

2008 Levit Essay Contest Hypothetical

You are the law clerk to the chief judge of a state appellate court,¹ reviewing a trial court's ruling excluding from trial evidence all communications in connection with a mediation proceeding, on "mediation privilege" grounds. The matter will be decided by a three-judge court. You have been asked to write the opinion for the two-judge majority in this case of first impression. You may decide the case any way you want. You should anticipate a strong dissent from the other judge, so you should address the arguments that will be asserted against your position. The following facts are undisputed:

Penelope's dream came true when she opened her own jazz club in Metropolis. A fine jazz guitarist herself, she knew many of the best musicians around town, and initially had no problem booking great talent. Running the club, however, proved harder than she expected. She had endless problems with her alcohol license, and her insurance costs were sky-high. Worse, the club's landlord was a nightmare. The plumbing was unreliable, and the air conditioning did not work. Although Leonard, the landlord, had promised Penelope that 25 percent of the parking spots in the adjacent lot would be reserved for her patrons, he reneged on the promise. Penelope began to lose patrons and bookings of the better jazz bands. The club's losses mounted, and after two years in business Penelope's Place was forced to close.

Penelope blamed Leonard the landlord for the loss of business. She hired attorney Alan to sue Leonard for breach of contract. Alan advised Penelope that her claims were weak, especially given that her business was less than two years old and had never turned a profit before it closed. Penelope said she didn't care. She told Alan she wanted to make Leonard's life difficult.

Penelope's lawsuit against Leonard sought millions of dollars in lost profits, asserting that Penelope's Place easily would have cleared several hundred thousand dollars a year and would have had a long and profitable future, were it not for the dismal state of the premises and the lack of promised parking. Leonard defended the action vigorously, claiming Penelope was a bad manager. The landlord also argued that Penelope's claim for future lost profits was purely speculative.

Despite the ill will, Penelope and Leonard agreed to mediate. At the mediation, Leonard's attorneys offered to settle for \$200,000. Alan was astounded, as was the mediator Mary. In a side conference, Alan and Mary urged Penelope to accept the offer, as it was highly unlikely she could do better at trial. Alan and Mary cautioned Penelope that she might get nothing if she turned down the \$200,000 on the table. Mary told Penelope that at most she could prove \$100,000 in damages, based on all the evidence. Penelope told Alan she would only settle for \$500,000. Mary presented the counter-offer to Leonard, who rejected it.

¹ *Your state is a fictional state with no law on point. Look to other jurisdictions for instructive authority.*

During a break in the mediation conference, to Alan's surprise, Penelope sent Leonard an email saying, "Your offer may cover my losses, Leonard, but I am going after every penny I can get because you're a lousy landlord, so no deal." When the conference resumed, Leonard informed the mediator about Penelope's email and walked out of the mediation.

Penelope felt Alan was not "aggressive" enough, so she fired Alan and hired Brutus to try her case in court, but to no avail. Because Alan had failed to properly disclose a damages expert that Penelope needed to prove her lost profit damages, Leonard was able to obtain a directed verdict, disposing of the case and leaving Penelope with no damages.

Penelope blamed Alan and sued him for legal malpractice. She alleged that Alan's failure to disclose a damages expert caused her to lose claims worth millions of dollars. At trial, Alan sought to introduce evidence from the mediation, including the email and all statements, arguing the evidence showed that Penelope squandered an opportunity to settle the underlying case for a reasonable amount, and that any negligence on Alan's part therefore did not damage Penelope. The trial judge stated that Alan's arguments were well taken, but that under the mediation privilege statute, the court excluded any evidence from the mediation.

The jury never saw any of the mediation-related communications. Penelope presented an expert who testified the claim against Leonard was worth at least \$1 million. The jury returned a verdict against Alan for \$300,000. Alan appealed from the verdict and specifically appealed the court's ruling excluding evidence concerning the failed mediation.

The issue before the court is whether any of the mediation evidence at issue was admissible as evidence at trial, under your state's mediation statute. The language of the state statute tracks the California mediation confidentiality statutes, Cal. Evid. Code §1115 *et seq.* Because it is an issue of first impression, the chief judge has suggested you review the California decision, *Wimsatt v. Superior Court*, 152 Cal.App.4th 137 (2007).