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Perilous Intersection of Rojas v. Los Angeles Superior Court and the Calderon Act - California Civil Code Section 1375

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The Perilous Intersection of *Rojas v. Los Angeles Superior Court* and the Calderon Act—California Civil Code Section 1375

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The Confidentiality of Expert Reports and Other Written Materials Produced During Mediation of Homeowner Association Construction Defect Claims Is in Jeopardy

I. INTRODUCTION

Participants in mandatory mediations of homeowner association ("HOA")[1] construction defect claims may be in for an ugly surprise if their participation is based upon the misapprehension that information exchanged during mediation, including materials prepared by their non-testifying expert consultants,[2] are protected from later disclosure to third parties by a mediation privilege. A recent California Second District Court of Appeal decision, *Rojas v. Los Angeles Superior Court*,[3] attempts to carve dangerous new exceptions to the broad confidentiality protections given to mediation communications under California Evidence Code sections 703.5 and 1119-1124.[4] Given its potentially harmful implications for the confidential mediation process in California, particularly with respect to mandatory mediations of HOA construction defect claims, it is unsurprising that on January 15, 2003, the California Supreme Court granted petitions for review of this decision.[5]

If *Rojas* is upheld, writings prepared by experts for mediation would be exposed to disclosure to third parties after the mediation concludes. Arguably, these third parties include parties who were obligated to participate in the mandatory mediation proceeding but did not (such as recalcitrant insurance

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1. The term "homeowner association" is used herein as synonymous with the term "association" as defined in California Civil Code section 1351(a) to mean "a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development." The term "common interest development" is defined in Civil Code section 1351(c) as "any of the following: (1) A community apartment project. (2) A condominium project. (3) A planned development. (4) A stock cooperative."

2. The terms "non-testifying expert/consultant" and "expert" are used interchangeably herein to refer to professional consultants who have been engaged by a party's attorney to provide analysis, testing and expert opinions regarding construction defect claims, but have not yet been designated to testify at trial pursuant to California Evidence Code section 721.

3. 126 Cal. Rptr. 2d 97 (Ct. App. 2002), *review granted*, 63 P.3d 212 (Cal. 2003).

4. CAL. EVID. CODE §§ 703.5, 1119-1124 (West 2003). All statutory citations herein are to California statutory codes.

5. *Rojas*, 63 P.3d at 212.

companies), and parties who later can convince a sympathetic court on a case-by-case basis that their "need" for the expert materials outweighs the abstract importance to the mediation privilege of enforcing statutory safeguards that were designed to provide near blanket confidentiality for mediation communications. As a result of this type of potential exploitation and exposure, the willingness of attorneys and their clients to be forthcoming in disclosure during mediation likely will be reduced substantially. This chilling effect threatens the viability of mediation as a meaningful dispute resolution alternative to litigation because effective mediation depends in large part upon candid and open communication among participants. The impact of *Rojas*, however, will be particularly acute with respect to mediations involving HOA construction defect claims because, by nature, the success of these mediations depends upon the free exchange of an immense amount of expert reports, test data and opinions. Consequently, before participating in mandatory mediation proceedings pursuant to Civil Code section 1375[6] (known as the "Calderon Act"),[7] HOA Board members, attorneys, experts, developers and builders should thoroughly acquaint themselves with the potential ramifications of the *Rojas* decision pending the California Supreme Court's review, and plan their mediation communications and presentations accordingly.

II. ANALYSIS

A. *The Calderon Act*

The newly revised Calderon Act became effective July 1, 2002.[8] The Act provides that, before an HOA may file a complaint for construction-related defects against a builder, developer or general contractor, the HOA must notify the party or parties it intends to sue of the HOA's claim.[9] The parties must participate in a 180-day dispute resolution process that is designed to provide a forum for the early exchange of expert reports and other information among the builder, developer, design professionals, subcontractors, insurance companies and HOA, for the purposes of narrowing issues and eliminating costly discovery, thereby facilitating early resolution of construction defect claims.[10]

The Calderon Act sets forth a detailed procedure for the parties to prepare for a mandatory non-binding mediation to be presided over by a "dispute resolution facilitator."[11] Among other things, the HOA is obligated to provide an initial

6. CAL. CIV. CODE § 1375 (West 2002).

7. *Id.* §§ 1375, 1375.05, 1375.1 (West 2003). The term "Calderon Act" is used herein to refer to Civil Code sections 1375, 1375.05, and 1375.1. This article focuses narrowly on those provisions relating to the parties' obligations to prepare for, and participate in, Calderon mandatory mediation proceedings, including the preparation of expert materials.

8. *Id.*

9. *Id.* § 1375.

10. *Id.*

11. *Id.*

defect list to the builder, developer or general contractor who has been put on notice of the claim (the "Respondent").[12] The Respondent, in turn, may ask for a meeting with the Board of Directors for the HOA to discuss the claim.[13] The Calderon Act provides that "the discussions at [this] meeting are privileged communications and are not admissible in evidence in any civil action" (such as a lawsuit or arbitration), unless the parties consent to their admission.[14]

Within sixty days, the Respondent and the HOA must provide each other with access to their own files for information that might lead to the discovery of admissible evidence.[15] For instance, the Respondent must provide plans, specifications, and subcontract files to the HOA.[16] The HOA must provide access to maintenance records, survey questionnaires, and testing results.[17] To the extent that any party claims that its files are privileged, that party must prepare and deliver a privilege log identifying the documents withheld.[18]

Also within sixty days, the Respondent must notify "all subcontractors, design professionals, their insurers," and any other potentially responsible parties and their insurers of the HOA claim, and the opportunity to participate in testing, inspections and the selection of the dispute resolution facilitator (usually a professional mediator or Special Master).[19] This notice must also contain warnings that the right to challenge the selection of the dispute resolution facilitator and the right to conduct testing and inspections may be waived if the recipient of the notice does not participate in the process as scheduled during the 180-day period.[20] Upon receipt of this notice, the subcontractor or design professional is obligated to acknowledge receipt of the notice, provide the HOA and Respondent with specified information regarding its insurance coverage, and place its insurance carrier(s) on notice of the claim.[21]

Within 100 days, a "case management meeting" is held, and a case management statement is prepared with the assistance of the dispute resolution facilitator.[22] This statement outlines the procedure and timing for (1) the "[e]stablishment of a document depository," (2) the "[p]rovision of a more detailed list of defects" by the HOA, (3) nonintrusive inspections, (4) invasive testing, and (5) preparation of a comprehensive settlement demand by the HOA so that the parties can meaningfully participate in mediation.[23]

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12. *Id.* § 1375(b)(1)-(5).

13. *Id.* § 1375(d); *see also* § 1363.05(b) (stating that the Board is authorized to meet in executive session for this meeting).

14. *Id.* § 1375(d).

15. *Id.* § 1375(e)(1).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* § 1375(e)(2).

20. *See id.* (providing the required content of the notification).

21. *Id.* § 1375(e)(2)(A)-(B).

22. *Id.* § 1375(f)-(h).

23. *Id.* § 1375(h)(1)-(6).

The case management statement must also provide a date and time for a mediation to occur among all the parties.[24] Upon agreement of all parties, the statement may also provide for "the exchange of consultant or expert photographs; expert presentations; expert meetings; or any other mechanism" the parties deem appropriate to resolve the dispute.[25] The mediation and all other exchanges of information, presentations and expert meetings must take place within 180 days, unless an extension of time is obtained by agreement of the parties.[26]

Subject to a limited list of exceptions, various penalties are associated with a party's failure to attend and participate in the mediation, including restrictions on the party's right to later conduct its own testing and inspections, and its ability to object to any settlement reached.[27] While penalties may apply for a failure to participate, the Calderon Act contains no provision for a non-participating party to obtain expert witness materials paid for by another party who exchanged such materials at the previous mediation. Indeed, Civil Code section 1375(*l*) specifically provides that "all defect lists and demands, communications, negotiations, and settlement offers made in the course of the prelitigation dispute resolution process provided by this section shall be inadmissible pursuant to Sections 1119 to 1124, inclusive, of the Evidence Code and all applicable decisional law."[28]

Thus, according to section 1375(*l*), the confidentiality of Calderon mediation communications depends upon the protections afforded by Evidence Code sections 1119-1124 and applicable published court decisions interpreting those provisions.[29] As discussed more fully below, until recently, these statutes provided for almost blanket confidentiality protection of mediation communications. Within the past several years, however, this privilege has been steadily eroded by court decisions that impose new, nonstatutory exceptions to the mediation privilege.

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24. *Id.* § 1375(h)(8).
25. *Id.* § 1375(i).
26. *Id.* § 1375(c).
27. *Id.* § 1375(e). Penalties will not apply when:

> (1) [A]n insurer for a subcontractor or design professional . . . did not [receive notice of the claim] at least 30 days prior to the commencement of inspections or testing . . . . (2) [T]he insurer's insured did not participate in [the testing] . . . . (3) [T]he insurer has, after receiving notice of a complaint . . . retained separate counsel, who did not participate in the . . . dispute resolution process, to defend its insured as to the allegations in the complaint. (4) [I]t is reasonably likely that the insured would suffer prejudice if additional inspections or testing are not permitted. [And] (5) [t]he information obtainable through the proposed additional inspections or testing is not available through any reasonable alternative sources. . . .

Id. § 1375.05(c).
28. *Id.* § 1375(*l*).
29. *Id.*

B. *Confidentiality and the Mediation Privilege*

If polled, most attorneys would probably acknowledge that they participate in mediations with the understanding that their mediation communications, including oral discussions and the exchange of expert written materials prepared specifically for mediation, are protected from later disclosure by a "mediation privilege." In addition to this "privilege," it is not uncommon for parties and their counsel to sign a stipulation prior to the commencement of mediation affirming the confidentiality of the anticipated mediation communications. These stipulations serve to enhance the perception on the part of mediation participants that the mediation is a confidential proceeding.

In California, confidentiality protection for mediation communications is provided by a statutory scheme that includes Evidence Code sections 703.5, 1119 (and its predecessor section 1152), and 1121. While the confidentiality protections provided by these statutes do not technically constitute a "privilege," the concept of a mediation privilege springs from these statutes. As such, the term "mediation privilege" is used loosely by courts, legal professionals and in this article to refer to the statutory confidentiality protections established by the Evidence Code.

This statutory scheme recognizes that a cornerstone of effective mediation is confidentiality. During mediations that occur in the litigation context, parties are often encouraged to discuss candidly the weaknesses and strengths of their legal positions and the evidence supporting their claims or defenses. Such discussions facilitate early resolution of lawsuits because parties are better able to assess, understand and evaluate their own positions and those of their adversaries. Maximization of open communication during mediation is difficult to achieve, however, unless litigants have assurance that the information they reveal will not be disclosed to their adversaries or other third parties without their permission, and that the information will not be exploited or otherwise used to their disadvantage during subsequent judicial proceedings in the same or another lawsuit. This assurance can be provided in several ways, including rules of evidence, statutes, court-created privileges, contracts (or stipulations), and court-issued protective orders. The key to effective use of any method is that it must be reliable in achieving confidentiality. In California, the most consistently utilized manner of achieving confidentiality in mediation is either by contract (stipulation of the parties) or by enforcement of the statutes contained in the Evidence Code.

C. *The California Evidence Code*

Evidence Code section 703.5 provides, in part, that a mediator is not competent to testify in any subsequent civil proceeding as to any statement, conduct, decision,

or ruling that occurred during mediation.[30] Further confidentiality protection is afforded by Evidence Code section 1119, which states in pertinent part:

> (b) 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.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.[31]

Evidence Code section 250 defines the term "writings" broadly to mean any "means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof."[32] California courts have construed this definition broadly to include photographs, videos, and tape recordings.[33] Expert prepared materials, photographs, videos, and raw test data fall neatly within the definition of the term "writings" and the provisions of section 1119.[34] Finally, Evidence Code section 1121 prohibits any person, including a mediator, from submitting to a court a mediator's report, evaluation, assessment, recommendation or finding of any kind "concerning a mediation conducted by the mediator" unless the parties to the mediation agree otherwise.[35]

While these statutes provide unambiguous confidentiality protection, there are several statutory exceptions to the scope of protection afforded. For example, Evidence Code section 1120 provides that evidence otherwise admissible or discoverable is not protected by the mediation privilege purely because it has

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30. California Evidence Code section 703.5 reads:

> 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, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Id. § 703.5 (West 2003).

31. *Id.* § 1119.

32. *Id.* § 250.

33. *See, e.g.*, Jones v. City of Los Angeles, 24 Cal. Rptr. 2d 528, 531-32 (Ct. App. 1993) (discussing admissibility of photographs and videos).

34. *See* CAL. EVID. CODE §§ 250, 1119 (West 2003).

35. *Id.* § 1121.

been introduced or used during mediation.[36] In the context of a Calderon mediation proceeding, section 1120 covers, for example, items such as the plans, specifications and subcontract files of a general contractor that existed prior to and independent of the Calderon mediation proceeding, and which the general contractor is obligated to turn over to the HOA pursuant to Civil Code section 1375(e)(1).[37] The mere introduction of these materials into a mediation proceeding does not convert these otherwise admissible and discoverable documents into privileged materials according to section 1120.[38]

Another statutory exception exists in Evidence Code section 1123, which provides in part that a written settlement agreement prepared during mediation is subject to admission if the agreement is signed by the parties to the settlement and (1) "provides that it is admissible or subject to disclosure," (2) "provides that it is enforceable or binding or words to that effect," (3) "all parties . . . agree in writing, or orally in accordance with [Evidence Code] Section 1118, to its disclosure," or (4) "[t]he agreement is used to show fraud, duress,"[39] or illegality that is relevant to an issue in dispute. These and other statutory exceptions to the mediation privilege set forth in the Evidence Code establish clear guidelines for limiting abuse and misuse of the mediation process and mediation privilege. According to the California Supreme Court, absent an express statutory exception, Evidence Code "sections 703.5, 1119, and 1121, unqualifiedly bar[] disclosure of communications made during mediation . . . ."[40]

D. The Mediation Privilege Under Attack

Despite the breadth of this explicit statutory confidentiality protection, recent federal and state court decisions have carved new, nonstatutory exceptions to the mediation privilege. In *Rinaker v. Superior Court*,[41] the Third District California Court of Appeal held that the mediation confidentiality provisions of Evidence Code section 1119 must yield to a juvenile's due process right to use prior

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36. In its entirety, section 1120 reads:

> (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation 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.
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> (b) This chapter does not limit any of the following:
>
> (1) The admissibility of an agreement to mediate a dispute.
>
> (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
>
> (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

Id. § 1120.

37. *See id.* §§ 1120, 1375(e)(1).

38. *See id.* § 1120.

39. *Id.* § 1123.

40. Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc., 25 P.3d 1117, 1126 (Cal. 2001).

41. 74 Cal. Rptr. 2d 464 (Ct. App. 1998).

inconsistent statements of a witness made during mediation for purposes of allowing the juvenile to effectively confront and impeach the witness in a later juvenile delinquency proceeding.[42]

In *Rinaker,* a victim purported to witness several juveniles throw rocks at his automobile and he accused those juveniles of doing so.[43] The victim and the juveniles agreed to a confidential mediation during which the victim/witness allegedly admitted that he did not really see who had thrown the rocks at his vehicle.[44] Later, during the juvenile delinquency proceedings, the juveniles sought permission to compel the mediator to testify as to the prior inconsistent statements of the victim/witness.[45] The mediator objected to testifying, citing, among other things, the provisions of section 1119 prohibiting such testimony, and also suggesting that the juveniles had waived their right to compel such testimony when they voluntarily agreed to participate in a confidential mediation.[46] The juvenile court judge found that the juvenile delinquency proceeding was not a civil action and therefore section 1119, which by its own terms applies only to civil actions, did not apply.[47] Accordingly, the juvenile court granted the juveniles' motion to compel the mediator's testimony.[48]

On appeal, the court held that the juvenile delinquency proceeding was a civil proceeding, not a criminal proceeding and, therefore, the confidentiality provisions of section 1119 did apply, but that there are circumstances where these provisions must yield to a juvenile's due process right to confront and effectively cross-examine witnesses.[49] The court, however, made it clear that any decision to "breach the confidential mediation process" should be given careful consideration.[50] In this regard, the court issued a peremptory writ of mandate directing the juvenile court to vacate its order compelling the mediator to testify under oath and instructing the juvenile court judge to instead first hold an in camera hearing with the mediator to determine whether a breach of the mediation privilege was compelled in order for the juveniles to effectively exercise their due process rights.[51] According to the court, the in camera hearing should involve

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42. *Id.* at 466.

43. *Id.* at 467.

44. *Id.*

45. *Id.*

46. *Id.* at 468.

47. *Id.*

48. *Id.*

49. *Id.* at 468-69. As to the mediator's contention that the juveniles had waived their right to compel his testimony by reason of their agreement to participate in a voluntary mediation, the court found that there was no knowing waiver on the part of the juveniles (i.e., the juveniles did not know at the time they signed the agreement that the witness would make statements during the mediation that would tend to exonerate them and that they would need to compel the mediator to testify as to those statements in order to prevent perjury and effectively cross-examine the victim witness). *Id.* at 471-72.

50. *See id.* at 472-73 (discussing the consideration of "factors bearing upon whether the minors' constitutional right of effective impeachment compels breach of the confidential mediation process.").

51. *Id.*

a three-pronged determination: (1) whether the mediator is competent to testify (i.e., did the mediator actually hear the statements), (2) the probative value of the statements (i.e., are the statements trustworthy or, rather, made for purposes of compromise), and (3) whether the evidence sought can be introduced without invading the mediation privilege (i.e., are there other equally or more credible witnesses to the statements).[52] Thus, although the *Rinaker* court created a nonstatutory exception to the strict provisions of section 1119, it authorized use of the exception under limited circumstances and subject to the three-pronged determination described above.

In *Olam v. Congress Mortgage Co.*,[53] a federal magistrate judge held that a mediator can be compelled to testify for purposes of assisting the court in determining a party's disputed capacity to sign a settlement agreement reached during mediation.[54] In *Olam*, the plaintiff had defaulted on a memorandum of agreement to settle (MOA) signed by her and her counsel at the conclusion of an extended voluntary mediation.[55] Although the MOA contemplated that a final settlement agreement would be drafted and signed by the parties following the mediation, the MOA expressly stated that the MOA, which contained the material terms of the settlement reached, was a binding, enforceable agreement.[56] The defendant sought enforcement of the MOA.[57] The plaintiff asserted that the MOA was not enforceable because, for various psychological and physical health reasons, she was incapable "of giving legally viable consent" to the MOA.[58] Significantly, both the plaintiff and defendant waived relevant confidentiality protections for purposes of allowing the court to determine the issue of competency.[59]

In order to determine the competency issue, the judge concluded that it was necessary to consider the mediator's perception of the plaintiff's competency during the mediation because the mediator was the most neutral eyewitness participant.[60] The judge assumed, without asking, that the mediator would object to being compelled to testify based upon the provisions of Evidence Code section 703.5, which provides that a mediator is not competent to testify on such matters.[61] Despite the lack of waiver on the part of the mediator, the court found that, on balance, there was justification to compel the mediator to testify despite the plain language of section 703.5, because the probative value of the mediator's testimony, coupled with the fact that there was no other equal or better neutral

52. *Id.*
53. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).
54. *Id.* at 1136-39.
55. *Id.* at 1117.
56. *Id.*
57. *Id.* at 1118.
58. *Id.* at 1117.
59. *Id.* at 1118-19.
60. *Id.* at 1127.
61. *Id.* at 1130; CAL. EVID. CODE § 703.5 (West 2003).

source for such information, outweighed the public policy interest in maintaining the mediation privilege associated with such testimony.[62] The judge specifically noted, however, that if the plaintiff and defendant had not voluntarily waived confidentiality, the analysis for this balancing test would have been much more difficult.[63] Indeed, it is not clear that the court would have reached the same conclusion to compel the mediator to testify.

The *Rinaker* and *Olam* decisions triggered alarms in the mediation community because they represented a new trend by the courts to create nonstatutory exceptions to the mediation privilege. The California Supreme Court, however, attempted to halt this trend in *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, even though in dicta it approved of the *Rinaker* and *Olam* decisions.[64]

In *Foxgate Homeowners' Ass'n*, the California Supreme Court was asked to determine whether a mediator's report concerning the bad faith conduct of a mediation participant was admissible for consideration by the trial court when it ruled on a motion for sanctions.[65] The appellate court had earlier reversed a superior court order awarding sanctions against the defendants for alleged bad faith mediation conduct, and remanded the matter back to the superior court so that the superior court could enter an order reciting in detail the conduct or circumstances justifying the order in accordance with Civil Procedure Code section 128.5.[66] However, in its opinion reversing the sanction order, the appellate court specifically rejected the defendants' contention that a mediator report of bad faith conduct to the superior court was barred by the provisions of Evidence Code section 1121 and that the superior court should not be entitled to consider the report when ruling on the motion for sanctions.[67] The appellate court concluded that even though Evidence Code sections 1119 and 1121 were unambiguous and provided for almost blanket confidentiality of mediation communications, it would be absurd to construe the two statutes to protect a party from its own bad faith conduct by prohibiting a mediator from reporting such conduct to the trial court in connection with a party's motion for sanctions.[68] Based upon the rule that judicial construction of an otherwise unambiguous statute is permitted where application of the statute according to its literal terms would lead to an "absurd" result or thwart the manifest purpose of the Legislature, the appellate court determined that it was appropriate to create a nonstatutory exception to the confidentiality requirements of sections 1119 and 1121 that would treat as admissible to the trial court a mediator's report of bad faith conduct.[69]

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62. *Olam*, 68 F. Supp. 2d at 1135-39.
63. *Id.* at 1133.
64. Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 25 P.3d 1117 (Cal. 2001).
65. *Id.* at 1119.
66. *Id.* at 1122.
67. *Id.* at 1122-23.
68. *Id.* at 1119, 1122.
69. *Id.* at 1122-23.

The California Supreme Court affirmed the lower court's decision to reverse the sanction award, but held that sections 1119 and 1121 were not subject to judicial construction because the California Legislature had already considered and decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to sanctions.[70] The supreme court also held that Evidence Code section 1119 is so clear and unambiguous that a mediator may not provide any information to a court about the bad faith conduct of a party, even when the conduct rises to the level of deserving to be sanctioned by a court.[71] The legislative purpose behind section 1119, as affirmed by the supreme court, is to encourage mediation by providing for confidentiality of all communications: "[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 other adjudicatory processes.'"[72]

Thus, under the *Foxgate* decision and Civil Code section 1375(*l*) of the Calderon Act, mediation communications, including expert reports, testing data and photographs that are prepared specifically for a Calderon mandatory mediation should be protected by the mediation privilege afforded by the unambiguous language of Evidence Code section 1119. The *Rojas* decision, however, has placed the confidentiality of those materials in jeopardy and may thwart the legislative purpose of promoting the frank exchange of information at mediation.

E. Rojas v. Los Angeles Superior Court

Until the California Supreme Court granted review, the *Rojas* decision constituted a very dangerous legal precedent for HOA construction defect claims that are subject to mandatory mediation proceedings under the Calderon Act because the fact pattern of *Rojas* is strikingly similar to that of a typical HOA construction defect claim.

1. Rojas' *Underlying Litigation*

The underlying litigation in *Rojas* involved a claim by the owners of an apartment complex (collectively "Coffin") for construction defects.[73] In 1996, Coffin sued the builders of the apartment complex and various other subcontractors

70. *Id.* at 1128.

71. *Id.* at 1126, 1128.

72. *Id.* at 1126 (citations omitted).

73. Rojas v. Los Angeles Superior Court, 126 Cal. Rptr. 2d 97, 100-01 (Ct. App. 2002), *review granted*, 63 P.3d 212 (Cal. 2003).

and contractor entities (collectively "Builder Defendants"), alleging that numerous construction defects had caused water intrusion in the apartment buildings, resulting in the presence of toxic molds and other microbes throughout the complex.[74]

The trial judge entered an order known as a "Case Management Order" (CMO) that appointed a Special Master, stayed discovery, and required all parties to attend and participate in a mediation.[75] To facilitate mediation of the claim, the CMO also required Coffin to apprise the Builder Defendants of all of the construction defects they claimed existed on the property, with detailed information concerning the type, extent and location of all such defects, as well as to prepare and produce a repair report setting forth in detail the necessary repairs and costs for such repairs.[76]

Following noninvasive and invasive testing, and other investigation of the property, including air sampling for the presence of mold, by both Coffin and the Builder Defendants, Coffin's legal team turned over to the Builder Defendants at the mediation expert-prepared written materials, together with a preliminary defect list, "an investigation binder containing hundreds of photographs of the [a]partment [c]omplex," and other test reports and test data derived from their investigation.[77] The materials turned over by Coffin had been prepared and produced by a team of consultants hired by Coffin's counsel.[78] Significantly, these materials were prepared for the purpose of exchanging information at the mediation, as ordered by the court in the CMO.[79]

In late 1998, as the underlying litigation proceeded, one of the apartment buildings was closed and its tenants were relocated, some to the other two buildings of the apartment complex.[80] Coffin eventually settled the lawsuit against the Builder Defendants in April 1999 and had repairs and abatement of the apartment buildings completed.[81]

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74. *Id.* at 100.

75. *Id.*

76. *Id.*

77. *Id.* at 100 & n.1, 101.

78. *Id.* at 103.

79. *Id.* at 102-03.

80. *Id.* at 101.

81. *Id.* The settlement agreement provided for the confidentiality of the terms of the settlement and also stated:

> In addition, 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 §§ 1119 and 1152, and it is hereby agreed that 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.

2. Rojas *Trial Court Proceedings*

In August 1999, subsequent to Coffin's settlement with the Builder Defendants, a group of tenants (collectively the "Rojas Plaintiffs") sued Coffin and the developers of the apartment complex (collectively the "Coffin Defendants"), contending that the water intrusion at the apartment complex had permitted microbes to infest the property, causing the Rojas Plaintiffs to suffer serious health problems.[82] They also contended that the Coffin Defendants had concealed the construction defects and microbe infestation from them.[83]

The Rojas Plaintiffs served discovery requests on the Coffin Defendants, demanding the production of, among other things, expert witness materials that had been prepared for mediation during Coffin's earlier litigation against the Builder Defendants.[84] When Coffin objected and refused to produce the materials demanded based upon the mediation privilege of Evidence Code section 1119, the Rojas Plaintiffs filed a motion to compel production, arguing that: (1) most of the documents demanded were purely "evidentiary" or "non-derivative" materials and not protected by the attorney work product doctrine; (2) such material included information regarding the location of physical evidence and location and identity of witnesses; and (3) to the extent that any of the materials demanded were "derivative" materials (i.e., containing attorney [or consultant] interpretations or evaluations of fact or law), such items were subject to disclosure upon a showing of good cause.[85]

The Rojas Plaintiffs contended that good cause existed because they had no other means by which to obtain the requested information since Coffin had remediated the property and the alleged defective and unhealthful conditions no longer existed.[86]

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82. *Id.*

83. *Id.* The Second Amended Complaint filed by the Rojas Plaintiffs alleged "causes of action for negligent maintenance of premises, breach of the warranty of habitability . . . , concealment, breach of the covenant of quiet enjoyment, nuisance, strict liability, negligence, and intentional infliction of emotional distress." *Id.* at 101 n.2.

84. *Id.* at 101-02. The request included a demand for:

> (2) "[A]ll actual physical evidence evidencing the condition of the buildings, including, without limitation, photographs, videotapes, test samples, test reports (such as spore and colony counts), and any physical evidence that was removed from the buildings and saved (drywall, plumbing, framing members, etc.)"; (3) writings describing the buildings, including written notes of observations made during building inspections, and witness interviews—"[t]his category would also include notes describing what the witnesses did and saw while conducting inspections or repairs of the buildings"; (4) and (5) writings evidencing the opinions of expert consultants, both those communicated to the defendants and those not communicated to the defendants.

Id.

85. *Id.* at 102.

86. *Id.*

Judge McCoy, the trial court judge, held an in camera inspection of the materials sought by the Rojas Plaintiffs. He ruled that the compilations of materials that had been prepared for and produced at the prior mediation held in the underlying litigation were protected by the mediation privilege set forth in Evidence Code section 1119, and that the Rojas Plaintiffs were not entitled to obtain them from the Coffin Defendants.[87]

The Rojas lawsuit was thereafter reassigned to Judge Mohr.[88] The Rojas Plaintiffs filed a new motion to compel production of, among other things, (1) photographs contained in the investigative binder and other compilations exchanged by Coffin and the Builder Defendants at the prior mediation; (2) videotapes, including videotapes of the project prepared by expert witnesses that were utilized during the mediation; (3) all raw data from "bulk sampling for mold spores"; and (4) all results from destructive testing.[89]

The Rojas Plaintiffs claimed that Judge McCoy's prior ruling supported their request for this information because it prohibited disclosure of the mediation materials that covered only the "compilation" materials produced at the mediation, and did not address whether the mediation privilege attached to individual photographs or other evidence.[90] They also contended that their inability to obtain elsewhere the raw data and photographic images constituted good cause for the production of the requested materials, and that photographs and raw data, such as mold spores, "did not contain attorney opinion, impression or analysis."[91]

The Coffin Defendants opposed this second motion to compel "on the grounds that the photographs and other raw evidence [were] prepared 'for . . . mediation'" and, therefore, were protected from disclosure by the express terms of Evidence Code section 1119.[92] The Coffin Defendants contended that if they had known that the mediation privilege would not apply to this material, they would not have produced it at the mediation, including the photographs and other raw material.[93] Additionally, the Coffin Defendants contended that the photographs were advocacy materials taken for the purpose of the mediation and that they were more than just a group of photographs, but rather "constituted a report of their experts" that revealed the experts' impressions of the construction defects (e.g., the photographs had arrows superimposed on them showing where the expert witness believed defects to exist).[94]

87. *Id.*
88. *Id.*
89. *Id.* at 102-03.
90. *Id.* at 103.
91. *Id.*
92. *Id.* at 103-04.
93. *Id.* at 103.
94. *Id.*

Judge Mohr ruled that the materials sought by the Rojas Plaintiffs were protected from disclosure, but expressed her own reservation that protecting this material from disclosure makes it possible for a party to use the mediation privilege as a means to make evidence "disappear" by simply producing the material at a mediation.[95] The Rojas Plaintiffs then filed a petition for a writ of mandate by the Court of Appeal directing Judge Mohr to vacate her order and to enter a new order compelling production of the materials sought by the Rojas Plaintiffs.[96]

3. Rojas *Appellate Court Proceedings*

The Court of Appeal granted the petition for writ[97] and held that non-derivative materials such as raw test data and photographs prepared by expert witnesses for purposes of mediation are not protected by Evidence Code section 1119.[98] The court based its reasoning on the language of Evidence Code section 1120, which it interpreted as a limitation on the scope of the mediation privilege set forth in section 1119, designed by the Legislature to prevent evidence from being introduced in mediation solely to preclude it from later discovery and to place a limit on the otherwise broadly stated mediation privilege set forth in section 1119.[99] Based upon this interpretation, the court concluded that section 1119 does not protect "evidence," but that sections 1119 and 1120, taken together, protect only the substance of negotiations and communications in furtherance of the mediation, not the factual basis of the negotiations.[100] Consequently, the court concluded, even if evidence is introduced at a mediation (whether or not prepared by expert witnesses expressly for use at such mediation), the mediation privilege does not necessarily protect it.[101]

Having found that not all evidence prepared for or used at a mediation is protected by section 1119, the court next analyzed the scope of protection that should be afforded such evidence by applying the analytic framework used to determine whether evidence is protected by the attorney work product doctrine.[102] Under California law, an attorney's effort, research, and thoughts in the preparation of a case (and those of persons employed by him, such as expert witnesses) are protected by the attorney work product doctrine to prevent others

95. *Id.*

96. *Id.* at 100.

97. *Id.* at 110-11.

98. *Id.* at 106.

99. *Id.* at 109. As earlier stated, section 1120 provides that "[e]vidence otherwise admissible . . . outside of a mediation" does not become privileged "solely by reason of its introduction . . . [into] a mediation." CAL. EVID. CODE § 1120 (West 2003).

100. *Rojas*, 126 Cal. Rptr. 2d at 107-08.

101. *Id.* at 107.

102. *Id.* at 108-10.

from taking undue advantage of an attorney's industry and efforts.[103] This doctrine provides protection for an attorney's work based upon a distinction between "derivative" and "non-derivative" materials:[104]

> Three levels of protection exist. Core work product, i.e., material solely reflecting an attorney's "impressions, conclusions, opinions, or legal research or theories," is entitled to absolute protection from discovery. (Citations omitted.) Qualified protection exists for work product which is an amalgamation of factual information and attorney thoughts, impressions, conclusions. (Citations omitted.) Such derivative materials would include charts and diagrams, audit reports, compilations of entries in documents, . . . appraisals, opinions, and reports of experts employed as non-testifying consultants. Derivative work product will be ordered disclosed if denial of discovery would unfairly prejudice the other party or result in an injustice. (Citations omitted.) The party seeking disclosure must demonstrate good cause, which involves a balancing of the need for disclosure against the purposes served by the work-product doctrine. (Citations omitted.) Lastly, purely factual material receives no work product protection. (Citations omitted.)[105]

The court concluded "that the framework of discoverable materials under the [attorney] work product doctrine closely mirrors the . . . statutory . . . exception" to the mediation privileges contained in section 1120. Therefore, the same sort of analytic framework should be applied to determine the scope of the mediation privilege that is attached to evidence prepared for or used at a mediation under section 1119.[106]

Accordingly, the court ruled that, to the extent that non-derivative materials attached to a compilation that discloses an attorney's or party's "evaluations of the strengths and weaknesses of the case or discloses" the substance of negotiations can reasonably be detached from the compilation (such as photographs taken by expert witnesses), it is not protected by section 1119.[107] The court also ruled that raw test data is not protected to the extent that it can be extrapolated from charts or reports without disclosing the attorney's or party's evaluation or negotiation posture.[108]

With respect to derivative materials, the court construed Evidence Code section 1120 to allow disclosure upon "a showing of good cause, which requires a determination of the need for the materials balanced against the benefit to the

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103. CAL. CIV. CODE § 2018 (West 2003).

104. *Rojas*, 126 Cal. Rptr. 2d at 108-09.

105. *Id.*

106. *Id.* at 110. For the express statutory exceptions set forth in section 1120, see *supra* note 36.

107. *Rojas*, 126 Cal. Rptr. 2d at 110.

108. *Id.*

mediation privilege obtained by protecting those materials from disclosure."[109] Reasoning that the petitioners had no other means to obtain the information sought by them due to the facts that they were not joined in the prior litigation and that the remediation of the construction defects eliminated physical evidence of the defects, the court issued a peremptory writ of mandate directing the trial court to conduct a careful in camera inspection of the materials sought to determine if good cause existed for the disclosure of derivative materials. [110]

F. The Impact of Rojas *on Calderon Act Proceedings*

There is little doubt that, if affirmed, the new case-by-case balancing test imposed by *Rojas* to determine the scope of the mediation privilege attached to expert-prepared materials will seriously discourage the free exchange of such information at Calderon mediation proceedings and encourage parties to adopt a "wait and see" approach for purposes of "piggy-backing" off the labor and expense of other parties. In his dissenting opinion, Justice Perluss decried the *Rojas* majority's gutting of the mediation privilege: "Divining a distinction between 'derivative' and 'non-derivative' materials nowhere found in the statutory scheme and acknowledging only a qualified protection from disclosure even for concededly privileged materials, the majority has now effectively eradicated any significance from the mediation privilege in California."[111]

Under *Rojas*, parties must now carefully consider that non-derivative materials (raw test data, photographs, etc.) may have no mediation privilege.[112] Furthermore, derivative materials may now enjoy only a qualified privilege, subject to a balancing test that includes consideration of factors such as a party's need for the information and whether an injustice may occur if the material is not disclosed.[113] Under *Rojas*, this qualified privilege attaches regardless of whether the expert writings were prepared specifically for mediation and did not exist independent of the mediation.[114]

The *Rojas* balancing test imposes several dilemmas for mediation participants. First, it is not always possible for a mediation participant to forecast an unidentified third party's possible future need for information, or to envisage whether information introduced at a mediation may later become unavailable. This uncertainty makes it difficult, at best, for a mediation participant to accurately predict whether mediation materials the mediation participant submits might later become subject to disclosure and possibly be used against the

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109. *Id.*

110. *Id.* at 110-11.

111. *Id.* at 111.

112. *See id.* at 108-10 (discussing the applicability of the framework of the work product doctrine to the mediation privilege).

113. *Id.* at 110.

114. *See id.* (creating no exception for materials prepared specifically for mediation).

mediation participant. Left to guesswork, the participant's willingness to be candid and to exchange information freely may be substantially reduced.

Second, the *Rojas* court failed to establish comprehensive guideposts for its balancing test. For instance, the *Rojas* decision is entirely without analysis regarding a party's responsibility to timely secure, prepare and preserve its own evidence.[115] As such, this consideration arguably may not be included within the balancing test factors. On its face, the *Rojas* opinion accepts, without further inquiry or discussion, the contention by the Rojas Plaintiffs that the defects had been concealed from them.[116] The court mentioned this alleged concealment, but did not explain its relevance, if any, with respect to the balancing test.[117] Nor did the *Rojas* court explain or discuss how the Coffin Defendants allegedly concealed the mold conditions from the Rojas Plaintiffs.[118] Presumably, testing and inspections by the Coffin Defendants were occurring within plain view of at least some of the Rojas Plaintiffs who remained in residence at the apartment buildings.[119] The court's failure to address these points makes the *Rojas* opinion susceptible to the interpretation that a party need only contend, not prove or offer reliable evidence supporting the contention, that evidence of its claim was wrongly concealed, in order to be excused from securing, preparing and preserving its own evidence.

The *Rojas* court also accepts without question that the information sought by the Rojas Plaintiffs became unavailable to them because they were not joined in the underlying litigation between Coffin and the Builder Defendants, and therefore, did not participate in it.[120] This dicta makes it appear that the onus was on everyone but the Rojas Plaintiffs (who arguably sat on their rights) to ensure that they obtained the opportunity to secure, prepare and preserve their own evidence. It also incorrectly assumes that participation by the Rojas Plaintiffs in the prior litigation constituted the only opportunity for them to gather and preserve evidence. It is not clear that anything prevented the Rojas Plaintiffs from gathering their own evidence earlier and filing a separate action against the Coffin Defendants. Indeed, stretched to its limit, *Rojas* may be interpreted to authorize production of derivative materials prepared specifically for mediation based upon mere need or unavailability, regardless of the reasons for the party's failure to gather and preserve its own evidence earlier.

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115. *See id.* at 108-10 (omitting any such analysis).

116. *See id.* at 101 (stating that petitioner alleged the defects had been concealed from them, but never discussing the issue thereafter).

117. *Id.*

118. *Id.*

119. *See id.* (stating that only some of the tenants vacated the building).

120. *See id.* at 110 (stating that, "[b]ecause petitioners were not parties to the underlying litigation and were not joined as parties to that litigation, they do not have access to much material that has been removed or destroyed.").

Third, the *Rojas* balancing test does not insist that the mediation privilege be pierced only upon a showing of extraordinary circumstances.[121] Unlike the *Rinaker* balancing test, the *Rojas* balancing test does not require proof of a threatened violation of constitutional due process rights if disclosure is prohibited.[122] Nor does *Rojas* involve waivers of confidentiality on the part of the mediation participants, as did *Olam*.[123] According to *Rojas*, a court is entitled to order disclosure of otherwise privileged mediation communications over the objection of parties to the mediation upon a showing of good cause, premised on a case-by-case balancing test that weighs a nonparticipating third party's "need" for the material against the benefit to the mediation privilege that is obtained by consistently and predictably protecting such materials from disclosure.[124] In other words, a trial court would be required to balance the prejudicial effect to a plaintiff of prohibiting disclosure of privileged mediation materials against the chilling effect on mediation if disclosure is ordered. Since the underlying mediation has already occurred, and any chilling effect exists in the abstract, it is likely that the needs of the injured plaintiff will almost always outweigh the need to protect an abstraction like mediation confidentiality.

Finally, the *Rojas* decision contains no provision for compensation to the party who is required to turn over expert materials that were prepared on its behalf and at its expense for purposes of court ordered or mandatory mediation.[125] Thus, an insurance company that fails to defend its insured may arguably later obtain derivative and non-derivative materials that were prepared at the expense of others, including its insured, for purposes of proving that no duty to defend existed. Under *Rojas*, there is no apparent duty to compensate these other parties for costs incurred in connection with developing the materials in the first instance.

Indeed, given the importance of the mediation privilege, as recognized by the California Supreme Court in *Foxgate Homeowners' Ass'n*,[126] it is alarming that the *Rojas* court decided, based upon the facts presented in *Rojas*, that the mediation privilege should be pierced by judicial construction. While the Rojas Plaintiffs may have been a sympathetic lot, not all parties who similarly sit on their rights are sympathetic, such as insurance companies who delay taking up the defense of their insureds. Nevertheless, need and unavailability of information arguably form the only guideposts for the balancing test imposed by *Rojas*.

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121. *See id.* at 108-10 (discussing the analytical framework of the balancing test).

122. *See id.* (omitting such a requirement from the analysis).

123. *See id.* (omitting any discussion of waivers of confidentiality).

124. *Id.* at 110.

125. *See id.* at 108-10 (containing no requirement for compensation to the party required to disclose mediation materials).

126. Foxgate Homeowners' Ass'n v. Bramalea Cal., 125 P.3d 1117 (Cal. 2001); *see supra* Part II.D.

In the specific context of HOA construction defect claims, the *Rojas* decision contradicts and undermines several key provisions of the Calderon Act that are specifically designed to protect parties who participate in Calderon mandatory mediation proceedings. For instance, as earlier mentioned, California Civil Code section 1375(*l*) expressly provides that "all defect lists and demands, communications, negotiations, and settlement offers made in the course of the prelitigation dispute resolution process . . . shall be inadmissible pursuant to Sections 1119 to 1124, inclusive, of the Evidence Code and all applicable decisional law."[127]

Under *Foxgate Homeowners' Ass'n*, Civil Code section 1375(*l*) would likely have been construed to protect all expert-witness-prepared materials prepared for a Calderon mediation (regardless of whether the materials were derivative or non-derivative) because the California Supreme Court treated the mediation privilege as sacrosanct.[128] Evidence Code section 1119 was determined to be unambiguous and not subject to judicial construction except where potential due process rights were threatened or where the parties waived confidentiality.[129] The plain language of section 1119 provides that "[n]o writing . . . that is prepared for the purpose of . . . a mediation . . . is admissible or subject to discovery . . . ."[130]

Under *Rojas*, however, Evidence Code sections 1119 and 1120 have been judicially construed to provide no protection for non-derivative materials and only a qualified protection for derivative materials, including defect lists and other expert-witness-prepared communications intended to be protected from disclosure under Civil Code section 1375.[131] This judicial construction is simply not supported by the plain language of these statutes, and is not authorized by the *Rinaker*, *Olam* or *Foxgate Homeowners' Ass'n* opinions.

Several other problematic issues arise under the Calderon Act when defect lists and expert-witness materials prepared for mediation become subject to disclosure to third parties. For example, section 1375.1 of the Calderon Act specifically provides that following settlement of the construction defect claim, the HOA Board is obligated to provide specified information to the homeowner members regarding the settlement including: (1) a general description of the construction defects the association believes will be repaired or replaced; (2) a good faith estimate as to when the repairs or replacements will take place; and (3) the status of claims for defects that are not scheduled to be repaired or replaced.[132]

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127. CAL. CIV. CODE § 1375(*l*) (West 2003).

128. *See supra* Part II.D.

129. *Foxgate Homeowners' Ass'n*, 25 P.3d at 1126-28.

130. CAL. EVID. CODE § 1119 (West 2003).

131. Rojas v. Los Angeles Superior Court, 126 Cal. Rptr. 2d 97, 108-10 (Ct. App. 2002).

132. CAL. CIV. CODE § 1375.1 (West 2003).

For good reason, the Board is not required to turn over preliminary defect lists, test data, photographs or any other expert-witness-prepared materials to the homeowner members. Such materials are often voluminous, technical, and by nature designed to serve an advocacy purpose—rendering them susceptible to misinterpretation and misuse by third parties. At a Calderon mediation, an HOA's attorney will typically present comprehensive and persuasive evidence (including expert-witness-prepared materials) depicting the extent of every potential construction defect. In response, the respondent typically puts on its best evidence to minimize or challenge the HOA's claims. Both will be fact-based presentations supported by expert opinion. Yet the presentations will not be identical, and may even embellish or overly minimize a party's position for purposes of negotiation. Importantly, the information exchanged will be, by most standards, preliminary in nature, having been developed within a 180-day time period, before a complaint is on file. Any settlement reached usually represents a compromise of the two viewpoints, which is the primary motivation for HOAs to present evidence zealously and identify all potential construction defects.

While expert-written materials are the basis for most mediation discussions, the written information exchanged is tested and compared with written information submitted by the opposing party, and synthesized by extensive oral discussions among experts. As the mediation continues, expert opinions may change on various issues, and testing results may be challenged or discounted. However, the written materials likely are not modified to reflect the change of the parties' or experts' positions and opinions. Thus, it is very common for an HOA to obtain a settlement that does not include recovery for all construction defects identified in its defect lists and expert witness compilation materials.[133] Despite this, under *Rojas*, homeowner members may obtain these materials for later use in separate litigation proceedings against the HOA, even though the evidence of oral communications occurring at the mediation that possibly modified the written information is inadmissible under section 1119 and *Rojas*.

For example, following settlement of an HOA construction defect claim, it is not uncommon for there to be disgruntled homeowner members who feel that the HOA is not repairing or replacing enough of the claimed defects, or who feel they are not benefiting adequately from the settlement. If the HOA settles the construction defect claim at the Calderon mandatory mediation without ever having filed a complaint against the builder, the homeowner members may be able to sue the HOA for failing to have recovered for latent defects that appear on construction defect lists, but are not scheduled for repair or replacement.[134] For

133. *Rojas*, 126 Cal. Rptr. 2d at 108-10 (discussing the balancing test utilized to determine whether mediation materials will be subject to disclosure).

134. California Civil Code section 1365.7(f) imposes an affirmative duty on the part of HOA Boards to decide whether it is appropriate to (1) investigate for latent defects and (2) file a civil action against the builder. CAL. CIV. CODE § 1365.7(f) (West 2003). If the HOA recovers settlement monies for only some of the claimed defects, a homeowner may claim that the Board breached its duty to properly pursue a civil action for the remaining defects. *Id.*

purposes of pursuing this claim, *Rojas* would permit the disgruntled homeowner members to obtain more than the limited information set forth in Civil Code section 1375.1. Indeed, *Rojas* would permit homeowners to discover all raw test data, photographs and other non-derivative materials, and possibly amalgamated or derivative materials that contain the thoughts, impressions and opinions of attorneys and expert witnesses, upon a showing that the information is not available elsewhere or that an injustice will occur if the materials are not disclosed.[135] As with the Rojas Plaintiffs, the homeowner members' adoption of a "wait and see" approach should not compromise their ability to obtain this information.

Such access to advocacy material prepared for purposes of mediation will very likely foster further litigation within HOAs. Faced with this risk, HOAs may elect to be less disclosive and aggressive at mediation, with the result that HOA settlement recoveries will be reduced, or resolution without trial will become more difficult and, perhaps, impossible. While, at first blush, reduced HOA settlement recoveries might appeal to developers, builders and general contractors, it is not in their interests that the mediation privilege be breached in this manner. The strict liability imposed upon these parties for construction defect claims makes it critical that Calderon mediation proceedings produce fair settlement results. Otherwise, the likelihood of HOA construction defect claims proceeding to trial will be increased, extraordinary litigation expenses will be incurred by both sides, and the potential for runaway jury verdicts against developers, builders and general contractors will be enhanced.

Furthermore, weaknesses of the Calderon Act are exacerbated by *Rojas*. The Calderon Act involves a very ambitious 180-day schedule that contemplates, in some cases, putting dozens of parties (including insurers) on notice of an HOA's construction defect claim, conducting extensive invasive testing and inspections of entire subdivisions, preparing technical expert materials, and coordinating and completing a mediation process that often lasts from several days to several weeks.[136] Among the many challenges presented by this schedule is that of procuring the participation of parties that are essential to settlement, including all potentially liable subcontractors, design professionals and their insurers.

Although the Calderon Act provides for certain disincentives for parties to refuse to participate or to be dilatory about participation,[137] the *Rojas* decision provides new incentives for parties, particularly subcontractors and design professionals, and their insurers, to delay participation until after expensive invasive testing, inspections and mediation proceedings have been completed.

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135. *See Rojas*, 126 Cal. Rptr. 2d at 110 (discussing and implementing balancing test to determine what mediation materials may be available for discovery).

136. *See* CAL. CIV. CODE §§ 1375, 1375.05, 1375.1 (West 2002).

137. *See, e.g., id.* § 1375(e).

As previously mentioned, Civil Code section 1375.05(c) restricts the ability of a party to engage in additional testing and inspections except where such party's insurer did not receive at least thirty days notice of the testing or inspections; the insured and separate counsel hired by the insurer did not participate in the testing or inspections; "the insured would suffer prejudice if additional inspections or testing are not permitted"; and the information obtainable by inspections and testing "is not available through any reasonable alternative sources."[138] These conditions are fairly easy to satisfy given the ambitious 180-day schedule imposed by the Calderon Act.[139]

Civil Code section 1375.05(d) states that any subcontractor or design professional who had notice of the mediation but failed to attend, or attended without settlement authority, is bound by the terms of any settlement reached at a Calderon mediation—i.e., the subcontractor or design professional cannot dispute the good faith of the settlement reached, but may introduce evidence to support its own position for allocation of the settlement.[140] The ability of the nonsettling subcontractor or design professional and its insurer to defend the insured by asserting all available defenses in a later trial, however, is not diminished in any way.[141]

Thus, armed with the combined potential and/or actual abilities to (1) fully defend a subcontractor or design professional later at trial under Civil Code section 1375.05(d); (2) conduct later testing and inspections after the mediation is concluded under Civil Code section 1375(c); (3) obtain all non-derivative expert-prepared materials for mediation; and (4) obtain otherwise unavailable derivative expert-prepared materials, the incentives for an insurer and its insured subcontractor or design professional to participate in early mediation are vastly reduced. Indeed, many tenders of defense by subcontractors and design professionals to their insurers may soon become "lost" in the mail.

Additionally, if all non-derivative and derivative materials used at a Calderon mediation proceeding are potentially subject to disclosure, an HOA must seriously consider whether long term retention and storage of these materials is required because of the possibility that the information might someday constitute admissible evidence in unrelated civil proceedings. For example, HOAs and homeowner members have certain disclosure obligations with respect to threatening, pending and resolved construction defect claims.[142] If a purchaser files a suit against an HOA or homeowner member claiming that the HOA and/or

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138. *Id.* § 1375.05(c).

139. *Id.* § 1375(c). It is not uncommon for subcontractors and design professionals to experience difficulties identifying and locating their insurance companies because Civil Procedure Code section 337.15 permits lawsuits for latent construction defects to be filed as many as ten years after a notice of completion for a project has been recorded. By then, records regarding the project may have been lost or destroyed. CAL. CIV. PROC. CODE § 337.15 (West 2003).

140. CAL. CIV. CODE § 1375.05(d) (West 2003).

141. *Id.*

142. *Id.* § 1368(a)(6)-(7), (b).

homeowner member failed to disclose the required information, it is likely that the purchaser will be entitled to discover all derivative and possibly non-derivative materials (if such evidence is not available elsewhere) produced at the earlier Calderon mediation proceedings. The result is that the HOA and all homeowner members face increased exposure and expense under *Rojas*.

III. CONCLUSION

In summary, *Rojas* miscalculates the benefit obtained by subjecting derivative and non-derivative written materials exchanged during mediation to disclosure based upon the analytical framework of the attorney work product doctrine. As a practical matter, the loss of confidentiality threatens the process of dispute resolution as a viable alternative to litigation. According to the California Supreme Court, Evidence Code sections 1119 and 1120 are unambiguous and should not be subject to judicial construction except in extraordinary circumstances such as when due process rights are threatened or where mediation participants have waived confidentiality.[143] The Legislature has already considered the competing interests of parties to obtain mediation communications versus the benefit to the mediation privilege of protecting the materials against disclosure, and concluded that, except as expressly provided by statute, the confidentiality provisions for mediation proceedings are absolute.[144] "To carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme . . . unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception."[145]

Beyond its analytical flaws, the *Rojas* decision places the effectiveness of Calderon Act mediations in peril. The 180-day dispute resolution process depends upon the free exchange of an immense amount of expert-prepared materials. The protections against disclosure of these materials contained in the Calderon Act have been compromised, thereby diminishing some of the built-in incentives to participate and freely exchange information. Pending the Supreme Court's review of *Rojas*, all Calderon mandatory mediation participants should remain cognizant of the potential ramifications of *Rojas* and carefully consider the extent and content of expert-prepared materials to be exchanged.

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143. *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1126-28 (Cal. 2001); *see supra* Part II.D.

144. *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1119.

145. *Id.* at 1126.