Supreme Court Case No. S178914
[2nd Civil No.B215215
SECOND APPELLATE DISTRICT,
DIVISION SEVEN]

In the Supreme Court Of the State of California

MICHAEL CASSEL,
Petitioner,
v.
SUPERIOR COURT LOS ANGELES COUNTY,
Respondent;
WASSERMAN, COMDEN, CASSELMAN & PEARSON LLP,et al.,
Real Party in Interest.

SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE WILLIAM A. MacLAUGHLIN, PRESIDING
Case No. LC 070 478

RESPONDENT MICHAEL CASSEL'S ANSWER TO PETITION FOR REVIEW

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MICHAEL CASSEL, ***Plaintiff and Respondent***

vs.

WASSERMAN, COMDEN, CASSELMAN & PEARSON LLP; DAVID B. CASSELMAN; AND STEVE K. WASSERMAN
Defendants and Petitioners

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Respondent Michael Cassel ("Respondent" or "Cassel") respectfully answers the Petition filed by Petitioners Wasserman, Comden, Casselman & Pearson LLP, David B. Casselman and Steve K. Wasserman ("Petitioners" or "Wasserman Comden") for Review of the granting of Cassel's Petition for Writ of Mandate by the Second District Court of Appeal, Division 8.

The Writ Petition was correctly decided by the majority below based on a single clear issue, and the Court should deny this Petition for Review.

I. INTRODUCTION

Michael Cassel sued his former counsel, Wasserman Comden, for negligence and breaches of fiduciary duty in underlying matters involving ownership of a popular apparel trademark, "Von Dutch Originals." Cassel alleged in his complaint that the representation was affected, in particular, by serious conflicts of interest arising from partner Steve K. Wasserman's and his son's attempts to profit from the unauthorized marketing of Von Dutch merchandise. Cassel further alleged that Wasserman Comden undermined his position in the resulting trademark lawsuit through delay, neglect and the firm's self-serving agenda.

A mediation in the trademark action, Von Dutch Originals LLC v. Cassel, took place on August 4, 2004. Cassel and his counsel engaged in several lengthy conversations on the two days preceding the mediation. Cassel and his counsel also engaged in conversations during the settlement discussions themselves, with neither the mediator nor opposing parties or their counsel present. There is no dispute that what transpired during these meetings was protected by the attorney-client privilege. Cassel contends

that Petitioners' statements and conduct during these meetings constitute probative evidence of Wasserman Comden's malpractice and breach of their fiduciary duty, and that this evidence is admissible under Evidence Code §958.

As trial approached in this malpractice action, Petitioners asserted that the court should bar evidence of communications between Cassel and his lawyers during the two days prior to and on the date of the mediation, based on mediation confidentiality. (Evidence Code §§1115 *et seq.*) Petitioners relied principally on *Wimsatt v. Superior Court (Kausch)* (2007) 152 Cal.App. 4th 137, in which certain exchanges *between opposing counsel* relating directly to the pending mediation were excluded as subject to the confidentiality statutes.

Cassel argued below that he was not attempting to introduce at trial any communications subject to mediation confidentiality. Instead, he contended then and contends here that Petitioners are attempting to carve out a "mediation confidentiality exception" for communcations otherwise admissible under Evidence Code §958.

The trial judge granted Petitioners' motion in limine to exclude ando certified the issue for appellate review. Petitioners now seek review of the Court of Appeal determination that the evidence is admissible.

Cassel respectfully urges this Court to find that the majority in the Court of Appeal decided the issue correctly.

II. SUMMARY OF ARGUMENT

The "issues presented" that Petitioners seek for this Court to decide demonstrate why the Court should not grant review.

As a first issue, Petitioners ask, "Are private conversations solely between an attorney and his or her client for the purpose of mediation. . .

confidential under the mediation confidentiality statutes. . .?" (Pet. at p.2) This question suffers from two defects that defeat Petitioners' arguments.

The question frames the issue too broadly. Cassel does not seek admission into evidence of his privileged discussions with Petitioners except in litigation between himself and his attorneys, as provided in Evidence Code §958. This is the *only* context in which the content of a privileged communication may be considered for admissibility. Thus, the Legislature had absolutely no reason specifically to except attorney-client privileged communications from the operation of Evidence Code §1119; they lie outside the mediation confidentiality scheme by their very nature.

The question requires the trial judge in a legal malpractice action to determine exceptions to the admissibility of evidence under Section 958. By contrast with the bright line created by Evidence Code, Article Three "Lawyer-Client Privilege" (Sections 950 *et seq.*), if Petitioners' view is accepted, the trial court would have to review each attorney-client privileged communication that a party--plaintiff client or defendant attorney--seeks to introduce at trial to determine whether it is excepted from Section 958 by the mediation confidentiality statutes.

For a second issue, Petitioners ask, "is an attorney a 'participant' in a mediation, so that communications between the attorney and his or her client for purposes of mediation musts remain confidential . . . ?" This question also suffers from at least two insurmountable defects.

The question, like the first, frames the issue too broadly. It is not whether the attorney is a "participant" in a mediation, which assumes away the very issue to be decided. It is whether the attorney is a *separate* participant from the client in mediation, whose separate

interests justify invoking mediation confidentiality *against* the client as to communications made admissible by Section 958.

Answering this second question affirmatively would permit attorneys to pursue a separate agenda from that of their clients in mediation, then to cloak their actions with confidentiality. Such a result finds no support whatsoever in California law; and although Petitioners place a great deal emphasis public policy considerations, their view conflicts with the truly detrimental consequences of hindering a client's recourse against negligent or dishonest legal counsel.

The Court of Appeal addressed a single, much simpler issue. The majority found that the question before it was "whether, as a matter of law, mediation confidentiality requires exclusion of conversations and conduct solely between a client, Cassel, and his attorneys." (Slip Op. at p.4) This was also the issue addressed by Justice Perluss in dissent. (Dissent p.1 and fn. 3)

This Petition for Review attempts to divert the Court's attention away from the simpler and clearer issue decided below. The majority in the Court of Appeal articulated a number of reasons in support of its holding that make review unnecessary. Three stand out, which permit this Court to deny the present Petition without subjecting *either* mediation confidentiality or the attorney-client relationship to exceptions or unpalatable public policy choices.

First, arguably any communications between attorney and client could, with artful manipulation, be placed under the rubric of "mediation." That is, indeed, what Cassel alleges occurred during Petitioners' representation of him. As a result, in any malpractice case where mediation took place in the underlying action, there would never exist a means of

determining which communications were genuinely made inadmissible by the confidentiality statute. (*See* Slip Op. at 10)

Conversely, finding that attorney-client communications are not subject to exclusion under the mediation confidentiality statutes, regardless of when and where they occur, creates a bright line by which all parties can abide.

The majority below also found that, by its nature, mediation involves exchanges between and among adverse parties, their counsel and the mediator. Attorney-client communications simply do not fall within this definition. Consequently, even the most expansive interpretation of "for the purpose of mediation" (*e.g.*, pre-mediation phone calls between opposing counsel, scheduling conferences with the mediator) does not encompass the attorney-client communications at issue in this action nor require their exclusion. (*See* Slip Op. at 7)

Moreover, the Court of Appeal majority found that "[f]or mediation purposes, a client and his attorney operate as a single participant." (Slip Op. at 7) The policy behind the confidentiality statutes, candor between the *adverse* parties in a mediation is not promoted by rendering attorney-client privileged matters inadmissible.

On the other hand, exclusion of evidence of attorney negligence and breaches of fiduciary duty--intended solely for use in a legal malpractice action--undermines the public policy promoting candor between an attorney and client. Clients with knowledge of the exception to Evidence Code §958 would justifiably apprehend that their lawyers may take advantage of them while in the mediation process.

The Petition for Review makes little if any attempt to address any of the above bases for granting Respondent's Writ Petition. Instead, the

Petition focuses on an imagined "exception" to mediation confidentiality supposedly created by the Court of Appeal. In truth, the real exception is the one to Evidence Code §958 that Petitioners seek as a safe harbor for malpracticing attorneys.

Equally futile to support review is Petitioners' strident accusation that the majority below "ignored or redecided the trial court's factual findings," and "utterly overlooked the factual conclusions" reached by Judge MacLaughlin. Neither the majority below, nor the dissent for that matter, required a finding of abuse of discretion in the factual findings of the trial judge upon which to base their holdings or arguments.

III. PETITIONERS' "BACKGROUND" DISCUSSION DOES NOT ASSERT FACTS ENTITLING THEM TO REVIEW OF THE GRANTING OF THE WRIT PETITION

Petitioners moved in limine in the trial court to exclude all attorney-client communications between them and Cassel made at the time of the August 4, 2004 mediation, and on the two preceding days. The court set a hearing under Evidence Code §§ 402-405 on April 1, 2009 to hear both parties' offers of proof regarding this evidence in light of the mediation confidentiality statutes.

In this Petition, however, Petitioners offer a truncated view of what transpired at the April 1, 2009 hearing, apparently to try to persuade this Court that all the discussions between themselves and Cassel, even before the date of the mediation, "pertained" to the mediation of the underlying case. (Pet. at pp.7-10)

While Petioners' recital is woefully one-sided and incomplete, it also begs the question. The trial judge understood all along--and so must have

Petitioners--that Cassel sought to introduce communications directly related to the mediation.

The trial court itself granted the request for a referral to the Court of Appeal under Code of Civil Procedure §166.1, and found that Cassel's Writ Petition "involve[d] a controlling question of law for which there are substantial grounds for difference of opinion and appellate resolution of the issues could materially advance the termination of the legal malpractice action." Thus, both the trial court and the Court of Appeal acknowledged that resolution of the issues did not require questioning Judge MacLaughlin's factual findings.

Yet Petitioners devote nearly four pages of their argument (Pet. at pp.25-28) to the assertion that the Court of Appeal majority made a "critical factual error." (Pet. at p. 25) Petitioners even resort to misquoting the dissent below in support of this fallacious contention, stating "[as] Presiding Justice Perluss points out in his dissenting opinion, the majority opinion ignores the trial court's actual factual findings, and impermissibly reaches and relies upon the opposite factual conclusions. (See, Slip. Opn., dissent pp.1-2 and fn.3.)" (Pet. at p.25)

Justice Perluss pointed out nothing of the sort. What he *really* said, in pertinent part, was:

> The proper reach of mediation confidentiality pursuant to section 1119 presents a question of law subject to independent review by this court . . . *and is the only issue addressed by the majority in granting petitioner Michael Cassel's request for relief.* . . . Cassel does not argue in his petition that the trial court abused its discretion in concluding, after carefully reviewing each of the statements at issue here, that they were

materially related to the mediation in the underlying, Von Dutch lawsuit, and that issue is not properly before us.

(Dissent below at fn. 3, italics added.) Thus, all except for Petitioners (*see* Pet. at p.26) concur that nowhere does the majority "conclude" or even imply in its decision below that "the trial court's factual conclusions were utterly wrong, and an abuse of discretion."

Undeniably, the majority below distinguished the communications in *Wimsatt v. Superior Court (Kausch)* ((2007) 152 Cal.App.4th 137) from those at issue herein "in that there is no readily identifiable link to the mediation in the communications, such as *content* of a mediation brief." (Slip Op. at 10, emphasis added.) Nothing about these distinctions suggests that the Court of Appeal majority "ignored" or "rejected" the trial court's factual findings. It had no reason to do so.

There is no incompatibility between the findings of the trial court that the communications between Cassel and his counsel occurred during or even "for the purpose of" the underlying mediation, and the holding of this Court that those communications are not legally excluded from evidence in the malpractice action.

As both the majority and the dissent in the Court of Appeal address the matter, the issue is the *legal* scope of the phrase "for the purpose of," which must be determined, not in a vacuum, but in light of the definition of "mediation" in Section 1115. The trial court below, too, recognized that its factual findings framed, rather than decided, the issue. Real Parties are therefore completely alone in their contention that a factual discrepancy or omission requires review of the granting of the Writ Petition.

IV. EVIDENCE CODE §§1115-1128 DO NOT PERMIT EXCLUSION IN A LEGAL MALPRACTICE ACTION OF EVIDENCE ADMISSIBLE UNDER SECTION 958

This Court should reject Petitioners' contention that attorney-client privileged communications, if arguably made "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" fall within the exclusionary provisions of Evidence Code §1119. Acceptance of that contention places mediation confidentiality and attorney-client privilege in a conflict in which confidentiality can only prevail with the creation of an exception to the admissibility provisions of Section 958.

Petitioners, in their argument, confuse, on the one hand, permissibly broad application of the confidentiality statutes to those communications encompassed by Evidence Code §1115, with on the other hand, impermissibly broad application of mediation confidentiality to communications merely based on their proximity to mediation.

The definitions contained in Section 1115 limit the applicability of the confidentiality statutes. As defined in Section 1115, mediation is a process of communication involving a neutral person to facilitate that communication. Even a broad application of this definition, however, does not include privileged conversations between attorney and client.

Confidential attorney-client communications, by definition, occur outside the presence of the mediator or opposing parties. (Evidence Code §952.) Moreover, such communications lose the protection of the attorney-client privilege statutes to the extent their disclosure is required in a legal malpractice action. (Section 958.)

Section 1120(a) reinforces the conclusion that privileged communications between attorney and client may not be excluded based on

mediation confidentiality. That section provides that, "[e]vidence 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."

This Court, in *Rojas v. Superior Court (Coffin)* (2004) 33 Cal.4th 260, 266, pointed out that Section 1120 serves the purpose of preventing improper invocation of the provisions of Section 1119. Thus, even the typically broad interpretation of Section 1119 "does not render section 1120 'surplusage' or permit parties 'to use mediation as a shield to hide evidence.' Rather, consistent with the Legislature's intent, it applies section 1120 as a 'limit[ ]' on 'the scope of [s]ection 1119' that '*prevent[s] parties from using a mediation as a pretext to shield materials from disclosure.*' (Cal. Law Revision Com. com., 29B pt. 3 West's Ann. Evid.Code (2004 supp.) foll. § 1120, p. 153.)" (*Id.*, italics added.)

Section 1120(a) thus may serve to exempt even certain communications actually introduced or used in mediation, which confidential attorney-client exchanges unquestionably are not.

Yet Petitioners urge an expansive interpretation of Section 1119 to include attorney-client communications because they pertain to mediation (Pet. at p.17), without regard to the limiting language of Section 1120 or this Court's discussion in *Rojas*, and without acknowledging that, in any event, *Rojas* did not address the priviliged communications at issue herein.

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A. The Mediation Confidentiality statutes do not apply to attorney-client communications

California Evidence Code §1115 provides:

> For purposes of this chapter:
>
> (a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.
>
> (b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.
>
> (c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

Evidence Code §1119(a) provides:

> Except as otherwise provided in this chapter:
>
> (a) No evidence of anything said or any admission made 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 evidence 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.

Taken together and in context, the plain language of the above statutes makes "mediation" a *process* conducted by a neutral, with the *presence of adverse parties*. Moreover, appellate court interpretation of the

mediation confidentiality statutes makes clear their purpose to promote the exchange of information, again between adverse parties, not between the parties and their own counsel.[1]

In order to support their argument that one provision of the Evidence Code, Section 1119, trumps another, Section 958, Petitioners must frame admission of Cassel's evidence as requiring creation of an "exception" to the mediation confidentiality statutes. (*E.g.*, Pet. at p.15) Cassel emphasizes, however, that he does *not* seek the creation of a judicial exception to the mediation confidentiality provisions.

Cassel argues instead that the confidentiality statutes do not apply to the use of evidence in his malpractice case that was never intended to be disclosed to the mediator nor the opposing parties. Because, as discussed below, attorney-client communications remain privileged regardless of their content, there exist no means of evaluating their relation to "the purpose of, in the course of, or pursuant to, a mediation" *except* in the context of a legal malpractice action.

This evalution, therefore, could result in exclusion of such evidence only if there were a judicially-created *exception to admissibility under Evidence Code §958.* The issue does not come up in any other context. Such exceptions are expressly disfavored in California case law. (*See, Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194.)

This Court has articulated the reasons for effective protection of statements and documents introduced in mediation. These reasons do not

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[1] Petitioners assert that "Section 1119 makes confidential 'all' communications *by any person* pertaining to a mediation, before, during or after one occurs." (Pet. at p.17 [italics in original]) Both phrases, "by any person" and "pertaining to a mediation," seek to extend the scope of the section without the slightest authority to support the extension.

include, however, protecting negligent attorneys from disclosure of privileged transactions and communications with their own clients.

> The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear. The parties and all amici curiae recognize the 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." (Nat. Conf. of Comrs. on U. State Laws, U. Mediation Act (May 2001) § 2, Reporter's working notes, ¶ 1; see also Note, *Protecting Confidentiality in Mediation* (1984) 98 Harv. L.Rev. 441, 445. ["Mediation demands ... that the parties feel free to be frank not only with the mediator but also with each other.... Agreement may be impossible if the mediator cannot overcome the parties' wariness about confiding in each other during these sessions."].)

(*Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 13.)

Nothing in *Foxgate* or any appellate cases addressing the issue, however, suggests that the confidentiality statutes shield attorneys from the consequences of their own conduct when it remains undisclosed to opposing parties, their counsel or the mediator.

1. Mediation confidentiality is not unlimited

Although numerous cases have acknowledged the broad sweep of the mediation confidentiality statutes, that breadth is not unlimited.

As the court pointed out in *Saeta v. Superior Court (Dent)* ((2004) 117 Cal.App.4th 261, 272), while "[t] he mediation and arbitration privileges have a broad sweep" (117 Cal.App.4th at 271), it is also the case that "privileges are narrowly construed so as to keep them within the limits of the statutes because they operate to prevent the admission of relevant evidence and impede the correct determination of issues." Just as they cannot create exceptions or exemptions to existing privileges, courts also "'are not free to create new privileges as a matter of judicial policy.' [Citation.]" (*Id.*) The bar to creating new privileges is statutory. (Evidence Code §911.)

In *Saeta*, the court examined whether the forum in which the parties conducted their negotiations rendered disclosures made during the proceedings in that forum inadmissible under Evidence Code §1119--and concluded it did not. Despite having some attributes of mediation, the "review board" before which the parties' dispute was pending did not comport with a narrow definition of "mediation." (*Id.*)

The *Saeta* court premised its findings on a definition of mediation that unquestionably included third parties:

> Mediation takes many forms. "Mediation has been defined in many different ways. In essence, mediation is a process where a 'neutral third party who has no authoritative decision-making power' intervenes in a dispute or negotiation 'to assist disputing parties in voluntarily reaching their own mutually acceptable' agreement. Mediation involves moving parties from focusing on their individual bargaining positions to inventing options that will meet the primary needs of all parties.

(*Id.* at 170.) Nothing in the *Saeta* definition of "mediation" makes attorney-client privileged communications part of the process protected by the confidentiality statutes.

Even in *Wimsatt v. Superior Court (Kausch)* (2007) 152 Cal.App.4th 137, relied upon extensively by Petitioners, the court cogently differentiates matters that fall within and outside the statutory scope.

Wimsatt is particularly important because it is a legal malpractice case superficially similar to the case below. *Wimsatt* is, however, distinguishable in a material respect that supports Cassel's contention that the court should not exclude his evidence arising from communications with his attorneys at the time of the underlying mediation.

In *Wimsatt*, real party Kausch sued his former attorneys for having lowered his settlement demand without his permission, impairing his position at mediation. He learned of the alleged breach from three sources, *none of which fell within the attorney-client privilege*: a "confidential mediation brief," a series of e-mails between opposing counsel quoting from the mediation brief, and testimony regarding the substance of attorney Wimsatt's telephone conversations with opposing counsel some weeks before the mediation. (152 Cal.App.4th at 141.) The trial court denied the attorneys' motion for a protective order, and a writ petition ensued.

The *Wimsatt* court held that the attorneys were entitled to a protective order as to the mediation brief and the e-mails. With respect to the former, "[m]ediation briefs epitomize the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure." (*Id.* at 158.) Similarly, as to the latter, the "e-mails were written the day before the second mediation. They quoted from, and referenced, the confidential mediation brief. The purpose of the e-mails was

to clarify statements made in all of the mediation briefs as such statements would significantly affect the mediation negotiation to be held the next day. The e-mails would not have existed had the mediation briefs not been written. The emails were materially related to the mediation that was to be held the next day and are to remain confidential." (*Id.* at 159.)

Most salient about the evidence excluded in *Wimsatt*, therefore, is that it consisted of a document specifically intended for circulation to the mediator and the opposing party, and e-mails between opposing counsel discussing that very document. By contrast, the evidence Cassel seeks to offer at trial in the case below consists entirely of matters that neither Cassel nor his attorneys intended for the mediator or the opposing parties and their counsel to learn about.

The *Wimsatt* court also ruled that the attorneys had not met their burden to show that Wimsatt's "conversation [was] linked to the second mediation or that it is anything other than expected negotiation posturing that occurs in most civil litigation." (*Id.* at 160.) The mediation confidentiality statutes, even where stringently applied, thus do not provide a blank check for a party to try to bring matters within the confidentiality provisions for the purpose of shielding them from later disclosure.

The court in *Wimsatt* further took pains to differentiate between matters disclosed *at the time of* a mediation but not subject to later exclusion; and those subject to later exclusion because otherwise the parties' willingness to disclose them during the mediation itself would be chilled. In particular, the court alluded to the fact that "[a]lthough the statutory scheme is broadly applied, it does *not* protect items admissible or subject to discovery merely because they were introduced in mediation." (*Id.* at 157.)

2. Mediation confidentiality and the attorney-client privilege serve similar but not competing interests

Petitioners' arguments presume that admission of evidence of mediation-related communications between themselves and Cassel within the attorney-client privilege statutory scheme requires the judicial creation of an exception to the mediation confidentiality statutory scheme. No such exception is required: the statutes embodying the two policies do not contradict one another and are not mutually exclusive.

As noted above, the purpose of mediation confidentiality is to ensure the effectiveness of mediation by encouraging adverse parties to reveal information they do not wish used against them later in the same case if it does not settle. (*See*, *Foxgate*, *supra*, 26 Cal.4th at 13.)

This Court recently revisited the attorney-client privilege, and reemphasized its importance. "The privilege 'has been a hallmark of Anglo-American jurisprudence for almost 400 years.' (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, 208 Cal.Rptr. 886, 691 P.2d 642.) Its fundamental purpose 'is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.'" [further citing *Mitchell* at *id.*]" (*Costco Wholesale Corp. v. Superior Court (Randall)* (2009) 47 Cal 4th 725, 219 P.3d 736, 740.)

The purpose of the attorney-client privilege is thus to encourage candor by the client in discussions with his lawyers. That candor, in turn, is intended to enable the fully informed attorney to provide appropriate legal advice and services. (*Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, 456-457.)

3. Attorney-client communications are excluded by their privileged nature from Section 1119; there was no need for an express exclusion

"The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material." (*Costco Wholesale Corp., supra*, 219 P.3d at 741.)

This Court, a quarter century ago, in *Mitchell, supra*, provided a description of the privilege that illuminates the reason why the Legislature had no need expressly to exclude attorney-client communications from those barred by Section 1119:

> In California the privilege has been held to encompass not only oral or written statements, but additionally actions, signs, or other means of communicating information. [Citations.] Furthermore, the privilege covers the transmission of documents which are available to the public, and not merely information in the sole possession of the attorney or client. In this regard, it is the actual fact of the transmission which merits protection, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy. [Citation.] While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as "sacred," it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions.

(37 Cal.3d at 600)

Thus, the content of an attorney-client communication ordinarily may not be examined. "Evidence Code section 915 states that, except in limited situations, a court may not require disclosure of information claimed to be privileged in order to rule on the claim of privilege." (*Cornish v. Superior Court (Capital Bond and Ins. Co.)* 209 Cal.App.3d 467, 480.)

Evidence Code §1119, on the other hand, is content-based. The analysis in *Wimsatt* discussed above, as well as the terms of Section 1120, make this amply clear.

Petitioners nonetheless argue that "if the Legislature had intended to exclude from confidentiality the private mediation discussions between an attorney and a client, it could have drafted such an exception easily." (Pet. at p.18) There exists no demonstrable reason for the Legislature to have made such an exception.

4. Excluding privileged communications from evidence in legal malpractice trials based upon mediation confidentiality would create an unnecessary exception to Evidence Code §958

Exclusion of a certain category of attorney-client privileged communications from evidence in legal malpractice cases based on content enumerated in Evidence Code §1119 would effectively permit mediation confidentiality to trump the admission of evidence of legal malpractice where otherwise permitted by Section 958.

That section provides, "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

The purpose of Section 958 is principally to even the playing field between an attorney defending himself against a claim of malpractice and his or her former

client. As the court put the issue in *Solin v. O'Melveny & Myers, LLP*, *supra*, 89 Cal.App.4th at 463, it would be "fundamentally unfair" for an attorney to be precluded from presenting evidence of what his former client had disclosed in the course of the representation that might help the attorney defend himself.

The exclusion Petitioners seek herein would defeat that purpose by allowing attorneys to claim that the malpractice or breaches occurred "for the purpose, of in the course of, or pursuant to, a mediation or a mediation consultation." In short, Petitioners' exception would permit attorneys to enjoy the benefits both of their former client's waiver insofar as it concerns evidence favorable to them, and at the same time, of exclusion of unfavorable evidence under an unrelated statutory scheme.

Petitioners can point to no authority creating an exception to attorney liability for conduct that occurs in a mediation setting. Yet that is precisely what will happen if private communications between attorney and client are deemed covered by the mediation confidentiality law, and evidence of the conduct is excluded from the malpractice action.

B. Evidence of attorney-client communications is "unaffected evidence" as set forth in Evidence Code §1120; for that reason, the decision below will not lead to "confusion"

Evidence Code §1120 provides in pertinent part:

> (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.

Section 1120 operates to permit admission of Cassel's evidence at trial in two ways. First, as discussed above, since Evidence Code §958

resolves the unfairness of allowing *either party* to a malpractice suit to exclude unfavorable evidence derived from attorney-client privileged communications, Section 1120 provides that such evidence does not acquire protection by being introduced or used in a mediation setting.

Second, Section 1120 itself reiterates the notion that communications protected by mediation confidentiality are those *introduced or used in a mediation.* The definition of privileged attorney-client communications, on the other hand, clearly rules out the possibility of such use:

> As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

(Evidence Code §952.)

Petitioners attempt to upend the issues by asserting that the majority opinion's "unstated conclusion" is "that the trial court's factual findings were utterly wrong, and an abuse of discretion." (Pet. at p.26) This, they say, will lead to "confusion" in application of the mediation confidentiality statutes. No facts or authority support this contention.

Indeed, it is the attorney-client privilege statutes, Evidence Code §§950 *et seq.*, that provide the bright line. Evidence Code §915 brightens

the line still further, providing in pertinent part (subject to exceptions not applicable here) that "the presiding officer may not require disclosure of information claimed to be privileged under this division. . . in order to rule on the claim of privilege. . . ."

As a result, short of excluding from a malpractice trial *all* exchanges between the attorney and the client for some indeterminate time around the date of the mediation, the malpractice trial court could never comply with Section 1119 if attorney-client communications fell within its scope.

Yet *Wimsatt* teaches (152 Cal.App.4th at p. 160), and the majority, citing *Wimsatt*, observed below, that in making a determination of whether or not a given communication is covered,

> the timing, context, and content of the communication all must be considered. Mediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation. [Citations.] Mediation confidentiality is to be applied where the writing or statement would not have existed but for a mediation communication, negotiation, or settlement discussion. [Citation.]" (*Ibid.*) The court explained that the timing of a conversation in relation to a scheduled mediation session was not determinative of whether the conversation was protected by mediation confidentiality. (*Id.* at p. 161.)

(Slip Op. at 10)

Only concluding that attorney-client communications constitute "unaffected evidence" as defined in Section 1120 saves both statutory schemes--privilege and confidentiality--from a morass of contradictions.

C. Petitioners participated in the mediation on behalf of Cassel, and cannot separately avail themselves of the confidentiality provisions.

In the mediation at issue here, Cassel and his lawyers ostensibly participated on the same side. The disclosures, arguments, proposals, discussions and in fact *all* the communications and evidence of conduct that Petitioners now seek to exclude were--or should have been--in furtherance of legal services provided to Petitioner. In short, those communications were, legally and ethically speaking, for the benefit of Cassel, and simply not Petitioners' to protect, withdraw *or exclude from evidence* in this malpractice case.

"As a general proposition the attorney-client relationship, insofar as it concerns the authority of the attorney to bind his client by agreement or stipulation, is governed by the principles of agency." (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403.) "An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal." (Civil Code §2330; see, *Heringer v. Schumacher* (1928) 88 Cal.App. 349, 352.)

Based on such agency considerations, under most circumstances the notion of "party" in civil litigation encompasses both client and counsel. (*Levy v. Superior Court (Golant)* (1995) 10 Cal.4th 578, 582.) And where "party" is not deemed to mean both, the term applies to the *client*, not his counsel. (*Id.* at 583; *Knabe v. Brister* (2007) 154 Cal.App.4th 1316, 1323.)

Thus there exist no circumstances that would arise in mediation where the *attorney* would act as a separate interested party--at least, not

without breaching his fiduciary duty of loyalty to his client. An attorney owes the client a fiduciary duty "of the very highest character." (*Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 430.)

Moreover, "[i]t is the duty of an attorney. . . [¶¶] (e)(1) To maintain inviolate the confidence, and *at every peril to himself* or herself to preserve the secrets, of his or her client." (Business and Professions Code §6068, emphasis added.)

The right to protect, or conversely to disclose, privileged communications between Cassel and Wasserman Comden that took place at any time during the underlying litigation--even before, during and in connection with mediation--belonged exclusively to Cassel. Only when Cassel sued Petitioners did he waive that control, and only with respect to his malpractice lawsuit.

By contrast, Petitioners' duty to their client superseded any protection of their own interests. It is impossible to reconcile that duty with Petitioners' attempt to bar evidence of their conduct by application of the mediation confidentiality statutes, which support an entirely different goal.

V. PUBLIC POLICY SUPPORTS ADMISSION OF THE EVIDENCE IN THE INTEREST OF ENFORCING ATTORNEYS' FIDUCIARY DUTIES TO THEIR CLIENTS

"Public policy" supports admission of the evidence. No harm will ensue to the mediation process as a result.

Although Petitioners argue the merits of mediation confidentiality from the standpoint of public policy (Pet. at pp.20 *et seq.*), those merits are not in dispute here nor would they be adversely affected by allowing

Petitioner's evidence consisting of privileged attorney-client communications to be admitted at trial of the malpractice action.

As the majority noted below, the mediation confidentiality statutes were intended to protect "the 'disputants,' i.e., the litigants—in order to encourage candor in the mediation process. (*Rojas v. Superior Court*, *supra*, 33 Cal.4th at pp. 415-416; accord, *Foxgate Homeowners' Assn. v.Bramalea California, Inc.*, *supra*, 26 Cal.4th at p. 14.)" (Slip Op. at 12)

Petitioners argue that "[t]he broad exception to mediation confidentiality created by the Slip Opinion will undermine the public policy that mediation is supported by robust confidentiality rules." (Pet. at p.20) This argument fails in two ways. First, as demonstrated above, admitting evidence based only on attorney-client exchanges, and only in a malpractice action, does not constitute an "exception" to the confidentiality statutes.

Second, every other exchange that actually involves adverse parties in the mediation, or the mediator, or both, and that actually is "made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" will remain subject to Section 1119. Seen in that light, the category of matters not encompassed by Section 1119 can hardly be described as "broad."

Simply put, it is not credible to assert that parties will refuse to participate in mediation because their attorneys must allow the admission of adverse evidence in a subsequent malpractice action. The assertion defies logic.

Petitioners attempt to bolster their argument with speculation that failure to create a "mediation exception" to otherwise admissible evidence under Section 958 will lead either to a spate of "settler's remorse" cases or

to a reluctance by lawyers to urge their clients to engage in mediation. (Pet. at pp.21-22)

Although Petitioners devote more than two pages to this scenario, it makes absolutely no sense to argue that clients will place greater, rather than less, trust in mediation with the knowledge that evidence of their lawyers' malpractice during the mediation is inadmissible.

Furthermore, lawyers have the *duty* to follow through with and promote mediation where it is in their client's interest, regardless of any risk to themselves of a later "settler's remorse" lawsuit.

In this respect, refusing admission of the evidence would affect adversely not simply the statutes and procedures governing use of privileged communications, but the entire scheme designed to protect a client's rights to introduce evidence when his lawyers commit malpractice or breach their fiduciary duties. Those fiduciary duties have long been deemed of vital concern by the courts of this State.

"An attorney owes the client a fiduciary duty 'of the very highest character.'" (*Bird, Marella, Boxer & Wolpert, supra* (2003) 106 Cal.App.4th at 430.) "A fiduciary relationship exists between attorneys and clients. An attorney must act with the most conscientious fidelity. A breach of fiduciary duty by an attorney is actionable whether it involves financial claims or physical damage resulting from the violation. [Citation.]" (*McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373.)

As this Court articulated the concept forty years ago:

> The relationship between an attorney and client is a fiduciary relationship of the very highest character. *All dealings* between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness

> for any unfairness. [Citation.] It is *incumbent upon the attorney* to show that the dealings are fair and reasonable and were fully known and understood by the client. The burden is on the attorney to show that the transaction between them was "at arm's length." [Citation.]

(*Clancy v. State Bar of California* (1969) 71 Cal.2d 140, 146-147 (emphasis added).) Soon thereafter, the Court held further:

> "[T]he dealings between practitioner and client frame a fiduciary relationship. The duty of a fiduciary embraces the obligation to render *a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests*. 'Where there is a duty to disclose, the disclosure must be full and complete and any material concealment or misrepresentation will amount to *fraud*.'"

(*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-189 (emphasis added).)

The protection of a client from breaches of fiduciary duty by his attorneys, as a matter of public policy enunciated by our courts for decades, admits of no exceptions, not even for services provided during or in connection with a mediation. Counsel's fiduciary duty to his client is in no way diminished prior to, during or after a mediation.

By seeking to apply the mediation confidentiality statutes to communications between and exclusively intended for a lawyer and his client, Petitioners nonetheless seek to carve out just such an exception. To them, it does not suffice that there is an evidentiary limitation based on communications to mediation participants other than their own client. They also demand extension of their insulation from liability to instances when in

private, but purportedly "in connection with a mediation," they perform their legal services negligently or breach their fiduciary duties.

VI. CONCLUSION

The present Petition for Review lacks any foundation other than Petitioners' desire for a third bite at the argument "apple," based upon dissatisfaction with the decision of the Court of Appeal majority below, and the court's rejection of Petitioners' request for a rehearing.

For all the reasons discussed above, Wasserman Comden's Petition for Review should be denied.

Dated: January 12, 2010

MAKAREM & ASSOCIATES APLC

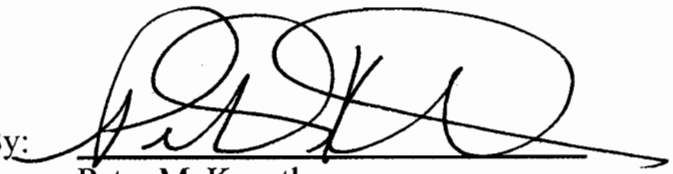
By 

PETER M. KUNSTLER
Attorneys for Respondent
MICHAEL CASSEL

CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.204(c))

The text of Respondent Michael Cassel's Answer to Petition for Review consists of 7101 words in text (including this certificate) and 54 words in footnote, according to the word-count feature of the Microsoft Word word-processing program used to create the document.

DATED: January 12, 2010 MAKAREM & ASSOCIATES APLC

By: 

Peter M. Kunstler
Attorneys for Respondent
MICHAEL CASSEL

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Ronald W. Makarem SB# 180442; Peter M. Kunstler SB#115841 Makarem & Associates APLC 11601 Wilshire Boulevard, Suite 2440 Los Angeles, California 90025-1760 TELEPHONE NO.: (310) 312-0299 FAX NO. *(Optional)*: (310) 312-0296 E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*: Petitioner Michael Cassel	Superior Court Case Number: LC 070 478 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: MICHAEL CASSEL RESPONDENT/REAL PARTY IN INTEREST: WASSERMAN, COMDEN, etc., et al	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): MICHAEL CASSEL

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 12, 2010

Peter M. Kunstler
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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PROOF OF SERVICE
(Code of Civil Procedure §1013A(d))

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 11601 Wilshire Boulevard, Suite 2440, Los Angeles, CA 90025-1740. On January 12, 2010, I caused the foregoing document described as:

Respondent Michael Cassel's Answer to Petition for Review

Said document was served on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

See Attached Service List

___BY MAIL: I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with this business' practice for collection and processing of mail and that on the same day, and in the ordinary course of business, said mail is deposited in the United States Mail with postage thereon fully prepaid at Los Angeles, California. I am aware that on motion of a party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit/proof of service.

_ PERSONAL SERVICE: I delivered said envelope by hand to the offices of the addressee(s).

_xx_ VIA OVERNIGHT DELIVERY: I placed such envelope for regularly scheduled pickup at our offices on the date of this declaration by our usual overnight delivery service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 12, 2010, at Los Angeles, California.

Stefani McDowell

Stefani McDowell

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