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SUPREME COURT COPY

Supreme Court Case No._____ Second Appellate District No. B215215

In the Supreme Court of the State of California

MICHAEL CASSEL,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

WASSERMAN, COMDEN, CASSELMAN & PEARSON, L.L.P., et al.,

Real Parties in Interest.

Plaintiff and Respondent,

titioners.

ATE OF

PETITION FOR REVIEW BY DEFENDANTS WASSERMAN, CAMDEN, CASSELMAN & PEARSON, L.L.P., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN

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State of California
Court of Appeal
Second Appellate District Division Seven

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: Second Civil no. B215215

Case Name: Cassel v Superior Court of California County of Los Angeles

Please check the applicable box:

☐ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208 and 8.490(i).

☒ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Steve K. Wasserman	Partial ownership of Wasserman, Comden, Casselman & Pearson, LLP
2. Leonard J. Comden	Partial ownership of Wasserman, Comden, Casselman & Pearson, LLP
3. David B. Casselman	Partial ownership of Wasserman, Comden, Casselman & Pearson, LLP

Please attach additional sheets with Entity or Person Information if necessary.

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Signature of Attorney/Party Submitting Form

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Party Represented: Defendants and Petitioners, Wasserman. Comden, Casselman & Pearson, LLP, David B. Casselman and Steve K. Wasserman

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In the Supreme Court of the State of California

MICHAEL CASSEL,

Plaintiff and Respondent,

vs.

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

Defendants and Petitioners.

PETITION FOR REVIEW BY DEFENDANTS WASSERMAN, CAMDEN, CASSELMAN & PEARSON, L.L.P., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN

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 petitioners, Wasserman, Comden, Casselman & Pearson, L.L.P., David B. Casselman, and Steve K. Wasserman, respectfully petition for review of the opinion of the Court of Appeal, Second Appellate District, Division Seven, in this case, and present the following issues for consideration by this Court.

ISSUES PRESENTED

1. Are private conversations solely between an attorney and his or her client for the purpose of mediation – such as discussing a plan for a mediation a few days beforehand, or discussing the merits of settlement offers during a mediation – confidential under the mediation confidentiality statutes, at *Evidence Code* §§ 1115 – 1128, *et seq.*?

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

WHY REVIEW SHOULD BE GRANTED

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.) This court and others have held consistently that these statutes are clear, are intended to be applied broadly, and that judicially created exceptions are forbidden.

Reflecting the legislative intent that this confidentiality is to be given "fierce protection,"[1] previous efforts to carve exceptions into the mediation confidentiality statutes have been reversed consistently. This court reversed an attempt to create a "good cause" exception, to allow evidence

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

claimed to be necessary for some other cause of action (*Rojas v. Superior Court* (2004) 33 Cal.4th 407). And in both published and 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 (*Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137).

Contrary to this legislative policy, as well as several opinions of this and other courts, the Slip Opinion (at Appendix A) creates an exception to mediation confidentiality that, even on its face, ignores applicable and explicit statutory language. That error is pointed out in the dissenting opinion, so it is not reasonable to conclude that its infidelity with California law will go unnoticed.

The Slip Opinion holds that private discussions between an attorney and his or her client that are for the purpose of, or pursuant to, 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. Thus, 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 the Slip Opinion 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 the Slip

Opinion stands in defiance of the policy that mediation is to be encouraged through provision of strong confidentiality.

The Slip Opinion needlessly brings doubt into what had been a clear body of law. Review is required to address this doubt, and to reverse this opinion.

BACKGROUND

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 04-0255 CAS (CTX), arising from claims over ownership of the "Von Dutch" clothing trademark. (RPApp. Ex. 1.[2]) Mr. Cassel lost an ownership interest in the Von Dutch Originals trademark in prior litigation, and retained WCCP to act as his lawyers. (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 that litigation so that Mr. Cassel was able to seek money from the *Von Dutch Originals* plaintiffs. A settlement was reached

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[2] WCCP's "Appendix to Return of Real Parties in Interest" is cited as "RPApp. Ex."

after a lengthy mediation, with Mr. Cassel receiving $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:

- WCCP's "threatening to withdraw" as counsel if Mr. Cassel would not accept the $1.25 million settlement offer;
- False representations by WCCP 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. Paradise, was with him throughout the mediation, 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 all of the relevant terms.

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.*[3] (RPApp. Ex. 3.) 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[4] 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 determine which fell within California's mediation confidentiality statutes. (See, RPApp. Exs. 9-11.)

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

[4] The Slip Opinion 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.

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,[5] discussing deposition testimony at RPApp. Ex. 12, pp. 560-561.[6])

Mr. Cassel decided at this meeting (but does not recall telling WCCP lawyers then (2RT 61-62)) that he wanted $2 million in settlement 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).)

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[5] 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.

[6] 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.)

There was also discussion about what WCCP lawyers and Mr. Cassel thought the opponent, and the sole owner of Von Dutch Originals, Mr. Sorenson, might be willing to pay 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, another meeting was held with Mr. Cassel in WCCP's offices the day before the mediation to further discuss and plan for the mediation. (See, 1RT 54-57.) WCCP lawyers told Mr. Cassel he should try to "make a deal" at the mediation.

C. Private Discussions During the Mediation.

On the day of the mediation, August 4, 2004, there were several private discussions between WCCP lawyers, Mr. Cassel, and/or Mr. Paradise, regarding what had been discussed during the formal sessions with the opponent or the mediator.

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

There were discussions about the general "tenor of the negotiations" at the mediation, including what Mr. Cassel, the mediator, and others did and said at the mediation. Mr. Cassel expressed that he was upset that the

negotiations were not moving forward more quickly. (1RT 37-40 (discussing testimony at RPApp. Ex. 12, pp. 571-572).)

Discussing whether to settle the suit, Mr. Cassel voiced to WCCP attorney Steve Wasserman his desire to regain control of Von Dutch Originals, LLC. Although telling him it was not typical to condition a settlement upon a transfer of ownership of the opponent's corporation, Mr. Wasserman responded that WCCP could approach the current owner of the Von Dutch Originals shares, Mr. Sorenson's soon-to-be ex-wife, who could obtain the shares pursuant to their ongoing divorce. Thus, Mr. Cassel could regain an interest in the company if the shares could be repurchased. (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 (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 his first substantial settlement offer: $1.25 million, to be paid to Mr. Cassel. A WCCP lawyer asked Mr. Paradise to call Mr. Cassel, telling him about the further offer and asking him to return because a better deal was 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. (RPApp. Exs. 9-10; see also, 2RT 37, 40-41, 110, 113-115; 3RT 12:24-25.) Other offered testimony was 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" can 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" were 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 in a taxi 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.)

Upon Mr. Cassel's request, the trial court issued a separate order under *Code Civ. Proc.* § 166.1, certifying that the issue[7] involved "a

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[7] At the hearing, Mr. Cassel's counsel framed the issue to be certified as being "... whether mediation means conversations between an attorney and a client when no adversary or mediator is present, and whether mediation proceeding and preparation for mediation means discussions between an attorney and a client a day or two beforehand or whether it means, as I believe [Section] 1115 describes, a proceeding where there's an ... adversary and/or a mutual facilitator." (3RT 7:11-19)

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. In it, he argued that private conversations regarding mediation between an attorney and a client 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 waived, so that evidence pertaining to the claimed professional negligence could be admitted.

5. The Published Opinion Ignores 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, the Court of Appeal reversed the trial court's orders, in their entirety. (Slip Opn. pp. 1, 14.) While quoting the language in Section 1119 that mediation confidentiality shall apply to all communications "made for the purpose of, in the course of, or pursuant to, a mediation," it applied confidentiality only to conversations that occurred "in the course of" the mediation, in front of a mediator or opponent. It failed to discuss or apply the further language that conversations occurring "for the purpose of" or "pursuant to" a mediation must also remain confidential. The dissenting opinion by Presiding Justice Dennis Perluss points out this inexplicable omission (Slip Opn., dissent pp. 1-2 and fn. 3); the majority opinion does not respond to the dissent.

The Slip Opinion then re-decides the trial court's factual conclusions, *sua sponte*. At pp. 10-11, 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, the Slip Opinion 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." (Slip Opn. p. 11.) The Slip Opinion then holds that "there is no readily identifiable link to the mediation in the communications, such as the content of a mediation brief." (Slip Opn. p. 10.) The unstated, yet obvious, conclusion in the Slip Opinion is that the trial court's factual

conclusions were utterly wrong, and an abuse of its discretion, yet that standard is never discussed, and the words "abuse of discretion" never appear.

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. (See, Appendix B.)

LEGAL DISCUSSION

I.
The Judicially Created Exception to the Mediation Confidentiality Statutes Violates the Plain Language of the Statutes and Undermines the Public Policy Supporting Mediation.

A. Mediation Confidentiality Statutes Bar 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.[8] (*Eisendrath v. Superior*

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[8] 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. The California Supreme Court has held repeatedly that this language "is clear and unambiguous," and that it was drafted intentionally to be comprehensive in scope. (See, *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 11.) This standard is given a practical application 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 160.)

Because the statutes are clear, this court and others 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. E.g., *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582 (reversing the Court of Appeal's creation of an exception where a litigant should be equitably estopped to

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> (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.

deny facts stipulated to be true in mediation; judicially created exceptions are forbidden and "mediation confidentiality is to be strictly enforced"); *Rojas*, *supra*, 33 Cal.4th at 424 (same).)

The Slip Opinion does what this court expressly has forbidden. It establishes 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. (Slip Opn. pp. 5, 12-14.)

The premise for the holding misconstrues Section 1119 in a way that will create confusion in how mediation confidentiality is determined in future cases. The Slip Opinion states that the subject "communications ... did not disclose anything said or done or any admission made in the course of the mediation ...." (Slip Opn. p. 13.) Based on that finding, the opinion concludes that because the private conversations were (supposedly) not repeated verbatim in the mediation sessions, those private conversations were not part of a "mediation," as defined separately in Section 1115. (Slip Opn. pp. 13-14.) The effect of this holding is that mediation confidentiality mandated in 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 (Slip Opn., dissent pp. 1-2 and fn. 3), the majority's narrow interpretation of Section 1119 is contrary to the 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 Section 1119(a) 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's orders found clearly that the specified conversations took place for the purpose of the *Von Dutch Originals* mediation. (See, RPApp. Exs. 9 – 11.) 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).

As pointed out in the dissent, the Slip Opinion's holding nullifies those two phrases, or makes them surplus. Under settled canons of statutory construction, this 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 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 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 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.[9] As held in *Wimsatt*, the strict, all-encompassing terms of the relevant statues afford courts no discretion to invent precisely that exception. "The stringent result we reach here means that *when clients* ...

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[9] The Legislature has not amended the mediation confidentiality statutes in response to dicta in *Wimsatt*, *supra*, 152 Cal.App.4th at 164, where (albeit stated in a different context), the Legislature was asked to "reconsider California's broad and expansive mediation confidentiality statutes ...."

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 163 (emphasis added).

At this point, WCCP must emphasize that the allegations raised against it are false. But the point of this Petition is not to have this court choose whether it is a good or bad thing if mediation confidentiality bars admission of mediation communications when allegedly needed to prove legal malpractice arising from a mediation. Instead, the point is that the Legislature is presumed to have already made that decision in its choice of words when drafting 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 17, fn. 13 (emphasis added).]

Finally, the statement in Slip Opinion 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. (Slip Opn. p. 13.)

Factually, the statement is unsupported because no evidence to prove or disprove what was said at the mediation was presented at this hearing.

Legally, this holding in the Slip Opinion is wrong because Section 1119 does not require that certain persons must be present before confidentiality will attach. Private conversations concerning a mediation, outside of the presence of the mediator or an opponent, still are deemed 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. No such precondition exists, and the judicial creation of such a precondition is contrary to the clear terms of Section 1119.

This aspect of the holding creates an awkward precedent that will hobble efforts to apply mediation confidentiality in a broad range of circumstances in future cases. Review is necessary to address and correct this error.

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

The broad exception to mediation confidentiality created by the Slip Opinion will undermine 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 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).) Allowing the judicial creation of a potentially huge new exception to mediation confidentiality will cause doubt that will make mediation a less attractive option. The public policy encouraging mediation will be undermined.

This 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 their "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) ("Bulmash").) "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." (Bulmash, *id.*)

Second-guessing a settlement does not occur only when lawyers allegedly mislead a client. Courts recognize that clients can 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; *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 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 his or 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 ("Toker"); 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 Slip Opinion

creates a powerful disincentive for litigants in difficult cases to enter into mediation.

A disincentive is created because the Slip Opinion endorses allowing private conversations that were unquestionably for purposes of a mediation to be admitted, while conversations in front of a mediator or opponent, perhaps just moments later, where the plans or substance of the private communication were put into effect in the mediation itself, are barred.

The problem is this: In their private pre-mediation conference, an attorney and client may agree on a certain approach, a certain settlement figure, or a certain set of facts. The Slip Opinion holds that conversation is admissible.

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 as the hallmark of mediation has its intended effect. But the Slip Opinion bars admission of that information. The Slip Opinion's holding 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 198; *Marriage of Rosevear*, *supra*, 65 Cal.App.4th at 686; see, *Vela v. Hope Lumber & Supply Co.*, 966 P.2d 1196, 1198 and fn. 2 (Okla. Civ. App. 1998) (rejecting claim that "coercion" could be 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 can create a disincentive to mediate a difficult case.

This concern also applies where, as here, an attorney candidly tells a client the "downside" of rejecting a settlement, or tells a client the weaknesses of his or her 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*, *supra*, 966 P.2d at 1199 fn. 3. But based on the Slip Opinion, lawyers in mediation should now be wary of ever changing a position discussed with their client 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).) "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. "Judicial 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 Slip Opinion will have a detrimental impact on the practice of mediation, and could easily discourage its use. Review must be granted to address and correct this consequence of the Slip Opinion.

C. By Utterly Overlooking the Factual Conclusions Reached by the Trial Court – Which Mr. Cassel Never Claimed Were an Abuse of Discretion, or Even Wrong – the Slip Opinion Can Only Cause Confusion in How Mediation Confidentiality Should Be Determined.

The overarching conclusion in the majority opinion is that attorney-client communications that do not relate to mediation are not to be excluded from evidence based on the mediation confidentiality statutes. (See, Slip Opn. pp. 12-14.) If this was all the Slip Opinion purported to hold, and if that holding was even arguably correct, the opinion would be unremarkable.

This Petition for Review would be incomplete without a discussion of the critical factual error that underpins the majority opinion. As Presiding Justice Perluss points out in his dissenting opinion, the majority opinion ignores the trial court's actual factual findings, and impermissibly reaches and relies upon the opposite factual conclusions. (See, Slip Opn., dissent pp. 1-2 and fn. 3.) Future litigants could only be confused as to the true effect of this holding, because the premise of the majority opinion is undermined utterly by the dissent's revelation of the true facts.

At the end of an evidentiary hearing stretching over three days, the trial court found that each of the subject communications pertained to the

mediation. The majority opinion never mentions this. Instead, it discusses, at pp. 10-11, 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, the Slip Opinion 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." (Slip Opn. p. 11.) The Slip Opinion then holds that "there is no readily identifiable link to the mediation in the communications, such as the content of a mediation brief." (Slip Opn. p. 10.) The unstated conclusion in the Slip Opinion is that the majority opinion concludes that the trial court's factual findings were utterly wrong, and an abuse of its discretion (even though Mr. Cassel never asserted that was so, and even though that standard of review is never discussed in the Slip Opinion).

That the majority might have reached a different factual conclusion than the trial court on this factual conclusion is irrelevant here, and the Court of Appeal could not re-decide those factual conclusions *sua sponte*. "When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*Marriage of Rosevear*, *supra*, 65 Cal.App.4th at 686.)

Without discussing the facts and findings beyond the undescribed "some" conversations that the Slip Opinion 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 Slip Opinion concludes that *all* private discussions between WCCP attorneys and Mr. Cassel pertained to trial preparation. (See, Slip Opn. pp. 11, 13-14.) That is wrong. And because that error in the majority opinion is pointed out in the dissenting opinion, it is all the more obvious. (See, Slip Opn., dissent pp. 1-2 and fn. 3.)

Redecision 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.

The Slip Opinion 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 they were *only* for mediation, so as to bring them within the intended ambit of mediation confidentiality. (Slip Opn. pp. 10-11.)

The effect of this part of the Slip Opinion is that regardless of what the trial court might hold, if an appellate court can recharacterize a conversation as also being useful for trial preparation, it will be unprotected by mediation confidentiality.

That holding 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 44.)

If, as here, the fact that a conversation deals with topics that "might" also be useful for trial and mediation 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.

Review must be granted so that the error inherent issue of whether the trial court abused its discretion in making its factual conclusions can be corrected.

II.
The Slip Opinion's Conclusion That Attorneys Are Not "Participants" in Mediations Misconstrues the Mediation Confidentiality Statutes, and Undermines the Legislative Policy That Broad Confidentiality for All Communications Pertaining to Mediation is Vital to Foster Effective Mediation.

A second reason why review is required is because the Slip Opinion relies on an unwise and contorted redefinition of the word "participants," as used in the statutory mediation confidentiality scheme. The Slip Opinion concludes that attorneys are not "participants" in mediation, for purposes of

Section 1119(c) (defining the communications that are to remain confidential), and Section 1122(a)(2) (defining that where a mediation communication is prepared by less than all the mediation's participants, confidentiality can be waived if all those participants agree). Based on its redefinition of the word "participants," the Slip Opinion 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. (Slip Opn. p. 12.) This holding misconstrues the statutes, and deserves review separately.

A. Attorneys Are Undeniably "Participants" in Mediations.

Section 1119's three subsections defining confidential mediation communications are stated in the disjunctive. Consequently, if the subject mediation communications meet the requirements of any one subsection, they must remain confidential.

Subsection (c) mandates that "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." 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).) This is contrary to the Slip Opinion's

construction of Section 1119(c) as limiting confidentiality by excluding private conversations with a party's attorney.

Section 1122(a)(2) allows an otherwise confidential mediation communication or writing to be admitted into evidence if it was "prepared by or on behalf of fewer than all the mediation participants," and all of those "participants" agree to waive confidentiality. Based on the court's previous conclusion that a party's attorney is not a separate "participant" in a mediation, the Slip Opinion holds that Mr. Cassel could unilaterally consent to waive confidentiality to his private mediation communications with WCCP lawyers. (Slip Opn. p. 12, fn. 11.)

This aspect of the Slip Opinion is incorrect, but should be dicta anyway. If, as the Slip Opinion stated previously, 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 opinion's discussion that Mr. Cassel could consent to waive confidentiality would be irrelevant. (See, Slip Opn. p. 12 and fn. 11.) There would be no confidentiality to waive.

Overlooking that internal contradiction, the Slip Opinion 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 Slip Opinion relies on two arguments to support this conclusion. Each is incorrect.

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

The word "participant" is not defined in the mediation confidentiality statutes (see, Section 1115), or anywhere else in the *Evidence Code*. The Slip Opinion does not attempt to define "participant" using its normal, exceedingly broad definition: "one who participates."[10] Instead, the Slip Opinion points to a different word that has an established legal definition: "party." (Slip Opn. p. 12.) The Slip Opinion then says 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). The court's analysis is wrong, for at least two reasons.

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 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.]" (*Id.* at 14.)

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

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" has a far broader definition than "party." One need not be a named "party" to be a "participant" in mediation. Mediators "participate" in mediation, but are not parties. 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 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 423-424.) This choice comports with the policy that to promote mediation, confidentiality must be applied broadly. (See, *Wimsatt*, *supra*, 152 Cal.App.4th at 150.)

The Slip Opinion's contrary conclusion misreads the statutes, and violates the Legislature's intent. Review must be granted to correct this error.

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

A second level of error in the Slip Opinion's construction of the statutes arises from its focus on the wrong section.

To interpret the word "participants" in Section 1119, the Slip Opinion points back to the word "disputants" used in Section 1115 to generally define "mediation" for purposes of mediation confidentiality. The Slip Opinion 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. (Slip Opn. pp. 12-13.) This reasoning is plainly erroneous.

It is erroneous because the definitions in Section 1115 have little or no impact on the meaning of words used in Section 1119. Those two sections define different things. Section 1115 defines what a "mediation" is, as a predicate for application of the confidentiality defined in the sections that follow. Subsection (a) 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.

Here, 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," as defined in that subsection, the rule requiring that communications regarding that mediation

remain confidential, and are inadmissible in subsequent lawsuits, 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. It did not. (Accord, *Rojas*, *supra*, 33 Cal.4th at 423-424.) This choice, too, comports with the broad support given to mediation. (See, *Wimsatt*, *supra*, 152 Cal.App.4th at 150.)

The Slip Opinion's construction of Sections 1119 and 1122 needlessly creates a muddle out of a statutory scheme that this court has repeatedly deemed clear. Failure to grant review of this opinion will create confusion in any future lawsuit involving mediation confidentiality, and will undermine its effectiveness. This is all contrary to the strong policy that, to support mediation, confidentiality must remain strong and free from judicially created exceptions.

III.
Conclusion

Allegations of "attorney misconduct" are serious. But Section 1119, *Wimsatt*, 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 Slip Opinion

takes a novel approach to navigate the broad language of Section 1119, the trial courts' factual findings may not be overlooked, even if they do not fit the narrative argued successfully by Mr. Cassel. The Slip Opinion compounds its errors by contorting the statutes. This case creates poor precedent, and will sow confusion into what is a clear body of law.

The Petitioners respectfully request that this court grant review of this opinion.

Respectfully submitted,

HAIGHT BROWN & BONESTEEL LLP,
Peter Q. Ezzell,
Nancy E. Lucas, and
Stephen M. Caine

Attorneys for Defendants, Real Parties in Interest, and Petitioners WASSERMAN, COMDEN, CASSELMAN & PEARSON, L.L.P., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN

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 Petition for Review brief was produced with a computer. It is proportionately spaced in 13 point Times Roman typeface. The brief contains 8,381 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 December 22, 2009, at Los Angeles, California.

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Stephen M. Caine

APPENDIX A

Filed 11/12/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL CASSEL, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent, WASSERMAN, COMDEN, CASSELMAN & PEARSON, L.L.P., et al., Real Parties in Interest.	B215215 (Los Angeles County Super. Ct. No. LC070478)

ORIGINAL PROCEEDING; petition for writ of mandate. William A. MacLaughlin, Judge. Petition granted in part with directions.

Makarem & Associates, Ronald W. Makarem, Peter M. Kunstler and Jamie R. Greene for Petitioner.

No appearance for Respondent.

Haight Brown & Bonesteel, Peter Q. Ezzell, Nancy E. Lucas and Stephen M. Caine for Real Parties in Interest.

INTRODUCTION

Petitioner Michael Cassel seeks writ relief from two orders excluding evidence in favor of real parties in interest Wasserman, Comden, Casselman & Pearson L.L.P., David B. Casselman and Steve K. Wasserman. We grant the petition to vacate the orders with directions.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, petitioner Michael Cassel (Cassel) filed a legal malpractice action against his former attorneys, real parties in interest Wasserman, Comden, Casselman & Pearson, L.L.P., David B. Casselman (Casselman) and Steve K. Wasserman (collectively Wasserman Comden). Wasserman Comden represented Cassel in a lawsuit regarding ownership interest in Von Dutch Originals, LLC, a famous clothing company, and a license to use the Von Dutch name (Von Dutch lawsuit).[1] Cassel and Wasserman Comden met with each other on August 2, 3 and 4, 2004 with respect to the Von Dutch lawsuit. Cassel (directly and through Wasserman Comden) and the opposing party (directly and through his counsel) participated in a mediation on August 4 as a result of which Cassel and the opposing party entered into a $1.25 million settlement agreement. Cassel subsequently brought the legal malpractice action, alleging that Wasserman Comden forced him to sign the settlement agreement for $1.25 million, rather than the higher amount he had told Wasserman Comden was acceptable.

In preparation for trial in the legal malpractice action, Wasserman Comden brought a motion in limine seeking to exclude evidence proffered by Cassel regarding certain conversations and conduct between Cassel and Wasserman Comden on August 2, 3, and 4, 2004 during meetings in which they were the sole participants and which were

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[1] The action is a federal trademark and copyright lawsuit, *Von Dutch Originals, LLC v. Cassel*, Case No. CV 04-0255 CAS (CTX).

held outside the presence of the opposing party and the mediator. Wasserman Comden claimed that the communications were protected from disclosure by the mediation confidentiality statutes in Evidence Code sections 1115 et seq.[2] Cassel argued that they were confidential communications between client and his attorneys which were subject to the law of the lawyer-client privilege in section 950 et seq. and that mediation confidentiality did not apply. The trial court and the parties acknowledged that they found no California judicial opinion dealing with communications solely between a client and his attorneys, outside the presence of the opposing party or the mediator, near or at the time a mediation was scheduled.

The trial court found that the communications were protected by mediation confidentiality and, accordingly, issued orders on April 1 and April 2, 2009 excluding them as evidence on the grounds they were inadmissible.[3] The court and parties discussed referring the issue to the Court of Appeal by petition for writ of mandate. At Cassel's request, on April 3, 2009, the trial court issued an order under Code of Civil Procedure section 166.1 finding that its orders excluding communications between Cassel and Wasserman Comden, based on mediation confidentiality, involve a controlling question of law for which there are substantial grounds for difference of opinion and

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2 All further statutory references are to the Evidence Code unless otherwise identified.

3 As to the conversations at issue, the court stated that "[t]he communications that occurred on August 3rd in the meeting that in any way addressed[] the mediation[] are going to be subject to the confidentiality, as is what the communications were during the mediation and leading to the premeeting and meetings — periodic meeting during the day when the mediation was actually not in progress are going to be subject to the privilege." Regarding the conduct at issue, the court orally ruled that if Cassel's proffered testimony would be "that in effect his attorneys were looming over him or around him in such a manner that by their proximity, their demeanor, and their manner that they were intimidating him to force him to sign [the settlement agreement], my ruling is that is a communication and that is subject to the [mediation confidentiality] [¶] . . . [¶] . . . exclusion." The court also ruled that the conduct of one of the attorneys in accompanying Cassel to the restroom during the attorney-client meetings was also communication protected by mediation confidentiality.

appellate resolution of the issues could materially advance the termination of the legal malpractice action. The court nevertheless set the trial to begin on August 13, 2009. Cassel included the order in his petition for writ of mandate and stay of proceedings filed April 8, 2009 with respect to the court's orders excluding the communications from evidence.

Cassel requests that we issue a peremptory writ of mandate directing the respondent 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 the evidence and that we award him his costs on this petition.[4]

We issued an order to show cause on April 23, 2009 as to why the court should not be compelled to vacate its orders of April 1 and April 2, 2009 granting Wasserman Comden's in limine motion to exclude evidence and to issue a new and different order denying the motion.

DISCUSSION

The question presented is whether, as a matter of law, mediation confidentiality requires exclusion of conversations and conduct solely between a client, Cassel, and his attorneys, Wasserman Comden, on August 2, 3, and 4, 2004 during meetings in which they were the sole participants and which were held outside the presence of any opposing party or mediator. The parties present arguments as if there was a mutually exclusive dichotomy—either, according to Cassel, the lawyer-client privilege statutory scheme applies (§ 950 et seq.) or, according to Wasserman Comden, the mediation confidentiality statutes apply (§ 1115 et seq.).

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[4] Cassel also requested that we issue an immediate temporary stay order in order to permit review and a final order on the petition prior to further proceedings in the trial court. We issued such an order on April 9, 2009.

In our view, resolution of the issue requires consideration of both statutory schemes. The parties apparently agree as to the initial step, application of the lawyer-client privilege statutory scheme. They do not dispute that, absent the filing of the instant malpractice action, the lawyer-client privilege statutory scheme (§ 950 et seq.) would apply to the disclosures sought by Cassel in his capacity as the client. (See § 954.)[5] Nor do they apparently dispute that a statutory exception (§ 958)[6] eliminates the disclosure protections otherwise provided by the privilege when either the lawyer or, as in this case, the client files suit against the other for breach of duties arising out of the lawyer-client relationship. Accordingly, admission of the communications would not be precluded by the lawyer-client privilege. The inquiry must continue, however, to determine whether any other limitations imposed by law preclude disclosure of all or a portion of the content of the communications.

Mediation confidentiality comes into play as a possible limitation.[7] Mediation confidentiality statutes include recognition that other statutes govern disclosure of particular kinds of information. Section 1120, subdivision (a), provides: "Evidence

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5 In pertinent part, section 954 provides: "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: [¶] (a) The holder of the privilege; [¶] (b) A person who is authorized to claim the privilege by the holder of the privilege; or [¶] (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure."

6 Section 958 provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

7 Although some courts have chosen to refer to mediation confidentiality as the "mediation privilege," courts have also recognized that mediation confidentiality does not create a privilege, but rather operates as an extrinsic confidentiality protection. (See *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 150, fn. 4; *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 61-62 and fn. 2.)

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."[8]

Section 1119[9] limits the admissibility of communications during the mediation process. In subdivisions (a) and (b), section 1119 precludes admission or other disclosure of oral and written communications made "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation." It provides in subdivision (c) 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." Wasserman Comden claims that as a party's attorney, it qualifies as a "participant" in the mediation process and, therefore, any communication made by Wasserman Comden as the attorney, regardless of the identity of the other communicant, is protected from disclosure. As we explain more fully below, we disagree.

In the instant case, the communicants are a client and his attorneys, the communications are outside the presence of, and not otherwise communicated to, any opposing party (or its attorney) or the mediator, and reveal nothing said or done in the

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[8] Such recognition is similarly indicated, albeit more indirectly, by Section 1116, subdivision (b), which states: "Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute."

[9] Section 1119 reads in full as follows: "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. [¶] (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. [¶] (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

mediation discussion. By definition, mediation is a process facilitated by a mediator between disputing parties, not between a client and his attorney. Section 1115[10] provides the following definition: "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." (Italics added.)

For mediation purposes, a client and his attorney operate as a single participant. Subdivision (b) of section 1775.1 of the Code of Civil Procedure provides: "Unless otherwise specified in this title or ordered by the court, any act to be performed by a party may also be performed by his or her counsel of record." This is consistent with the common understanding that "party" as used in numerous procedural statutes, means "not only the actual litigant, but also the litigant's attorney of record." (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 583.)

Legislative intent and policy behind mediation confidentiality are to facilitate communication by a party that otherwise the party would not provide, given the potential for another party to the mediation to use the information against the revealing party; they are not to facilitate communication between a party and his own attorney. "The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear. 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.

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10 Section 1115 reads in full as follows: "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."

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.'].) [¶] . . . [C]onfidentiality is essential to effective mediation . . . ." (*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14, italics added; accord, *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415-416.)

Wasserman Comden relies on *Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th 137 as support for its argument that mediation confidentiality statutes apply broadly to conversations solely between a party and his attorney. The admissibility issues before the *Wimsatt* court were in a context similar to the circumstances in the instant case. In a legal malpractice action, the client alleged that his attorneys breached their fiduciary duty by lowering the dollar amount of the client's settlement demand without the client's knowledge or consent on the eve of a mediation. (*Id.* at p. 144.) The communications at issue referred to a purported $1.5 million settlement demand made by the plaintiff's attorney to at least one of the defendant's attorneys, in three forms—statements in mediation briefs, emails recounting portions of the briefs' statements, and a telephone conversation. (*Id.* at pp. 147, 158.) The purported demand occurred after the close of the first mediation between the parties and shortly before the second mediation between them. (*Id.* at p. 147.) The trial court denied the attorney's motion for a protective order to seal all the communications on the basis of mediation confidentiality. (*Id.* at p. 148.) The attorney sought a writ mandating the trial court to vacate its denial and issue the protective order. (*Id.* at p. 149.)

Wasserman Comden points to the statement of the *Wimsatt* court that "[t]he 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. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand

that this result is a by-product of an agreement to mediate." (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at p. 163.) That statement is not, however, the court's holding and, therefore, does not operate as authority for such a broad unqualified rule. The court had previously indicated that its holding was not an unqualified bar to disclosure of all communications by a party's attorney. Specifically, the court had stated that "[p]reventing [the party/client] from accessing mediation-related communications *may* mean he must forgo his legal malpractice lawsuit against his own attorneys." (*Id.* at p. 162, italics added.)

Further, the *Wimsatt* court did not reach the same decision as to all three forms of communication. The court held that, pursuant to section 1119, the disclosures of statements appearing in mediation briefs and emails that contained the statements were protected and not subject to discovery. (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at pp. 158-159.) The court required little analysis to reach its conclusion. The court stated that "[m]ediation briefs epitomize the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure." (*Id.* at p. 158.) They are, the court continued, "an integral part of the mediation process and are 'prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation,' and are to remain confidential." (*Id.* at pp. 158-159.) The court directed the trial court to issue a protective order prohibiting disclosure of the statements from the briefs and the emails. (*Id.* at p. 165.)

The court did not, however, reach the same conclusion with respect to a telephone conversation that "might have occurred on the 'eve'" of the second mediation and in which the plaintiff's attorney purportedly made the demand to at least one of the defendant's attorneys. (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at p. 160). In dealing with the attorney-to-opposing attorney communication, the *Wimsatt* court provided guidelines for analyzing communications not clearly a part of the protected mediation process. The court noted that the exact number and content of conversations and which of the defendant's attorneys was involved were unclear, but "[w]hat is clear is that . . . the moving party[] has the burden to show that the conversation is protected by

mediation confidentiality. To do so, the timing, context, and content of the communication all must be considered. Mediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation. [Citations.] Mediation confidentiality is to be applied where the writing or statement would not have existed but for a mediation communication, negotiation, or settlement discussion. [Citation.]" (*Ibid.*) The court explained that the timing of a conversation in relation to a scheduled mediation session was not determinative of whether the conversation was protected by mediation confidentiality. (*Id.* at p. 161.) The court concluded that the moving party failed to meet its "burden to link the conversation to a mediation session." (*Ibid.*) In short, the *Wimsatt* court determined that evidence of the telephone conversation between the opposing attorneys was not protected from disclosure by mediation confidentiality.

The communications in the instant case are distinguishable from the communications that the *Wimsatt* court concluded were protected by mediation confidentiality, in that there is no readily identifiable link to the mediation in the communications, such as content of a mediation brief. (Cf. *Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at pp. 158-159.) Furthermore, any nexus to the mediation is even more tenuous than the one which the *Wimsatt* court determined was insufficient to bring the settlement demand telephone conversation within the ambit of mediation confidentiality protection. Similarly to the *Wimsatt* conversation, some of the communications at issue here involved specific dollar figures as to the amount acceptable for settlement. As the *Wimsatt* conversation, the communications were made very close to the time for a scheduled mediation session at which a settlement figure might have been or was discussed.

As to the telephone conversation, the *Wimsatt* court observed that there was evidence that it occurred during a telephone call about scheduling experts' depositions and touching on whether a second mediation would be worthwhile. (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at p. 161.) The court explained that the moving party had not demonstrated that the conversation was "anything other than expected negotiation

posturing that occurs in most civil litigation . . . . It is not unusual for parties to change positions as new information is developed . . . [and to] revalue liability and damages." (*Id.* at pp. 160-161.) The court continued that "[t]hus, the conversation may have occurred . . . even if there was to be no mediation." (*Id.* at p. 161.) In the instant case, there were similar indications that some of the communications were more related to the civil litigation process as a whole rather than to the mediation. For example, according to the record, Casselman expressed in his deposition that, during the course of Wasserman Comden's conference with their client that occurred after the mediation process had begun, he was evaluating the value of the case as he always does when it appears that the case will go to trial. The *Wimsatt* court's rationale on this point would also support a conclusion that the fact that Cassel or his attorneys may have discussed a specific dollar amount for settlement with the other party, its attorneys, or the mediator would not be sufficient to render a statement solely between Cassel and his attorneys about a specific dollar amount inadmissible.

The foregoing discussion points out some similarities between the lawyer-client communications at issue here and the indicators in the *Wimsatt* case that the telephone conversation between the opposing attorneys was not protected by mediation confidentiality. There is a key factual distinction that renders the communications in the instant case even farther removed from being protected by mediation confidentiality than the *Wimsatt* conversation. In the instant case, the communications were not made by the client or his attorneys to another party (or its attorney) which was a participant in the mediation or to the mediator. That is, as we previously concluded, they were not communications between "disputants" and the "mediator," as required to come within the definition of a "mediation" or "mediation consultation" and, therefore, to qualify for protection under mediation confidentiality. (§§ 1115, 1119.)

The parties have cited no California case which addresses the factual circumstances in the instant case, i.e., communications made solely between a client and his attorneys outside the presence of an opposing party, or its attorney, or the mediator, and containing no information of anything said or done or any admission by a party made

in the course of the mediation. We know of none.[11] The mediation cases cited by Wasserman Comden are factually distinguishable, in that they involved communications between a party or its attorney to another party to the mediation about the mediated dispute or a communication to or by the mediator about the mediation.

Perhaps most importantly, Wasserman Comden and Cassel are not within the class of persons which mediation confidentiality was intended to protect from each other—the "disputants," i.e., the litigants—in order to encourage candor in the mediation process. (*Rojas v. Superior Court*, *supra*, 33 Cal.4th at pp. 415-416; accord, *Foxgate Homeowners' Assn. v.Bramalea California, Inc.*, *supra*, 26 Cal.4th at p. 14.) There is no indication of any legislative intent that the mediation confidentiality statutes were to protect a lawyer from his client where only the client was a disputant in a mediation. As previously discussed, in the mediation confidentiality statutes, "the party" refers to the litigant who is one of the disputants in a mediation. (See Code Civ. Proc., § 1775.1; see

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11 We note that in section 1122, the mediation confidentiality statutes recognize that there may be circumstances in which a writing or other communication is unilaterally generated by a mediation disputant, but comes within the purview of mediation confidentiality. Presumably such generation process could involve communications solely between the disputant and his attorneys. Section 1122, subdivision (a)(2), however, operates as a limit on the scope of section 1119. It allows a party to consent to the disclosure of a communication, document, or writing that the party unilaterally prepared solely for itself "for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation" if the "communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation." (§ 1122, subd. (a)(2); *Rojas v. Superior Court*, *supra*, 33 Cal.4th at pp. 418-421.) The legislative intent is to facilitate "'admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion.'" (*Rojas*, *supra*, at p. 421.)

Applying section 1122, subdivision (a)(2), to the facts in the instant case, the communications between Cassel and his attorneys would not be protected from disclosure under section 1119 even if, arguably, they were "made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation." The communications were unilaterally generated by Cassel, either directly or through his attorneys as his agents. They did not disclose anything said or done or any admission made in the course of the mediation, and Cassel clearly has consented to their disclosure.

also § 1115.) A party's attorney is a component of, "the party" to the mediation, rather than a free-standing, independent entity. (See Code Civ. Proc., § 1775.1.)

Wasserman Comden also asserts that the trial court properly applied section 1128 to exclude the communications. Pursuant to section 1128, "[a]ny reference to a mediation during any other subsequent non-criminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief." As we previously concluded the meetings in which the communications occurred do not qualify as mediation meetings protected by mediation confidentiality. In addition, no reference need be made to a mediation with respect to the communications. In any event, section 1128 does not apply to any and all references to a mediation, but only a reference which "materially affected the substantial rights of the party requesting relief."

With start of trial within two weeks, the meetings and accompanying communications between Cassel and Wasserman Comden were for trial strategy preparation, not just for mediation or creation of any documents or other communications such as mediation briefs or witness statements intended solely for use in the mediation. The proximity in time of the meetings and communications to any part of the mediation process is not determinative. (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at p. 160.) The crux of the communications was that Cassel wanted his Wasserman Comden attorneys to honor his wishes, but they resisted to the extent, according to Cassel, that they breached their duties to him as his counsel. Neither Cassel nor Wasserman Comden assert that the communications contained information which the opposing party (or its representatives) or the mediator provided during mediation or otherwise contained any information of anything said or done or any admission by a party made in the course of the mediation. For the foregoing reasons, we conclude that the communications solely between Cassel as a client and his lawyer, Wasserman Comden, do not constitute oral and written communications made "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" protected by section 1119,

subdivisions (a) and (b) or communications by "participants" protected by section 1119, subdivision (c). Wasserman Comden failed to demonstrate a sufficiently close link between the communications and the mediation to require application of mediation confidentiality to the communications. (*Wimsatt v. Superior Court, supra*, 152 Cal.App.4th at p. 160.) For this reason, the evidence should not be excluded.

DISPOSITION

The petition for writ of mandate is granted. The trial court is directed 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 temporary stay order is hereby terminated. Cassel shall recover his costs of this proceeding.

JACKSON, J.

I concur:

ZELON, J.

PERLUSS, P. J., Dissenting.

I respectfully dissent.

Evidence Code section 1119, subdivision (a),[1] provides, "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 . . . civil action . . . ."[2] Nonetheless, the majority holds statements between a client and his or her lawyer made expressly and solely for the purpose of mediation (for example, discussions in a private strategy session immediately before or during mediation proceedings) would not be protected from compelled disclosure unless they were also communicated to, or made in the presence of, an opposing party or its attorney or the mediator.[3] That conclusion, in

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[1] Statutory references are to the Evidence Code.

[2] Section 1119, subdivision (b), in language substantially the same as section 1119, subdivision (a), provides no writing "prepared for the purpose of, in the course of, or pursuant to, a mediation" is admissible or subject to discovery or compelled disclosure.

[3] Whether a particular statement or writing exchanged between a client and his or her lawyer is materially related to the mediation is a separate and different question from whether mediation confidentiality is available at all for this category of communications. The proper reach of mediation confidentiality pursuant to section 1119 presents a question of law subject to independent review by this court (see *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311 [the meaning of statutory language presents a question of law that we review de novo]) and is the only issue addressed by the majority in granting petitioner Michael Cassel's request for relief. Whether the trial court erred in concluding a particular statement is sufficiently connected to a mediation to be protected from disclosure, however, is an evidentiary ruling subject to abuse-of-discretion review. (See *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 160 ["[m]ediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation"]; see generally *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476 [trial court's ruling on the admissibility of evidence generally reviewed for abuse of discretion].) 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. (Cf. *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [argument asserted in the trial court but not raised on appeal is forfeited]; *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 267 [same].)

my view, is not only at odds with the clear language of section 1119, subdivision (a), but also inconsistent with the Supreme Court's repeated disapproval of "judicially crafted exception[s]" to the mediation confidentiality statutes. (See *Foxgate Homeowners Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14 (*Foxgate*); *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424; see also *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194.) The majority's narrow interpretation of section 1119, subdivision (a), is based in large part on section 1115, subdivision (a)'s definition of "mediation" as a process in which a neutral person, the mediator, "facilitate[s] communication between the disputants to assist them in reaching a mutually acceptable agreement." Cassel was the "disputant" in the mediation in the underlying litigation; his counsel at Wasserman, Comden, Casselman & Pearson, L.L.P., was not a separate party or disputant, but operated together with Cassel as a single party. Thus, private communications between Cassel and his lawyer were not "between the disputants" or between a disputant and the mediator. To that point, I have no disagreement with the majority's analysis. And if mediation confidentiality pursuant to section 1119, subdivision (a), were limited to anything said or admissions made "in the course of" a mediation, I might well agree with its conclusion. But section 1119, subdivision (a), applies equally to statements or admissions made "for the purpose of" a mediation. For that additional statutory language to have meaning, mediation confidentiality must cover statements that were not made "in the course of" the mediation proceeding itself. (See *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [courts should avoid construction of a statute that makes any word surplusage]; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249 [same].) That is, private, unilateral statements that are materially related to the mediation are inadmissible and protected from disclosure, even if they are not communicated to another party or the mediator and do not otherwise reveal anything said or done in the course of the mediation itself. The majority's more restricted interpretation of section 1119, subdivision (a), improperly ignores this statutory language.

A broader interpretation of section 1119, subdivision (a), than the majority's is also mandated by section 1122, subdivision (a), which specifies certain circumstances in

which a communication or a writing, otherwise protected by mediation confidentiality, may be disclosed or admitted into evidence in a subsequent civil action. Pursuant to this provision, if all persons who conduct or otherwise participate in the mediation expressly agree to disclosure, the communication or writing is admissible. (§ 1122, subd. (a)(1).) Even absent the express agreement of all parties to the mediation, if the communication or writing "was prepared by or on behalf of fewer than all the mediation participants," the communication or writing is admissible if "those participants expressly agree . . . to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation." (§ 1122, subd. (a)(2).) As explained in the Law Revision Commission comments to this provision, "Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion." (Cal. Law Revision Com. com., reprinted at 29B pt. 3B West's Ann. Evid. Code (2009 ed.) foll. § 1122, p. 409.)

What mediation-related communications or writings are prepared by fewer than all mediation participants and reveal nothing about mediation discussions? While this category might include something more than the type of communications between a party and his or her lawyer at issue in this writ proceeding (for example, planning discussions between two codefendants relating to the mediation), plainly section 1122, subdivision (a)(2), contemplates the application of mediation confidentiality (absent express agreement to the contrary) to private statements made for the purpose of mediation that are not communicated to the opposing party or the mediator. If the majority's interpretation of the scope of section 1119, subdivision (a), were correct, section 1122, subdivision (a)(2), would be unnecessary.

In the end, the majority's analysis of section 1119, subdivision (a), seems to be founded primarily on its concern that protecting private communications between a client and his or her lawyer under the rubric of mediation confidentiality may shield unscrupulous lawyers from well-founded malpractice actions without furthering the fundamental policies favoring mediation. That may well be true; but, respectfully, it is

not our role to make that determination. Rather, it is for the Legislature to balance competing public policies and to create an exception to the statutory scheme governing mediation confidentiality where it finds it appropriate to do so. (See *Foxgate, supra*, 26 Cal.4th at p. 17 [Supreme Court deferred to Legislature to balance competing public policies even though recognizing confidentiality in case before it left unpunished sanctionable conduct and, in effect, undermined the entire purpose of mediation]; *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 152-153, 155 [Supreme Court and Courts of Appeal have resisted attempts to narrow the scope of mediation confidentiality "even in situations where justice seems to call for a different result"].)

I would deny the petition for writ of mandate.

CERTIFIED FOR PUBLICATION

PERLUSS, P. J.

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 7

DATE: December 15, 2009

Peter Q. Ezzell
Haight Brown & Bonesteel
6080 Center Drive
Suite 800
Los Angeles, CA 90045-1574

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

B215215
Los Angeles County No. LC070478

NOTICE

Pursuant to California Rules of Court, Rule 8.268(c), if the Court of Appeal does not rule on the petition before the decision is final, the petition is deemed denied. The petition for rehearing filed in the above captioned matter is denied by operation of law.

cc: File

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.: Second Civil Number B215215

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 ***December 22, 2009***, I served the within ***Petition for Review*** 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:

Clerk of the Supreme Court of the
State of California
350 McAllister Street
San Francisco, California 94102

((Original and Thirteen Copies Via Federal Express))

Clerk of the Court
Court of Appeal – State of California
Second Appellate District Division Seven
300 South Spring Street
North Tower Second Floor
Los Angeles, California 90013

The Honorable William A. MacLaughlin
Judge of the Superior Court – Dept. 89
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I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of party served,

service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. ***Executed on December 22, 2009***, at Los Angeles, California.

Theresa Welsch

(Original Signed)