 1 v. Superior Court*,[94] the court noted that it "recognize[s] the conceptual difficulties in distinguishing between a mediation and a settlement conference once a court is involved and a bench

89. *See id.* at 4.

90. *See id.*; *see also supra* note 15 and accompanying text.

91. SCMA Brief, *supra* note 15, at 4.

92. *See* Rojas v. Superior Court, 93 P.3d 260, 265–66 n.4 (Cal. 2004). The SCMA based its argument on the language of "(1) the [Case Management Order], which stated that '[a]ll conferences and mediations are deemed to be mandatory settlement conferences of this court,' and (2) the language of section 1117, subdivision (b)(2), which states that the mediation confidentiality provisions do not apply to '[a] settlement conference pursuant to Rule 222 of the California Rules of Court.'" *Id.* at 266 n.4 (quoting SCMA Brief, *supra* note 15, at 7).

93. *Id.*

94. 34 Cal. Rptr. 3d 248 (Cal. Ct. App. 2005). *Doe 1* involved nearly five hundred suits against the Roman Catholic Archbishop of Los Angeles for alleged acts of childhood sexual molestation committed on the plaintiffs by various priests. *Id.* at 249–50. After Judge Peter D. Lichtman was appointed to be the settlement and mediation judge, the defendants offered to prepare written "proffers." The proffers were written summaries of personnel files concerning more than one hundred priests who had been identified in previous cases as molesters. *Id.* Some of the named defendants in the case filed a motion for a protective order to prevent the disclosure of the proffers to the public by the Archdiocese, claiming in part that release of the proffers violated the "mediation confidentiality privilege." *Id.* at 250–51. Relying in part on *Rojas*, the court of appeal reversed the order denying the petitioners' motion for a protective order and granted the motion prohibiting the Archdiocese from publicly disclosing the proffers. *Id.* at 258.

officer is presiding at those talks."[95] Where two parties voluntarily enter into mediation, the case is stronger that the information produced in mediation should be privileged. The parties have essentially agreed to "waive" or postpone any benefits of litigation in favor of mediation. However, when parties have already brought their dispute before a court for resolution, how can mediation privilege be forced upon them by virtue of a judge ordering that the parties mediate?

On the other hand, in circumstances where mediation is ordered by statute or a judge,[96] it is difficult to argue that materials should be undiscoverable in a later proceeding, as the parties were essentially forced into mediation. An opposing party could introduce harmful evidence and then prevent its later use at trial. The party who wants the evidence to be admitted could then be left without any recourse after being forced into a process that allows for the disappearance of relevant evidence.[97] In fact, this issue is so problematic that some commentators have argued against the use of mandatory or court-ordered mediations altogether.[98]

III. A NEW PROPOSAL FOR INTERPRETING THE PREPARATION CLAUSE

I suggest that courts narrowly interpret the Preparation Clause in order to achieve the goal of encouraging mediation as an alternative to litigation. A narrow interpretation will help remedy the potential for the improper shielding of evidence left open by the *Rojas* decision. Limiting the reach of

95. *Id.* at 252. However, the court in *Doe 1* determined that "[b]ecause the record so clearly shows that the parties were mediating, we do not believe those abstract distinctions apply here." *Id.* For further discussion of the *Doe 1* decision, see *infra* Part III.A.

96. *See supra* notes 17, 20–22 and accompanying text.

97. It could also be argued that a party seeking to exclude the evidence may have been participating in good faith during the mediation and therefore should not be penalized for introducing the evidence during mediation. However, given the potential for misuse of the mediation process to hide evidence, and the compulsory nature of court-ordered or statutorily mandated mediation, the benefit of the doubt should be given to the party seeking to admit relevant evidence. If a court has to order a mediation, it is less likely that both parties will fully cooperate and want the mediation to succeed. *See supra* note 25. Otherwise, the parties would likely have already entered into voluntary mediation. Therefore, courts should use caution before imposing the mediation privilege on a party who had no choice but to participate in a mediation.

98. *See, e.g.*, Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993) (arguing against mandatory, nonbinding federal court-annexed arbitration programs and commenting that many of the same criticisms apply to court-ordered mediations); Marfice, *supra* note 25, at 57 (discussing the difficulties that attorneys face "when they are ordered to mediate a case absent a motion or request for such an order").

section 1119 will also ensure that mediation is not abused to provide privilege for materials and proceedings that were not extended statutory protection by the legislature.

Specifically, I propose the following safeguards. First, courts should apply the protections of mediation confidentiality to evidence and items that were prepared for use *solely* at mediation, as suggested by the SCMA. Second, courts should adopt the procedural requirements suggested by the SCMA that parties declare that the evidence was prepared only for mediation at the time it is introduced, and that they also be prevented from using that evidence in any subsequent litigation.[99]

Additionally, courts should place the burden of proof on the party seeking to have the mediation evidence excluded from trial by requiring the party to show that the evidence was prepared only for mediation. However, in cases where litigation has already begun, there should be a rebuttable presumption that the evidence was prepared not just for mediation, but for possible use in litigation as well. In overcoming this rebuttable presumption, courts should first look to see if there is a contract between the parties that describes which items were prepared for mediation. In the absence of a contract, I propose that courts apply a three-factor test that focuses on the circumstances under which the evidence was created or collected, and how the evidence was used in mediation and adversarial proceedings.[100]

A narrow interpretation of section 1119 is not contrary to the Court's broad interpretation in *Rojas* because it would not limit the types of materials protected under the statute, but rather would define more clearly when the statute applies. Holding that the language of the statutory scheme does not allow for a "good cause" exception to mediation privilege[101] does not preclude a definition of "prepared for . . . mediation"[102] that makes clear that the statutory protections were meant to apply solely to mediation. The legislature's goal is to protect the communications and evidence prepared for mediation,[103] so a narrow interpretation of section 1119 would simply be an effort to clarify that only evidence that falls clearly within the boundaries of the statute are entitled to remain confidential and privileged.

99. SCMA Brief, *supra* note 15, at 9; *see also infra* Part III.B–C.
100. *See infra* Part III.C.
101. Rojas v. Superior Court, 93 P.3d 260, 270–71 (Cal. 2004).
102. CAL. EVID. CODE § 1119(b) (West Supp. 2006).
103. *See Rojas*, 93 P.3d at 265.

A. Defining Mediation: What Is Considered a "Mediation" Under the Preparation Clause?

Before addressing how to determine whether evidence is "prepared for, pursuant to, or in the course of a mediation," it is important to define what actually constitutes a "mediation." The legislature was clear that the statutory protections of section 1119 apply only to mediation and do not apply to proceedings such as mandatory settlement conferences or other types of dispute-resolution proceedings.[104] However, the circumstances surrounding mediations and other types of proceedings do not always reflect this brightline distinction drawn by the legislature.

If there is any ambiguity or question as to whether a proceeding is a mediation, the court should err on the side of caution and find that it is not a mediation, especially when the proceeding takes place under adversarial conditions that more closely resemble litigation. This will ensure that the statutory protections of section 1119 are not extended to proceedings beyond those contemplated by the legislature.

Such a cautious and more restrictive interpretation of the term "mediation" is consistent with the statutory language adopted by the legislature. CEC section 1115(a) defines mediation as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."[105] The legislature also specifically distinguished mediation from other types of court proceedings. For example, CEC section 1117 expressly distinguishes between mediations and mandatory settlement conferences when it states that "mediation as defined in Section 1115 . . . does not apply to . . . [a] settlement conference pursuant to Rule 222 of the California Rules of Court."[106] Despite the express distinction made by the legislature, it can be difficult in practice for parties to know whether their proceeding is actually considered a mediation under the statute. Although the Court in *Rojas* declined to address the SCMA's argument that the underlying action was a mandatory settlement conference and not a mediation,[107] the distinction is important for parties who need to know whether the confidentiality provisions of CEC section 1119 apply to their proceeding.

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104. *See supra* text accompanying note 102; *see also infra* note 106 and accompanying text.

105. CAL. EVID. CODE § 1115(a).

106. *Id.* § 1117. Rule 222 of the California Rules of Court authorizes the court to set a mandatory settlement conference on its own motion, or at the request of any party. CAL. CT. R. 222(a). For the language of California Evidence Code (CEC) section 1115(a), see *supra* text accompanying note 105.

107. *Rojas*, 93 P.3d at 265–66 n.4; *see also supra* note 92 and accompanying text.

The post-*Rojas* court of appeal decision in *Doe 1 v. Superior Court*[108] provides further support that there is a recognized distinction between mediations and mandatory settlement conferences. The court acknowledged the difficulties in distinguishing between mediation and a settlement conference, particularly when a "bench officer is presiding" over the talks.[109] In *Doe 1*, Judge Peter D. Lichtman was appointed as the "settlement and mediation judge."[110] Judge Lichtman ruled on objections to information provided during the meeting between the parties and on the application of "confidentiality privileges" to the information.[111] Although the court felt that the record clearly showed that the parties engaged in mediation,[112] the presence of a judge at a meeting between parties and the ability to make rulings on admissibility of evidence may provide an air of authority, which could confuse the parties and lead them to view the meeting more like an adversarial court hearing than an open and cooperative mediation process overseen by a neutral third party.[113]

Additionally, in *Saeta v. Superior Court*,[114] the court emphasized the importance of applying the protections of CEC section 1119 only to proceedings that are considered to be mediations. *Saeta* arose from an employment discharge dispute. Kathleen Dent was discharged from her job and invoked a provision in her employment contract that entitled her to have her discharge reviewed by a three-member termination review board.[115] The review board, which included Philip Saeta, upheld her discharge, and Dent filed a lawsuit.[116] When Saeta was deposed, he refused to answer any questions relating to what occurred in the review-board hearing, claiming that they were privileged under CEC section 703.5.[117] Despite the parties' disagreement as to whether the proceeding constituted a mediation, the court of appeal affirmed the trial court's findings that statements made during the employment termination review panel were not protected under sections 703.5 or 1119, and that the

108. 34 Cal. Rptr. 3d 248 (Cal. Ct. App. 2005). For the facts of *Doe 1*, see *supra* note 94 and accompanying text.

109. *Doe 1*, 34 Cal. Rptr. 3d at 252.

110. *Id.* at 250.

111. *Id.* at 250–51.

112. *Id.* at 252; *see also supra* note 95 and accompanying text.

113. *See generally* Marfice, *supra* note 25, at 57 (discussing the difficulties that attorneys face "when they are ordered to mediate a case absent a motion or request for such an order").

114. 11 Cal. Rptr. 3d 610 (Cal. Ct. App. 2004).

115. *Id.* at 612.

116. *Id.*

117. *Id.* CEC section 703.5 states: "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding . . . ." CAL. EVID. CODE § 703.5 (West 1995).

proceeding was "neither an arbitration nor a mediation"[118] because it did "not serve to actually resolve and settle disputes."[119]

In order to protect themselves and preserve the protections of mediation privilege under Section 1119, the parties should clearly specify for the record that the proceeding they are engaging in is actually mediation, as courts appear to place great importance on what the record reveals. In *Doe 1*, the court felt that the record was clear that the parties were engaged in mediation,[120] and in *Rojas*, the court also noted that "at all times, the parties in this case have assumed that a mediation took place in the underlying action."[121]

However, difficulties can arise if the record is unclear or if the parties disagree on whether or not they were engaged in mediation. For example, a judge might refer to the meeting as both a mediation and a mandatory settlement conference, as was the case in *Doe 1*.[122] If neither party asks for clarification, there will be conflicting statements in the record. Then, if one party reasonably believed the meeting was a mediation and the other party claims it was a mandatory settlement conference, how should the court rule?

In the absence of a clear record, the court should look at the circumstances under which the meeting took place. Where the parties have been forced to meet under circumstances resembling adversarial conditions, the meeting should not be treated as a mediation.[123] If a meeting between the parties takes place in a courtroom before a judge, the parties may feel compelled to stay or forced to "mediate." At its heart, mediation is a voluntary and cooperative process.[124] However, the presence of a judge can make the process feel

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118. *Saeta*, 11 Cal. Rptr. 3d at 612.

119. *Id.* at 613 (citation omitted).

120. *See supra* note 95 and accompanying text; *see also infra* note 123.

121. Rojas v. Superior Court, 93 P.3d 260, 265–66 n.4 (Cal. 2004). The Court, however, declined to address this issue because the parties failed to raise the issue. *See supra* text accompanying note 93.

122. Although the court in *Doe 1* felt that the record clearly indicated that the parties were engaged in mediation, it also noted that the lower court used the terms "mediation" and "settlement" interchangeably. Doe 1 v. Superior Court, 34 Cal. Rptr. 3d 248, 252 (Cal. Ct. App. 2005); *see also supra* text accompanying note 110.

123. "In court-annexed mediation, there is a natural dichotomy between the adversarial litigation process over which the court normally presides and the inherently cooperative process upon which successful mediation depends." Marfice, *supra* note 25, at 62.

124. The court in *Saeta* noted the importance of the voluntary and "self-determined" nature of mediation when it stated:

> ... The concept of *self-determination*, which gives the parties control over the resolution of their own dispute, is of major importance to the mediation process. It is thought that self-determination enhances commitment to the settlement terms because parties make decisions themselves instead of having a resolution imposed upon them by an authoritative third party.

Saeta v. Superior Court, 11 Cal. Rptr. 3d 610, 616 (Cal. Ct. App. 2004) (quoting Pamela A. Kentra, *Hear No Evil, See No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 718).

involuntary for the parties because he has the ability to make adjudicatory determinations and levy sanctions.[125] Parties may even feel as though they are under compulsion and are not free to leave the "mediation" or may fear being viewed as uncooperative by a judge. Moreover, if the trial judge and the mediation judge work in the same courthouse, parties might even fear (correctly or incorrectly) that their conduct or information revealed in the meeting will be disclosed to the trial judge and affect their case.[126]

To protect against the compulsive effect of court-ordered meetings or conferences, any meeting that occurs in a courthouse with a judicial officer present should not be considered a mediation unless the record is not otherwise clear. Given the considerable influence that judges have over parties, some states have even prohibited judges from acting as mediators.[127] Even in *Doe 1*, where the court relied primarily on the record, the court still acknowledged the difficulty presented in defining what constitutes a mediation when an officer of the court is overseeing a proceeding.[128]

On the other hand, if the parties meet outside the courthouse before a person who is not a court official, they are more likely to view the meeting as a cooperative endeavor before a neutral third party. Therefore, if a meeting takes place under these circumstances, the court should find that it was a mediation because it is less likely that the parties felt compelled to participate. It would be unfair for a party to feel forced or compelled to participate in a proceeding that would allow for the later exclusion of relevant evidence from trial.[129]

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125. Some courts have even allowed for sanctions where a party failed to appear for a court-ordered mediation. *See, e.g.*, Roberts v. Rose, 37 S.W.3d 31 (Tex. App. 2000).

126. *See e.g.*, Bob Hornberger, *Court-Ordered Mediation Issues*, 40 ARK. LAW. 10, 10 (Spring 2005), *available at* http://www.arkbar.com/Ark_Lawyer_Mag/Articles/Court OrderedMediationSpring05.html (noting that despite mediation-confidentiality provisions, the author was told by a judge that "in the event the mediation failed to result in resolution, [he] was to report to the court as to whether or not the parties had 'participated in good faith' in the mediation"); *see also* Fabber v. Wessel, 604 So. 2d 533, 533 (Fla. Dist. Ct. App. 1992) (disqualifying a judge because he had received "privileged mediation communications").

127. *See* Marfice, *supra* note 25, at 60.

128. *See supra* notes 108–113 and accompanying text.

129. A statutory privilege can have "drastic results" because it can "exclude any evidence that [falls] under its umbrella, even highly relevant evidence, or perhaps the only evidence in a case." Aaron J. Lodge, Comment, *Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells?*, 41 SANTA CLARA L. REV. 1093, 1113 (2001). Given these potentially drastic results, courts should err on the side of caution when deciding that a meeting is a mediation for purposes of applying the mediation privilege.

B. Proposals for Defining the Preparation Clause

In addition to the difficulties raised when determining what constitutes a mediation, the Court left a gaping hole to be filled when it failed to define what constitutes evidence that is "prepared for the purpose of, in the course of, or pursuant to, a mediation." This omission is significant because the Court did not specify whether it considered the creation of evidence for "dual purposes"[130]—such as both mediation and possible litigation—to be relevant for the purposes of applying mediation privilege. If the Court in fact believed this to be a relevant distinction for invoking privilege, by not addressing the importance of the "purpose for which the evidence was developed," the Court failed to provide guidance on how to determine if an item was prepared for mediation or for dual purposes such as litigation and mediation.[131]

Two different definitions of the Preparation Clause were suggested at trial in *Rojas*. The appellants suggested a "but for" test that would question whether or not the evidence would have been prepared "but for" the mediation.[132] This test however, does not solve the problem of potential misuse of the mediation privilege by the parties.[133] Parties would still be able to claim that they would not have prepared the materials if they had not been involved in mediation. Documents, such as briefs prepared for the mediator, are less subject to misuse, but compilations of data or samples are less clear. A brief prepared specifically to provide a mediator with a background of the dispute, by its nature, is more likely to be limited to use at mediation. On the other hand, data compilations, photographs, and samples could be taken and collected for a myriad of other purposes, including litigation.

The potential for misuse under the "but for" test is especially present where the mediation is ordered by the court or where litigation has already begun. Parties may hold on to potentially damaging information and then introduce it at mediation, claiming that, "but for" the mediation, it would not have been prepared. Additionally, parties may wait until mediation is ordered before taking photographs or conducting certain tests that could be potentially damaging to their case. Essentially, the parties would have an incentive to hold on to bad evidence or to delay the timing of its discovery to coincide with mediation.

130. Lehrman, *supra* note 60, at 7.

131. *Id.*

132. *See* Miles, *supra* note 11, at 636.

133. *Compare* Miles, *supra* note 11, at 635–36 (arguing that the "but for" test is the "broadest of possible interpretations" that would have limitless application to evidence used in mediation), *with* Scallen *supra* note 39, at 587–88 (stating that the "but for" test proposed by the appellants in *Rojas* was a "narrower" interpretation of section 1119 that would solve the court of appeal's concern that parties would use mediation to hide evidence from later discovery by claiming privilege).

The SCMA suggested that the court in *Rojas* adopt both a test and a two-part procedure for use at mediation. The SCMA's test would provide "absolute confidentiality only to evidence prepared *solely* for purposes of mediation."[134] The Court did not explicitly adopt the test espoused by the SCMA, but the Court's analysis of the CEC in *Rojas* suggests that it would support the SCMA's interpretation. The Court stated that "a party cannot secure protection for a writing . . . that was not 'prepared for the purpose of, in the course of, or pursuant to, a mediation' simply by using or introducing it in a mediation or even including it as part of a writing."[135] The Court relied on the language of section 1120(a) in its analysis, which states that evidence is not protected "solely by reason of its introduction or use in a mediation."[136] The logical implication of the Court's reasoning is that only evidence prepared *solely* for mediation will be protected. Otherwise, simply using or introducing evidence at mediation would invoke the mediation protection, which the Court rejects.

The SCMA would also impose two procedural guidelines on the parties who wish to invoke mediation confidentiality or privilege. First, "[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."[137] Second, the SCMA argued that a "party should be required to identify the evidence as prepared solely for mediation when the evidence is disclosed at the mediation."[138]

The SCMA's approach is preferable to the "but for" test because it requires the parties to declare at the time of mediation that the materials were prepared solely for the mediation. This prevents parties from deciding after the fact that they will try to keep damaging evidence out of litigation by invoking mediation privilege at a later date. Parties should not be able to introduce damaging evidence in mediation and then, if the mediation breaks down and litigation ensues or resumes, claim that the evidence was prepared solely for mediation.

The problem remains, however, that even these additional procedural protections still allow the parties to misuse the mediation process to hide evidence. Parties can still decide to wait until mediation to introduce or investigate potentially damaging evidence. This will be especially true if extensive discovery has not yet occurred. Parties will simply have to say "up front" that

134. SCMA Brief, *supra* note 15, at 9.

135. Rojas v. Superior Court, 93 P.3d 260, 266 (Cal. 2004) (citations omitted) (quoting CAL. EVID. CODE § 1119(b) (West Supp. 2006)).

136. *Id.* (quoting CAL. EVID. CODE § 1120(a)).

137. SCMA Brief, *supra* note 15, at 9.

138. *Id.*

they intend for their bad evidence never to be used against them. Not surprisingly, parties will jump at this opportunity.

It does little to solve the problem to say that the party invoking mediation protection "should not be allowed to use that evidence in subsequent litigation."[139] Presumably a party would not *want* to use damaging evidence at trial, so preventing it from doing so is not a deterrent to the misuse of mediation privilege. Additionally, parties will choose not to admit that good evidence was prepared for use only at the mediation, which will allow them to introduce it later at trial. In the end, both approaches allow for mediation to be used as a dumping ground for bad evidence while still preserving good evidence for later use at trial.

C. Including Additional Safeguards Against the "Shielding" of Evidence

I propose that courts adopt an interpretation of the Preparation Clause similar to that of the SCMA, but with additional safeguards. First, courts should apply the protections of mediation confidentiality to evidence and items that were prepared for use only at mediation, as suggested by the SCMA.[140] Second, the courts should adopt the procedural requirements that parties declare that the evidence was prepared only for mediation at the time it is introduced, and also that the parties be prohibited from using that evidence in later litigation proceedings.[141]

The SCMA's proposals would go a long way toward encouraging mediation, but they do not go far enough. Therefore, courts should also place the burden of proof on the party who is seeking to have the mediation evidence excluded from trial. For example, in the case of the tenants in *Rojas*, it would be the defendants' burden to prove at trial that the photographs and data sample compilations were prepared only for mediation, and not for possible use at trial as well. Placing the burden on the party seeking to exclude the evidence is not inconsistent with the legislature's and the Court's desire to protect mediation confidentiality. Rather, it simply demands that the party seeking the protections of mediation found in CEC section 1119 must show that it is in fact entitled to those statutory protections.

Placing the burden on the party seeking the benefit of mediation privilege is also consistent with other areas of law where parties assert that information is privileged. For example, in *People v. Velasquez*,[142] the court held

139. *Id.*
140. *See* SCMA Brief, *supra* note 15, at 9.
141. *See id.*
142. 237 Cal. Rptr. 366 (Cal. Ct. App. 1987).

that, in the context of the attorney-client privilege, "[t]he burden is on the party claiming the existence of the privilege to show that it should be protected."[143] Courts acknowledge that, while the doctrine of privilege creates important protections, it also results in the exclusion of potentially relevant evidence and must therefore be strictly construed.[144]

The trial judge in *Rojas* also acknowledged that there was a balance to be struck between the privilege and the importance of admitting relevant evidence when he stated, "This is a very difficult decision . . . because it could well be that there's no other way for the plaintiffs to get this particular material. On the other hand, the mediation privilege is an important one . . . ."[145] Because parties may be prevented from discovering relevant evidence, the party asserting mediation privilege should have the burden of showing that it is entitled to the protections of the statute.

Moreover, the party asserting the privilege will have more knowledge about the purposes for which the information was prepared. It is unfair and disadvantageous to impose the burden on the party trying to admit relevant evidence to show that the opposing party created evidence or documents for purposes other than mediation. This information is almost exclusively in the hands of the party asserting mediation privilege. Therefore, the party who is seeking the protections of section 1119 and has more knowledge concerning the creation of evidence should bear the burden at trial.[146]

An additional distinction should be drawn between parties who were already involved in litigation at the time of the mediation and those who were not. Once the parties have brought themselves before the court, the presumption

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143. *Id.* at 371.

144. *See, e.g.*, City of San Francisco v. Superior Court, 231 P.2d 26, 29–30 (Cal. 1951) ("This privilege is strictly construed, since it suppresses relevant facts that may be necessary for a just decision . . . . The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.") (citations omitted).

145. Rojas v. Superior Court, 93 P.3d 260, 264 (Cal. 2004).

146. *See* CAL. EVID. CODE § 500 (West 1995). CEC section 500 states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." *Id.* The burden of proof in the doctrine of attorney-client privilege is such that,

> [u]nder California law, the party asserting the attorney-client privilege bears the initial burden of proving that a communication has been made in confidence during the course of the attorney-client relationship. Once the party asserting the privilege makes this initial showing, the burden shifts to the party opposing the privilege to show either that the information was not confidential or that it falls within an exception.

Fed. Deposit Ins. Corp. v. Fidelity & Deposit Co. of Md., 196 F.R.D. 375, 380 (S.D. Cal. 2000) (citations omitted). A party asserting that a communication is privileged would have more information about the circumstances under which the communication was made and, therefore, bears the initial burden of showing that the communication is privileged.

should be that items prepared for mediation were prepared for dual purposes. This is an abundantly fair presumption, because once the parties are involved in litigation, it is reasonable to assume that any material prepared for a court-ordered mediation, for example, is actually prepared for both mediation and litigation. Although it would be a rebuttable presumption,[147] this safeguard would go a long way toward ensuring that damaging evidence is not buried in mediation. Where parties forego litigation and adversarial proceedings in favor of mediation, it is more likely that the materials they prepare are only for use at mediation. Although this will not always be the case because the parties may still be considering litigation in the future, they will still have the burden later at trial to show that they are entitled to the protection of mediation confidentiality.

When determining whether a party has overcome the presumption that items were prepared for dual purposes, the first thing that the court should look to is the existence of any contract between the parties that defines the scope of the statute as it relates to their particular case. Parties may wish to contract[148] before a mediation occurs that certain types of documents or evidence are being prepared for use only at mediation and not for dual purposes.[149] In the case of court-ordered mediations, the parties may wish to stipulate before the judge that certain items will be prepared only for the mediation, or that certain materials are being created for dual purposes and not just for the mediation.[150] The court should give great weight to any contract or stipulation

147. Compare this with the doctrine of marital privilege, which presumes that marital communications are privileged. *See* Pereira v. United States, 347 U.S. 1, 6 (1954). The presumption of confidentiality "may be overcome by proof of facts showing that they were not intended to be private." *Id.*

148. *See generally* Max Factor III, *Some Mediation Contracts Need Confidentiality Aspects*, L.A. DAILY J., Sept. 16, 2004, at 7 (arguing that counsel should take contractual precautions prior to mediation if there is concern that opposing counsel will attempt to hide evidence, and arguing that, "[b]efore starting 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'").

149. Although a party could still try to hide evidence, such as by not admitting that a document has already been created before mediation was contemplated, it may still be mutually beneficial for both parties to enter into an agreement before mediation. Both parties may be more willing to run tests or prepare evidence or documents for mediation that will help them reach a mutually beneficial resolution of the dispute. There will always be a risk that a party could manipulate the process to hide bad evidence, but the agreement may be worth the risk depending on the circumstances surrounding the dispute. If an attorney believes that the opposing party has a serious stake in a successful mediation (for example, a party may wish to avoid the expense or negative publicity involved in a full-blown trial), he might be more willing to contract or stipulate that certain materials will be considered as prepared only for mediation. However, if an attorney is suspicious of the opposing party's motivation in entering into a mediation, he could decide not to contract or stipulate beforehand about the future admissibility of evidence at trial.

150. *See* Factor, *supra* note 148, at 7.

entered into by the parties when considering whether evidence was prepared for dual purposes or just for mediation.[151]

Absent an express agreement by the parties, courts should adopt a three-factor balancing test when determining whether a party has overcome the rebuttable presumption that materials were created for dual purposes. The first factor that courts should consider is when the materials were prepared. If a document is written, a photograph is taken, or data is compiled in a report only after mediation has been contemplated, the court should find that to be evidence that the material was prepared *solely* for the mediation and not for possible use at trial as well. On the other hand, if data is collected or a document is written while there is still heated litigation occurring, the court should consider that as evidence that the document was created or the data was compiled for possible use at trial as well.

For example, assume a construction-defect dispute similar to that in *Rojas*. Party A is suing Party B for defective construction resulting in a harmful mold infestation. In October, the parties are involved in heated litigation and are preparing for a full-fledged trial. Also in October, Party B hires an expert to take mold samples and raw data samples from the building. In December, the parties decide to enter into mediation where Party B introduces written compilations of the data samples taken in October. The mediation subsequently fails and litigation resumes.

If Party B later invokes the mediation privilege in an attempt to exclude the written compilations of the data samples taken in October, the court should not find that the compilations were prepared solely for mediation. The fact that the raw data samples were taken while the parties were involved in litigation and before mediation was contemplated provides evidence that the materials were created for dual purposes and therefore, should not be entitled to the protection of mediation privilege. If, on the other hand, the raw data samples were not taken until after mediation had been discussed and the litigation was put on hold, the court should consider that as evidence that the data compilations were created for use only at mediation.

The second factor that courts should consider is the nature and type of document at issue. If a document introduced at mediation uses similar language or takes a position similar to one taken in a court brief, courts should view that as evidence that the document was created for dual purposes. During a dispute, parties will often prepare briefs and arguments that are used interchangeably

151. In some instances a court may still need to determine whether a piece of evidence introduced at mediation is actually covered by the agreement between the parties.

between mediation and trial.[152] Even if a document used at mediation is not identical to a document used at trial, similarities in language, positions taken, and the use of authorities lends credence to the idea that the information was prepared for both purposes. On the other hand, if a document used at mediation has no similarities to documents introduced in court and argues a new and different position, it is more likely that the document was prepared solely for mediation.

The third factor that courts should consider is how the evidence that a party is seeking to exclude relates to other evidence that is not being excluded. If a party is seeking to exclude a small portion of evidence that is part of a larger set of data, the court should be suspicious of the claim that the evidence was prepared solely for the mediation and should be protected. For example, if a party gathers spore-sample tests, air-quality tests, and mold cultures at the same time and then seeks to exclude only the spore samples, it is unlikely that the spore samples were taken for use only at mediation, while the other tests were being taken for possible use at trial.

In applying this factor, the court should consider whether the evidence, in relation to the other evidence in the case, appears to have been gathered or created for an independent purpose. Separate and independent preparation of the evidence a party is seeking to exclude would provide evidence in favor of overcoming the rebuttable presumption that the evidence was created for dual purposes. However, attempting to carve out a piece of harmful evidence or exclude only a portion of the evidence should provide evidence in favor of the presumption that the material was prepared for dual purposes.

CONCLUSION

The California Supreme Court and the California Legislature have both demonstrated their clear intent to encourage mediation and to protect both communications and evidence in mediation. However, these goals are threatened by the uncertainty left by the *Rojas* decision.[153] In order to further the goal of encouraging mediation, courts should interpret section 1119 in a way that prevents mediation from being used as a strategic forum for burying evidence, while still protecting the sanctity of mediation.

Encouraging mediation requires a balance between providing the parties with confidentiality and ensuring that this important protection is not

152. *See supra* text accompanying notes 88–89.

153. *See* Erik Paul Smith, Comment, *The Uncertainty of Community Property for the Tortious Liabilities of One of the Spouses: Where the Law Is Uncertain, There Is No Law*, 30 IDAHO L. REV. 799, 823 (1994) ("When the law is uncertain, the people . . . cannot be confident in their dealings nor can . . . lawyers be sure of their advice.").

abused.[154] Courts can mitigate the potential misuse of the mediation privilege after *Rojas* by interpreting the Preparation Clause according to the suggestions of the SCMA, and by placing the burden of proof on the party invoking the privilege.[155] By providing these additional protections, courts can ensure that mediation will continue to be a valuable alternative to litigation without becoming a vehicle for hiding damaging evidence.

The good news is that until courts decide to address this issue, some of the concerns noted above may be overstated, or at least less damaging to the discovery process in some instances. The Court in *Rojas* made clear that the underlying facts contained in writings are discoverable, despite introduction of the writing in mediation.[156] In many instances, evidence that was introduced in mediation will be discoverable in other ways, albeit with more time and expense. However, as the trial judge admitted in *Rojas*, sometimes there will be no other way for parties to acquire the information they need[157] because it might have been subsequently destroyed or demolished.

The danger of evidence being destroyed is especially pertinent when a litigant was not a party to the mediation, as was the case in *Rojas*.[158] By the time the tenants in *Rojas* discovered the possible cause of their illnesses, parts of the building had already been demolished and rebuilt.[159] As a result, the tenants were unable to take their own samples; the underlying facts of their case had been destroyed.[160] Although cases like *Rojas* may be the exception rather than the rule, attorneys and litigants still need to be wary and take special care until the courts provide further guidance.[161]

154. *See supra* notes 23, 83 and accompanying text.

155. *See supra* Part III.C.

156. *See supra* note 69 and accompanying text.

157. Rojas v. Superior Court, 93 P.3d 260, 264 (Cal. 2004).

158. *Id.* at 262.

159. *Id.*

160. Third parties who are not parties to the original dispute are particularly vulnerable to the harsh consequences of mediation privilege. Additionally, it may be in the best interest of both of the original parties to have the evidence excluded or destroyed for fear of being named as defendants in a future action. Unlike the original parties, third parties cannot protect themselves contractually before the mediation takes place to ensure that valuable evidence is not lost or improperly hidden.

161. *See generally* Gilmore, *supra* note 11 (recommending attorneys involved in early mediation to undertake document discovery before the first mediation session and to reach agreements with opposing counsel as to what will be deemed "prepared for mediation"); *see also* Factor, *supra* note 148, at 7.

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