

## CALIFORNIA SUPREME COURT EXCLUDES ATTORNEY-CLIENT COMMUNICATIONS MADE FOR THE PURPOSES OF MEDIATION

January 13, 2011--The California Supreme Court today released its decision in *Cassel v. Superior Court (Wasserman Comden Casselman & Pearson)*. The Court has deemed attorney-client privileged communications “made for the purposes of mediation” inadmissible at a subsequent legal malpractice case. The decision reverses the Second District Court of Appeal decision.

Unfortunately for consumers, clients with compelling legal malpractice cases against corrupt or incompetent lawyers may find it too difficult to prosecute their cases if the claims are in any way connected to mediation. The decision in *Cassel* excludes from evidence in a malpractice suit those communications evidencing an attorneys’ incompetence and fraud on a client not only “in the course of” a mediation but even if determined to be “made for the purposes” of a mediation. The ruling allows attorneys to breach their fiduciary duties to their clients within the context of discussing mediation. Although the Supreme Court in *Cassel* stated that the statements must be “immediately preceding” a mediation, statements one week or even one month conceivably can be argued are “made for the purposes” of mediation. In *Cassel*, the statements were made one and two days before the mediation, as well as on the day of mediation. Further, the “made for the purposes” of mediation will no doubt be abused and expanded by those lawyers fighting malpractices case. In *Cassel*, the statements involved legal bills, witnesses at trial, experts and abandoning the case. All those topics somehow were deemed “made for the purposes” of mediation.

Further, mediation is also affected by today’s ruling in *Cassel*. Clients may not want to participate in mediation for fear of being taken advantage of by their attorney without the ability for recourse in a subsequent legal malpractice case.

While Evidence Code Section 958 seems on point in our instance – stating all attorney-privileged communications are admissible at a subsequent legal malpractice case – it was not persuasive to the Supreme Court. As the Supreme Court decision in *Cassel* seems to imply, the Legislature should provide further clarification to the Courts in interpreting whether attorney-client privileged communications are deemed “made for the purposes” of mediation.

### **About Makarem & Associates APLC**

Makarem & Associates APLC represents plaintiffs in legal malpractice cases.