

# The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

## [A Unanimous CA Supreme Court Upholds Mediation Confidentiality](#)

January 14, 2011 by [Michael Walsh](#)

In [Cassel v. Superior Court \(Wasserman Comden Casselman & Pearson\)](#), the California Supreme Court evaluated the mediation confidentiality created by [Evidence Code, § 1119](#), which prevents the admission of “evidence of anything said,” or any “writing” which was prepared “for the purpose of, in the course of, or pursuant to, a mediation. . . .”, subject only to certain statutory exceptions. Upholding an earlier Court of Appeal decision, [Wimsatt](#), but reversing here, the Court found that the express statutory language applied to protect discussions between counsel and client made during and immediately preceding the mediation in the underlying action, even in a subsequent legal malpractice action in which counsel’s conduct at the mediation was a basis for the malpractice claim. As a result, the court found that counsel defending itself against a legal malpractice action was entitled to exclude evidence of such communications with its own former client, now the legal malpractice plaintiff. While expressing no opinion on the merits of this statutory scheme, the Court noted that the Legislature was free to reconsider it. Justice Chin concurred, “reluctantly,” noting this was “a high price to pay for confidentiality in the mediation process,” and suggesting statutory amendments which could avoid this result while preserving mediation confidentiality. For more history regarding *Cassel*, see the [ADR update page](#).