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, ***Plaintiff and Respondent***

vs.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES
Respondent

WASSERMAN, COMDEN, CASSELMAN & PEARSON LLP; DAVID B. CASSELMAN; AND STEVE K. WASSERMAN
Defendants and Real Parties in Interest

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

PETITIONER MICHAEL CASSEL'S ANSWERING BRIEF ON REVIEW

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

Petitioner, Plaintiff below Michael Cassel ("Petitioner" or "Cassel") respectfully submits his Answering Brief to the Opening Brief on the Merits of Real Parties in Interest, Defendants below, Wasserman, Comden, Casselman & Pearson LLP, David B. Casselman and Steve K. Wasserman ("Real Parties" or "Wasserman Comden"), on this Court's Review of the granting of Cassel's Petition for Writ of Mandate by the Second District Court of Appeal, Division 8.

The issue before this Court is whether certain privileged attorney-client communications in the underlying case—all of which became *admissible* under Evidence Code §958 when Cassel sued his attorneys)—became *inadmissible* because they occurred two days and one day before and on the day of mediation, even though the communications were never disclosed to the mediator, any disputant or opposing counsel, and even though the communications constituted evidence of legal malpractice and breaches of fiduciary duty by the attorneys seeking exclusion.

The question is, will this Court create a "mediation exception" to Evidence Code §958? Or will the Court rather leave intact both the statutory scheme governing the attorney-client privilege and the statutory protections for mediation confidentiality.

Stated another way, can attorney-client privileged communications be deemed part of the "*process*" defined as mediation under Evidence §1115 without serious adverse consequences to the privilege and to the entire attorney-client relationship?

I. QUESTION PRESENTED

Did the Court of Appeal properly direct the Superior Court "to vacate its orders of April 1 and April 2, 2009, and to issue a new order denying Wasserman Comden's motion in limine to exclude evidence of Cassel's communications with his own attorneys and evidence of conduct by Cassel engaged in only in the presence of his own counsel, all of which occurred outside the presence of any opposing party (or its authorized representatives) or any mediator (as defined in § 1115, subd. (b)) prior to and on the same days as the mediation of the *Von Dutch* lawsuit"?

The answer to this question, however arrived at, is Yes.[1] The Writ was properly granted.

Any other result would create a "mediation exception" to the statutory structure of the attorney-client privilege, and would thereby allow mediation confidentiality to trump the attorney-client relationship--totally unnecessarily. On the other hand, and notwithstanding Real Parties' dire predictions, the result reached by the Court of Appeal allows *both* principles, privilege and confidentiality, to co-exist.

Real Parties seek to exclude evidence of the tactics they employed on the days leading up to and on the same day as the underlying mediation to secure Cassel's consent to a settlement, tactics that, regardless of when or where they occurred, would constitute egregious breaches of the attorneys' duties to their client.

By way of illustration, Cassel seeks to introduce evidence of Real Parties' threat to abandon Cassel as his trial counsel —just two weeks before trial—unless he settled for the amount offered by the opposing party.

---

[1] For this Court's acceptance of a result reached by the Court of Appeal, but not its reasoning, see *Adams v. Paul* (1995) 11 Cal.4th 583, 592, fn. 4.

Cassel offered to prove that Real Parties' made this threat because they had a conflict of interest: Wasserman Comden would be implicated in the very claims brought against Cassel to the point of potentially having to testify against their own client to evade liability. (See discussions in Sections II and III, *infra.*)

This Court has consistently emphasized over many decades the "very highest character" of the fiduciary duty an attorney owes his or her client. The statutes of this State contain a system of protections of the communications between attorney and client that constitutes a mainstay of the relationship between them. Crucial to that system of protections is the principle that neither party may use the attorney-client privilege as both sword and shield in litigation between them.

Deeming that communications *solely between attorney and client* and solely based on whether the communications included topics related to settlement must be excluded from evidence in malpractice litigation would create, by judicial mandate, an exception to the carefully balanced structure protecting the fiduciary nature of the attorney-client relationship and the privileges upon which that relationship depends.

Yet nothing in the mediation confidentiality statutes requires this extension of coverage to privileged communications, because nothing in those statutes implies that such communications fall with the definition of "mediation" set forth in Section 1115.

Real Parties, for their part, posit two questions for this Court. First, they ask "[a]re the private conversations of an attorney and client for the purpose of mediation entitled to confidentiality under *Evidence Code* sections 1115 through 1128." (Opening Brief ("O.B") at p. 2.)

While this question superficially resembles the question set forth above by Petitioner, it requires a content-based analysis of attorney-client communications, although such communications are privileged regardless of content. Alternatively, and potentially worse, Real Parties' interpretation would "entitle" communications, only one of whose purposes is mediation, to confidentiality, thus making the confidentiality applicable to admissible evidence--at the malpracticing attorney's discretion.

The Court of Appeal understood and addressed this issue, pointing out that it is almost impossible to characterize some communications as exclusively for mediation, unrelated to mediation or settlement, or multipurpose, even with an [improper] examination of their content. (Slip Op. at p. 10-11.) Real Parties acknowledge this as well. "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." (O.B. at p.18.)

Real Parties' proposed solution to the difficulty in characterizing the evidence proposes the exclusion of all the admissible evidence together with what they contend is inadmissible. They extend the arm of confidentiality beyond its reach, and vitiate the premises of the attorney-client privilege in the process.

Real Parties' second question asks, "[i]s 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)." (O.B. at p. 2.) The question is not only compound and somewhat deceptive. As Cassel's argument herein will show, it also does not contribute to resolving the issue before this Court.

"Participants" or not, when Wasserman Comden advanced their own agenda at the underlying mediation adversely to Cassel, they breached their fiduciary duty to their client. Holding Real Parties accountable for their breaches based on their private communications with Cassel will not create a "disincentive" to mediate cases. (O.B. at p.3.) On the other hand, it may just create a disincentive for lawyers to lie to, coerce, threaten and abandon their client under a false veil of "confidentiality."

II. INTRODUCTION

Michael Cassel sued his former counsel, Real Parties Wasserman Comden, for negligence and breaches of fiduciary duty in underlying matters involving ownership of a popular apparel trademark, "Von Dutch Originals." This was not a small matter: the damages potentially recoverable by Cassel amounted to tens of millions of dollars. The $1.25 million obtained for Cassel, seen in this light, constitute anything but a windfall.

Cassel alleged in his complaint that the representation was significantly affected, among other factors, by serious conflicts of interest arising from partner, Real Party Steve K. Wasserman's participation in his son's attempts to profit from the unauthorized marketing of Von Dutch merchandise on E-bay, thus aggravating the dispute to their client's detriment when the opposing party sought a contempt order.

If the underlying action had gone to trial, this would have placed Mr. Wasserman in the position of having to testify against the firm's own client. That disclosure by Real Parties to Cassel days before the mediation was one of the pieces of evidence that Real Parties sought successfully to exclude.

Cassel further alleged that Wasserman Comden undermined his position in the resulting trademark lawsuit through delay--including

deliberate concealment of the existence of the lawsuit--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 second day and day before the mediation. Cassel and his counsel also engaged in conversations on the day of the mediation, with neither the mediator nor opposing parties or their counsel present.

There is no dispute that what transpired during these meetings involving only Cassel and Wasserman Comden was protected by the attorney-client privilege. Cassel contends, moreover, that Real Parties' statements and conduct during these meetings constitute probative evidence of Wasserman Comden's malpractice and breaches of their fiduciary duty, and that this evidence is admissible at trial under Evidence Code §958.

As trial approached in this malpractice action, Wasserman Comden 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.*) Real Parties 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. That the communications in *Wimsatt* involved third parties--lawyers for the underlying defendants--makes it readily distinguishable from this case.

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 attorney-client privileged

communications are not a part of the mediation "process" as defined in Section 1115.

In fact, Real Parties were and are attempting to carve out a "mediation confidentiality exception" for communcations otherwise admissible under Evidence Code §958. Thus, Cassel did not seek admission of any evidence of what was said while either the mediator or opposing counsel or parties were present. He did not seek admission of matters addressed in privileged communications that was later discussed with opposing parties or the mediator.

Real Parties describe Cassel's proposed evidence in dismissive terms--for example, that Cassel merely wants to show that he was "tired and hungry," or that his attorneys were simply being "realistic." (O.B. at p. 5.) Even if that were the case, the argument only goes to the weight of the evidence, not its admissibility. But in fact, Cassel seeks to offer evidence of far more egregious conduct:

- Cassel testified that Real Parties told him any offer over $1 million was substantial and he must consider it. At the time Wasserman Comden made that statement, they still had not gathered the financial documents necessary to assess Cassel's damages at trial, nor retained any experts for trial.
- Cassel testified that Real Parties told him if he did not take the $1.25 settlement deal they thought he was greedy. Based on the evidence that Wasserman Comden were advocating the settlement for their own benefit and to avoid liability, the insults directed at Cassel constituted an intentional breach of Real Parties' fiduciary duty.
- Cassel testified that Steve Wasserman told Cassel that if he took the proposed settlement amount, Mr. Wasserman would make Cassel a deal that

would render the settlement inconsequential. Mr. Wasserman stated to him, "I can make that deal with the wife. That deal, we can make that deal. So you take this much money, I'll still make the deal with his wife." Mr. Wasserman even explained his purported strategy to Cassel. This "deal" never materialized--the terms of the settlement precluded it, and Mr. Wasserman made himself "unavailable" thereafter.

- Cassel testified that he left the mediation, which began at 10:00 a.m., late in the evening--with not intention of returning. Real Parties instructed his business partner to call Cassel and represent that he had to return to the mediation because they had a deal for him. Cassel returned under duress, and the mediation continued until approximately 2:00 a.m. As noted, no "deal" could or would be made.
- Cassel testified that David Casselman, in addition to accusing him of being greedy, asked Cassel who was going to try his case if he did not enter into a settlement agreement that night. In light of evidence that Real Parties were grossly unprepared to go trial as well as irremediably conflicted, it appears that Mr. Casselman knew long in advance of the mediation that he would use this trump-card to force Cassel to accept *any* settlement amount.
- Cassel testified Real Parties had led him to understand that Mr. Casselman would be his trial attorney. Mr. Casselman, for his part, had no intention of any Wasserman Comden attorney trying the case.
- Cassel testified that David Casselman called another attorney to resolve another pending case whose outcome would affect Cassel's recovery if the Von Dutch case settled. Casselman represented that he had in fact resolved the matter favorably to Cassel, so that Cassel's recovery would not be diminished. This was untruthful.

- Cassel testified that Real Parties offered him a special discount on their legal fees, as part of leading him to believe he would walk away with a *net* recovery to himself of over a million dollars. The reduction did not occur and Cassel's recovery was far less than a million dollars.
- Cassel testified that Steve Wasserman stated that he could still act as a broker in deals after the settlement. Mr. Wasserman thus assured Cassel that he would get additional money, making the bill for legal fees insignificant.

The representations, promises and threats described above all were factors in Cassel's ultimate acceptance of the settlement amount.

Cassel offered to prove that the motivating factors for Real Parties' conduct included Wasserman Comden's realization that they could not represent Cassel at trial without partner Steve Wasserman incurring liability for the transactions he and his son had engaged in using the Von Dutch name. In fact, it was the illegal sale of Von Dutch merchandise that triggered the underlying lawsuit--which Steve Wasserman did not disclose to Cassel until the plaintiffs had obtained a restraining order against him.

Real Parties therefore approached trial burdened by an insoluble firm-threatening conflict of interest. They conceded this by even attempting to Steve Wasserman and his son Keith in the release agreement.

Seriously compounding the effects of Real Parties' conflict of interest was that Wasserman Comden had not prepared for trial, had no expert witnesses to support Cassel's case, and had developed no trial plan. They had not obtained documents essential to proving Cassel's damages in an amount as high as $40 million. They had not prepared witnesses, including their client. They had not prepared because they had no intention of going to trial.

The trial judge nonetheless granted Real Parties' motion in limine to exclude the above-described evidence. He did, however, certify the issue for appellate review. Cassel thereupon submitted his Writ Petition, which was granted.

III. SUMMARY OF ARGUMENT

The plain language of Evidence Code §1115 defining "mediation" and "mediation consultation" does not encompass attorney-client communications that are statutorily privileged under Section 952 and that may be admitted exclusively in a legal malpractice action, as provided in Section 958. The two statutory schemes, mediation confidentiality and attorney-client privilege, serve entirely different purposes, and each may be fully enforced without impinging upon the other.

As the Court of Appeal found, the confidential attorney-client communications and conduct that Wasserman, Comden moved to exclude do not fall within the definition of being pursuant to a "mediation" or "mediation consultation." (Slip Op. at p.7) Section 1115 defines "mediation" as the process engaged in where the neutral facilitates communications between adverse parties; and "mediation consultation" as a process also requiring the mediator's participation.

Because by definition the mediator does not participate in confidential attorney-client communications, whether in the course of a mediation or not, the mediation confidentiality statutes do not preclude introduction of evidence of attorney-client communications that *are* admissible under Section 958 in malpractice actions.

Attorneys, also by definition, while, as Real Parties argue at length they may be "participants" in the process, are not *separate* "participants" from their own clients in mediation. Lawyers appear at mediation only in

service to their clients, not in support of a separate--and potentially adverse--agenda. Carving out a "mediation confidentiality" exception to Section 958, would nonetheless permit attorneys to advance that separate and adverse agenda during mediation, to their former clients' detriment in malpractice actions.

The privileged attorney-client communications and conduct at issue in this case fall, moreover within the "unaffected evidence" categories of Evidence Code §1120, that is, evidence that is not excluded based on mediation confidentiality.

Cassel, as noted above, seeks to offer at trial evidence of threats of abandonment, coercion, unrealized promises, insults and encroachments on his privacy. He also seeks to admit evidence that Wasserman Comden's breaches were part of an agenda, disclosed to him just before and at the time of the mediation, to settle the underlying case at any cost to their client. Not only were they not prepared for trial, they knew that they could not face the risk to the law firm of going to trial. Admission of such evidence plainly does not entail disclosure of discourse between and among the "participants and the mediator."

Cassel acknowledges that the Legislature intended for mediation confidentiality to encourage open participation in the mediation process. That concern is simply not affected by permitting clients suing their former lawyers to reveal confidential communications with their attorneys, and allowing attorneys to reveal such communications in their own defense, under Evidence Code §958. The two concepts--mediation confidentiality and attorney-client privilege--are unrelated and protect different interests, neither of which will be adversely affected by the other.

In a legal malpractice lawsuit, the attorney-client privilege is waived by the client in exchange for the right to sue former counsel—otherwise the attorneys might not be able to raise an effective defense. (Evidence Code §958.) However, Wasserman Comden should not be permitted to avail itself of this advantage, and then also take refuge behind mediation confidentiality. Such tactics amount to turning the tables on the former client, giving to the *lawyers* an unfair advantage that the client's waiver is intended to avoid.

Affording attorneys accused of malpractice a protected repository for all of the communications with their client whose admission at trial they seek to preclude, by placing those communications under the heading of "for the purposes of mediation," also has a number of serious, negative public policy consequences. While the admission of the evidence in a malpractice trial does no detectible harm to the mediation process, exclusion of such evidence has the potential, in the hands of negligent or unscrupulous lawyers, to wreak significant harm on those lawyers' clients.

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

Attorney-client privileged communications, are not made "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation." If the confidentiality statutes were deemed to encompass a lawyer's private conversations with his client, that would place mediation confidentiality and the attorney-client privilege in a conflict in which confidentiality could only prevail with the creation of an exception to the admissibility provisions of Section 958.

No conflict need exist between the statutory schemes. The definitions contained in Section 1115 themselves limit the applicability of the confidentiality statutes so as not to impinge upon admissibility under Section 958. As defined in Section 1115, mediation is a process of communication between adverse parties 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.*

Real Parties argue, however, that Evidence Code §1119 enunciates a much broader applicability for mediation confidentiality (O.B. at pp. 18-19), as if calling a person a "participant" in mediation extends the reach of confidentiality without requiring a definition of "mediation." (*See*, O.B. at pp. 36-42.)

Confidential attorney-client communications, by definition, always 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 only to the extent their disclosure is required in a legal malpractice action. (Section 958.)

Evidence Code §1120(a) supports 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 serves to render mediation confidentiality inapplicable even to certain communications actually introduced or used in mediation (as properly defined), which confidential attorney-client exchanges unquestionably are not. By way of example, the *Rojas* Court noted, "a party cannot secure protection for a writing-including a photograph, a witness statement, or an analysis of a test sample-that was not 'prepared for the purpose of, in the course of, or pursuant to, a mediation' (§ 1119, subd. (b)) simply by using or introducing it in a mediation or even including it as part of a writing-such as a brief or a declaration or a consultant's report-that was 'prepared for the purpose of, in the course of, or pursuant to, a mediation.'"

By contrast, Real Parties would have the Court exclude *all* privileged communications that might, arguably, have some mediation-related content. Since adding such content to otherwise admissible matters remains almost entirely within the control of counsel, not the client, Real Parties are in effect asking the Court to fashion the perfect device for exclusion of evidence adverse to an attorney accused of malpractice.

///

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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, in the

presence of adverse parties for the purpose of reconciling the differences between those parties.

Although Real Parties completely ignore any analysis of Section 1115, such an analysis is essential to understanding why attorney-client privileged communications lie outside the mediation confidentiality statutory scheme. Thus,

(a) "[C]ommunication *between the disputants*" clearly does not encompass attorney-client exchanges. The attorney and client are not disputants with each other.

(b) "[F]acilitate communication between the disputants" means that "mediation" occurs when *disputants* exchange information or views. Lawyer and client neither need nor want a third-party present when they exchange information or views between themselves.

(c) Just as obviously, "to assist *them* in reaching a mutually acceptable agreement" does not mean that the lawyer and his client are expecting to reach an agreement between themselves.

(d) The "process" as described involves "disputants" and a mediator engaged in exchanges between opposing parties. An attorney-client communication does not involve the mediator or opposing parties, and therefore cannot be the "process" referenced in the statute.

(e) The definition of "mediation consultation" as "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator" makes it even clearer that attorney-client privileged communications lie outside the "process" protected by confidentiality. This definition requires the presence of a mediator.

Real Parties do not quarrel with, nor even address, the definitions set forth in Section 1115, including the notion that mediation involves, in particular, "communication *between the disputants* " (emphasis added). (O.B. at p. 42.) Yet, inexplicably, Real Parties then conclude that because both attorney and client are also "participants," Section 1119 somehow broadens the scope of confidentiality to encompass future litigation between them, completely outside the concept of "mediation" enunciated in Section 1115. (*Id.*)

In this regard, therefore, in order to support their argument that one provision of the Evidence Code, Section 1119, trumps another, Section 958, Real Parties have attempted to frame the admission of Cassel's evidence as requiring creation of an "exception" to the mediation confidentiality statutes. (*E.g.*, O.B. at pp. 2-3.)

To the contrary, Cassel emphasizes that in fact he does *not* seek the creation of a judicial exception to the mediation confidentiality provisions.

At the same time, Cassel also points out that he has found nothing in the legislative history of the confidentiality statutes to suggest that Sections 1115 *et seq.* of the Evidence Code were intended to abrogate, supersede or limit the operation of the sections governing the attorney-client privilege.

Cassel argues instead that the confidentiality statutes do not apply to the admissibility as evidence, only in his malpractice case, of communications and conduct that were never intended to be disclosed to the mediator nor the opposing parties in the underlying case.

Moreover and as discussed below, because attorney-client communications remain privileged, as discussed below, *regardless of their content*, barring waiver by the client (not a factor here), their content

becomes at issue most generally in the context of a legal malpractice action, under Section 958.

It is an accepted principle in California case law that judicially-created exceptions are expressly disfavored. (*See*, *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194.) Real Parties agree. (O.B. at p.2.)

The evalution required under Real Parties' analysis, however, could result in the exclusion of Cassel's evidence only if there were a ***judicially-created*** *exception to admissibility under Evidence Code §958.* The issue of offering privileged communications into evidence does not come up in any other context.

This Court has articulated the reasons for effective protection of statements and documents introduced in mediation. These reasons do not 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.) What *Foxgate* makes clear, therefore, is that the mediation confidentiality statutes were enacted to facilitate exchanges between the "parties."

Lawyer and client already have that facilitating statututory structure: the attorney-client privilege established in Evidence Code §§950 *et seq.* Thus, Real Parties labored distinction between "parties" and "participants" has no bearing on whether attorney-client communications are covered by the mediation confidentiality statutes. They are not and were never contemplated to be.

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. The phrase "for the purpose of mediation" does not encompass attorney-client privileged communications

As defined in Evidence Code §1115 and discussed above, "mediation" is a "process" involving *a mediator* and *disputants*. The provisions of Section 1119, broad as they may be, *depend* upon the definitions articulated in Section 1115. The notion of "for the purposes of" therefore must remain within the confines of Section 1115. Expanding the scope of the "purposes of mediation" to include privileged attorney-client communications incorrectly interprets the mediation statutes.

No authority exists for the notion that attorney-client communications are "for the purposes of" the mediation process. Even when the attorney-client communications involve settlement strategies, settlement amounts or the reasons for settling or not settling, the discussions relate to something different than the mediation process. Further, we cannot presume that the Legislature meant to exclude every statement ever made by a participate no matter when the statements are said or who the statements are said to were made for the purposes of mediation, if they relate to settlement and there's an up-coming mediation. Imagine if every statement relating to settlement, made by a participant to a friend, his mother, his wife, his lawyer, even to himself, are deemed "for the purposes of mediation" and excluded from a subsequent trial.

More specifically, attorney-client communications take on a completely different purpose. As Real Parties themselves argue, the exchanges in mediation are extremely fluid. (O.B. at p.32.) If any "assumption" may be made, it is therefore that the confidential communications in the mediation will be substantially different in content, structure and tone from the one that transpired only between attorney and client. For example, while Cassel avers that he was hungry, tired, discouraged and clearly fearful of his lawyers' threatened abandonment, Real Parties allude to evidence that they were able to conceal their client's state of mind from the mediator, Judge Schottler. (O.B. at p.5.)[2]

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[2] Real Parties make explicit reference to the content Judge Schottler's written declaration in support of a motion in the District Court to compel Cassel to sign the settlement documents. The statements made by Judge Schottler are unquestionably inadmissible in California, even if not in Federal courts. (Evidence Code §1121; Federal Rules of Evidence, Rule 501) This tactic by Real Parties exemplifies their "confidentiality selectivity," and demonstrates why there cannot exist a "mediation confidentiality" exception to Section 958 of the Evidence Code.

Litigators must remain extremely careful about what they disclose to a mediator, let alone to the opposing side in a mediation. A lawyer must not divulge to mediator that, for example, the client "will take what he can get."

The facts in this case provide an even clearer illustration. While Wasserman Comden could tell their client that they were unprepared for trial and willing to abandon him if he did not settle, and that, among other things, they had no expert witnesses ready to testify, none of that information could be given to the mediator or the other side without contradicting the purpose of the disclosures to Cassel.

The types of communications most likely to bear on the attorneys' liability for malpractice and breaches of fiduciary duty will be those that are least likely to be disclosed to anyone but the attorney and the client. It would be absurd, for example, to assume that an attorney would disclose to the mediator or especially the other disputants the attorney's threat to abandon the client if the case did not settle.

Arguably, every conversation, email or letter between attorney and client may relate to or is for the purpose of settlement of the litigation. A lawyer is constantly speaking to the client about gaining leverage against the other side for settlement pressure, problems with the case which would be a reason to settle, victories in motion practice which would be a reason not to settle, and damage discussions which would relate to settlement demands. In short, Real Parties would place no limits on what is "for the purposes of mediation." While they purport to argue against "fine lines" (O.B. at p. 28), the attorney-client privilege is one of the brightest lines in the Evidence Code--and Real Parties would have the Court erase it.

Including attorney-client privileged communications among those "for the purposes of mediation" is, in fact, just as inappropriate as

considering such private conversations during a trial as part of "the trial." While we broadly use the phrase "in trial," when an attorney and client have a privileged conversation, the communication is certainly not made "in trial."

Further, no authority exists for creation of an exception to Evidence Code §958 when the evidence at issue relates to discussions pertaining to settlement, settlement strategies, settlement amounts or the reasons for settling or not settling. Yet in the view of Real Parties, such privileged communications would be considered "for the purposes of mediation" regardless of any other purposes they might serve, regardless of their entirely privileged nature and regardless of the likelihood of overinclusiveness.

Real Parties allude, however, to a "but for" test discussed in *Wimsatt v. Superior Court (Kausch)* (2007) 152 Cal.App.4th 137. (O.B. at p. 16.) However, this is an incorrect analogy. To begin with, in discussing what matters would not have existed "but for" the mediation, the *Wimsatt* court alluded to *documents*, in particular the mediation brief, whose existence "for the purpose of mediation" can readily be ascertained. (152 Cal.App.4th at 158-159.) The more logical interpretation of the "for the purposes" of mediation can be made to documents such as emails sent to disputants, power points prepared for mediation and expert charts to show damages at the mediation. All those documents are prepared "for the purposes of" mediation.

Wimsatt itself, however, does not permit an unlimited extension of the term "for the purposes of mediation." While documents such as mediation briefs, by their terms, may qualify under Section 1119, attorney-

client privileged communications are difficult, indeed almost impossible, to place under the confidentiality heading.

2. 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 settlement discussions between the parties in an employment termination review panel qualified for confidentiality under Evidence Code §1119. The *Saeta* court concluded that the definition of "mediation" could not be expanded so as to include the review panel. Despite having some attributes of mediation, the settlement transactions at the review board before which the parties' dispute was pending did not comport with the 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 Wasserman Comden throughout these proceedings, the court cogently and carefully differentiated matters that fall within and outside the statutory scope of Sections 1115 *et seq.*

Wimsatt is particularly important because it is a legal malpractice case similar, but only superficially, to this case. *Wimsatt* is, in fact, distinguishable in a material respect that supports Cassel's contention that the trial court should not have excluded 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 his lawyer and 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 e-mails 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.

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

Admission of evidence of privileged communications between Wasserman Comden and Cassel, even if arguably "mediation-related," does not require the judicial creation of an "exception" to the mediation confidentiality statutory scheme, notwithstanding Respondents' contentions to the contrary. No exception is required because 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.)

4. Attorney-client communications, because of their privileged nature, are not covered by Section 1119; there was no need expressly to exclude them

"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 of a century ago, in *Mitchell, supra*, provided a description of the privilege, and that description 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.*) (1989) 209 Cal.App.3d 467, 480.)

In this regard, Real Parties make a revealing, if most likely inadvertent concession. According to Real Parties, "[t]he rule created [by the Court of Appeal] 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 minute, but will protect convesations a moment later." (O.B. at p.3.)

That is precisely the point of the attorney-client privilege. It protects conversations between the attorney and the client when no one else is present. It matters not where or when the communication takes place. It is a completely content-neutral principle.

Real Parties contend that it is "absurd" not to assume that the "evidence, general mediation plan, acceptable settlement range, and other things discussed at pre-mediation planning meetings, and at the mediation itself, was somehow not communicated to the mediator and opponent at the mediation. . . ." (O.B. at p.24.)

If Real Parties were correct on this point, Section 958 would not apply as to any communication in any case where mediation had taken place. The defendant lawyer could contend that virtually every communication, e-mail, piece of correspondence or conversation involved

reasons for settlement, settlement strategies and related topics--provide an excuse for the lawyer to seek exclusion.

Real Parties are not, however, correct. There is no "absurdity" in asserting that neither the attorney nor the client will disclose a "mediation plan," that is their privately developed strategy for maximizing a favorable outcome, or the upper or lower limits of their actual settlement range, to the mediator or opposing party.

Evidence Code §1119, unlike the attorney-client privilege, is content-based. The analysis in *Wimsatt* addressed above, as well as the terms of Section 1120, further discussed below, make this amply clear. Consequently there exists no demonstrable reason for the Legislature to have made an "attorney-client privilege" exception to mediation confidentiality. The issue does not arise.

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

Evidence Code §958 provides that "[t]here 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 express language of Section 958 plainly contains no statutory exceptions--and no mention of "mediation" whatsoever. Thus, in order to render inadmissible in a malpractice trial attorney-client communications arising at or around the time of a mediation, but relevant to allegations legal malpractice and breaches of fiduciary duty, the courts must fashion an exception to Section 958. To make matters worse, creation of such an exception to a non-content based statute would require that the communication be analyzed for its content.

Consequently, excluding 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.

This conflicts substantially with the purpose of Section 958, which 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 Wasserman Comden seeks 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, Real Parties' 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.[3]

Real Parties have pointed to no authority creating an exception to Evidence Code §958 when it relates to discussions pertaining to settlement, settlement strategies, settlement amounts or the reasons for settling or not settling. Yet that is precisely what will happen if private communications between attorney and client are deemed covered by the mediation

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[3] Indeed, Real Parties' arguments in this case give rise to a somewhat ironic situation. Cassel does not doubt that, were he to have tried to exclude evidence of his statements or conduct during mediation that Wasserman Comden considered supportive of their defenses, Real Parties would not be trying to create the exceptions they seek here.

confidentiality statutes, 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

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 effectively provides that such evidence does not acquire protection even 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.)

Real Parties nonetheless have attempted to upend the issues by asserting that admission in malpractice trials of privileged communications made at or around the time of the mediation of an underlying case will lead to "confusion" in application of the mediation confidentiality statutes. (O.B. at p.3) No facts or authority support this speculative 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, or conceivably, even for the entire case, the court hearing a malpractice case could never resolve the question of how to comply with Section 1119.

Yet *Wimsatt* teaches (152 Cal.App.4th at p. 160) that in making a determination of whether or not a given communication is covered by mediation confidentiality, "the timing, context, and content of the communication all must be considered. [Citations.]"

The *Wimsatt* court explained that the mere timing of a communication (and in *Wimsatt*, the communications were *not* privileged attorney-client communications) in proximity to a scheduled mediation session did not, by itself, render the communication confidential if "otherwise admissible or subject to discovery outside of a mediation or a mediation consultation." (*Id.* at p. 161.)

Consequently, reasonably 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. Real Parties 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 Respondents seek to exclude were--or should have been--in furtherance of legal services provided to their client, Cassel. In short, those communications were, legally and ethically speaking, for the benefit of Cassel, and simply not Wasserman Comden's to protect, withdraw *or exclude from evidence* in this malpractice case.

Real Parties nonetheless submit a lengthy argument in support of a contention that is neither disputed nor particularly relevant: that the notion of "party" and that of "participant" are different, and that they were "participants" in their own right. Wasserman Comden's status as "participants," however, does not excuse their malpractice and breaches of fiduciary duty.

1. Wasserman Comden "participated" only as Cassel's counsel and on Cassel's behalf

"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.)

As a result, 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 Real Parties did he waive that control, and only with respect to his malpractice lawsuit.

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

2. Real Parties' argument that they must be defined as "participants" in the mediation is a red herring

Wasserman Comden devote over six pages of their Opening Brief to an argument that they were "'participants' in mediation independently of their clients. . . ." (O.B. at pp. 36-42.)

This argument is a red herring for two principal reasons. To begin with, there is no dispute that Wasserman Comden were "participants" in the mediation, and, like their client, required to maintain the confidentiality of those matters *to which confidentiality applied.* That duty to the mediator, the opposing parties and the "process" as defined in Section 1115 still did not make them "disputants" with *Cassel.*

Instead, as argued above, Wasserman Comden's role in the mediation was to represent Cassel. They owed a fiduciary duty to Cassel, even if they were offering him "opinions, independent assessments of a case and the evidence, and ability act [sic] as an intermediary. . . ." (O.B. at p. 38.) That Real Parties were "participants" did not permit them to step out of their role and advance an agenda adverse to Cassel. (*See*, *Travelers Cas.*

and Sur. Co. v. Superior Court (Clergy Cases I) (2005) 126 Cal.App.4th 1131, 143 fn. 14: insurer's mediation confidentiality obligation did not eliminate potential bad faith liability).

Moreover, and flowing from the first reason, Real Parties' effort to invoke Evidence Code §§1119 and 1122 against their own former client betrays their role in the mediation. Wasserman Comden argue that the Court of Appeal has created "an impossible evidentiary Catch-22 for attorney defendants." (O.B. at p.31.)

That argument stands reality on its head. The *attorney*, not the client, is far more likely to know that privileged communications between lawyer and client may be introduced as evidence in a malpractice trial. At the same time, in Real Parties' analysis, the lawyer will also be aware that he can protect his or her most egregious or offensive conduct and statements by engaging in the conduct or making the statements during a mediation. In so doing, the lawyer has stepped out of the role of advocate for the client, and become the client's adversary.

D. Real Parties have abandoned the contention that Evidence Code §1128 may exclude the evidence

Real Parties argued below that Evidence Code §1128 might also bar Cassel's evidence of attorney-client privileged communications. They appear correctly to have abandoned this contention.

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

"Public policy" supports admission of Cassel's evidence of Wasserman Comden's malpractice and breaches of fiduciary duty during mediation at the trial of his action against Wasserman Comden. Benefits to

the public, in particular to consumers of litigation services, arise when attorneys cannot give priority to their own agendas during a mediation; and when attorneys, with or without separate agendas, are motivated to pay closer attention to the needs and goals of their clients.

Indeed, deliberate disregard of Cassel's needs and goals by Wasserman Comden lies at the heart of Cassel's allegations against his former lawyers.

Although Real Parties have, during the litigation and the current writ proceedings, forcefully argued the merits of mediation confidentiality from the standpoint of public policy, those merits are not in dispute here. But the argument is also irrelevant: the mediation process will not be adversely affected by allowing Petitioner's evidence consisting of privileged attorney-client communications to be admitted at trial of the malpractice action.

The cases on point provide that the mediation confidentiality statutes were intended to protect the "disputants," meaning the litigants, from having their disclosures made to promote compromise being turned against them at trial—this in order to encourage candor in the mediation process. (*Rojas v. Superior Court*, *supra*, 33 Cal.4th at 415-416; *Foxgate Homeowners' Assn.*, *supra*, 26 Cal.4th at 14.)

In contrast, the predicted ill-effects of admitting Cassel's evidence will not occur for two substantial reasons.

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*. The attorney-client privilege will remain entirely irrelevant to those other communications. There will be no slippery slope, no unwarranted exceptions to mediation confidentiality.

In this regard, it is simply 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, although this assertion seems to underpin the argument that allowing Cassel's evidence to be presented at the malpractice trial will somehow spawn an array of "exceptions" to mediation confidentiality. (O.B. at p. 32.) The assertion defies logic.

In fact, if privileged communications discussing settlement matters for a forthcoming mediation or at a mediation are excluded from evidence in subsequent malpractice actions, clients unaware of the exclusion will go unprotected from unscrupulous conduct by their attorneys; clients aware of the exclusion are likely to trust their own counsel less, not more, during the mediation. Either scenario is detrimental to the client's interests in the mediation.

The first situation allows attorneys to employ methods to obtain their client's assent to a settlement, agreement to a strategy or consent to a limitation on the amount of the demand that are prohibited by the Rules of Professional Conduct. The second situation risks making the sophisticated client more sensitive to what the client perceives as undue pressure by his own lawyers, possibly reluctant to accept even the lawyers' reasonable suggestions, and even doubtful about the entire mediation process.

Equally unfounded is the speculation raised by Real Parties that failure to create what clearly amounts to 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.

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 summary, 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,* 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, Respondents nonetheless seek to carve out just such an exception. To Wasserman Comden, 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. REAL PARTIES' ATTACK ON THE COURT OF APPEAL'S REASONING AND THEIR RELIANCE ON NON-CALIFORNIA AUTHORITY DO NOT SUPPORT THEIR POSITION

Real Parties mount an unwarranted two-fold attach on the Court of Appeal decision. First, they accuse the Court of Appeal of ignoring the rulings of the trial court, and not determining whether or not the trial court had abused its discretion. (O.B. at p. 12-14.) This argument makes no sense. The trial court itself had determined that its decisions were subject to an examination of the legal scope of the attorney-client privilege.

As for the unpublished case of *Benesch v. Green* (2009 U.S. Dist. LEXIS 117641 (12/17/09)), Real Parties appear to ask this Court to rely on the conclusions of the Federal court of the first instance, and to allow those conclusions to supersede not only the views of the majority on the panel of the Court of Appeal, but also this Court's own analysis. (O.B. at pp. 21 *et seq.* and 33 *et seq.*) With all due respect to the District Court, its decision really only consitutes argument in this Court, not authority.

A. The attack on the Court of Appeal decision is unfounded

Real Parties' contention with regard to the decision below comes down to "[t]he 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." (O.B. at pp. 12-13.)

This contention is not only incorrect, it also begs the question. The trial judge understood all along--and so must have Real Parties--that Cassel sought to introduce, at the malpractice trial, communications that took place around and at the time of the mediation that related to settlement

strategies and amounts, as well as matters affecting the case if it did not settle.

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."

Consequently, 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 Real Parties assert that the Court of Appeal majority overstepped its authority because it "redecided" the trial court's factual conclusions. (O.B. at p.13.) This misconstrues not only the majority's view, but also the question asked: should the courts create a judicial exception to Section 958 of the Evidence Code?

Real Parties' criticism of the majority's use of examples to illustrate the difficulty of determining what part of the subject attorney-client communications should be excluded under the confidentiality statutes is equally misplaced. What the majority really demonstrates is that the exception to Section 958 proposed by Real Parties would permit defendant attorneys to seek exclusion of virtually any adverse evidence they might choose, by mischaracterizing such evidence.

Real Parties 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 overlooks the trial court's

factual findings, and impermissibly reaches and relies upon the opposite factual conclusions." (O.B. at p. 13.)

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 Real Parties 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.

B. The *Benesch* case does not provide authority for this Court

The discussion by the United States District Court in *Benesch v. Green*, *supra*, should not influence this Court's decision on the issue presented here. Aside from the fact that the District Court opinion is, accordingly to Real Parties, as yet unpublished (O.B. at p. 21), it clearly constitutes *argument*, not authority.

That *Benesch* cannot be relied upon here is shown by Real Parties citation to the finding by the *Benesch* court that "Cassel is 'in significant tension with the large majority of California opinions' regarding application of mediation confidentiality. . . ." (O.B. at p. 22.) Thus Real Parties would have the District Court's review of the "California opinions" take the place of this Court's own review.

A serious problem with such an approach is that there are no means of determining the focus of the parties' briefs that underlie the Federal court's decision. Most significantly, did the plaintiff in Benesch clarify, or even point out, that what the defendants therein, and Real Parties herein, were and are attempting is to create an exception to Evidence Code §958.

Benesch v. Green should be completely disregarded by this Court, and certainly not relied upon as authority.

VII. CONCLUSION

Attorneys' fiduciary duties to their clients; and the attorney-client privilege that constitutes an essential part of the relationship between the two are very close to "sacred" in California law. On occasion, unfortunately, that relationship breaks down due to negligence or breaches of fiduciary duty by the lawyers.

In the ensuing malpractice lawsuits, of course, the lawyer has the right to defend against the allegations even by disclosure of privileged communications; as does the client.

Similarly occupying a protected place in California law is the concept of mediation confidentiality--the notion that parties in mediation may need to disclose to the mediator and to their adversaries, in order to make settlement possible, information that could be used against them at the subsequent trial.

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As the Court of Appeal correctly held below, there exists no need, however, to define mediation confidentiality in a way that requires the courts to create an exception to Evidence Code §958. Attorney-client communications are not excluded in malpractice trials under the confidentiality statutes.

This Court should affirm the granting of Cassel's writ petition by the Court of Appeal.

Dated: April 5, 2010 MAKAREM & ASSOCIATES APLC

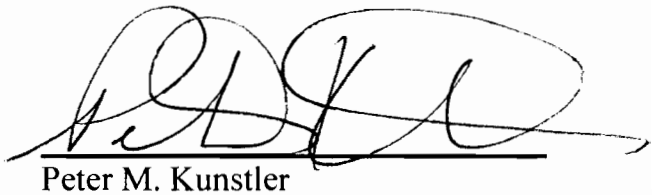
By
PETER M. KUNSTLER
Attorneys for Petitioner
MICHAEL CASSEL

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

The text of Petitioner Michael Cassel's Answer to Petition for Review consists of 11,777 words in text (including this certificate) and 156 words in footnote, according to the word-count feature of the Microsoft Word word-processing program used to create the document.

DATED: April 5, 2010

MAKAREM & ASSOCIATES APLC

By: 

Peter M. Kunstler
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MICHAEL CASSEL

PROOF OF SERVICE
(Code of Civil Procedure §l0l3A(d))

I am employed in the County of Los Angeles, State of California. I am over the age of l8 years and not a party to the within action. My business address is 11601 Wilshire Boulevard, Suite 2440, Los Angeles, CA 90025-1740. On April 5, 2010, I caused the foregoing document described as:

PETITIONER MICHAEL CASSEL'S ANSWERING BRIEF ON 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 April 5, 2010 at Los Angeles, California.

Stefani McDowell

Stefani McDowell

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