Supreme Court Case No. S178914

In the Supreme Court of the State of California

MICHAEL CASSEL,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

WASSERMAN, COMDEN, CASSELMAN & PEARSON, L.L.P., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN,

Real Parties in Interest.

Review Sought of the Decision Rendered by the Court of Appeal for the State of California, Second Appellate District, Division Seven

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OPENING BRIEF ON THE MERITS

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To the Honorable Ronald M. George, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The defendants and real parties in interest, Wasserman, Comden, Casselman & Pearson, L.L.P., David B. Casselman, and Steve K. Wasserman (collectively "WCCP"), submit this opening brief on the merits to address the two issues specified by this court in its order granting review, entered February 3, 2010:

ISSUES PRESENTED

1. Are the private conversations of an attorney and client for the purpose of mediation entitled to confidentiality under *Evidence Code* sections 1115 through 1128?

2. Is an attorney a "participant" in a mediation such that communications between the attorney and his or her client for purposes of mediation must remain confidential under *Evidence Code* sections 1119, subdivision (c) and 1122, subdivision (a)(2)?

INTRODUCTION

Strong public policy in California encourages mediation. To effectuate this policy, the Legislature enacted a robust, exception-free statutory scheme assuring that "all" communications made "for the purpose of, in the course of, or pursuant to, a mediation" are inadmissible in "any" subsequent lawsuit. (*Evidence Code* § 1119.[1]) This court and others have held consistently that these statutes are clear, must be applied broadly, and that judicially created exceptions are forbidden.

Courts and legal commentators have long recognized that the California Legislature's intent in drafting Sections 1115–1128 was to effectuate a robust, comprehensive protection for communications exchanged at mediation. Because mediation confidentiality is to be given "fierce protection,"[2] all previous efforts to carve exceptions into the mediation confidentiality statutes have been rejected or reversed. This court reversed an attempt to create a "good cause" exception, to allow evidence claimed to be necessary for some other cause of action. (*Rojas v. Superior Court* (2004) 33 Cal.4th 407.) And in both published and

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[1] All further statutory references are to the *Evidence Code* unless stated otherwise.

[2] Caplan, *Mediation Confidentiality – The Brightest Line Rule in Law* (Oct. 2007) 49 Orange County Lawyer 42, 44 ("Caplan").

unpublished opinions, trial court efforts to create an exception to admit evidence of claimed professional negligence by an attorney arising from the mediation itself have been reversed consistently. (E.g., *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137.)

Contrary to the intent of the Legislature, and contrary to several opinions of this and other courts, in *Cassel* the Court of Appeal has created an exception to mediation confidentiality that, even on its face, ignores the specific language of the applicable sections of the *Evidence Code* and *Rules of Court*. That error is pointed out in the dissenting opinion, so allowing the majority opinion to stand unchanged will only result in confusion.

The majority opinion holds that private discussions between an attorney and his or her client concerning a mediation are not protected by mediation confidentiality if they did not occur in front of a mediator or an opponent. The rule created is that confidentiality turns on and off like a light switch whenever a mediator or opponent enters or leaves the mediation room. Effectively, mediation confidentiality will not protect mediation conversations one moment, but will protect conversations a moment later. As a practical matter, this rule is unworkable and unfair. Evidence of a conversation between an attorney and his or her client either could not be placed into context, or could be offered as a conduit for confidential communications not otherwise admissible.

This judicially created exception finds no support in the statutes or in prior appellate opinions. In practice, this aspect of *Cassel* creates a serious disincentive for attorneys and litigants to agree to mediation, or to be as candid as possible in mediation. The exception created by *Cassel* stands in defiance of the policy that mediation is to be encouraged through provision of strong, predictable confidentiality rules.

Cassel introduces doubt into what had been a clear body of law. If not reversed, it will create needless confusion in the trial courts, as well as future appellate opinions.

STATEMENT OF FACTS

1. The Allegations in the Complaint.

Mr. Cassel alleges professional negligence against his former counsel, WCCP, based primarily on the attorneys' allegedly wrongfully advising him to accept $1,250,000.00 to settle an underlying federal trademark and copyright lawsuit, *Von Dutch Originals, LLC v. Cassel*, Case No. CV 04-00255 CAS (CTx), arising from claims over ownership of the "Von Dutch" clothing trademark. (RPApp. Ex. 1.[3]) Mr. Cassel lost an ownership interest in the Von Dutch Originals trademark in prior litigation, and then retained WCCP as his attorneys. (RPApp. Ex. 1, p. 4, ¶12.) WCCP then provided business and transactional advice to Mr. Cassel.

Litigation ensued between Von Dutch Originals and Mr. Cassel over the right to use the "Von Dutch" trademark. Mr. Cassel was sued originally as a defendant for trademark infringement. WCCP then pursued a cross-action on his behalf. (RPApp. Ex. 1, pp. 6-7.) WCCP successfully changed the focus of the litigation so that, rather than just defending claims against him, Mr. Cassel was able to go on the offensive by seeking money damages from the *Von Dutch Originals* plaintiffs. A settlement was reached after a lengthy mediation, with Mr. Cassel to receive $1,250,000.00. (RPApp. Ex. 1, pp. 7-8, ¶25-26.)

In this action, Mr. Cassel alleges that he and WCCP "agreed before the mediation commenced" that he wanted $2,000,000.00 to settle. (RPApp. Ex. 1, p. 7, ¶25.) He testified at deposition that during and immediately before the mediation at which he agreed to resolve his case, he was "forced" or "tricked" into the settlement by WCCP by, among other things:

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[3] Mr. Cassel's appendix filed with his petition for writ of mandate did not include any of the relevant pleadings beyond the court's orders. WCCP was left to provide the necessary record. Its "Appendix to Return of Real Parties in Interest" is cited as "RPApp. Ex."

- WCCP's "threatening to withdraw" as counsel if Mr. Cassel would not accept the $1.25 million settlement offer;

- Painting WCCP's efforts to point out weaknesses in his case and to accept a more realistic settlement amount as "coercion," Mr. Cassel alleges that WCCP made false representations regarding the merits of his case; and,

- He felt weak and "malleable" at the mediation because he was "tired" and "hungry," but WCCP "falsely" told him that he should continue with the mediation, rendering him less able to determine that WCCP's advice at the mediation was wrong.

WCCP disputes these claims. Mr. Cassel, whose business advisor, Mr. Michael Paradise, accompanied and assisted him throughout the mediation (and so could have assisted him if he truly felt "coerced" or "hungry"), exhibited no signs of weakness at the mediation, or of being unable to determine whether settlement was beneficial. Instead, he agreed to settle the case willingly, and voluntarily signed a settlement agreement reciting that he understood all of the relevant terms of the settlement, and was entering into it freely.

The District Court in *Von Dutch Originals* agreed. After the mediation, Mr. Cassel's opponent, Mr. Tony Sorenson, had to file a motion to compel Mr. Cassel to comply with the terms of the mediated settlement, and to sign the documents necessary to effectuate it. In support of that motion in the District Court, the mediator, Judge William Schoettler (ret.), provided a declaration explaining that Mr. Cassel never expressed that he did not understand the settlement agreement and made no complaint about being tired or hungry. He further declared that ample food was available at the mediation (some pizza was left uneaten). If Mr. Cassel had expressed any dislike of pizza, any other food could and would have been delivered. (2RT 66-67; see generally, 2RT 55, 61-62.) The motion was granted, and the mediated settlement was enforced as written and agreed to by Mr. Cassel.

2. WCCP's Pretrial Motion in Limine to Determine Whether Mediation Confidentiality Applies to Specific Evidence of Private Discussions Between Mr. Cassel and WCCP Lawyers Just Before and During the Underlying Mediation.

WCCP filed a pretrial motion in limine to determine whether numerous conversations between WCCP lawyers and Mr. Cassel shortly before and during the *Von Dutch Originals* mediation would be subject to mediation confidentiality, under *Evidence Code* §§ 1115 – 1128, *et seq.*[4] (RPApp. Ex. 3.) Because this issue was decided in a pretrial motion, under the relevant standard of review it necessarily focused on the unproven allegations and one-sided testimony of Mr. Cassel, addressing his allegations without admitting their truth, and without consideration of the ample evidence that disproves many of his claims.

After substantial briefing (RPApp. Exs. 3-8), the court held an evidentiary hearing that spanned three court days. It ruled on evidence presented in three ways: (1) Selected questions from the deposition of Mr. Cassel; (2) offers of proof as to further testimony, offered by Mr. Cassel's counsel at the hearing, and (3) in-court testimony[5] by defendant and WCCP attorney David Casselman, offered during the hearing under Section 402 to describe further conversations with Mr. Cassel pertaining to the mediation. The trial court then entered orders carefully ruling on each of dozens of individual statements or offers of proof concerning the mediation, to

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[4] Unless otherwise noted, citations to "Sections" refer to the *Evidence Code*.

[5] *Cassel* references that the trial court ruled based on Mr. Casselman's "deposition." This is incorrect, as Mr. Casselman was never deposed. He instead testified in court for this hearing. (See, RPApp. Ex. 9, p. 74 ("David Casselman is sworn and testifies for a limited purpose").) This factual error was not corrected on rehearing.

determine which fell within California's mediation confidentiality statutes. (See, RPApp. Exs. 9-11.)

The evidence pertaining to private conversations considered by the court (not in front of the mediator or the opponent) included the following:

A. The Meeting to Discuss a Plan for the Mediation Two Days Before the Mediation.

On August 2, 2004, two days before the mediation (roughly 15 days before the trial date), Mr. Cassel attended a meeting at WCCP's offices, along with his "assistant/partner" (see, RPApp. Ex. 8, p. 2, line 8), Mr. Michael Paradise, to "plan and prepare for the mediation." (RPApp. Ex. 12, p. 561, lines 4-5.) Mr. Cassel testified that the meeting included a "discussion of strategy and the amount we would be willing to take and what we thought the value was" for purposes of preparing for the mediation. (1RT 28-30,[6] discussing deposition testimony at RPApp. Ex. 12, pp. 560-561.[7])

Mr. Cassel decided at this meeting (but does not recall telling WCCP lawyers then (2RT 61-62)) that he wanted at least $2 million to settle at the mediation. (1RT 30-32 (discussing testimony at RPApp. Ex. 12, pp. 561, and 562-563).) Mr. Cassel also testified as to how he arrived at this $2 million settlement floor at the pre-mediation meeting. (1RT 33 (discussing testimony at RPApp. Ex. 12, p. 563:13 – 564:25).)

There was also discussion about what WCCP lawyers and Mr. Cassel thought the opponent, Mr. Sorenson (the sole owner of Von Dutch

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[6] Three volumes of Reporter's Transcripts were prepared for the trial court hearing held on April 1, 2, and 3, 2009. They are cited in order as 1RT, 2RT, and 3RT.

[7] The arguments in the Reporter's Transcripts and the court's orders (RPApp. Exs. 9-10) all refer to the relevant pages of Mr. Cassel's deposition using its original page numbers. To avoid confusion, WCCP will cite to the deposition's original page numbers. (See, RPApp. Ex. 12.)

Originals LLC), might be willing to pay to settle at the mediation. (1RT 34 (discussing testimony at RPApp. Ex. 12, p. 566).) They also discussed how ownership of the Von Dutch "global master license" might factor into any settlement offer at the mediation. (1RT 34-35 (discussing testimony at RPApp. Ex. 12, pp. 566:2 – 567:18); 1RT 40-42 (discussing testimony at RPApp. Ex. 12, pp. 572:14 – 574:3).)

B. The Meeting One Day Before the Mediation.

On August 3, 2004, the day before the mediation, another meeting was held with Mr. Cassel in WCCP's offices to discuss and plan for the mediation. The approach to be taken at the mediation was again discussed, and WCCP lawyers told Mr. Cassel he should try to "make a deal" at the mediation. (See, 1RT 54-57.)

C. Private Discussions During the Mediation.

At the mediation on August 4, 2004, there were several private discussions among WCCP lawyers, Mr. Cassel, and/or Mr. Paradise, Regarding what had been discussed during the formal mediation sessions with the opponent or the mediator.

At lunch, WCCP lawyers told Mr. Cassel they were "optimistic about the case," and that they "thought he could win this case." (1RT 27-28 (discussing testimony at RPApp. Ex. 12, pp. 559-560).)

There were discussions about the "tenor of the negotiations" at the mediation, including discussion of what Mr. Cassel, the mediator, Mr. Sorenson, and others did and said at the mediation. (All things said by the mediator, Mr. Sorenson, and others were confidential, by operation of Section 1119.) Mr. Cassel was upset that the negotiations were not moving along faster. (1RT 37-40 (discussing testimony at RPApp. Ex. 12, pp. 571-572).)

Discussing the terms on which he might agree to settle the suit, Mr. Cassel voiced to WCCP attorney Steve Wasserman his desire to regain control of Von Dutch Originals, LLC. In response, Mr. Wasserman said that it was not typical to condition a settlement upon a transfer of

ownership of the opponent's corporation, but that he could approach the current owner of the Von Dutch Originals shares, Mr. Sorenson's soon-to-be ex-wife, to see if she could obtain the shares as part of the property division in their ongoing divorce. If she could obtain them, and a deal could be struck to then buy the shares from her, Mr. Cassel might be able to regain an interest in the company. (See, 1RT 40-42 (discussing testimony at RPApp. Ex. 12, pp. 572:14 – 574:3); 1RT 50 (discussing testimony at RPApp. Ex. 12, pp. 607:10 – 608:11).)

There was ongoing discussion regarding which attorney at WCCP would try the case for Mr. Cassel if the case did not settle (this was uncertain, due to the attorneys' scheduling conflicts). (1RT 50 (discussing testimony at RPApp. Ex. 12, pp. 594:9 – 597:20).)

At the dinner break for the mediation, WCCP lawyers recommended that Mr. Cassel consider any offer over $1 million. (1RT 42-43 (discussing testimony at RPApp. Ex. 12, pp. 575:22 – 577:4, and 577:11-18).)

As the mediation continued, Mr. Cassel left the mediator's office, taking a taxi to his father's house so that he could consult him regarding the lawsuit and settlement. Mr. Casselman asked Mr. Cassel to stay at the mediation, but Mr. Cassel disagreed and left. (1RT 44-45 (discussing testimony at RPApp. Ex. 12, p. 581).)

The mediation continued while Mr. Cassel was away. Eventually, the opponent, Mr. Sorenson, made a substantial settlement offer: $1.25 million, to be paid to Mr. Cassel. A WCCP lawyer asked Mr. Paradise to call Mr. Cassel, to tell him about the offer and to ask him to return because a better deal was now available. (1RT 43-44 (discussing testimony at RPApp. Ex. 12, p. 580).)

Mr. Cassel returned to the mediation, and Mr. Casselman recommended that he accept the $1.25 million offer. (1RT 46-48 (discussing testimony at RPApp. Ex. 12, pp. 585:20 – 586:24).) Mr. Cassel testified that at this point he was considering $5 million in settlement, but that Mr. Casselman told him that was "greedy." However, if the $1.25 million offer was accepted, WCCP could reduce its fees owed by Mr.

Cassel at the time, thus increasing Mr. Cassel's net recovery. (1RT 49-50 (discussing testimony at RPApp. Ex. 12, p. 590:3-24).)

3. The Trial Court's Orders and Factual Findings That Some (But Not All) of the Private Pre-Mediation Discussions Between WCCP Lawyers and Mr. Cassel Were For Purposes of Discussing the Mediation, and Thus Were Inadmissible Due to Mediation Confidentiality.

All of the foregoing testimony was ruled inadmissible pursuant to the mediation confidentiality statutes, even if those conversations did not take place in front of the mediator or an opponent. This was because all "would not have existed but for a mediation communication, negotiation, or settlement discussion." (*Wimsatt, supra*, 152 Cal.App.4th at 160.) (RPApp. Exs. 9-10; see RPApp. Exs. 9-11; 2RT 22:27 – 23:13, 33, 72-89, 110-115 (individual rulings articulated on the record); 3RT 12:24-25 (rulings affirmed after additional argument).) Other offers of proof and testimony were allowed.

The trial court noted specifically that mediation confidentiality, under Section 1119, was not "confined only to the beginning and ending of a mediation. ... [U]nder 1119 and the related section, the confidentiality applies to any communications that are part of the process for the mediation." (1RT 14:9-13.) Presciently, the trial court also articulated its understanding that any exceptions to the confidentiality statutes to avoid claimed "unfairness" may be made only by the Legislature, not the courts. (1RT 21:19-22.)

Mr. Cassel's testimony that he agreed to settle at the mediation only because he was "hungry" or "tired" was ruled admissible to explain his state of mind, so long as mediation is not mentioned. (2RT 72-73, 76, 79-80.)

Similarly, the fact that Mr. Cassel left the mediation to discuss aspects of a settlement with his father, and that he was feeling tired and hungry at that time, was ruled admissible (again, so long as mediation is not mentioned). (2RT 77-78.)

The underlying written settlement agreement was ruled admissible, under Section 1123(b). (2RT 33.)

At Mr. Cassel's request, the trial court issued a separate order under *Code Civ. Proc.* § 166.1, certifying that the question of whether private communications between a client and counsel pertaining to a mediation must remain confidential involved "a controlling question of law ... resolution of which may materially advance the conclusion of the litigation."

4. Mr. Cassel's Petition for Writ of Mandate.

Mr. Cassel filed a petition for writ of mandate: *Cassel v. Superior Court for the County of Los Angeles*, Second Civil No. B215215. In it, he argued that private conversations between an attorney and a client regarding mediation that would otherwise be subject to the attorney-client privilege, due to no mediator or opponent being present at the time, would not fall within mediation confidentiality.

At no point did Mr. Cassel argue that the trial court's factual conclusions that individual conversations were for purposes of, or pursuant to, the *Von Dutch Originals* mediation were an abuse of discretion, unsupported by substantial evidence, or in any way factually wrong. Instead, he argued only that attorney-client conversations discussing mediation would not be "for the purpose of, in the course of, or pursuant to, a mediation," as intended in Section 1119, if they did not occur in front of a mediator or an opponent.

Further, because Section 958 operates to waive the attorney-client communication privilege automatically upon the filing of this legal malpractice action, Mr. Cassel argued that mediation confidentiality, too, should be deemed waived, so that evidence pertaining to the claimed professional negligence could be admitted.

5. The Published Opinion Overlooks or Re-Decides the Trial Court's Factual Findings, and Finds That the Private Discussions Between WCCP Lawyers and Mr. Cassel Regarding the Mediation Are Not Subject to Mediation Confidentiality.

In a published opinion (*Cassel v. Superior Court* (2009) 179 Cal.App.4th 152 ("*Cassel*")), the Court of Appeal reversed the trial court's orders, in their entirety. (*Id.* at pp. 155, 164-165.) While citing Section 1119, the majority opinion applies confidentiality only to conversations that occurred "in the course of" the mediation, in front of the mediator or opponent. It fails to discuss or apply the further language that conversations occurring "for the purpose of" or "pursuant to" mediation must also remain confidential. The dissenting opinion by Presiding Justice Dennis Perluss points out this inexplicable omission. (*Id.* at pp. 165-166 and fn. 3.) The majority opinion does not respond to the dissent.

Cassel then seems to re-decide the trial court's factual conclusions, *sua sponte*, or overlooks them entirely. It concludes that "some" of the subject pre-mediation conversations between WCCP attorneys and Mr. Cassel *may* have concerned "pretrial preparations," as well as mediation planning and strategy. Further, *Cassel* notes undescribed "indications" that *some* conversations concerning the mediation, including discussions about the value of the case and liability, *might* have been "more related to the civil litigation process as a whole rather than to the mediation." (*Cassel*, *supra*, 179 Cal.App.4th at p. 162.) *Cassel* then holds that "there is no readily identifiable link to the mediation in the communications, such as the content of a mediation brief." (*Id.* at p. 164.)

The unstated yet obvious conclusion in the *Cassel* majority opinion is that the trial court's factual conclusions were utterly wrong, and an abuse of its discretion. Yet Mr. Cassel had offered no argument that the trial

court's factual conclusions were erroneous. "Abuse of discretion" never appears, and that standard of review is never discussed.[8]

As Presiding Justice Perluss points out in his dissenting opinion, the majority opinion in *Cassel* overlooks the trial court's factual findings, and impermissibly reaches and relies upon the opposite factual conclusions. (Cassel, supra, 179 Cal.App.4th at pp. 164-165 and fn. 3.) The intended narrative of the *Cassel* majority is undermined utterly by the dissent's revelation of the true facts.

That the majority might have reached a different factual conclusion than the trial court on its factual conclusions is irrelevant. The Court of Appeal could not re-decide those factual conclusions *sua sponte*. As mentioned above, in his petition for writ of mandate Mr. Cassel never argued that the trial court's factual conclusions were not supported by substantial evidence, or were an abuse of its discretion. Even if the Court of Appeal disagreed with the trial court's conclusions, it had "no authority to substitute its decision for that of the trial court.' [Citations.]" (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 686.)

Without discussing the facts and findings beyond the undescribed "some" conversations that the *Cassel* majority concludes might have been equally useful for trial preparation – contrary to the factual conclusions the trial court reached – and with no discussion whatsoever whether or why the trial court's factual conclusions were wrong, or an abuse of its discretion, the *Cassel* majority concludes that *all* private discussions between WCCP attorneys and Mr. Cassel pertained to trial preparation. (*Cassel*, *supra*, 179

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[8] Rulings on WCCP's evidentiary objections in the motion in limine could have been reversed only for abuse of discretion. (*Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) However, where the ruling involves the court's "proper construction and application of" a statute, the aspects of the ruling that impart the court's interpretation of the statute are reviewed de novo. (*Estate of Thottam* (2008) 165 Cal.App.4th 1331, 1337.)

Cal.App.4th at pp. 161-162.) As recognized in the dissent, that is wrong. (See, *id.* at pp. 164-165 and fn. 3.)

6. A Petition for Rehearing is Filed, and Denied.

WCCP filed a timely petition for rehearing, discussing the topics that are raised in this petition. It was deemed denied by the expiration of time as of December 12, 2009.

7. The Order Granting Review.

On February 3, 2010, this court granted WCCP's petition for review.

LEGAL DISCUSSION

I.
California's Mediation Confidentiality Statutes Apply Broadly to All Communications Made "For the Purpose Of, In the Course Of, Or Pursuant To, a Mediation," Without Exception for Private Conversations Between a Client and His or Her Counsel.

A. The Plain Language of the Mediation Confidentiality Statutes Bars Introduction of All Evidence of Communications That Broadly Pertain to Mediation, Not Just Communications "During" Mediation, in Front of a Mediator or an Opponent.

California's "broadly framed and strictly construed" mediation confidentiality laws reflect the "strong policy encouraging settlements." (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 85, 87.)

"[T]he fundamental rule regarding confidentiality of mediation communications" is contained in Section 1119.[9] (*Eisendrath v. Superior*

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[9] Section 1119 states:

Except as otherwise provided in this chapter:

Footnote continued on next page.

Court (2003) 109 Cal.App.4th 351, 358.) That section states that all "communications" made "for the purpose of, in the course of, or pursuant to, a mediation" shall remain confidential. This court and others have held repeatedly that this language "is clear and unambiguous," and that it was drafted intentionally to be comprehensive in scope. (*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 11.) Consequently, the statutes are to be applied broadly. (*Id.*; *Wimsatt*, *supra*, 152 Cal.App.4th at 150.)

Because the mediation statutes are drafted using clear, conspicuously expansive language, it is recognized that the Legislature intended to preclude any effort to carve into those statutes any exceptions or preconditions other than those expressly stated in the statutory scheme. Consequently, reviewing courts have held, again and again, that judicially created exceptions are forbidden. "[T]he Supreme Court has declared that exceptions to mediation confidentiality must be expressly stated in the statutes." (*Wimsatt*, *supra*, 152 Cal.App.4th at 162, citing and construing *Foxgate*, *supra*, 26 Cal.4th at 15. Accord, *Rojas*, *supra*, 33 Cal.4th at 424 (same); *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582 (reversing the Court of Appeal's creation of an exception by a court where it sought to apply equitable estoppel to bar a litigant from denying facts stipulated to be true in mediation; judicially created exceptions are forbidden and "mediation confidentiality is to be strictly enforced").)

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

A practical test to determine when this broadly worded standard applies has been supplied in case law. Where a statement or writing "would not have existed but for a mediation communication, negotiation, or settlement discussion," it must remain confidential. (*Wimsatt*, *supra*, 152 Cal.App.4th at p. 160.) That practical test applies to all of the testimony and evidence that the trial court here concluded fell within the ambit of mediation confidentiality, so as to require it to bar that evidence at trial.

Despite the clear prohibition against judicial creation of exceptions to the statutory scheme, the Court of Appeal in *Cassel*, *supra*, 179 Cal.App.4th 152, did what this court expressly has forbidden. It established a new, judicially created exception to mediation confidentiality not appearing anywhere in the statutes. It allows admission of attorney-client discussions regarding or pursuant to a mediation if those conversations did not take place in front of a mediator or an opponent in mediation. (*Id.* at pp. 162-164.)

Cassel cites most of this court's opinions in which the prohibition against judicial creation of exceptions to mediation confidentiality is expressed, but it fails to actually apply that prohibition, at least until the dissenting opinion. (E.g., *Cassel*, *supra*, 179 Cal.App.4th at p. 166, construing, among others, *Foxgate*, *supra*, 26 Cal.4th at p. 14.) To avoid the overwhelming body of law that prohibits the result the majority reaches, *Cassel* changes or overlooks entirely the trial court's factual conclusions – which Mr. Cassel never challenged in the Court of Appeal – as well as the clear, *complete* wording of the statutes. (E.g., *id.* at pp. 166-167.)

The *Cassel* majority states that the subject "communications ... did not disclose anything said or done or any admission made in the course of the mediation ...." (*Cassel*, *supra*, 179 Cal.App.4th at p. 163, fn. 11.) Based on that finding, the majority concludes that because the private conversations were (supposedly) not repeated verbatim in the mediation sessions, WCCP had failed "to demonstrate a sufficiently close link between the communications and the mediation," as defined separately in Section 1115, "to require application of mediation confidentiality to the communications." (*Cassel*, *supra*, 179 Cal.App.4th at p. 164.)

Further, the *Cassel* majority concludes that when WCCP attorney Mr. David Casselman was discussing the possible settlement value of the case with Mr. Cassel at one of their pre-mediation conferences, and was discussing their plan for the mediation, "some" of those conversations "were more related to the civil litigation process as a whole," and were not exclusively for purposes of mediation. Specifically, because Mr. Casselman was determining the settlement value at mediation using the same method he used to evaluate the case for purposes of trial, any communications regarding evaluation of the case were not "for purposes of mediation." (*Cassel*, *supra*, 179 Cal.App.4th at p. 166 and fn. 3.)

Factually, this conclusion is plainly wrong. After hearing the evidence and offers of proof over a three day hearing, the trial court concluded, correctly, that the private conversations between WCCP attorneys and Mr. Cassel regarding the advisability of settling at mediation, the amount that might be accepted, the approach to be taken at the mediation, and aspects of the settlement offers made at the mediation all were "for purposes of the mediation," as contemplated in Section 1119. (See, RPApp. Exs. 9-10.) None of those communications would have taken place but for the mediation, less than two days away. (*Wimsatt*, *supra*, 152 Cal.App.4th at p. 160.)

Legally, this conclusion is also wrong. Section 1119 contains no language excluding communications for purposes of, or pursuant to, a mediation that, in hindsight, might also be useful to prepare for trial, or "the civil litigation process as a whole." (*Cassel*, *supra*, 179 Cal.App.4th at p. 162.) The *Cassel* majority creates a rule that too easily allows courts to nullify mediation confidentiality.

Rulings on evidentiary objections, such as these, are reviewed for abuse of discretion. (*Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) However, where the ruling involves the court's "proper construction and application of" a statute, the aspects of the ruling that impart the court's interpretation of the statute are reviewed de novo. (See, *Estate of Thottam* (2008) 165 Cal.App.4th 1331, 1337.)

Here, communications regarding WCCP's evaluating of the settlement value of the case at mediation were excluded from confidentiality simply because that valuation was about the same as the case's value at trial. (*Id.* at pp. 162-163 and fn. 11.) That reasoning effectively rewrites the description of the communications that Section 1119 requires confidentiality, and raises an important question: If topics discussed at mediation, or in express preparation for mediation, are not confidential if they might also be useful for trial preparation, what topics discussed for purposes of mediation, *exactly*, will remain confidential? It is difficult to imagine a topic relevant to the mediation of a case that is not also relevant to its trial, or case preparation in general. Nothing in the mediation confidentiality statutes allows appellate courts to recharacterize and negate, *sua sponte*, the factual conclusions reached by trial courts on whether communications are "for the purpose of, in the course of, or pursuant to, a mediation," for purposes of applying mediation confidentiality. (Section 1119(a).)

The net effect of the *Cassel* majority opinion is that the confidentiality for communications relating to mediation required by Section 1119 applies only to communications taking place during a mediation session, in front of a mediator or opponent.

As pointed out by Presiding Justice Dennis Perluss in his dissenting opinion (*Cassel*, *supra*, 179 Cal.App.4th at pp. 165-166 and fn. 3), the *Cassel* majority's narrow interpretation of Section 1119 is contrary to the expressed intent of the statutes. The clear language of Section 1119(a) does not limit confidentiality to only communications taking place during a mediation session, in front of a mediator or opponent. If it did, perhaps subsection (a) could have limited its application to only communications "in the course of" a mediation. But it says more.

Section 1119(a) makes confidential "all" communications *by any person* pertaining to a mediation before, during and after one occurs: "*for the purpose of*, in the course of, *or pursuant to*, a mediation." (Section 1119(a) (emphasis added).) The trial court found that the specified conversations must remain confidential because they occurred during, or

for the purpose of, the *Von Dutch Originals* mediation. (See, RPApp. Exs. 9 – 10.) That they did not take place in front of a mediator or the opponent, "in the course of" an actual mediation session is not required by Section 1119(a).

Also as pointed out in the dissent, the *Cassel* majority opinion nullifies those two phrases in Section 1119(a) ("*for the purpose of*, in the course of, *or pursuant to*, a mediation"), or makes them surplus. Under settled canons of statutory construction, that is impermissible. (*People v. Cole* (2006) 38 Cal.4th 964, 981.)

This court has rejected a similar attempt to narrow the application of Section 1119(a). In *Rojas*, *supra*, 33 Cal.4th at 422, this court reversed the lower court's creation of an exception Section 1119(a) to allow a "good cause" exception to mediation confidentiality to allow admission of reports prepared for mediation if necessary to obtain data compiled for the mediation. (*Id.* at p. 411.) This court explained that "[t]he [Law Revision] Commission's official comment explains that this section 'extends [protection] to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.' [Citation.]" (*Id.* at p. 422.)

Also applicable here, in *Rojas* this court explained further that it was improper for the lower court to carve a "good cause" exception into the mediation confidentiality statutes. The Legislature could and would have enacted a good cause exception when it passed section 1119 if it had so desired. (*Rojas*, *supra*, 33 Cal.4th at pp. 423-424.)

Likewise, 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. It did not. Section 1119 makes no effort to identify, define, or limit the persons whose "communications" or "writings" are subject to mediation confidentiality. Instead, the statutes define mediation confidentiality strictly in terms of the content or subject of the communications involved. Nowhere in Section 1119 is confidentiality limited to just conversations in front of the mediator or an opponent.

Similarly, if the Legislature had intended to allow introduction of mediation communications when they are alleged to be useful for a malpractice action against counsel, it could have drafted such an exception easily. It did not.[10] Clearly, such an exception could be drafted easily. From the fact that no such exception is stated in Section 1119 or elsewhere, it is presumed that the Legislature chose not to intend such an exception. (Accord, *Rojas*, *supra*, 33 Cal.4th at pp. 423-424.)

As held in *Wimsatt*, the strict, all-encompassing terms of the relevant statues afford courts no discretion to invent that exception, even if a court finds the result too distasteful to apply the statutes as written: "The stringent result we reach here means that *when clients ... participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel.*" (*Wimsatt*, *supra*, 152 Cal.App.4th at p. 163 (emphasis added).)

The *Cassel* court appears to have found the trial court's accurate application of the statutes distasteful, but crafted a novel detour around their terms and intended application, discussed in *Wimsatt*.

The Legislature chose to adopt comprehensive, exception-free mediation confidentiality rules. California is among the few states that have rejected the proposed Uniform Mediation Act ("UMA"), promoted by legal scholars and adopted by some other states.[11] The UMA specifically

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[10] The Legislature has not amended the mediation confidentiality statutes in response to the Court of Appeal's request in *Wimsatt*, *supra*, 152 Cal.App.4th at 164, that the Legislature might "reconsider California's broad and expansive mediation confidentiality statutes ...."

[11] The UMA "isolates contract enforcement proceedings and participant misconduct or malpractice proceedings as the only two areas where a confidentiality exception exists for all [participants], but not for mediators. Mediator testimony about the mediation is specifically

Footnote continued on next page.

allows introduction of mediation confidences if needed to prove misconduct at a mediation. "States with strong histories of protecting confidentiality in mediation, specifically California and Texas, have opted not to adopt the UMA, criticizing its less vigorous confidentiality provisions." (Peterson, *When Mediation Confidentiality and Substantive Law Clash: an Inquiry Into the Impact of* In re Marriage of Kieturakis *on California's Confidentiality Law*, 8 Pepp. Disp. Resol. L. J. 199, 209, and fn. 61 (2007).) Consequently, even apart from the clear statutory language used in Sections 1115-1128, it is unreasonable to conclude that the California Legislature really meant to allow the judicial creation of the exception to mediation confidentiality established in *Cassel*, but could not draft that exception itself.

Less than a month after the opinion in *Cassel* was entered, another court rejected its majority holding, applying reasoning identical to that argued by WCCP. That holding is exceptionally persuasive here.

In *Benesch v. Green*, 2009 U.S. Dist. LEXIS 117641 (Dec. 17, 2009),[12] [13] the United States District Court for the Northern District of

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authorized" for other specified topics. (Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. Dispute Resol. 135, 171, 166.)

[12] The *Benesch* opinion, available only electronically, is in WCCP's separate Appendix of Non-California Authorities, at Appendix A.

[13] At this time, it is unclear whether *Benesch* will be published. (The decision does not contain the instruction typically inserted into unpublished District Court decisions that it is "not designated for publication.") Regardless, *Benesch* may be cited as a persuasive authority even if it is not eventually published in the official federal reporters. California *Rules of Court*, rule 8.1115, does not prohibit citation of unpublished District Court opinions or orders. (See, *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096 (unpublished opinions); *Lebrilla v. Farmers Group, Inc.* (2008) 119 Cal.App.4th 1070, 1077 (unpublished orders).)

California was required to apply California's mediation statutes under claims that are nearly identical to those raised in this case. In *Benesch*, a client sued her lawyer "for malpractice arising out of a mediation." (*Id.* at p. 1.) The plaintiff sought to introduce evidence of private conversations with her lawyer to prove that a settlement agreement she agreed to at mediation "did not accurately reflect her intent ...." (*Id.*) The deviation between the settlement agreement negotiated and drafted at the mediation, and her intentions in settling the case discussed with counsel in pre-mediation meetings, was blamed on attorney negligence. (*Id.* at pp. 1, 4.)

The District Court was asked to determine whether conversations between the client and her lawyer just before and during the mediation were admissible under California's mediation confidentiality statutes, along with telephone conversations plaintiff had during the mediation with another person, Connie Benesch (the intended beneficiary of the agreement). (*Benesch*, at pp. 1-2.) The District Court had to analyze and weigh the controlling California appellate opinions interpreting the mediation confidentiality statutes, under the rule in federal diversity actions that the District Court must "approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum. In doing so, federal courts are bound by the pronouncements of the state's highest court on applicable state law." (*Id.* at pp. 5-6 (citation omitted).)

After analyzing the controlling California cases, and noting "Cassel is the latest word from the California appellate court on the issue of mediation confidentiality," the District Court declined to apply its majority holding. It found that *Cassel* is "in significant tension with the large majority of California opinions" regarding application of mediation confidentiality, and that its "dissent, rather than the majority, is more persuasive and true to the statutory language and the California Supreme Court's injunction not to create implied exceptions." (*Benesch*, p. 5.)

Most significantly, the District Court concluded that *Cassel* "appears to create an implied judicial exception to the mediation confidentiality statutes." (*Benesch*, p. 6, citing *Foxgate*, *supra*, 26 Cal.4th at p. 14.) This

court has repeatedly forbidden judicially created exceptions to the mediation confidentiality statutes. (*Simmons*, *supra*, 44 Cal.4th at p. 582; *Foxgate*, *supra*, 26 Cal.4th at p. 11; accord, *Wimsatt*, *supra*, 152 Cal.App.4th at p. 162.)

Benesch amplifies the arguments set forth convincingly in the dissenting opinion in *Cassel*, and WCCP's arguments here. *Cassel* must be reversed. The mediation confidentiality statutes do not allow the creation of an exception to allow mediation communications between a client and a lawyer merely because the mediator or opponent is not present.

At this point, WCCP must re-emphasize that the allegations raised against it are false. But mediation confidentiality does not depend on whether some one, or some court, might deem it is a good or bad thing to bar the particular communication involved. Specifically, as outlined in *Wimsatt*, *supra*, 152 Cal.App.4th at p. 162, when a trial court concludes that a communication concerns a mediation, confidentiality may not be set aside if the communication is allegedly needed to prove legal malpractice arising from a mediation. The Legislature is presumed to have already weighed that possibility when making its choice of the words used in the statutes. This court has already recognized as much in *Foxgate*:

> The conflict between the policy of preserving confidentiality of mediation in order to encourage resolution of disputes and the interest of the state in enforcing professional responsibility to protect the integrity of the judiciary and to protect the public against incompetent and/or unscrupulous attorneys has not gone unrecognized. ... [¶] *However, any resolution of the competing policies is a matter for legislative, not judicial, action.* [*Foxgate*, *supra*, 26 Cal.4th at p. 17, fn. 13 (emphasis added).]

Finally, the statement in *Cassel* that the private communications were not repeated to the mediator or opponent, and thus were not for

purposes of the mediation, adds nothing to support its holding because that statement is both factually unsupported and legally wrong. (*Cassel*, *supra*, 179 Cal.App.4th at p. 164.)

Factually, the statement is unsupported because no evidence to prove or disprove what was said to the mediator or opponent at the mediation was presented at the evidentiary hearing before the trial court. The focus was not on communications with the mediator or opponent, it was on the private communications between Mr. Cassel and WCCP attorneys.

However, the assumption in *Cassel* that the evidence, general mediation plan, acceptable settlement range, and other things discussed at the pre-mediation planning meetings, and at the mediation itself, was somehow not communicated to the mediator and opponent at the mediation is absurd. The plan and strategy for the mediation discussed and agreed upon at the meetings was, logically, then "communicated" to the mediator and/or opponent at the mediation, as a necessary part of presenting Mr. Cassel's position and arguments at the mediation. Mr. Cassel has never alleged that WCCP's approach at the mediation was contrary to the plan discussed and agreed upon with him over the previous two days (other than that the settlement was, in hindsight, too small), or that WCCP attorneys somehow sat mute throughout the mediation.

Legally, this is wrong because Section 1119 does not precondition confidentiality based upon whether certain persons are present or absent. Instead, it states the applicability of confidentiality in the broadest possible terms. Private conversations for the purpose of or pursuant to a mediation, even if held outside of the presence of the mediator or an opponent, are still confidential.

If the Legislature intended that confidentiality would attach only to communications in front of a mediator or opponent, such a precondition would have been easy to draft. But no such precondition exists. The absence of such a precondition is a clear indication that the Legislature did not intend for it to exist. (*Rojas*, *supra*, 33 Cal.4th at pp. 423-424.) The judicial creation of such a precondition is contrary to the clear terms of Section 1119.

In addition to being barred by the clear language of Section 1119, the exception to mediation confidentiality created in *Cassel* will hobble efforts to apply mediation confidentiality in a broad range of circumstances in future cases. As explained in the next subsection, that inevitable result is precisely the opposite of the stated goal of the mediation confidentiality statutes.

B. By Creating a Potentially Extensive Exception to Mediation Confidentiality Statutes, Cassel *Undermines the Stated Public Policy That Robust Mediation Confidentiality is Essential to Encourage Mediation.*

The broad exception to mediation confidentiality created by the *Cassel* majority undermines the public policy that mediation is supported by robust confidentiality rules. It could therefore discourage attorneys or litigants from being as candid as they should be in a mediation, or even from choosing to mediate difficult cases at all.

Confidentiality aids mediation by giving participants confidence to be candid, and to make concessions. (*Foxgate*, *supra*, 26 Cal.4th at p. 14.) But to instill the confidence that attorneys and litigants need to be candid, confidentiality must be predictable, and not surrounded by a minefield of exceptions. "[I]f parties cannot be assured of predictability of mediation confidentiality, including its exceptions, they may hesitate to engage in candid discussions or participate in the mediation process at all." (Nauss-Exon, *California's Opportunity to Create Historical Precedent Regarding a Mediated Settlement Agreement's Effect on Mediation Confidentiality and Arbitrability*, 5 Pepp. Disp. Resol. L.J. 215, 220-221 (2005) ("Nauss-Exon").) Creating a potentially huge new exception to mediation confidentiality will create doubt that will make mediation a less attractive option. The public policy encouraging mediation will be undermined.

Creation of this exception will harm disproportionately the difficult cases in which mediation can be most useful. Lawyers commonly recognize that mediation is especially useful to resolve difficult cases, or to help educate a client with an erroneous or unrealistic view of the case. (Consider the opposite: If the clients on both sides of a civil case have

accurate views on the facts of a case, and of the realities of litigation, settlement is seldom difficult, and mediation is less often necessary.) To have an effective mediation, it is recommended that a lawyer prepare a client, including getting the client to understand that his "fantasy" outcome is unlikely, and that he may be happier "the morning after" if he settles, rather than continues to fight. (See, Bulmash, *Making Sure Your Clients Know What They Really Want*, L.A. County Bar Assoc. Negotiation Tips, vol. III, no. 1 (Oct. 2009).) "Recognize that some clients have a difficult time letting go of the fantasy outcome. In some respects, settling is a mourning process. Your client has fantasized about the outcome of this dispute for a long time. The realistic settlement does not compare to the fantasy." (*Id.*)

Second-guessing a settlement does not occur only when lawyers allegedly mislead a client. Courts recognize that clients sometimes change their minds despite the best efforts of their counsel. So-called "settler's remorse" – where a litigant regrets having settled a case, and tries to repudiate a settlement – is a recognized risk of any mediated outcome. (See, *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 198; *Marriage of Rosevear*, *supra*, 65 Cal.App.4th at p. 686 (trial court's factual conclusion that settling party was not coerced into settlement, but instead simply suffered from "buyer's remorse," was a factual conclusion that should not be disturbed on appeal).) When a client decides that her lawyers should have gotten a better settlement, or should not have settled at all, a " 'settle and sue' " lawsuit against the lawyers is a common result. (*Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1461, fn. 12.)

Mediation is useful specifically because it allows greater communication among all participants, increasing the opportunities to address all aspects of a case that may impact settlement and increasing their willingness to settle. (E.g., Toker, Cal. Arbitration and Mediation Practice Guide (2002) §§ 12.1 – 12.4, pp. 435-444; Caplan, *supra*, 49 Orange County Lawyer at 44.) "[T]he mediation confidentiality provisions of the Evidence Code were enacted to encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings." (*Wimsatt*, *supra*, 152 Cal.App.4th

at 150 (citations omitted).) This aspect of the *Cassel* opinion creates a powerful disincentive for litigants in difficult cases to enter into mediation.

Further, as explained above, creating this exception to the mediation confidentiality statutes will affect all the participants at a mediation, not just an aggrieved client and his or her counsel. Opponents will be aware that if a rift develops between a client and his or her counsel, the opponent's confidences communicated to them at the mediation may be revealed publicly in any subsequent lawsuit, to the extent that those confidences were discussed "privately" between the client and counsel. Equally possible, confidential matters discussed even by the client or his attorney in front of the mediator or opponent would also be admissible, even though all those present for such discussions must consent to waiver of confidentiality. (Section 1122.)

Cassel provides no method to give opponents advance notice that their confidences will be so revealed in a later lawsuit. The requirement that an opponent (along with all other participants) must consent to the revelation of his discussions at a mediation, provided in Section 1122, is nullified.

Cassel creates a powerful disincentive for *any* participant at a mediation to be as open and honest as he can be, for fear that confidential conversations or admissions, if discussed privately between a client and counsel (as they inevitably are), can be revealed in any later lawsuit between the opponent and his counsel.

This concern comes to life whenever, as here, an attorney candidly tells a client the "downside" of rejecting a settlement, or tells a client the weaknesses of his case. Courts have warned counsel not to omit telling a client in mediation news she might not want to hear. "[H]ad plaintiff's counsel failed to advise her of the 'negatives' involved in the case [while preparing for a mediation], ... he may very well have been remiss in his duties as her advocate." (*Vela v. Hope Lumber & Supply Co.*, 966 P.2d 1196, 1198 and fn. 2 (Okla. Civ. App. 1998) at 1199 fn. 3.) But based on *Cassel*, lawyers in mediation should now be wary of ever changing a position discussed with their clients in private, no matter how honest and

accurate that change of mind might be. Such a result is antithetical to the policy favoring mediation. (See, Caplan, *supra*, 49 Orange County Lawyer at p. 45 (discussing that mediation confidentiality applies equally to inculpatory as well as exculpatory evidence).)

A secondary problem is exhibited by *Cassel*. "Drawing fine lines in this area seems counter to the policy embodied in *Rojas*." (*Doe 1 v. Superior Court* (2005) 132 Cal.App.4th 1160, 1168, fn. 9.) Allowing "[j]udicial sifting" of mediation communications to try to find fine-line exceptions to confidentiality "would deter some litigants from participating freely and openly in mediation." (*Ryan v. Garcia* (1994) 27 Cal.App.4th 1006, 1011.)

The policy that robust confidentiality is needed to encourage mediation is manifest in the statutes' plain language. Broad, plain language was employed in order to preclude judicially created exceptions. The first issue framed for review has effectively been answered in this court's prior opinions. The *Cassel* majority sidesteps those opinions, but in so doing runs headlong into an insurmountable problem. Nothing in *Cassel* answers the question raised by a fair reading of its majority holding: If an exception for private mediation communications between a client and lawyer is needed, why did the Legislature not include it?

Such an exception would not be hard to draft. Section 1119 easily could have included a precondition that confidentiality will be extended only to mediation communications "occurring before the mediator or an opponent." That language, or similar language, is plainly absent. Yet the *Cassel* majority invents such an exception, contrary to the mandate of this Supreme Court that courts cannot invent exceptions that the Legislature has not seen fit to enact. (*Rojas*, *supra*, 33 Cal.4th at p. 423 (reversing the Court of Appeal's creation of a "good cause" exception to mediation confidentiality, this court notes that "the Legislature clearly knows how to establish a 'good cause' exception to a protection or privilege if it so desires. The Legislature did not enact such an exception when it passed *Evidence Code* section 1119 and the other mediation confidentiality provisions;" accord, *Wimsatt*, *supra*, 152 Cal.App.4th at p. 162).)

Cassel defies the much larger body of California law construing mediation confidentiality. Uncorrected, it will have a detrimental impact on the practice of mediation, and will discourage its use. Its misconstruction of the relevant statutes is error.

C. The Unintended Consequences of Creating an Exception to Mediation Confidentiality to Allow "Private" Conversations Between a Client and Counsel Pursuant To, or For Purposes Of, a Mediation to Be Revealed.

a. The Confidences Revealed Will Not Be Limited to Those Communicated "Privately" Between a Client and Counsel.

The exception to mediation confidentiality created in *Cassel* assumes that the private communications between a client and counsel pertaining to mediation will reveal only those individuals' statements or confidences at the mediation, or concerning the mediation. As recognized already by several legal commentators,[14] this assumption is short-sighted.

A primary purpose of a mediation is to allow a participant to consider and weigh the other side's offers, positions, and explanations of underlying events. Confident that his mediation communications may remain confidential, an opponent is now free to discuss candidly confidential, damaging, or potentially embarrassing matters such as personal concessions, business secrets, information relevant to patents or trademarks, or any number of other of topics that a litigant might not want broadcast publicly. Logically, a client and counsel's private conversations pertaining to a mediation, or at a mediation, will include analysis of statements by the opponent or mediator, including their concessions, private evaluations, or discussion of sensitive business or personal matters

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[14] E.g., The IP ADR Blog, at: http://www.ipadrblog.com/2009/11/articles/ip-adr/von-dutch-tradename-settlement-gives-rise-to-legal-malpractice-action-and-questionable-mediation-confidentiality-decision/

expressed at the mediation,[15] to the extent those things will affect whether it is wise to settle.

If the "private" conversations between a client and counsel pertaining to mediation become admissible in a later claim against the lawyer, then the opponent's or mediator's confidential communications will be revealed in the later lawsuit, to the extent that the client and attorney will have privately discussed the opponent's positions, admissions, or statements at the mediation. The opponent's or mediator's expectation of confidentiality is effectively tossed aside, because the consent all participants must normally grant to allow admission of their statements at mediation (e.g., Section 1122) is sidestepped under the exception created by the Court of Appeal. The exception will swallow the rule of absolute confidentiality.

For that reason, the construction given to the mediation confidentiality statutes in *Cassel*, *supra*, 179 Cal.App.4th 152, further violates the rules of statutory construction. Where construction of a statute is allowed at all,[16] courts must construe it in a way that harmonizes the section with other related statutes. (*Travelers Casualty And Surety Co. v.*

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[15] While an opponent's truly private, confidential, damaging or embarrassing matters revealed at a mediation are the most obvious topics that might be discussed privately between a client and counsel, it remains true that the mediation confidentiality statutes deem "[a]ll communications, negotiations, or settlement discussions" – even seemingly innocuous discussions – to be "confidential." (See, Section 1119(c).) An opponent has a justifiable expectation that *everything* he or she says at a mediation will remain confidential.

[16] Courts "give effect to statutes according to the usual, ordinary import of the language employed in framing them. When statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it. [Citations.]" (*West Covina Hospital v. Superior Court* (1986) 41 Cal.3d 846, 850.)

Superior Court (2005) 126 Cal.App.4th 1131, 1146, citing *Kotler v. Alma Lodge* (1998) 63 Cal.App.4th 1381, 1391, 1394 (Sections 1119-1122 must be harmonized and construed together).)

Excluding from mediation confidentiality private communications between a client and lawyer, even though they are found to clearly relate to an ongoing mediation, will allow an opponent's confidences discussed at the mediation to be introduced if, as is likely, those confidences were discussed by the client and lawyer. Yet Section 1122 broadly prohibits introduction of *any* mediation communication unless all those involved in the communication consent. As to other participants in a mediation, the holding of the *Cassel* majority trumps Section 1122, and eliminates their statutory right to object to the revelation of their statements at mediation, all of which are made confidential by Section 1119(c). The construction of the mediation confidentiality statutes in *Cassel*, allowing all private communications between a client and lawyer concerning mediation to fall outside of mediation confidentiality, is impermissible.

b. Allowing Introduction of "Private" Mediation Discussions Between a Client and Lawyer, But Continuing to Bar Introduction of Communications In Front of the Mediator or Opponent Just Moments Later, Creates an Impossible Evidentiary "Catch 22" for Attorney Defendants.

The *Cassel* majority expresses that California's broadly phrased mediation confidentiality statutes were not intended to render inadmissible evidence of alleged attorney misdeeds at mediation. (See, *Cassel*, *supra*, 179 Cal.App.4th at pp. 162-164.) In the same vein, the court in *Wimsatt*, *supra*, 152 Cal.App.4th at p. 164, asked the Legislature to "reconsider California's broad and expansive mediation confidentiality statutes ... ." It has not.

Even though those courts express doubt that the Legislature truly intended for mediation confidentiality to apply to evidence of alleged attorney misdeeds at mediation, far greater problems and inequities would be created if *Cassel* remains law, carving an exception into the statutes to

allow evidence of "private" mediation communications between a client and lawyer.

As currently formulated, mediation confidentiality is broad, but it is also even-handed. In any lawsuit premised on events at a mediation, it bars introduction of evidence that might help a party, just as it bars evidence that might hurt a party. (See, Caplan, *supra*, 49 Orange County Lawyer at p. 45 (discussing that mediation confidentiality applies equally to "inculpatory" as well as "exculpatory" evidence).)

The rule created in *Cassel* can have a very unfair and unintended result at trial, the possibility of which will create another powerful disincentive to agree to mediation. A disincentive is created because the majority's holding in *Cassel* allows admission of private conversations that were unquestionably for purposes of a mediation, while conversations in front of a mediator or opponent, perhaps just moments later, where the plans and agreements discussed in the private communication are put into effect in the mediation itself, remain barred by mediation confidentiality.

The facts of this case underscore the inequity of the rule in *Cassel*. In a private pre-mediation conference, an attorney and client might agree on a certain approach, a certain settlement figure, or a certain set of facts. Even though it was clearly "for the purpose of mediation," under Section 1119, the *Cassel* majority holds that conversation does not fall within mediation confidentiality, and it is admissible in a later lawsuit.

Perhaps moments later, in negotiations or discussions with a mediator or an opponent, different facts are discussed. Parties begin to soften their positions. Mistaken views of the facts are corrected. Alternatives are presented. Consensus is reached, all with the client's participation and consent. "Exposing weaknesses, giving up some demands, and discovering new common ground are frequent occurrences in mediation." (Lodge, *Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells?* (2001) 41 Santa Clara L. Rev. 1093, 1112.) In short, the free-flowing exchange of views and information that both the courts and commentators recognize is the hallmark of mediation has its intended effect. But mediation confidentiality still applies to those

mediation communications. The judicially created exception in *Cassel* allows half the story to be told, while hiding the other half.

Later, if a client has "buyer's remorse," it becomes all too easy to blame the lawyer. This can occur regardless of whether "malpractice" is alleged. (E.g., *Fair*, *supra*, 40 Cal.4th at p. 198; *Marriage of Rosevear*, *supra*, 65 Cal.App.4th at p. 686; see, *Vela v. Hope Lumber & Supply Co.*, 966 P.2d 1196, 1198 and fn. 2 (Okla. Civ. App. 1998) (rejecting claim that evidence of "coercion" to settle a case should be admissible as an exception to Oklahoma's comparably strong mediation confidentiality statute). "Promises" or "firm plans" discussed in private are admissible, but the client's later agreement to a different plan, or acknowledgement of facts different than those discussed with his or her counsel in private, are inadmissible. This possibility can create a disincentive to mediate a difficult case, and definitely creates a disincentive for an attorney to ever moderate any position discussed with or agreed to with a client privately beforehand.

This inequitable result was discussed in *Benesch*, *supra*, 2009 U.S. Dist. LEXIS 117641 (at Appendix A). In *Benesch*, the District Court held that applying mediation confidentiality to some statements during or pertaining to mediation, but not others, would be inherently "inequitable and unfair," as well as in violation of the clear terms of the statutes. (*Id.* at p. 6.) Allowing a plaintiff to "provide evidence of communications with Defendant when they were alone together during the mediation, but Defendant, by virtue of the mediation confidentiality statutes, could not defend herself with other relevant evidence such as communications with opposing parties in the mediation and/or the mediator," was not a result that the mediation confidentiality statutes allow.

> While a client may desire a certain term in a comprehensive settlement and initially tell her attorney that she insists on it, it is not uncommon at a mediation – when, for example, opposing parties communicate a refusal to agree to that term or the mediator provides a

> persuasive reason why it cannot be part of the settlement – that the client accepts the need to compromise and agrees to drop the condition. Thus, it would be inequitable to prevent Defendant from presenting any such evidence of what was said or done in the course of, for the purpose of, or pursuant to the mediation. [*Benesch*, *supra*, at p. 6 (citation omitted).]

As discussed in *Benesch*, the mediation process relies on people changing their minds, and softening their preconceived expectations or preconditions to settlement, based upon the give-and-take that is the hallmark of any mediation. Allowing evidence of pre-mediation decisions to be introduced into evidence, but barring the introduction of communications during a mediation that result in parties softening their positions and coming to agreement, could easily discourage parties from ever changing their minds during a mediation.

In *Benesch*, the District Court relied on *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378. In *McDermott*, the Court of Appeal affirmed the dismissal of a shareholder derivative suit brought against corporate counsel because the attorney-client privilege would have barred the attorneys from testifying as to their side of the story. " 'We simply cannot conceive how an attorney is to mount a defense in a shareholder derivative action alleging a breach of duty to the corporate client, where, by the very nature of such an action, the attorney is foreclosed, in the absence of any waiver by the corporation, from disclosing the very communications which are alleged to constitute a breach of that duty." (*Id.* at p. 385, quoted in *Benesch*, *supra*, at p. 6.)

The exception to mediation confidentiality created by the *Cassel* majority will be equally inequitable. The mediation confidentiality statutes contain no language allowing such an uneven and inequitable result.

This aspect of the majority opinion in *Cassel* could provide a powerful disincentive to parties either to enter into mediation, or to change their minds once mediation begins. Either result will harm mediation,

rather than encourage it. The stated goal of the mediation confidentiality statutes is to encourage mediation, rather than create disincentives to it. (*Foxgate*, *supra*, 26 Cal.4th at p. 14.)

Ultimately, though, the issue is not whether this court believes it is a good or bad idea to endorse an exception to mediation confidentiality that will so heavily slant the admissible evidence. The issue is instead whether the Legislature presumably considered that possibility in drafting the relevant statutory language. It is presumed that the Legislature considered that result and chose to draft the mediation confidentiality statutes without the exception for private communications between a client and lawyer, thereby avoiding the inequitable result noted in *Benesch*. (Accord, *Rojas*, *supra*, 33 Cal.4th at pp. 423-424.)

c. *Cassel* Creates Doubt That a Trial Court's Factual Findings That Communications Were for Purpose Of, or Pursuant To, a Mediation Are Easily Reversed or Overlooked On Appeal, *Sua Sponte*.

The *Cassel* majority's re-decision of the trial court's factual conclusions (especially where abuse of discretion is not argued by a party), creates a second unintended consequence: It creates an exception to mediation confidentiality that could easily swallow the rule.

Cassel holds that because pre-mediation discussions of the possible value of the lawsuit or of factual problems in the lawsuit that would affect Mr. Cassel's stance at the mediation could be useful to prepare for both mediation and the trial, those conversations "might" have also been useful for trial preparation. Thus, the Court of Appeal concludes that WCCP did not establish that those conversations were *only* for mediation, so as to bring them within the intended ambit of mediation confidentiality. (*Cassel*, *supra*, 179 Cal.App.4th at pp. 161-162.)

The effect of this part aspect of the *Cassel* majority opinion is that regardless of what the trial court might hold, if an appellate court can, after-the-fact, recharacterize a conversation as also being useful for trial preparation, it will be unprotected by mediation confidentiality. This will

create doubt as to the applicability of mediation confidentiality that will undermine it completely. (E.g., Nauss-Exon, *supra*, 5 Pepp. Disp. Resol. L.J. at pp. 220-221.)

Further, this aspect of the *Cassel* majority opinion creates an exception that will consume the rule. If mediation confidentiality can be cancelled just because a communication's subject "might" also be useful for trial preparation, then the mediation confidentiality statutes will be rendered a hollow farce. *Of course*, things that are important for trial preparation will also be discussed to prepare for mediation. Preparation for a meaningful mediation could hardly avoid discussion of factual disputes, problems in a case, or the case's value for settlement and judgment. Proper preparation for a meaningful mediation requires that these topics be discussed thoroughly. (See, Caplan, *supra*, 49 Orange County Lawyer at p. 44; see also, The IP ADR Blog, at fn. 14, above.)

If, as here, a conclusion that a mediation communication deals with topics that "might" also be useful generically for trial or case preparation can be used to find mediation confidentiality inapplicable, it is difficult to imagine a mediation communication that will be confidential. The mediation confidentiality statutes could too easily be rendered meaningless.

II.
Attorneys Are "Participants" in Mediations Independently of Their Clients, In Addition To Acting as the Agents of Their Clients.

Section 1119(c) applies mediation confidentiality to all mediation participants. Section 1122(a)(2) requires that all "participants" to a mediation communication must consent to the waiver of confidentiality before evidence of that communication is admissible in any action. WCCP has never consented to waive any mediation confidentiality concerning its attorneys' private mediation communications with Mr. Cassel.

In *Cassel*, *supra*, 179 Cal.App.4th at p. 163, the majority opinion sidesteps this requirement by concluding that attorneys are not independent "participants" in mediation, for purposes of Sections 1119(c) and

1122(a)(2). Based on its definition of the word "participants," the *Cassel* majority concludes that attorneys "are not within the class of persons which mediation confidentiality was intended to protect from each other," so that private communications between a lawyer and client regarding a mediation are nonetheless not confidential. (*Cassel*, *id.*) In so holding, *Cassel* underestimates the important role attorneys play in mediation, and ignores the plain wording and intent of the statutes and rules pertaining to mediation.

The starting point for determining whether attorneys are "participants" in mediation is California *Rules of Court*, rule 3.852. In the section of the *Rules of Court* controlling how mediations are conducted, in subsection (3) it states that:

> "Participant" means any individual, entity, or group other than the mediator taking part in a mediation, *including but not limited to attorneys for the parties*. [Emphasis added.]

The Court of Appeal in *Cassel* does not cite or consider this rule.

Aided by the precursor to *Rules of Court*, rule 3.852(3),[17] the Court of Appeal in *Travelers Casualty*, *supra*, 126 Cal.App.4th 1131, 1146, held that the mediation confidentiality statutes, expressly including Sections 1119 and 1122, apply to all "participants, not just parties," including specifically insurance representatives. "Participants," as used in these statutes, is intended to include even " '*nonparties* attending the mediation ([including] an insurance representative ...)'." (*Id.* at p. 1146, quoting Cal. Law Revision Com. com., 29B pt. 3, at West's Ann. Evid. Code (2005 supp.) foll. section 1122, p. 188.)

Active participation by attorneys is vital to any mediation. But attorneys are not just unthinking conduits of a client's information, as the

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[17] Former California *Rules of Court*, rule 1620.2(c), was renumbered as *Rules of Court*, rule 3.852(3).

Cassel majority seems to infer. Attorneys' opinions, independent assessments of a case and the evidence, and ability act as an intermediary between a client and the opponent or mediator all add value to the mediation process beyond merely regurgitating the facts or the client's pre-agreed mediation stance.

Attorneys' communications regarding a mediation – even if only to a client – are therefore deserving of confidentiality, just as are every other participant's mediation communications. The Legislature presumably considered this by making confidentiality applicable to all "participants," without excluding lawyers. (Accord, *Rojas*, *supra*, 33 Cal.4th at pp. 423-424.)

Section 1119(c) mandates that "[a]ll communications, negotiations, or settlement discussions by and between *participants* in the course of a mediation or a mediation consultation shall remain confidential." (Emphasis added.) The Law Review Commission comments regarding Section 1119(c) explain that it is intended to clarify that mediation confidentiality is to be applied regardless of who is present when a mediation communication is made. "A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process." (Cal. Law Revision Com., Deering's Ann. *Evidence Code* (2009 supp.) foll. Section 1119(c).)

The foregoing rules and authorities do not allow "participants," as used in Section 1119(c) and 1122(a)(2), to exclude a party's attorney.

Section 1122(a)(2) allows admission of an otherwise confidential mediation communication or writing if it was "prepared by or on behalf of fewer than all the mediation participants," and all of those "participants" waive confidentiality. Based on its conclusion that a party's attorney is not a separate "participant" in a mediation, *Cassel* holds that Mr. Cassel could unilaterally consent to waive confidentiality to his private mediation communications with WCCP lawyers. (*Cassel*, *supra*, 179 Cal.App.4th at p. 163, fn. 11.)

This aspect of *Cassel* is incorrect, but it is dicta anyway. If, as the *Cassel* majority stated, the conversations between WCCP lawyers and Mr. Cassel planning for the mediation and discussing the mediation as it occurred were somehow not connected to the mediation, and thus not confidential, the majority's discussion that Mr. Cassel had consented to waive confidentiality would be irrelevant. (*Cassel*, *supra*, 179 Cal.App.4th at p. 163 and fn. 11.) There would be no confidentiality to waive.

Overlooking that internal contradiction, the *Cassel* majority finds that attorneys are not "participants" in mediation, separate from their clients, so that their private communications with a client cannot be deemed a part of "mediation," regardless of these sections' contrary commands. This is a misguided interpretation of the statute's plain meaning.

The *Cassel* majority relies on two arguments to support this conclusion. Each is incorrect.

A. "Participant" is Not the Same as "Party."

The word "participant" is not defined in the mediation confidentiality statutes (see, Section 1115), or anywhere else in the *Evidence Code*. The *Cassel* majority does not attempt to define "participant" using its normal, exceedingly broad definition: "one who participates."[18] Instead, the *Cassel* majority points to a different word that has an established legal definition: "party." (*Cassel*, *supra*, 179 Cal.App.4th at p. 159.) The *Cassel* majority holds that a "party" is the same as a "participant," and upon that concludes that attorneys are not "participants" to mediation, for purposes of Sections 1119(c) or 1122(a). "For mediation purposes, a client and his attorney operate as a single participant." (*Cassel*, *id.*) This analysis by the *Cassel* majority's analysis of this is wrong, for at least two reasons.

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[18] See, http://www.merriam-webster.com/dictionary/participant

First, and most obviously, "party" does not appear in Section 1119 or 1122. It is patently improper to construe a statute based on a word not appearing in it.

It is even more improper to engage in a complicated construction of a statute that is clear on its face. Specifically construing Section 1119(c), this court has already stated that "[t]he statutes are clear." (*Foxgate*, *supra*, 26 Cal.4th at pp. 11, 13.) "Because the language of sections 1119 and 1121 is clear and unambiguous, judicial construction of the statutes is not permitted unless they cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature. [Citations.]" (*Foxgate, id.* at p. 14.)

Second, even if it was proper to construe these statutes, "party" cannot be used to define "participant" because those words do not mean the same thing. "Party" has a set legal definition. " 'Party' is a technical term having a precise meaning in legal parlance; it refers to 'those by or against whom a suit is brought ... , the party plaintiff or defendant ... .' " (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1176.)

Clearly, "participant" is a different word than "party," and it has a far broader definition. One need not be a named "party" to be a "participant" in mediation. Mediators, "insurance representatives," and "nonparties" attending the mediation are deemed to be "participants" in mediation, for purposes of applying mediation confidentiality, even though they are not "parties." (*Travelers Casualty, supra*, 126 Cal.App.4th at pp. 1145-1146, construing former *Rules of Court*, rule 1620.2(c).[19])

Rules of Court, rule 3.852(3), defines that a "participant" is "any individual, entity, or group, other than the mediator taking part in a mediation, including but not limited to attorneys for the parties." (See, *Travelers Cas.*, *supra*, 126 Cal.App.4th at 1146.)

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[19] See, footnote 17, above.

.Attorneys are surely "participants" in mediation. Any other conclusion would be contrary to the logical notion that mediation requires both a client and his or her attorney to "participate" in the mediation.

By intentionally choosing an exceptionally broad word to describe the persons to whom mediation confidentiality might apply, the Legislature made a choice. It could have limited confidentiality, and waivers of it, to only a "party," if that was its intent, by simply using that word. It did not. Choice of the broader word "participant" reflects a reasoned choice not to limit application of mediation confidentiality to only "parties," or to when certain persons are present or absent. (Accord, *Rojas*, *supra*, 33 Cal.4th at pp. 423-424.) This choice comports with the policy that to promote mediation, confidentiality must be applied broadly. (*Wimsatt*, *supra*, 152 Cal.App.4th at p. 150.)

Any contrary conclusion will misread the statutes, and violate the Legislature's intent. Review must be granted to correct this error.

B. The Mediation Communications That Must Remain Confidential Are Defined in Section 1119, not Section 1115.

A second level of error in the *Cassel* opinion's construction of who constitutes a "participant" in the statutes is created by its focusing on the wrong statute.

To interpret the word "participants" in Section 1119, *Cassel* points back to the word "disputants" used in Section 1115, which is used to define generally what is a "mediation," for purposes of mediation confidentiality. The *Cassel* majority reasons that because attorneys are not "disputants" with their clients, the mediation confidentiality statutes must not intend for attorneys to be considered as separate "participants" from their clients, as that word is used in Section 1119. (*Cassel*, *supra*, 179 Cal.App.4th at pp. 159, 163.) This reasoning is plainly erroneous.

It is erroneous because Sections 1115 and 1119 define different things. The definition of "mediation" in Section 1115 has little or no impact on the meaning of "participants," as used in Section 1119.

Section 1115 defines what a "mediation" is, as a predicate for application of the confidentiality defined in the sections that follow. Subsection (a) of Section 1115 specifies that " '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." (Accord, *Code Civ. Proc.* § 1775.1.)

There is no dispute that a "mediation," as defined in Section 1115(a), took place in the underlying *Von Dutch Originals* lawsuit. That suit was resolved through a written agreement reached at that mediation.

If parties first engage in or agree to "mediation," the separate rule requiring that communications regarding that mediation remain confidential is then described in Section 1119. As noted above, that section applies confidentiality in the broadest terms possible. It uses the broad word "participants," rather than the more narrow "disputants," which is given its own specialized definition in Section 1115. The word "disputants" does not appear in Section 1119.

Again, if the Legislature intended the confidentiality provided in Section 1119 to apply only as between "disputants," it could have easily included that restriction in Section 1119 by using that word. (Accord, *Rojas*, *supra*, 33 Cal.4th at pp. 423-424.) It did not. The inescapable conclusion from its use of a different, much broader word is that it intended a different, much broader application for mediation confidentiality. This choice comports with the statutory scheme's intention to give mediation the broadest possible support. (*Wimsatt*, *supra*, 152 Cal.App.4th at p. 150.)

The construction of Sections 1119 and 1122 in *Cassel*, *supra*, 179 Cal.App.4th at pp. 162-164, needlessly muddles the statutory scheme that this court has repeatedly deemed clear. The *Cassel* majority's inaccurate definition of the statutes' terms introduces needless confusion whenever confidentiality becomes an issue in future lawsuits, and it undermines the use of mediation throughout California. This is all contrary to the strong policy that, to support mediation, confidentiality must remain comprehensive and free from judicially created exceptions.

III.
Conclusion

Allegations of "attorney misconduct" are serious. But Section 1119, *Wimsatt*, *Benesch*, and numerous other appellate opinions are clear and comprehensive. Those authorities and others require that the evidence carefully identified and considered by the trial court here must be barred from evidence under mediation confidentiality. While the majority opinion in *Cassel* attempts to weave carefully around the case law that expressly bars judicial creation of exceptions to mediation confidentiality, that holding runs afoul of both the trial court's factual conclusions and the clear, broad language of Section 1119. The *Cassel* majority is plainly out of step with the body of California case law applying mediation confidentiality.

WCCP respectfully requests that this court reverse the holding of the *Cassel* majority, and to construe the mediation confidentiality statutes consistently with the *Cassel* dissent, as well as the trial court and this court's prior opinions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH RULE 8.204(c)(1)

I, the undersigned Stephen M. Caine, declare that:

I am a partner in the law firm of Haight Brown & Bonesteel, which represents Defendants and Petitioners Wassrerman, Comden, Casselman, & Pearson, L.L.P., David B. Casselman, and Steve K. Wasserman, in this case.

This Certificate of Compliance is submitted in accordance with Rule 8.204 (c)(1) of the California *Rules of Court*.

This Opening Brief on the Merits was produced with a computer. It is proportionately spaced in 13 point Times Roman typeface. The brief contains 13,083 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 5, 2010, at Los Angeles, California.

_____

Stephen M. Caine

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES)

Case Name: MICHAEL CASSEL v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES
Case No.: Supreme Court Case o.: S178914

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, California, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 6080 Center Drive, Suite 800, Los Angeles, CA 90045-1574; that on ***March 5, 2010***, I served the within ***Opening Brief on the Merits*** in said action or proceeding by depositing a true copy thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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Theresa Welsch

(Original Signed)