

## **California Court Creates Judicial Exception to Mediation Confidentiality**

In the past, courts have been reluctant to create judicial exceptions to California's mediation confidentiality statute. (*See* Evidence Code Section 1115 et seq.) However, the California Court of Appeal, Second District, recently created a judicial exception and this ruling marks a departure from nearly a decade of judicial restraint. Cassel v. Superior Court, 2009 WL 3766430 (Cal. App. 2 Dist. November 12, 2009).

### **Attorney-Client Conversations During Mediation Are Admissible in Subsequent Malpractice Action**

In Cassel, the court held that private communications between an attorney and client during mediation are admissible in a later action for legal malpractice. The alleged malpractice involved claims that the attorney forced his client to settle for a lesser amount than the client desired.

The court concluded that communications made during mediation solely between an attorney and client that were not communicated to the mediator, any opposing party or its attorney, and that do not reveal anything said in mediation discussions with the mediator, any opposing party or its attorney, should not be protected by the confidentiality statute. The court reasoned that mediation is a process "facilitated by a mediator between disputing parties, not between a client and his attorney."

The defense relied on Wimsatt v. Superior Court, 152 Cal.App.4<sup>th</sup> 137 (2007), as support for its argument that mediation confidentiality statutes apply broadly to conversations solely between a party and his attorney. In Wimsatt, the client similarly sued his attorney for breach of fiduciary duty claiming that the attorney lowered the client's settlement demand without his consent. The lower settlement demand was communicated in the mediation brief, in the attorney's e-mails to opposing counsel that quoted the mediation brief, and in a telephone conversation with opposing counsel on the eve of a second session of the mediation. The Wimsatt court held that the communications in the mediation brief and in the e-mails were protected from disclosure by California's mediation confidentiality statute.

The Cassel court distinguished Wimsatt because Wimsatt involved communications between opposing attorneys during mediation, whereas Cassel involved communications solely between an attorney and his client.