Foreword: I first started researching this article soon after *Cassel v. Superior Court* (previously at 179 Cal.App.4th 152) was published. However, in light of the California Supreme Court’s recent grant of review that case, we can be sure to expect that there is more to be said on the issue. I will supplement this column after the Supreme Court’s decision is published. In the meantime, this article will set the stage for the Supreme Court’s forthcoming *Cassel* decision.

Introduction

There are countless examples of well-intended legislation being used in ways that no lawmaker would have ever imagined when drafting the bill. It appears as though the unintended consequences of the mediation privilege, set forth at Evidence Code §§1115 – 1128, has caught the attention of the California Supreme Court. The Supreme Court has granted review of *Cassel v. Superior Court*, which called into question whether attorney-client communications relating to settlement fall within the scope of the mediation privilege in a subsequent attorney malpractice action. This column will discuss the general application of the mediation privilege and the issues the privilege has raised in subsequent attorney malpractice actions.

The Mediation Privilege

Generally speaking, the mediation privilege protects all communications relating to mediation. Evidence Code §1119 appears to be intentionally overbroad:

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.

California courts have observed that “…confidentiality is essential to effective mediation … and, in some cases required by, the Legislature.” *Foxgate Homeowners’ Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1,14. “[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.” *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194.

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The Mediation Privilege in Subsequent Attorney Malpractice Actions

It is the sweeping application of the mediation privilege that the California Supreme Court has taken under consideration in the Cassel case. Cassel is an attorney malpractice action in which the plaintiff alleged that his attorneys “forced” him to sign a settlement agreement for $1.25 million rather than a higher, previously authorized amount (the actual amount of the “higher amount” is not stated in the case). Before the trial of the malpractice action, the attorney defendant moved in limine to preclude discussions held with the client in the days leading up to the mediation. The trial court granted the in limine motion and plaintiff responded by filing a writ petition. The Court of Appeal granted the writ and issued an order directing the trial court to vacate its order and to enter an order denying the motion.

The Court of Appeal decision provides a brief but informative discussion of how attorneys have attempted to use the mediation privilege as a shield in subsequent attorney malpractice actions. Prior decisions, including Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137, have found that the mediation privilege does preclude the admission of certain forms of evidence from mediations, even when the alleged malpractice arises out of the attorney’s actions relating to the mediation. In Wimsatt, the plaintiff alleged that his attorney, Wimsatt, issued an unauthorized settlement demand in the underlying case, eventually resulting in a settlement lower than the plaintiff’s expectations. In the subsequent malpractice action, Wimsatt moved for a protective order covering certain mediation communications. After the trial court denied the protective order, Wimsatt successfully petitioned for a writ directing the trial court to enter a protective order covering some of the mediation communications.

The Wimsatt court reviewed prior California Supreme Court decisions on the mediation privilege and noted that the Supreme Court consistently interpreted the privilege broadly. See, e.g., Foxgate, supra, 26 Cal.4th 1, and Rojas v. Superior Court (2004) 33 Cal.4th 407. The Wimsatt court observed:

The Supreme Court has repeatedly resisted attempts to narrow the scope of mediation confidentiality. The court has refused to judicially create exceptions to the statutory scheme, even in situations where justice seems to call for a different result. Rather, the Supreme Court has broadly applied the mediation confidentiality statutes and has severely curtailed courts’ ability to formulate exceptions. The court has stated that “[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme ... unqualifiedly bars disclosure of communications [and writings] made during mediation absent an express statutory exception.”

Wimsatt, supra, at 152 (quoting Foxgate and citing Rojas, supra).

The Wimsatt court also noted that the Foxgate court had recognized its conclusion left sanctionable conduct unpunished—conduct that obstructed the mediation process—and in effect, undermined the entire purpose of mediation. “However, Foxgate deferred to the Legislature to balance competing public policies and to create exceptions to the statutory scheme.” Id. at 153. After applying these sweeping policy arguments to the case at hand, the Wimsatt court granted the writ in part and directed the trial court to enter a protective order covering a number of mediation communications. As to the communications that were excluded from the protective order, the court did not rule on the issue of privilege.

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but rather, it found that the moving party failed to meet its burden of establishing privilege.

As discussed by the Court of Appeal in *Wimsatt*, the Supreme Court was clearly aware of the unintended consequences of the mediation privilege – consequences that could potentially leave sanctionable conduct unpunished and that could deprive victims of malpractice from presenting key evidence in support of their cases. However, in deciding the conflict between promoting the mediation process versus the need to use evidence generated during mediations, the Supreme Court cast its vote for preserving the sanctity of the mediation process.

Personally, while I respect the Court’s desire to maintain the free and open communications that are so vital to the mediation process, I question precisely which communications might be stifled if an exception existed for subsequent malpractice or attorney discipline actions. A parallel example is the waiver of the physician-patient privilege when a party’s physical or psychological injuries are put at issue in subsequent litigation. Why is it, then, that a party can’t likewise waive the privilege by putting the mediation conduct at issue in a subsequent action? To shield these communications from ever seeing the light of day essentially gives unethical attorneys the ability to violate their professional and ethical duties while conducting mediations with the knowledge that their clients will face significant evidentiary obstacles in subsequent claims. Yes, the client always has the right to refuse to sign a release, but that places the impetus on often unsophisticated clients to overcome the will of their own attorney when involved in often emotionally-charged and fast-moving settlement negotiations.

**The Cassel Case**

Like the *Wimsatt* case, the *Cassel* case deals with a client claiming that an unauthorized settlement demand was made by his attorney. However, the controlling difference between the two cases was that the communication at issue in *Wimsatt* was whether Wimsatt extended a lower settlement offer to other attorneys (clearly a “mediation communication”), whereas the subject communication in *Cassel* was whether Cassel himself authorized his attorney to extend the lower demand. The Court of Appeal concluded that this attorney-client communication was just that – an attorney-client communication – and that it did not fall within the definition of a “mediation communication.” As a result, the Court of Appeal directed the trial court to deny the motion in limine seeking to exclude evidence of the communications. *Cassel v. Superior Court*, supra, 179 Cal.App.4th at 162 – 164.

In a brief but pointed dissent, Presiding Justice Perluss argued that the communications should have been excluded, explaining:

> 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 with-out 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 poli-cies and to create an exception to the statu-

**CONCLUSION**

The California Supreme Court has now granted review of *Cassel v. Superior Court* (previously at 179 Cal.App.4th 152). Given the Court’s refusal in other cases to contract the scope of the mediation privilege despite several opportunities to do so, it is difficult to imagine that the Court will reverse the Court of Appeal decision. However, I hold out hope that the Supreme Court will craft an exception to the rule that will encourages frank and open communications during mediation, but still provides litigants with the ability to support and refute claims of attorney malpractice in subsequent actions. **TBN**