Supreme Court Copy

SUPREME COURT
FILED

APR 27 2010

Frederick K. Ohlrich Clerk

Deputy

CRC 8.25(b)

Supreme Court Case Number S178914

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., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN,

Real Parties in Interest.

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

REPLY BRIEF ON THE MERITS

HAIGHT BROWN & BONESTEEL LLP
Peter Q. Ezzell (Bar No. 53497),
Nancy E. Lucas (Bar No. 126854) and
Stephen M. Caine (Bar No. 119590)
6080 Center Drive, Suite 800
Los Angeles, California 90045-1574
Telephone: (310) 215-7100
Facsimile: (310) 215-7300
e-mail: scaine@hbblaw.com

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

TOPICAL INDEX

Page

INTRODUCTION 1

ISSUES PRESENTED 3

MR. CASSEL'S STATEMENT OF THE FACTS VIOLATES THE *RULES OF COURT*, AND IT MAY BE STRICKEN OR DISREGARDED. 4

LEGAL DISCUSSION 6

I.
Mr. Cassel Offers No Real Argument That the Mediation Confidentiality Statutes Are Unclear, or That Their Broad Terms, When Interpreted Fully and Accurately, Do Not Encompass the Mediation Communications Identified by the Trial Court. 6

II.
That a Lawyer May Act as the "Agent" for His Client at Mediation Does Not Affect His Status as a "Participant" in the Mediation, Under the Normal Definition of That Word; If the Legislature Intended to Exclude Lawyers From the Mediation Confidentiality Statutes, It Could Have Done So Easily. 12

III.
The Attorney-Client Privilege, and Its Waiver, Have Only a Tangential Impact on the Issues Being Reviewed Because That Privilege Is an Entirely Separate Evidentiary Objection to Mediation Confidentiality. 15

A. The Plain Language of the Attorney-Client Privilege Statutes and the Mediation Confidentiality Statutes Does Not Allow a Conclusion That Waiver of the Attorney-Client Privilege Expressly or Implicitly Waives Mediation Confidentiality. *16*

IV.
The Mediation Communications Identified by the Trial Court Were Not Evidence Admissible in the Underlying *Von Dutch Originals* Lawsuit, So Those Communications Do Not Fall Within the Limited Exception to Mediation Confidentiality in Supplied in Section 1120. 26

Page

V.

Because the Legislature Has Expressly Determined and Considered the Competing Public Policy Considerations Relevant to Mediation Confidentiality, It Is Improper for Courts to Revise Those Findings, or to Reach Different Choices Than Those Presumptively Made by the Legislature. 27

A. Public Policy Has Presumably Been Considered and Incorporated Into the Relevant Statutes. *27*

B. The Unintended Consequences Arising From Application of Cassel Have Also Presumably Been Considered by the Legislature, and Its Policy Decisions Are Presumptively Contained in the Statutes as Drafted. *31*

VI.

Conclusion. 34

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1) 35

TABLE OF AUTHORITIES CITED

Page(s)

Cases

Am. Acad. of Pediatrics v. Lunger
(1997) 16 Cal.4th 307 24

Benesch v. Green
2009 U.S. Dist. LEXIS 117641 (Dec. 17, 2009) 29, 32

Cassel v. Superior Court
(2009) 179 Cal.App.4th 152 ..... passim

Cooley v. Superior Court
(2002) 29 Cal.4th 228 7

Doe 1 v Superior Court
(2005) 132 Cal.App.4th 1160 ..... 27, 29

Eisendrath v. Superior Court
(2003) 109 Cal.App.4th 351 ..... passim

Foxgate Homeowners Ass'n v. Bramalea Cal., Inc.
(2001) 26 Cal.4th 1 ..... 7, 10, 11, 28

In re Marriage of Kieturakis
(2006) 138 Cal.App.4th 56 ..... 18, 21, 26

Jensen v. Board of Trustees
(1974) 43 Cal.App.3d 945 24

Merenda v. Superior Court
(1992) 3 Cal.App.4th 1 14

Metcalf v. County of San Joaquin
(2008) 42 Cal.4th 1121 7

Moran v. Harris
(1982) 131 Cal.App.3d 913 ..... 29, 30

People v. Arias
(1996) 13 Cal.4th 92 15

People v. Cole
(2006) 38 Cal.4th 964 24

Philip Chang & Sons Assocs. v. La Casa Novato
(1986) 177 Cal.App.3d 159 15

Page(s)

Porter v. Wyner
2010 Cal. App. LEXIS 487 (Apr. 8, 2010) ..... passim

Roberts v. City of Palmdale
(1993) 5 Cal.4th 363 19

Rojas v. Superior Court
(2004) 33 Cal.4th 407 ..... passim

Simmons v. Ghaderi
(2008) 44 Cal.4th 570 ..... passim

Wimsatt v. Superior Court
(2007) 152 Cal.App.4th 137 ..... 21, 28, 29

Statutes

Evidence Code
section 900 18
section 910 18
section 912 ..... passim
section 950 ..... 17, 23
section 958 ..... passim
section 962 23
section 1070 18
section 1115 ..... passim
section 1118 18
section 1119 ..... 6, 8, 10
section 1119(a) ..... passim
section 1119(c) 3, 12, 13
section 1120 ..... 26, 27
section 1122 ..... 17, 18, 31, 33
section 1122(a) ..... passim
section 1122(a)(2) 3, 8, 12, 13
section 1128 ..... 2, 17, 21, 23

Other Authorities

27 Cal. Law Revision Com. Rep.
(1997) p. 601 26

Factor and Graham, *New Cases Suggest "Wimsatt Warnings" Are a Better Practice*, L.A. Daily Journal (Apr. 26, 2010), p. 7 ..... 14, 32

Toker, Cal. Arbitration and Mediation Practice Guide (2003) ¶¶12.2, 13.1(b)(3-4), 13.4(c-d) 14

Page(s)

Rules

Rules of Court
rule 3.852(3) 12
rule 8.204(a)(2)(C) 3
rule 8.204(e)(2) 4
rule 8.520(b)(1) 4
rule 8.520(b)(3) 3

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., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN,

Real Parties in Interest.

REPLY BRIEF ON THE MERITS

INTRODUCTION

Appellate courts have recognized that mediation confidentiality is drafted in the broadest possible language, and is intended by the Legislature to remain exception-free. Robust mediation confidentiality benefits the practice of mediation. For those reasons, this court has held consistently that judicially created exceptions to the mediation confidentiality statutes are forbidden.

Until now, appellate courts have hewn to the clear, expansive language of the mediation confidentiality statutes, applying it as written to bar introduction of communications "for the purpose of, in the course of, or pursuant to, a mediation," even if those communications might evidence alleged wrongdoing. Some courts have expressed misgivings about doing so, and have urged the Legislature to reconsider the statutes. To date, the Legislature has not.

For the first time, in this case the Court of Appeal has charted a detour around this court's prohibition of judicially created exceptions. The appellate court determined that every one of dozens of conversations that the trial court found were within the statutory definition of mediation communications are not subject to mediation confidentiality in the first place. The court did so by expressing disbelief that the Legislature intended the statutes it drafted to apply as written to private attorney-client discussions concerning a pending mediation (and even during the mediation itself). Its reasoning is incompatible with the facts as found by the trial court, and the plain language of the mediation confidentiality statutes.

This case hinges largely upon whether courts must apply the mediation confidentiality statutes as written. That a court might be reluctant to do so in a given situation is not the standard by which clear and unambiguous statutes are applied. Cases where evidence of true misconduct is rendered inadmissible are unfortunate, but they are also rare. But the exception to mediation confidentiality created by the appellate court will have far-ranging, unintended consequences. The opinion is contrary to the Legislature's statement of policy supporting mediation. Affirming it

will damage the practice of mediation in every one of the thousands of other cases that are mediated every year in California.

The harm this opinion will do to mediation confidentiality in every lawsuit is manifest. Currently, if a litigant asks a mediator whether confidential matters he might discuss will remain confidential and inadmissible in court if told to the opponent, the answer is an unambiguous "yes." Mediations are fostered by such certainty. But if this opinion is affirmed, the mediator's answer will be changed in every mediation to "maybe not." If, as is likely, the opponent discusses the litigant's concessions, admissions, or anything else said at mediation privately with his attorney, those concession, admissions and other matters will be admissible if a dispute ever arises between the opponent and his counsel. Mediation confidentiality will forever be less certain, and less attractive. The practice of mediation will be harmed as a result.

This result is contrary to the Legislature's intent, and every prior holding of this court. The opinion must be reversed.

ISSUES PRESENTED

For convenience, the two issues presented in this appeal, as framed by the Supreme Court, are repeated here:

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

2. Is an attorney a "participant" in a mediation such that communications between the attorney and his or her client for

purposes of mediation must remain confidential under *Evidence Code* sections 1119, subdivision (c) and 1122, subdivision (a)(2)?

In his Answering Brief, Mr. Cassel appears to disregard these issues, believing that they are merely arguments by the Real Parties in Interest, Wasserman, Comden, Casselman & Pearson, L.L.P., Mr. David Casselman and Mr. Steve Wasserman ("WCCP"). (See, Answering Brief pp. 3-4.) Mr. Cassel states that the second issue "is not only compound and somewhat deceptive," it "does not contribute to resolving the issue before this Court." (Answering Brief, p. 4.) The "issue" Mr. Cassel believes is before the court is not identified separately; he did not request review of any additional issues.

It is therefore unsurprising that Mr. Cassel proceeds with arguments that are somewhat divorced from the two issues framed by this court. Whether his arguments are "fairly included" within the issues framed for this appeal, within the limits of *Rules of Court*, rule 8.520(b)(3), can only be determined by the court. In this Reply, WCCP will attempt to corral the various arguments presented by Mr. Cassel, and relate them to the extent possible to the issues framed by this court.

MR. CASSEL'S STATEMENT OF THE FACTS VIOLATES THE *RULES OF COURT*, AND IT MAY BE STRICKEN OR DISREGARDED.

WCCP is surprised to have to point out that *Rules of Court*, rule 8.204(a)(2)(C), requires that all factual assertions in appellate briefs must be supported by accurate citations to the appellate record. This rule is made

applicable to briefs on the merits in this court by *Rules of Court*, rule 8.520(b)(1). Mr. Cassel's Answering Brief ignores these rules.

Its recitation of the supposed factual background of this case, contained primarily in his "Introduction" and "Summary of Arguments" (Answering Brief pp. 5 – 12), contains no citations to the record whatsoever. This is problem enough, but Mr. Cassel exacerbates it by making factual claims that are often wildly exaggerated, or simply wrong. Most, if not all, of the "egregious conduct" claimed by Mr. Cassel (Answering Brief, p. 7) is not only unsupported in the appellate record, it is unsupported by the discovery or other documentation for this case beyond the record on appeal. Mr. Cassel's recitation of the facts can be fairly described as the case he wishes he had, rather than the one he has.

Because most of the claimed "egregious conduct" is unsupported in the record, it is difficult to disprove those claims directly – proving the absence of evidence is often impossible. Most of the claims of "egregious conduct" were not noted in Mr. Cassel's prior briefs, or in the Court of Appeal's opinion in *Cassel v. Superior Court* (2009) 179 Cal.App.4th 152 ("*Cassel*"). These new claims appear to be inserted more as rhetorical flourishes.

An accurate recitation of the facts is important. Pursuant to *Rules of Court*, rule 8.204(e)(2), it would be appropriate to strike Mr. Cassel's Answering Brief, so that an amended brief can be filed, solely limited to revising the statement of facts. Alternatively, this court can disregard his unsupported factual assertions, and rely instead on WCCP's Statement of Facts (which, in addition to being supported by accurate citations to the record, is *fair*).

LEGAL DISCUSSION

I.
Mr. Cassel Offers No Real Argument That the Mediation Confidentiality Statutes Are Unclear, or That Their Broad Terms, When Interpreted Fully and Accurately, Do Not Encompass the Mediation Communications Identified by the Trial Court.

The majority in *Cassel*, *supra*, 179 Cal.App.4th 152, reaches its primary holding by parsing Section 1119. As explained in the Opening Brief, as well as in the dissenting opinion in *Cassel*, *Evidence Code* § 1119[1] contains the primary language framing what evidence or communications are subject to mediation confidentiality. In its subsection (a), Section 1119 articulates the standard used to determine if a communication is subject to mediation confidentiality, using a three-part phrase. A communication must remain confidential if it is "for the purpose of, in the course of, or pursuant to, a mediation ...." (Opening Brief, pp. 12, 18-19.) This language is repeated in Section 1122(a).

The majority in *Cassel* improperly omits or ignores two of the three parts in Section 1119(a), focusing instead solely on the phrase "in the course of." (*Id.*) This omission by the majority was pointed out in the dissenting opinion. (See, *Cassel*, *supra*, 179 Cal.App.4th at pp. 165-166, and fn. 3.)

---

[1] Unless stated otherwise, all further statutory references shall be to the *Evidence Code*.

While in interpreting the statutes it is important to note "the intent of the Legislature so as to effectuate the purpose of the law," the first and most important step in determining that intent is "to look to the language of the statute itself." (*Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 362 (citations omitted).) The plain language of the relevant statutes is what Mr. Cassel, as well as the Court of Appeal in *Cassel*, mostly overlooks or misapplies.

The mediation confidentiality statutes are clear and unambiguous. Generally, it is therefore improper to engage in a convoluted "construction" of them. (See, *Foxgate Homeowners Ass'n v. Bramalea Cal., Inc.* (2001) 26 Cal.4th 1, 11, 13-14.) When construction of a statute is permitted and required, it is plainly wrong to ignore some its relevant words, or arrive at a construction that renders them surplusage or a nullity. "[C]ourts should avoid construction of a statute that makes any word surplusage." (*Cassel*, *supra*, 179 Cal.App.4th at p. 166 (Perluss, P.J., dissenting), citing and construing *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135; and *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249.)

Here, the trial court carefully reviewed evidence regarding a series of alleged conversations between Mr. Cassel and WCCP attorneys. Even Mr. Cassel acknowledges that these conversations all occurred during the two pre-mediation meetings held on the two days prior to the *Von Dutch Originals* mediation, and during that mediation itself. The trial court concluded, quite logically, that most (but not all) of those conversations fell within the definition of communications that were "for the purpose of, in the course of, or pursuant to, a mediation ...," as contemplated in Section 1119(a). (See, RPApp. Exs. 9-11.) Mr. Cassel never challenged the

accuracy of those factual conclusions by the trial court in his underlying petition for writ of mandate.

In his Answering Brief, Mr. Cassel does not provide an adequate explanation of how it is possible to construe the subject communications identified by the trial court as not somehow falling within the broadly defined categories of being "for the purpose of, in the course of, or pursuant to, a mediation ...." (Section 1119(a).) Instead, he argues primarily that the Legislature could not, in his opinion, have intended mediation confidentiality to apply to private attorney-client communications. (Mr. Cassel's other primary argument, that mediation confidentiality is waived or inapplicable whenever the attorney-client privilege is waived, is discussed below.)

Mr. Cassel's broad discussion of the Legislature's presumed "intent," like the majority opinion in *Cassel*, misses the mark because it simply fails to take into account the plain language in the relevant statute: Section 1119.

The majority in *Cassel* holds that private conversations between a lawyer and client that clearly pertain to mediation (either at the mediation itself, or within two days of it), as contemplated in Section 1119(a), nonetheless do not fall within the court's belief of what the Legislature presumably intended when it drafted Section 1119(a) (and also Section 1122(a)(2)). Section 1119(a) states that confidentiality shall apply to "anything said" by anyone involved in a mediation, without limitation, if that communication was made "for the purpose of, in the course of, or pursuant to, a mediation." (*Id.*)

Moreover, communications subject to mediation confidentiality shall remain inadmissible in "*any* ... civil action," without excluding legal malpractice actions arising from mediation. (Section 1119(a) (emphasis added).)

Cassel, and now *Porter v. Wyner*, 2010 Cal. App. LEXIS 487 (Apr. 8, 2010),[2] each avoid the clear and exceptionally broad definition of the communications that must remain confidential, contained in Section 1119(a), by creatively piecing together parts of Legislative histories, dicta, and by relying heavily on the use of the word "disputants," as used in Section 1115 to broadly define what is a "mediation." (*Cassel*, *supra*, 179 Cal.App.4th at pp. 159-160; *Porter*, *supra*, 2010 Cal. App. LEXIS 487, pp. 22-23.) These opinions avoid being labeled as having created forbidden "judicial exceptions" to mediation confidentiality by simply declaring that private mediation communications could not be for the purpose of mediation, even if some of those private communications took place during the mediation itself.

As discussed in the Opening Brief (at pp. 41-42), "disputants" is one of the words used in Section 1115 to define what is a mediation. There is no question that the *Von Dutch Originals* litigation was resolved at a mediation, as defined in Section 1115. But once it is determined that a

---

[2] The opinion in *Porter* was entered just a few days before this Reply was due. WCCP is informed by the counsel in *Porter* that review by this court will likely be sought. However, at this moment, it is impossible to determine whether *Porter* will remain published and citable. Regardless, at this time *Porter* should be addressed.

mediation occurred, the question of whether communications relating to that mediation must remain confidential depends on different statutes: Sections 1119 and 1122(a). The majorities in *Cassel*, and now *Porter*, do not apply these statutes, focusing instead almost entirely on the definition of the word "disputants." As pointed out by the dissenting opinions in both *Cassel* and *Porter*, this is improper.

The communications that must remain confidential in "any" later lawsuit (Section 1119(a)) does not repeat or incorporate the terms used in Section 1115. Instead, the Legislature chose different, more expansive language. Section 1119(a) does not define or limit the communications that must remain confidential in terms of the persons engaging in those communications. Instead, Section 1119(a) and 1122(a) define the communications that "shall" remain confidential in terms of their context. Communications "shall" remain confidential in "any" later lawsuit if they are "for the purpose of, in the course of, or pursuant to, a mediation." (*Id.*)

Use of this broad language reflects the strong Legislative policy that mediation is to be encouraged, and that broad confidentiality must be applied to everyone at a mediation. (See, *Foxgate*, *supra*, 26 Cal.4th at p. 14; *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 588.)

Mr. Cassel, like the courts in *Cassel* and *Porter*, fails to provide any cogent explanation why, if the Legislature supposedly intended that mediation confidentiality should apply only to communications between "disputants," it did not simply include that word, or some other limitation, in Section 1119(a) or 1122(a). The Legislature could have easily included the word "disputants" in Section 1119(a) or 1122(a) if that was its intent. Comparably, some exclusion of communications from one's own

"attorneys" could have been included easily, if that was the Legislature's intent. Clearly, no such limitations are expressed in those sections. Instead, the language defining what communications must remain confidential is stated as broadly as it can be.

Many times now, this court has expressed that the mediation confidentiality statutes are "clear and unambiguous." (See, *Foxgate*, *supra*, 26 Cal.4th at p. 14.) Therefore, "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." (*Ibid.* (citations omitted).) It was therefore not within the power of the appellate court in Cassel to engage in its creative construction of those statutes, so as to allow it to conclude that the discussions between Mr. Cassel and WCCP attorneys that so clearly concerned the *Von Dutch Originals* mediation were, nevertheless, not "for the purpose of, in the course of, or pursuant to, a mediation," as contemplated in Sections 1119(a) and 1122(a). The majority opinion in *Cassel* fails to apply those words, at all or under their correct, broad definitions. As pointed out in the dissenting opinion, this is impermissible. (*Cassel*, *supra*, 179 Cal.App.4th at p. 166.)

II.
That a Lawyer May Act as the "Agent" for His Client at Mediation Does Not Affect His Status as a "Participant" in the Mediation, Under the Normal Definition of That Word; If the Legislature Intended to Exclude Lawyers From the Mediation Confidentiality Statutes, It Could Have Done So Easily.

Mr. Cassel states that the second of the two issues that are being reviewed – whether attorneys are "participants" in mediation, as intended within Sections 1119(c) and 1122(a)(2) – is "not particularly relevant." (Answering Brief, p. 33.) He is wrong.

The importance of the second issue (apart from it having been selected, at least in part, by this court) is that the Legislature's use of the specific words "participants" or those who "participate" in Sections 1119(c) and 1122(a)(2) has significance. In Section 1119(c), it impacts whether communications with attorneys, as "participants" in mediation, must remain confidential, separately from their clients. And in Section 1122(a), it impacts whether attorneys' consent must be obtained separately before a voluntary waver of mediation confidentiality is possible.

As used in Section 1119(c), use of those exceedingly broad words, which are not defined or limited anywhere in the *Evidence Code*,[3] imparts

---

[3] *Rules of Court*, rule 3.852(3), specifically includes attorneys within its statement of the intended definition of "participant," as that word may be used to define the duties of mediators. No different or more limited definition is contained in the *Evidence Code*. There is no basis to conclude that a different or more restrictive meaning was intended by use of that word elsewhere in the statutory scheme.

the Legislature's intention that, to be applied as broadly as possible, mediation confidentiality must be applied to every person involved. Likewise, use of that word in Section 1122(a) imparts the Legislature's intention that all persons participating (i.e., taking part) in a mediation must consent before particular mediation communications may be admitted in any later lawsuit.

Mr. Cassel offers no argument to contest that if the Legislature had intended that communications subject to mediation confidentiality could be used against attorneys, contrary to the broad language in Section 1119(c), or that if their consent to waive mediation confidentiality was unnecessary, contrary to the broad language within Section 1122(a), it could have said so easily in either statute. Instead, the Legislature chose words with (possibly) the broadest definition possible: "participant," or those who "participate."

Mr. Cassel concedes that WCCP attorneys were "participants in the mediation," as attorneys for Mr. Cassel. (Answering Brief, pp. 35, 33.) He attempts to qualify that concession by stating that WCCP, like Mr. Cassel, was "required to maintain the confidentiality of those matters *to which confidentiality applied*." (Answering Brief, p. 35 (emphasis in original).) This qualification simply imports Mr. Cassel's adoption of the reasoning in *Cassel*.

The error in this attempt to parse the plain meaning of the words in Section 1119(a) is discussed above.

Regardless, it is an exercise in understatement to affirm that, under the normal definition of the word, lawyers are "participants" in mediations, as contemplated in Sections 1119(c) and 1122(a)(2). Any other conclusion

would seem to invite the famous riposte by attorney Brendan Sullivan in the Iran-Contra hearings years ago that, as the lawyer representing a client at a hearing, he was "not a potted plant. I'm here as the lawyer. [Objecting and arguing is] ... my job." Stated another way, even in mediations, attorneys are not as impassive as *Cassel* infers. They most certainly "participate" in mediation.

An attorney's role in a mediation is much different than his role at trial or in other phases of litigation. To be effective at mediation, an attorney must do more than impassively regurgitate the case's facts. (Cf. *Porter*, *supra*, 2010 Cal.App. LEXIS 487, p. 24.) The effective attorney must be an engaged interlocutor between the client and the opponent and the mediator. The attorney's job includes preparing a client to understand "his or her own interests and needs" as well as the opponent's, bring reality to "fantasy" outcomes, and generally prepare the client to consider any number of options to resolve the dispute that are unavailable in normal civil litigation. (See, Toker, Cal. Arbitration and Mediation Practice Guide (2003) ¶¶12.2, 13.1(b)(3-4), 13.4(c-d), at pp. 436-440, 446-454, 473-483.) Sometimes this requires making a client hear and understand aspects of his case that he may not want to hear. (Factor and Graham, *New Cases Suggest "Wimsatt Warnings" Are a Better Practice*, L.A. Daily Journal (Apr. 26, 2010), p. 7 ("Factor"). While an attorney's fiduciary duty is to protect the client's interests, it remains true that "emotional tranquility" is never assured in litigation. (See, *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 5.)

III.
The Attorney-Client Privilege, and Its Waiver, Have Only a Tangential Impact on the Issues Being Reviewed Because That Privilege Is an Entirely Separate Evidentiary Objection to Mediation Confidentiality.

Mr. Cassel argues that mediation confidentiality should not apply to private attorney-client discussions, even if, as here, they are found to be "for the purpose of, in the course of, or pursuant to, a mediation." (Section 1119(a).) In summary, the basis for Mr. Cassel's argument is that, in this attorney negligence action, Section 958 mandates waiver of the attorney-client privilege. And because that privilege would also normally attach to private attorney-client communications regarding mediation, mediation confidentiality is also waived. Thus, he argues, it is wrong to exclude that "admissible evidence" on the basis that it is separately subject to mediation confidentiality.

Among the flaws in Mr. Cassel's argument, the first and most obvious is that it runs afoul of the long-recognized maxim that if evidence is subject to objections on multiple grounds, an exception to each objection must be found before the evidence will be admissible. (See, *Philip Chang & Sons Assocs. v. La Casa Novato* (1986) 177 Cal.App.3d 159, 173; accord, *People v. Arias* (1996) 13 Cal.4th 92, 149 (multiple hearsay is admissible for its truth only if each hearsay layer separately meets the requirements of a hearsay exception).) An exception or exclusion to one objection does not make the other objections moot (*i.e*, a conversation that is both subject to the attorney-client privilege and is hearsay does not become admissible if only an exception to the hearsay rule is found). Therefore, the waiver of the attorney-client privilege otherwise applicable

to the private conversations between Mr. Cassel and WCCP lawyers that are at issue here, as mandated by Section 958, does not, in the normal process of the law, automatically cancel other applicable objections, including mediation confidentiality.

This undermines Mr. Cassel's effort to shift the issue in this appeal to being whether mediation confidentiality can act as an "exception" to the waiver of the attorney-client privilege effectuated in Sections 912 and 958. That issue misses the point. Mediation confidentiality does not act as an "exception" to the waiver of the attorney-client privilege effected in Sections 912 and 958 because, as explained further below, these two legal doctrines act independently of each other. Like any other evidentiary objection, each exists, and is waived, only on the terms of the statutes creating them. While they may overlap as to a certain subset of evidence (private attorney-client communications that happen to have taken place "for the purpose of ..." mediation), one does not automatically cancel the other. Where both objections may apply, an exception or exclusion to both must exist before the evidence will be admitted.

A. The Plain Language of the Attorney-Client Privilege Statutes and the Mediation Confidentiality Statutes Does Not Allow a Conclusion That Waiver of the Attorney-Client Privilege Expressly or Implicitly Waives Mediation Confidentiality.

Section 958 mandates that the attorney-client privilege is waived in a client's lawsuit against his attorney for legal malpractice. Mr. Cassel's argument that this section or others mandate waiver of mediation confidentiality is undermined by the very statutes upon which he relies.

The largest problem with Mr. Cassel's argument – a problem that he never addresses head-on in his Answering Brief – is that neither the attorney-client privilege statutes (Sections 912, 950 - 958) nor the mediation confidentiality statutes (Sections 1115 – 1128) contain language allowing the conclusion he urges.

Mr. Cassel's argument relies on broad arguments regarding "policy" or the presumed "intent" of the Legislature, divorced from the actual language of the statutes it drafted. As will be discussed below, the public policy considerations in this situation have already been considered by the Legislature, and may not be rewritten here, even if this court might have made different policy choices.

The interaction (if any) between the attorney-client privilege statutes and the mediation confidentiality statutes presents an issue of statutory interpretation. As referenced above, the primary step in determining the Legislature's intent behind a statute (assuming it is not already clear and unambiguous) is "to look to the language of the statute itself." (*Eisendrath*, *supra*, 109 Cal.App.4th at p. 362 (citations omitted).) Neither Mr. Cassel, nor the majority opinion in *Cassel*, does this correctly.

The attorney-client privilege is an entirely separate evidentiary objection, and it is subject to its own rules. In the context of applying mediation confidentiality, the Court of Appeal in *Eisendrath*, *supra*, 109 Cal.App.4th 351, held that the means to waive mediation confidentiality, provided solely in Section 1122, are different from and unrelated to the different means provided to waive of other evidentiary privileges, including specifically the attorney-client privilege, provided primarily through Sections 912 and 958. Waiver of the attorney-client privilege requires a

different showing, and by fewer people, than a waiver of the attorney-client privilege. Section 1122 requires that, to waive mediation confidentiality, "[a]ll persons who conduct or otherwise participate in the mediation" must agree in writing.[4] (See, *Eisendrath*, *supra*, 109 Cal.App.4th at p. 363, construed in *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 81-82.)

There is nothing in these statutes that states, or creates an inference, that waiver of the attorney-client privilege somehow waives other evidentiary objections, actually or implicitly.

Appellate courts have already held that this it is not possible to waive mediation confidentiality by inference, or by any means other than voluntary agreement under Section 1122. In *Eisendrath*, the Court of Appeal specifically analyzed waiver of the attorney-client privilege by a person's "conduct" or other inferences, as allowed in through Sections 910, 912, and 958. (*Eisendrath*, *supra*, 109 Cal.App.4th at p. 363.) It held that, unlike the statutes controlling the attorney-client privilege, the mediation confidentiality statutes contain no language allowing waiver by implication, or by virtue of the waiver of other privileges, including specifically the attorney-client privilege:

> We conclude that the implied waiver provisions in section 910 *et seq.* [which incorporates Div. 8 of the *Evidence Code*, comprised of Sections 900 – 1070], by their plain language, are limited to the particular privileges enumerated therein.

---

[4] Or orally, if that oral agreement is then transcribed under the additional rules specified in Section 1118.

> *None of these waiver provisions refer to mediation confidentiality rights or the statutory scheme governing these rights*. Furthermore, we may not extend these waiver provisions beyond their existing limits. As our Supreme Court explained in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 ... '[c]ourts may not add to the statutory privileges except as required by state or federal constitutional law [citations], nor may courts imply unwritten exceptions to existing statutory privileges. [Citations.]' [*Eisendrath*, *supra*, 109 Cal.App.4th at p. 363 (emphasis added).]

This court reaffirmed and applied the holding in *Eisendrath* in *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 586 ("[a] court may not extend waiver provisions beyond their existing statutory limits").

Even more relevant here, in *Simmons* this court noted that the implied waiver of evidentiary privileges allowed by Section 912, which includes the automatic waiver of the attorney-client privilege effectuated in Section 958, existed at the time the mediation confidentiality statutes were enacted (in 1997). Yet in drafting the mediation confidentiality statutes, the Legislature did not include any language allowing any of the implied waivers allowed by Section 912, including Section 958, to apply to mediation confidentiality. Consequently, this court held that it must be presumed that "the Legislature did not intend for implied waivers to apply to mediation confidentiality." (*Simmons*, *supra*, 44 Cal.4th at p. 587; accord, *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424 (implied waiver of mediation confidentiality not possible by reference to waiver of the attorney work product privilege).)

Like Section 912, Section 958 had long existed when the mediation confidentiality statutes were enacted. (See, *Simmons*, *supra*, 44 Cal.4th at

p. 587.) If the Legislature intended for private attorney-client discussions concerning mediation to be excluded from mediation confidentiality, it could have easily articulated such an exclusion in either the mediation confidentiality statutes or Section 958. No such exception exists in either set of statutes. The inescapable conclusion from the absence of such language is that Section 958 is not intended to waive mediation confidentiality.

In the recent *Porter* opinion, the majority expresses fear that "[i]f the mediation confidentiality sphere were to be extended to the attorney-client relationship it would render section 958 a nullity." (*Porter*, *supra*, 2010 Cal. App. LEXIS 487, p. 20.) This statement is overwrought, as it finds no logical support in the statutes. There are several reasons for this.

First, and most obviously, the communications between a client and lawyer "for the purpose of, in the course of, or pursuant to, a mediation," as contemplated in Section 1119(a), are almost always (and are here) a small subset of the much larger body of attorney-client communications that occur over the months or years that a litigated matter progresses. Mediation confidentiality, applied only where appropriate, will have no impact on the attorney-client privilege, or its waiver, for the far larger history of communications between a lawyer and client over the course of a legal matter that do not pertain to mediation. The attorney-client privilege and Section 958 are not "nullified" by proper application of mediation confidentiality any more than they are "nullified" by proper application of objections for hearsay, lack of foundation, or any other evidentiary

objection that might also apply to a particular attorney-client communication.[5]

Second, the plain terms of the relevant statutes do not support the argument by Mr. Cassel, or by the majority in *Porter*, that Section 958 trumps Sections 1115-1128. As noted correctly in the dissenting opinion in *Porter*, even the snippets of Section 958 selectively quoted in the majority opinion (*Porter*, *supra*, 2010 Cal. App. LEXIS 487, p. 21[6]) reveal that Section 958 does not apply to mediation confidentiality because mediation confidentiality is not a " 'privilege.' " (*Id.* at p. 37.) Appellate courts have often distinguished mediation confidentiality from evidentiary "privileges." (See, *Eisendrath*, *supra*, 109 Cal.App.4th at pp. 362-363; accord, *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 150, fn. 4, and *Kieturakis, supra*, 138 Cal.App.4th at pp. 61–62 & fn. 2, cited in *Cassel, supra*, 179 Cal.App.4th at p. 158.) Even the majority in *Porter* acknowledges that

---

[5] A further fear expressed in *Porter*, that trial courts may be flummoxed when trying to determine what communications over the course of litigation are "for the purpose of" mediation, seems unfounded. (*Porter*, *supra*, 2010 Cal. App. LEXIS 487, pp. 24-25; see also, p. 37 (dissenting opinion).) Trial courts make comparable factual findings every day. A practical test for making that determination is provided in *Wimsatt.* Mediation confidentiality will apply to any statement or writing that "would not have existed but for a mediation communication, negotiation, or settlement discussion." (*Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 160.) This test makes the analysis straightforward.

[6] In support of its holding, the *Porter* majority describes and applies Section 958 using this description: "It provides that there is 'no privilege' that covers '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.' (Section 958.)" (*Porter*, *supra*, 2010 Cal.App. LEXIS 487, p. 21.)

mediation confidentiality is not a "privilege." (*Porter, supra*, 2010 Cal. App. LEXIS 487, p. 5, fn. 3.)

Tellingly, within the *Evidence Code* itself, the Legislature placed the attorney-client privilege in division 8, entitled "Privileges." Mediation confidentiality, however, was placed in division 9, entitled "Evidence Affected or Excluded by Extrinsic Policies." (See, Deering's Cal. Codes Annot., Evidence (2004), p. vi.) "This placement reflects that the Legislature considered the specific limitations placed on the admissibility of evidence by the mediation confidentiality statutes and endorsed those limitations to encourage mediation as a matter of public policy." (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 588.) Conversely, if the Legislature wanted mediation confidentiality to be treated as a "privilege," it would have placed it in division 8.

Regardless of whether mediation confidentiality is accurately deemed a "privilege," though, other terms within Section 958 establish conclusively why it does not effectuate a waiver of mediation confidentiality.

Section 958 expressly limits the extent of the privileges waived by implication in a suit between a client and his or her counsel: "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." (*Id.* (emphasis added).)

By its own terms, Section 958 only effectuates a waiver of the "privilege" created "under this article" in a suit brought upon a breach of duty arising in the attorney-client context. "This article" refers to division

8, ch. 4, art. 3 of the *Evidence Code*, comprised of *Evidence Code* §§ 950-962. These sections create and pertain to only one privilege: the attorney-client privilege. "This article" does not purport to apply to mediation confidentiality, the parameters of which are provided in a completely separate division, chapter and article of the *Evidence Code* (division 9, ch. 2), comprised of *Evidence Code* §§ 1115-1128. (Accord, *Simmons, supra*, 44 Cal.4th at pp. 587-588.)

By use of that qualifying phrase, Section 958 effectuates an automatic waiver of only the *single* privilege created "under this article:" the attorney-client privilege. By its plain language, Section 958 does not purport to waive any and all *multiple* "privileges" that might conceivably apply in a suit sounding in professional negligence. So, even if one were to mischaracterize mediation confidentiality as being a "privilege," Section 958 would not apply to it.

Curiously, in *Porter* the important phrase "under this article" was excised from the majority opinion's quotation of Section 958 in its explanation of this aspect of its holding. (See fn. 6, above; *Porter, supra*, 2010 Cal. App. LEXIS 487, p. 21.) In holding that Section 958 effectuates a waiver of all privileges, including mediation confidentiality, the majority in *Porter* never explains how or why the qualifying phrase "under this article" can be ignored. Only by omitting that essential qualifying language does the holding in *Porter* seem possible (even if still flawed).

Mr. Cassel's effort to have Section 958 cancel application of mediation confidentiality in Sections 1115-1128 is impermissible because it violates a fundamental rule of statutory interpretation. As discussed above, when construction of one or more statutes is required, it is plainly wrong to

engage in a construction of statutory language that ignores relevant words, or renders them surplusage or a nullity.[7] "[C]ourts should avoid construction of a statute that makes any word surplusage." (*Cassel, supra*, 179 Cal.App.4th at p. 166 (Perluss, P.J., dissenting) (citations omitted); *People v. Cole* (2006) 38 Cal.4th 964, 981.)

The *Porter* majority, similarly to Mr. Cassel's argument, expands the reach of Section 958 far beyond its plain terms, and does so by impermissibly ignoring the limitation to its application stated within it. Mr. Cassel's argument, and the reasoning followed in *Porter*, based upon Section 958 must fail because the plain wording of the statutes simply does not allow the conclusion that Section 958 applies to nullify Sections 1115-1128.

If the Legislature truly intended that Section 958 would effectuate a waiver of mediation confidentiality as well as the attorney-client privilege in professional negligence actions, it could have very easily included language to that effect in Sections 912 or 958. The Legislature could have also easily included appropriate language in Sections 1115-1128 if it wanted to exclude private attorney-client communications from mediation confidentiality. Or the Legislature could have placed the mediation confidentiality statutes in *Evidence Code* division 8, so as to bring

---

[7] This court and others have long warned against relying on selective or incomplete quotations from statutes or case law, as doing so leads easily to erroneous and misleading interpretations. (E.g., *Am. Acad. of Pediatrics v. Lunger* (1997) 16 Cal.4th 307, 426, fn. 4; *Jensen v. Board of Trustees* (1974) 43 Cal.App.3d 945, 951.)

mediation confidentiality within the implied waiver provisions of Section 912. (See, *Simmons, supra*, 44 Cal.4th at pp. 587-588.) It did none of these things.

Mr. Cassel's argument regarding the scope of the waiver effectuated by Section 958, and the part of the opinion in *Porter* which relies on Section 958 (*Porter, supra*, 2010 Cal. App. LEXIS 487, p. 22)[8], rely on a common conclusion. Each assumes that the Legislature could not somehow manage to put its intention on straightforward topics into words. Both sets of statutes involved here – Sections 1115-1128 and Sections 912 and 958 – are clear. Yet none contain any language permitting the construction of them engaged in by the Court of Appeal in *Cassel*, or urged by Mr. Cassel now. The absence of such language in not just one, but *multiple* statutes, cannot be ignored. The Legislature presumably knows how to craft such exceptions to mediation confidentiality, if that was its intent. (See, *Rojas, supra*, 33 Cal.4th at pp. 423-424 (Legislature was capable of drafting a "good cause" exception to mediation confidentiality if it intended to).)

---

[8] In *Cassel*, the Court of Appeal purports to consider both the attorney-client privilege in Section 958 and the mediation confidentiality statutes in Sections 1115-1128. (See, *Cassel, supra*, 179 Cal.App.4th at pp. 157-158.) While Section 958 is mentioned at the outset of the opinion, that statute, and the attorney-client privilege more generally, is not referenced later as a substantial basis for the court's holding. (See, *id.* at pp. 158-164.)

IV.
The Mediation Communications Identified by the Trial Court Were Not Evidence Admissible in the Underlying *Von Dutch Originals* Lawsuit, So Those Communications Do Not Fall Within the Limited Exception to Mediation Confidentiality in Supplied in Section 1120.

As an alternative argument, Mr. Cassel asserts that the private communications with WCCP attorneys are admissible as " 'unaffected evidence' " that Section 1120 allows to be introduced in later proceedings. Mr. Cassel's argument misconstrues Section 1120. That statute is irrelevant to determine the issues being analyzed by this court.

Section 1120 explains that mediation confidentiality does not apply to evidence relevant to prove the lawsuit that is the subject of the mediation. It does this by differentiating " 'pure evidence' " in a case, which is not confidential, from " 'the substance of mediation, i.e., the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand.' " (*Rojas, supra*, 33 Cal.4th at p. 418.) Confidentiality " 'does not [apply] where the document, or statement, would not have existed but for the negotiations, hence the negotiations are not being used as a device to thwart discovery by making existing documents unreachable.' [Citation.]" (*Ibid.*; accord, 27 Cal. Law Revision Com. Rep. (1997) p. 601, quoted in *Kieturakis*, *supra*, 138 Cal.App.4th at p. 62 (Section 1120 is intended "to 'prevent[] parties from using a mediation as a pretext to shield materials from disclosure ...' ").

Under Section 1120, relevant, pre-existing evidence cannot be removed from admissibility in the case simply by producing it in a

mediation. For example, a document relevant to prove a claim is not made inadmissible in the case by producing or discussing it at a mediation. (See, e.g., *Doe 1 v Superior Court* (2005) 132 Cal.App.4th 1160, 1173 (information in priests' pre-existing personnel files remained admissible at trial despite being discussed at mediation, but the summaries of those files prepared for mediation fell within mediation confidentiality).)

None of the statements barred by the trial court here were, of themselves, evidence admissible in the underlying *Von Dutch Originals* litigation. None would have been "pure evidence" in that suit. (See, *Rojas, supra*, 33 Cal.4th at p. 418.) Section 1120 is irrelevant here.

V.

Because the Legislature Has Expressly Determined and Considered the Competing Public Policy Considerations Relevant to Mediation Confidentiality, It Is Improper for Courts to Revise Those Findings, or to Reach Different Choices Than Those Presumptively Made by the Legislature.

A. Public Policy Has Presumably Been Considered and Incorporated Into the Relevant Statutes.

Finally, Mr. Cassel argues that public policy considerations should trump the plain language of the statutes. This reasoning has been rejected by this court before. The Legislature's policy decisions supporting mediation confidentiality are extensive, and are well recognized in prior appellate opinions. (See, *Simmons, supra*, 44 Cal.4th at p. 578.) Consequently, all aspects of "public policy" relevant to mediation confidentiality were presumptively considered by the Legislature in drafting the mediation confidentiality statutes. (See, *id.* at pp. 578-579;

Wimsatt, supra, 152 Cal.App.4th at p. 150.) By choosing to frame mediation confidentiality using exceedingly broad language, the Legislature intended that the statutes should be applied broadly. The exception created in *Cassel* (or its creative reasoning used to avoid bringing the mediation communications at issue here within the ambit of mediation confidentiality in the first place, so as to avoid creating the appearance that an exception was created) finds no support in the actual language of the statutes.

The statutes drafted by the Legislature reflect that it chose to favor robust, exception-free mediation confidentiality over possible concerns that broad application of confidentiality might, on rare occasion, conceivably encompass alleged bad conduct at mediations. (*Simmons, supra*, 44 Cal.4th at p. 583; *Wimsatt, supra*, 152 Cal.App.4th at p. 150.) This court, in *Simmons*, discussed that the Legislature weighed (or is presumed to have weighed) the competing policy concerns, and made its choice, as reflected in the language of the relevant statutes:

> In deciding whether a judicial exception was appropriate to carry out the Legislature's goals, we observed that with the enactment of the mediation confidentiality statutes, the Legislature contemplated that some behavior during mediation would go unpunished. [Citation.] ... [W]e were bound to respect the Legislature's policy choice to protect mediation confidentiality rather than create a procedure that encouraged good faith participation in mediation. Thus, we held that evidence of a party's bad faith during the mediation may not be admitted or considered. [*Simmons, supra*, 44 Cal.4th at p. 583, citing *Foxgate, supra*, 26 Cal.4th at p. 17.]

Consequently, in a variety of contexts, this court and others have affirmed that the mediation confidentiality statutes, as phrased, must be

applied as written, despite potentially having the effect of occasionally applying to alleged improper conduct. (E.g., *Foxgate, supra*, 26 Cal.4th 1 ("bad faith" conduct by counsel during mediation and refusal to participate in the mediation could not be reported to the court for punishment or sanctions, as the evidence of the conduct would violate mediation confidentiality); *Wimsatt, supra*, 152 Cal.App.4th 137 (court acknowledges that statements allegedly made by counsel at a mediation are inadmissible, despite claim that doing so will lead to the harsh result that the client must possibly forego a legal malpractice claim based on those statements); *Doe 1, supra*, 132 Cal.App.4th 1160 (withholding production of personnel record summaries of priests accused of child molestation that were prepared for mediation); *Eisendrath, supra*, 109 Cal.App.4th 351 (excluding from evidence oral statements between the parties, but outside of the presence of the mediator, inconsistent with a mediated settlement agreement that were allegedly necessary to prove the intended terms of that agreement); accord, *Benesch v. Green*, 2009 U.S. Dist. LEXIS 117641 (Dec. 17, 2009).)

WCCP must reassert here that it denies the allegations against it, and that Mr. Cassel's offers of proof are unproven. But even if every allegation was true, the mediation confidentiality statutes must still be applied as written.

Mr. Cassel's claim that attorneys' fiduciary duties somehow trump the clear language of Sections 1115-1128 does not add anything to his argument. Ethical concerns are among those presumably weighed by the Legislature in choosing language for the relevant statutes. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, the Court of Appeal reasoned that claimed "ethical considerations" did not allow it to enact public policy

where the Legislature had already expressed spoken on that issue. (*Id. at p.* 921.)

The fact that a litigant, or even the court, might disagree with the Legislature's choice is unavailing. "Whether one argument is better than the other is unimportant. What is important is to recognize there are differing points of view on this subject" and that the Legislature made its choice." (*Moran, supra*, 131 Cal.App.3d at p. 922.)

This court has already declined to second-guess the Legislature's policy choices regarding mediation confidentiality. "The Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice." (*Simmons, supra*, 44 Cal.4th at p. 22.) "The Courts of Appeal ... strictly construe the mediation confidentiality statutes, even when the equities in the case suggest contrary results." (*Wimsatt, supra*, 152 Cal.App.4th at p. 155.)

Applying mediation confidentiality as written, even as to private attorney-client communications, is not "contrary to a statute" and would not lead to absurd results. (E.g., *Moran, supra*, 131 Cal.App.3d at p. 921.) The two evidentiary objections have their own bases, and own methods to obtain waiver, on the terms deemed necessary by the Legislature.

Despite its clever avoidance of appearing to be an "exception" to mediation confidentiality, *Cassel* is just that. In *Foxgate, supra*, 26 Cal.4th 1, this court held that a comparable "judicially crafted exception" to Section 1119 based upon the attorney-client privilege was "not necessary either to

carry out the legislative intent or to avoid an absurd result." (*Id.* at p. 14.) "[T]he mediation privilege is an important one, and if courts start dispensing with it by using the ... test [governing the work-product privilege], ... you may have people less willing to mediate." (*Ibid.*, quoted in *Rojas, supra*, 33 Cal.4th at p. 424.)

A different holding here would be contrary to Legislature's stated policy that robust, exception-free mediation confidentiality benefits mediation, and would equally discourage some litigants from mediating cases, or from being as open as they could be if confidentiality remained exception-free.

B. The Unintended Consequences Arising From Application of Cassel Have Also Presumably Been Considered by the Legislature, and Its Policy Decisions Are Presumptively Contained in the Statutes as Drafted.

Mr. Cassel's claim that applying mediation confidentiality as written is poor policy because it gives an attorney the option not to waive confidentiality under Section 1122 is similarly irrelevant. This argument has already been rejected by this court and others. (See, *Eisendrath, supra*, 109 Cal.App.4th at p. 365, citing and construing *Foxgate, supra*, 26 Cal.4th at p. 17 (claim that mediation confidentiality, as written, "effectively gives control over evidence of some sanctionable misconduct to the party engaged in the conduct" was presumably "considered … when it enacted the statutory scheme").)

Also presumptively considered is the unfairness that would be created by *Cassel* in the relative abilities of the parties to a professional negligence action to provide proof of their claims. (Opening Brief, pp. 32-

35.) *Cassel* allows one party to admit evidence of "private" communications concerning mediation, such as "firm" plans or "not less than" figures at which to settle. Yet mediation confidentiality would force exclusion of conversations in front of a mediator or opponent, perhaps just moments later, when that party learns different facts, has a change of heart, moderates his "fantasy" outcome in a case, and then agrees quite voluntarily to a different set of facts, or a different, "middle ground" sum in settlement. (See, *Benesch, supra*, 2009 U.S. Dist. LEXIS 117641.) As discussed in the variety of sources cited in the Opening Brief,[9] this is common in mediation. Indeed, this is the commonly recognized goal of mediation. (See, Opening Brief, pp. 31-35; see also, Factor, *supra*, L.A. Daily Journal (Apr. 26, 2010), p. 7 (discussing that mediations often occur at a time when discovery has been conducted, the case has progressed, so that the client may, for the first time, have to confront the realities of her case).)

Finally, there is no cogent argument offered why allowing "private" attorney-client discussions regarding mediation would not discourage opponents from being as forthright as possible in mediation. The large new loophole in mediation confidentiality created by *Cassel* allows into evidence any communication between an attorney and client regarding

---

[9] Mr. Cassel's complaint that WCCP cites a variety of authorities beyond case law is especially misplaced. By its nature, mediation practice is not often discussed in published opinions. Mediation is intended to remove cases from litigation, and thus from the realm of appellate opinions. WCCP believes that more relevant input from mediation practitioners is better than less, and that this court is well equipped to weigh properly the various resources developed for and by mediation practitioners.

mediation, including their "private" discussions of the opponent's statements, admissions, and evidence discussed in confidence at a mediation. Attorneys and clients almost always discuss their opponent's statements and admissions at mediation privately, so as to decide how to respond. Those private communications are now admissible in any later action between the attorney and client. The former opponent is not given notice of this, and has no ability to object or consent in advance, as is strictly required by Section 1122. (See, Opening Brief, pp. 27-28.) A full and fair analysis of the extent of the exception to mediation confidentiality enshrined by *Cassel* cannot ignore that it will inevitably sweep up the opponents' confidences, not just those of the client or attorney.

The *Cassel* majority's interpretation of the mediation confidentiality statutes improperly renders this aspect of Section 1122 a nullity. Once again, though, this unintended result was presumably weighed by the Legislature in drafting the relevant statutes. It is both improper and unnecessary for courts to graft onto these clear statutes its own perceptions of the Legislature's intent, or public policy, where the Legislature has already articulated and acted upon the relevant policy.

Mr. Cassel fails to analyze correctly the myriad of policy decisions that were presumptively included in the language chosen or omitted by the Legislature for the multiple *Evidence Code* sections implicated by his arguments, and by the holding in *Cassel*. This court, however, has not failed to recognize those policy choices in the past. There is no basis to ignore them now, or to reach different decisions than those reached by the Legislature.

VI.
Conclusion.

This court may or may not believe that the Legislature should revisit the issue of whether mediation confidentiality should apply so broadly. Regardless, it remains true that the numerous policy concerns that would be implicated from any change to mediation confidentiality must be considered, if at all, only by the Legislature.

To assure that robust mediation confidentiality can continue to foster mediation, as intended by the Legislature, *Cassel* must be reversed.

Respectfully submitted,

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

Attorneys for Defendants and Real Parties in Interest, 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 Real Parties in Interest, WASSERMAN, 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 reply to answering brief on the merits was produced with a computer. It is proportionately spaced in 13 point Times Roman typeface. The brief contains 8,387 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 April 26, 2010, at Los Angeles, California.

_____

Stephen M. Caine

PROOF OF SERVICE

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

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

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, California, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 6080 Center Drive, Suite 800, Los Angeles, CA 90045-1574; that on ***April 26, 2010***, I served the within ***Reply Brief on the Merits*** in said action or proceeding by depositing a true copy thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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

(For filing pursuant to Rule 8.25(b), original and 13 copies via Federal Express overnight delivery)

Clerk
Court of Appeal of the State of California
Second Appellate District, Division Seven
300 S. Spring St., North Tower, Second Fl.
Los Angeles, California 90013

The Honorable William A. MacLaughlin
Judge of the Superior Court – Dept. 89
111 North Hill Street
Los Angeles, California 90012-3014

Mr. Ronald W. Makarem
Makarem & Associates, APLC
11601 Wilshire Boulevard, Suite 2440
Los Angeles, California 90025-1760

Telephone: 310.312.0299
Facsimile: 310.312.0296
Attorneys for Plaintiff

Mr. Lyle R. Mink
Law Offices of Lyle R. Mink
1801 Century Park East, Suite 2600
Los Angeles, California 90067

Telephone: 310.553.1010
Facsimile: 310.284.5743
Attorneys for Plaintiff

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 or, where indicated, with a delivery service for next day delivery, that same day with postage/payment 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 April 26, 2010***, at Los Angeles, California.

Robbie Williams

(Original Signed)