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A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure

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I. INTRODUCTION

Historically the mediation field has been widely unregulated. The result has been that definitions, rules, and protections have varied greatly or not existed at all.¹ In response to this confusion and uncertainty, the Uniform Mediation Act draft² (hereinafter UMA) has attempted to create a framework for consistency and

*. J.D. with Honors Drake University School of Law (1994), LL.M. University of Missouri-Columbia School of Law (2001). I would like to thank Jean Sternlight, John Lande, Len Riskin, and the LL.M. candidates of 2000-2001 for the input, insight, and assistance, that made this article possible. I would also like to thank the drafters of, and contributors to, the Uniform Mediation Act. While I disagree with the basis and application of the Privilege Against Disclosure, I commend them for undertaking a task that was absolutely necessary and unquestionably daunting.

1. See generally Gregory A. Litt, *No Confidence: The Problem of Confidentiality by Local Rule in the ADR Act of 1998*, 78 Tex. L. Rev. 1015 (2000).

2. See generally U.M.A. Prefatory Note & Reporter's Notes (prop. off. draft May 4, 2001). The UMA is sponsored by the American Bar Association and the National Conference of Commissioners on Uniform State Laws. The intent of the UMA is to create a uniform law governing mediation that will be adopted by the individual states. *Id.* at Prefatory n. 2. The primary focus of the UMA is "to provide a privilege that assures confidentiality in legal proceedings." *Id.* at Prefatory n.1.

The UMA was approved by the National Conference of Commissioners on Uniform State Laws on August 16, 2001. A number of floor amendments were incorporated into the approved form. I was able to review the approved text of the UMA. That text had not yet gone to the Committee on Style. The final form of the UMA may differ in minor ways from the provisions identified in this article, but there should be no major substantive differences.

The May 4, 2001, Draft Uniform Mediation Act is a thirty-four page document downloaded from www.pon.harvard.edu/guests/uma/NovUMAWP.htm. Approximately six pages of the document are the provisions for the proposed UMA. The remainder is composed of Prefatory Notes and Reporter's Notes.

protection in the mediation process.³ Specifically, the UMA seeks to protect the confidentiality of mediation communications⁴ through the creation of the following privilege:

SECTION 5. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY

(a) A mediation communication is privileged and is not subject to discovery or admissible in evidence in a proceeding.⁵

(b) In a proceeding, the following privileges apply;

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing, a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in a mediation.⁶

This Privilege Against Disclosure would codify a popular view. It is a widely held belief in the mediation community that the mediation process requires confidentiality to promote the disclosure of information by parties and to reinforce the parties' belief in the neutrality of the mediator.⁷ While confidentiality and privilege are two very different concepts,⁸ the UMA has chosen a privilege mechanism to help to ensure that a degree of confidentiality is mandated by law for the mediation process. According to popular opinion that would be a good thing. The problem is that the Privilege Against Disclosure substitutes convenience for

3. The UMA defines "mediation" as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." U.M.A. § 3(2).

4. The UMA defines a "mediation communication" as "a statement, whether oral, in record, verbal, or nonverbal, that is made or occurs during a mediation for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." *Id.* § 3(3).

5. The UMA defines a "proceeding" as "a legislative hearing or similar process, or a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery." *Id.* § 3(8).

6. *Id.* § 5.

7. See *infra* text accompanying nn. 80-82.

8. See e.g. Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. Tex. L. Rev. 69 (1999).

intellectual honesty. As I will discuss, there is no empirical support for the creation of the Privilege Against Disclosure and there is no demonstrable utilitarian societal justification for that privilege. Further, the UMA privilege would apply to a relationship of adversarial interests. Privilege has never been applied to such a relationship and I will argue that it should only be applied to relationships of common interests.

I do not expect this article to be warmly welcomed by the mediation community or proponents of the Privilege Against Disclosure. I will flatly challenge the dogma that "mediation needs confidentiality"⁹ and the belief that privilege is an appropriate mechanism for attempting to create confidentiality for mediation communications.¹⁰ The minimal debate that has previously occurred on this topic has focused on whether or not mediation has shown general empirical¹¹ or societal¹² justification for a privilege. The only two authors arguing against the creation of a general mediation privilege have asserted that an empirical case for such a privilege has not been made.¹³ They have left the collection and analysis of empirical data to those who would proffer the privilege. It does not appear that mediation privilege proponents have been eager to pick up that gauntlet, but I will analyze data from analogous fields using confidential relationships (primarily attorney-client and psychotherapist-patient) and conclude that there is no empirical support for the contention that mediation needs confidentiality. Absent such empirical support, legislatures should not adopt the UMA Privilege Against Disclosure because there is no demonstrated need for the privilege.

Very few have argued against the general creation of a mediation privilege. Until now none have argued that privilege is not an appropriate mechanism for creating confidentiality for mediation communications. I take the position that privilege should not be applied to create confidentiality in the mediation process because that application would be fundamentally contrary to the relationships traditionally protected by privilege. Historically privilege has only been applied to relationships of common interests. There is no precedent for applying privilege to a relationship of competing interests, but that is precisely what the Privilege Against Disclosure would do. Applying privilege based on the subjective perception of importance, and ignoring empirical analysis and historical precedent, will make privileges common and obviate their otherwise unique value.

9. See e.g. Lynne H. Rambo, *Impeaching Lying Parties With Their Statements During Negotiation: Demysticizing the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes*, 75 Wash. L. Rev. 1037, 1064 (2000) ("It is universally recognized that in order for [mediation] to work, [it] must be conducted in a spirit of candor and in such fashion that anything said or done during the discussions will not cause jeopardy to any of the parties should there be subsequent litigation").

10. To my knowledge, only two other authors have voiced criticism of the belief that "mediation needs confidentiality" as support for a mediation privilege. See Scott H. Hughes, *A Closer Look: The Case for a Mediation Privilege Still Has Not Been Made*, 5 Dis. Res. Mag. 14 (1998); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio. St. J. on Dis. Res. 1 (1986).

11. See Hughes, *supra* n. 10, at 14 ("[T]here is no empirical work to demonstrate a connection between privileges and the ultimate success of mediation"). See also Green, *supra* n. 10, at 2 ("Neither the necessity for such a privilege or the social utility of a general mediation privilege have been demonstrated").

12. Green *supra* n. 10, at 31-35.

13. See *supra* n. 10.

This paper is comprised of four sections. In Section II, I will argue that state legislatures should analyze the Privilege Against Disclosure under the standard of "reason and experience."¹⁴ In this context, "reason" requires the use of abstract logic,¹⁵ while "experience" requires the use of empirical analysis when creating or interpreting privileges.¹⁶ I will first use the case of *Jaffee v. Redmond*,¹⁷ and research from related fields, to discuss "experience" in analogous relationships and to argue that there is no empirical evidence to support the assertion that mediation needs confidentiality.¹⁸ I will then analyze "reason" under the Wigmore analysis¹⁹ to determine whether there is a utilitarian societal justification for the Privilege Against Disclosure. The Wigmore analysis consists of four steps, each of which must be met for the recognition of a privilege. I will argue that the privilege proposed by the UMA fails all four steps and that there is no demonstrated societal justification for the recognition of the Privilege Against Disclosure.

In Section III, I will discuss the historical development, use, and scope of the attorney-client privilege, the husband-wife privilege, the priest-penitent privilege, and the physician-patient privilege. I will argue that the UMA creation has no support in the historical use of privilege protection. The UMA anticipates mediation being used to address disputes between parties with differing legal rights and interests.²⁰ Relational privileges have not been, and should not be, applied to relationships of adverse interests. Ignoring uniform precedent simply to create the Privilege Against Disclosure will open the door to making privileges common and obviating their unique value. Applying the UMA privilege to relationships of adversarial interests is also likely to undermine the public policy interest in fostering knowing and informed resolution to disputes because the Privilege Against Disclosure would actually benefit and protect parties who "disclose" false or misleading information during mediation.

I will offer an alternative to the Privilege Against Disclosure in Section IV and propose the creation of mediation confidentiality through contract provisions. I will argue that there is no mechanism that guarantees absolute confidentiality of communications made in mediation. I will further argue that the level of

14. "Reason and experience" is the standard applied by federal courts, pursuant to Federal Rule of Evidence 501, when creating or construing privileges at federal common law. *See infra* text accompanying n. 43.

15. As I will discuss, "abstract logic" refers to a utilitarian societal justification for the creation or application of a privilege.

16. *See* Daniel A. Cantu, *When Should Federal Courts Require Psychotherapists to Testify About Their Patients? An Interpretation of Jaffee v. Redmond*, 1998 U. Chi. Legal F. 375, 384 (1998) ("In this context, 'reason' implies the use of abstract logic to arrive at a conclusion; 'experience' requires that courts bring factual or empirical evidence to bear on their decisions").

17. 518 U.S. 1 (1996).

18. The standard is "reason and experience," but I will examine the "experience" component first because it develops and discusses data necessary for later analysis of the "reason" component.

19. 8 Wigmore Evidence §§ 2191-92, 2285 (McNaughton rev. 1961).

20. *See* U.M.A. § 5(a). Section 5(a) applies the protection of the Privilege Against Disclosure to the disclosure of information in "a proceeding." The UMA applies the Privilege Against Disclosure to subsequent adversarial proceedings such as court action, administrative hearings, arbitration hearings, and other adjudicative processes. *Id.* § 3(8). There can be no subsequent adversarial proceedings without previously adversarial interests.

confidentiality needed and wanted in mediation varies and is properly defined by the parties to a particular dispute.

I will discuss and respond to three potential concerns of creating confidentiality through contractual provision. First, contract provisions are not binding on persons not parties to the contract. As a purely legal principle this is undoubtedly correct, but I will argue that while contract provisions cannot specifically bind non-parties, they can decrease the risk of disclosure of mediation communications to and by non-parties. Second, while it is true that contractual provisions may be voided as violative of public policy, I will argue that courts have generally upheld contractual confidentiality provisions and only voided them when the need for confidentiality was outweighed by a sufficiently compelling interest. Third, contract provisions are not afforded the same level of legal protection as a privilege. I freely admit that this position, again, is generally true. However, it is unclear when, and to what extent, any mediation confidentiality protection, including privilege, will be upheld. In light of this uncertainty, it is more intellectually honest to allow parties to draft contract provisions specifying what type of confidentiality protection they want in a particular mediation, than to allow them to blindly rely on a privilege where the scope of protection is unknown.

II. THE PRIVILEGE AGAINST DISCLOSURE DOES NOT SATISFY THE STANDARD OF "REASON AND EXPERIENCE" THAT SHOULD BE APPLIED BY STATE LEGISLATURES CONSIDERING THE ENACTMENT OF STATUTORY PRIVILEGES

A. The Privilege Against Disclosure Should be Analyzed by State Legislatures Under the Standard of "Reason and Experience"

The UMA, and its Privilege Against Disclosure, would be submitted to state legislatures for adoption. Admittedly, state legislatures do not have to apply any specific standard in the creation or interpretation of statutory privileges.²¹ In this section I will argue they should analyze the Privilege Against Disclosure²² under the

21. The UMA drafters argue that twenty-one states have used a privilege structure to create legal protections for mediation confidentiality. U.M.A. Reporter's Notes for § 5, at 20. The legislative history is unclear regarding what, if any, standard the states applied when creating those privileges.

22. I would argue that state legislatures should analyze all prospective statutory privileges under the standard of "reason and experience," but other privileges are beyond the scope of this article.

standard of "reason and experience"²³ for three reasons.²⁴ First, and most importantly, the "reason and experience" standard will safeguard the unique value of privileges. Second, several federal and state courts have recognized that such a safeguard is necessary and have applied "reason and experience" in creating or interpreting privileges. Third, I suspect that if a sufficient number of states adopt the Privilege Against Disclosure, it will be asserted as federal common law at some point.²⁵ When that happens the privilege will be analyzed under the standard of "reason and experience" required by Federal Rule of Evidence 501.²⁶ If true uniformity is the goal of the UMA, then its Privilege Against Disclosure should be adopted by state legislatures only if that same privilege will be adopted at federal common law.²⁷

The term "privilege" is derived from the Latin phrase "privata lex," meaning a private law applied to a small group of persons as a special prerogative.²⁸ Even though evidence may be relevant to a trier of fact, the purpose of a privilege is to protect certain communications from compulsory revelation based on the maintenance of desirable social relationships.²⁹ For purposes of this article, privilege is defined as the unique ability not to reveal information where persons in other circumstances would have no protection from compelled revelation. I interpret privileges as being used to protect information that would be likely to cause social embarrassment, potential professional or civil liability, or criminal action if revealed. Privileges are unique legal devices and they carry a certain level of importance precisely because they are unique.

The courts are in the best position to view the actual effects of privileges. As succinctly stated by Professor Edmund M. Morgan:

23. The phrase "reason and experience" appears to have originated, at least in the context of federal common law principles, in *Wolfe v. United States*, 291 U.S. 7, 12 (1934) (holding that the "rules governing competence of witnesses in criminal trials in federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common-law principles as interpreted and applied by the federal courts in the light of reason and experience").

24. For a related position see Raymond F. Miller, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 Conn. L. Rev. 771 (1999) (arguing that the federal common law approach to creating privileges is superior to the states' legislatively-based method).

25. See Charles W. Ehrhardt, *Confidentiality, Privilege, and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 La. L. Rev., 91, 118 (1999) ("If the mediation privilege provision presently included in the [p]roposed [UMA] is widely adopted by the states, this factor used to determine whether to recognize a 'common law' privilege will more clearly be present").

26. See *infra* text accompanying n. 43.

27. See *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998) ("Practically speaking, the confidential status accorded to mediation proceedings by the states will be of limited value if the federal courts decline to adopt a federal mediation privilege").

28. Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 181 (1960).

29. Roy D. Weinberg, *Confidential and other Privileged Communication 2* (Oceana Publ. 1967). See Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 Ohio St. J. on Dis. Res. 37, 39 (1986) ("A rule of privilege . . . shuts out probative evidence, and thus obstructs the truth in order to protect some other interest or policy").

[Privileges] are nothing more or less than privileges to suppress the truth, and no officers of any department of government, other than the judiciary, have the constant opportunity to observe them in operation and the skill to determine how far and in what respects they interfere with the orderly and effective administration of justice.³⁰

The courts have clearly “indicated a narrowing interpretation of existing privileges and a hesitation to recognize new privileges under the principles of . . . common law.”³¹ Effectively the courts have created a presumption against privileges:

For more than three centuries it has been recognized as a fundamental maxim that the public... has a right to everyman's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.³²

Limitations may be placed on the general rule requiring each person to give the best evidence at their disposal when there is a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining [the] truth.”³³ Whatever the origin of such exceptions, they are not lightly created nor expansively construed because they are in derogation of the search for truth.³⁴ Privileges are abrogations of everyman's duty to provide all available evidence to the trier of fact.³⁵

The “concept of privileged communication, as applied in the rules of evidence, is derived from considerations of public policy rather than any ‘right’ vested in confidentiality itself.”³⁶ Those public policy considerations have ancient

30. Edmund M. Morgan, *Rules of Evidence-Substantive or Procedural?*, 10 Vand. L. Rev. 467, 483-84 (1956-57).

It appears that the federal legislature recognizes this fact as well. In 1998 Congress codified the Federal ADR Act of 1998. See A.D.R. Act of 1998, Pub. L. No. 105-315, § 2, 112 Stat. 2993 (1998) codified as amended at 28 U.S.C. §§ 651-658 (West Supp. 1999). The Act required that every federal court implement an ADR program. The Act specifically left the issue of mediation confidentiality to the ninety-seven individual federal courts, rather than establishing a mediation privilege to be applied by them all.

31. Ehrhardt, *supra* n. 25, at 114.

32. *U.S. v. Bryan*, 339 U.S. 323, 331 (1949) (citing 1 Wigmore on Evidence § 2191 (3d ed., Little, Brown & Co. 1940)).

33. *Elkins v. U.S.*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

34. *U.S. v. Nixon*, 418 U.S. 683, 710 (1974).

35. *Id.* at 709 (quoting *Bryan*, 339 U.S. at 331; *Blackmer v. U.S.*, 284 U.S. 421, 428 (1932); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)).

36. Weinberg, *supra* n. 29, at Introduction.

origins, "[t]he idea that the law should protect the sanctity of relationships finds its roots in Roman law, where 'the basis for exclusion [of testimony] was the general moral duty not to violate the underlying fidelity upon which the protected relationship was built.'"³⁷ "No pledge of secrecy nor professional ethic can prevail against the general principle of full testimonial disclosure, unless it issues from a relationship regarded by law as worthy of encouragement and maintenance even at the cost of occasional suppression of testimony."³⁸

The United States Supreme Court has been clear that a party seeking judicial recognition of a new evidentiary privilege, under the standard of "reason and experience," must "demonstrate with a high degree of clarity and certainty that the proposed privilege will effectively advance [that] public good."³⁹ Even in cases where the proposed privilege is designed in part to protect constitutional rights, the Court has demanded that the proponent come forward with a compelling empirical case for the necessity of the privilege.⁴⁰ A generalized assertion of privilege must give way to a strong and demonstrable need for evidence in a given set of facts.⁴¹

In 1975 Congress enacted Federal Rule of Evidence 501 (hereinafter Rule 501) because it wanted to allow federal courts to create or interpret privilege protection, while also trying to ensure that privileges were recognized in a manner consistent with their historical scarcity, importance, and use.⁴² Rule 501 formalized the standard of "reason and experience":

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.⁴³

37. Miller, *supra* n. 24, at 782 (quoting *State ex rel. State Hwy. Dept. v. 62.96427 Acres of Land*, 193 A.2d 799, 806 (Del. Super. 1963)).

38. Weinberg, *supra* n.29, at Introduction.

39. *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir.1998). See e.g. *U.S. v. Gillock*, 445 U.S. 360, 375 (1980).

40. See Ehrhardt, *supra* n. 25, at 120 (citing *In re Sealed Case*, 148 F.3d 1073); *Swindler & Berlin v. U.S.*, 524 U.S. 399 (1998) ("[T]he courts [have] emphasized the need for empirical evidence to support the recognition of a new privilege or to restrict the application of an existing one. In light of these recent decisions, the most persuasive argument to recognize a mediation privilege under Rule 501 would be based on empirical data that demonstrates that the values of mediation are enhanced in jurisdictions which have a broad mediation privilege as contrasted with those which simply protect confidentiality [otherwise]").

41. See *Nixon*, 418 U.S. at 713 (holding that assertion of a form of executive privilege based on general confidentiality concerns cannot supersede due process demands).

42. It is my sense that the purpose of Rule 501 was to leave questions of privilege construction and interpretation to the courts because they are in the best position to understand and evaluate the actual uses and effects of those privileges. See Morgan, *supra* n. 30, at 483-484.

43. Fed. R. Evid. 501 (2001).

The general rule is that "when a case is in federal court, due to a federal question, the court is required to apply federal common law when analyzing the applicable or proposed Privilege". See Jennifer C. Bailey, Student Author, *The Mediator's Privilege: Can a Mediator be Compelled to Testify in a Civil Case? California Privilege Law Says Yes*, 2000 J. of Dis. Res. 395, 398 (2000). State privilege

The evolution of Rule 501 is particularly important when discussing the creation of any new privilege. The Federal Rules of Evidence were adopted in 1975. Proposed drafts were disseminated prior to ratification. Article V of the proposed Rules would have recognized nine discrete privileges.⁴⁴ Article V was to be exclusive except as otherwise provided by the United States Constitution, acts of Congress, or other Supreme Court Rules.⁴⁵ Federal common law development of privileges was to be frozen and state privilege law was to be superseded in all federal cases.⁴⁶ These proposed Article V Rules were rejected in favor of Rule 501.

The Senate Report accompanying the adoption of the rules was clear that the intent of Rule 501, and its standard of "reason and experience," "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis."⁴⁷ That guidance has been routinely implemented in decisions of the Supreme Court and its holdings that Rule 501 directed the federal courts to continue the evolutionary development of testimonial privileges.⁴⁸ While this rationale could lead readers to believe that the Court is ready to accept expansion of privilege protection, the opposite is true. The federal courts are clear that privileges are not to be recognized under Rule 501 unless the new privilege promotes sufficiently important interests to outweigh the need for probative evidence.⁴⁹ Even necessity does not require the recognition of privileges in all cases.⁵⁰ Rule 501, and its standard of "reason and

law is not applied unless the matter at issue is an element of a state claim or defense. *Id.* (quoting Sen. Rpt. 93-1277, at 11-24 (1974)).

44. See proposed Fed. R. Evid. 503, 56 F.R.D. 235, 235-37 (1972). Article V would have included attorney-client, psychotherapist-patient, husband-wife, and priest-penitent privileges, it would not have recognized physician-patient or journalist-source privileges. While it is beyond the scope of this article, this prioritization may simply reflect powerful or effective lobbying of groups at interest. See Miller, *supra* n. 24, at 787 (quoting Charles Nesson, *Modes of Analysis: The Theories and Justifications of Privileged Communications*, 89 Harv. L. Rev. 1471, 1479 (1985)) ("The real roots of privilege law lie in the power of those benefitting from it"). It is exactly this type of concern that makes it essential that a proposed privilege is supported by a rational and empirical basis. Opponents of Article V noted that its Advisory Committee consisted entirely of lawyers who had drafted an elaborate attorney-client privilege, while discarding privileges for other professions. See H.R. Jud. Comm., *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 243 93d Cong., 1st Sess. (1973) (citing letter from Prof. Charles L. Black Jr.).

45. See proposed Fed. R. Evid. 501, 56 F.R.D. 230, 230 (1972).

46. Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 Geo. L. J. 61, 66 (1973).

47. *Jaffee*, 518 U.S. at 8 (quoting Sen. Rpt. 93-1277, at 13 (1974) (reprinted in 1974 U.S.C.C.A.N. 7051, 7059)).

48. See e.g. *Jaffee*, 518 U.S. at 711-712; *Trammel v. U.S.*, 445 U.S. 40, 47 (1990).

49. See e.g. *Nixon*, 418 U.S. at 711-712; *Trammel*, 445 U.S. at 51. See also *N.L.R.B. v. Macaluso*, 618 F.2d 51, 54 (9th Cir. 1980) (quoting Wigmore, *supra* n. 32, at § 11) (holding that the public interest being protected by privilege "must be substantial if it is to cause us to 'concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth'").

50. Daniel W. Shuman & Myron F. Weiner, *The Psychotherapist-Patient Privilege: A Critical Examination* 54 (Charles C. Thomas 1987) (quoting *Wheeler v. Le Marchant*, 17 Ch. D. 675, 681 (1881)) ("In the first place, the principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life

experience," recognizes that the ad hoc creation of privileges would devalue privilege importance and decrease the level of privilege protection as a whole.

The standard of "reason and experience" addresses two very different concerns. I define "reason" as requiring utilitarian social justification for the creation of a privilege. I propose that "reason" should be evaluated under the frequently used four-step Wigmore analysis.⁵¹ I define "experience" as requiring courts to use empirical analysis in the creation or interpretation of privileges. I propose that "experience" should be evaluated in light of empirical research on point to the proposed privilege, or from related or analogous fields.⁵²

The "reason and experience" standard has been applied by federal courts to a wide variety of existing and proposed privileges. Courts have applied it to the "husband-wife privilege,"⁵³ the "psychotherapist-patient privilege,"⁵⁴ a "presidential-secret service" or "protective function privilege,"⁵⁵ a "presidential privilege of immunity from judicial process,"⁵⁶ a "corporate ombudsman privilege,"⁵⁷ several variations of a "parent-child privilege,"⁵⁸ the "debate privilege,"⁵⁹ the "academic peer review privilege,"⁶⁰ the "self-critical analysis privilege,"⁶¹ a "police personnel file privilege,"⁶² a "police officer-president of the policeman's association privilege,"⁶³ a "deliberative process privilege,"⁶⁴ and a variation of the attorney-client privilege.⁶⁵

State legislatures may or may not be applying the "reason and experience" standard when adopting privileges,⁶⁶ but several state courts have used that standard in creating or interpreting privileges. The "reason and experience" standard generally, and the Wigmore analysis specifically, have been applied at the state court level to create or interpret a "psychotherapist-patient privilege,"⁶⁷ a "parent-child privilege,"⁶⁸ and a private and governmental "social worker privilege."⁶⁹ At least six jurisdictions (Arizona, South Carolina, Guam, Indiana, Nevada, and Colorado) have

cannot be carried on, still are not privileged").

51. See *infra* text accompanying nn. 163-215.

52. See *infra* text accompanying nn. 85-158.

53. See *e.g.* *Trammel*, 444 U.S. 40.

54. See *Jaffee*, 518 U.S. 1.

55. See *In re Sealed Case*, 148 F.3d 1073.

56. See *Nixon*, 418 U.S. 683.

57. See *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997).

58. See *e.g.* *In re Grand Jury*, 103 F.3d 1140 (3d Cir. 1997); *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. 1487 (E.D. Wash. 1996).

59. See *In re Grand Jury*, 821 F.2d 946 (3d Cir. 1987).

60. See *U. of Penn. v. E.E.O.C.*, 493 U.S. 182 (1990).

61. See *e.g.* *Aramburu v. Boeing Co.*, 885 F. Supp. 1434 (D. Kan. 1995); *Etienne v. Mitre Corp.*, 146 F.R.D. 145 (E.D. Va. 1993).

62. See *Welsh v. City & County of San Francisco*, 887 F. Supp. 1293 (N.D. Cal. 1995).

63. See *Walker v. Huie*, 142 F.R.D. 497 (D. Utah 1992).

64. See *Gov't Suppliers Cons. Servs., Inc. v. Bayh*, 135 F.R.D. 531 (S.D. Ind. 1990).

65. See *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655 (S.D. Ind. 1991) (attorney asserted privilege to protect communications made when he was acting as a claims adjuster).

66. See *supra* n. 21.

67. See *Allred v. State*, 554 P.2d 411 (Alaska 1976).

68. See *State v. Grossberg*, 1998 WL 117975 (Del. Super. 1998); *In re Agosto*, 553 F. Supp. 1298 (D.C. Nev. 1983).

69. See *State v. Driscoll*, 193 N.W.2d 851 (Wis. 1972). See also *State v. Palmer*, 338 N.W.2d 281 (Neb. 1983) (applying a Rule 501 analysis at the state level, but not specifically applying the Wigmore analysis).

adopted a rule of evidence specifically using a standard of "reason and experience" for interpreting or creating privileges.⁷⁰ New Mexico has adopted part of that analysis.⁷¹ Federal Rule of Evidence 501 has been applied by state jurisdictions because it provides the standard proposed privileges should be measured against. This standard is necessary because not every relationship is worthy of privilege protection.

I have discussed the subject of this article with many people having different interests in mediation, including neophyte mediators, experienced mediators, mediation advocates and mediation scholars. All but one have almost immediately offered a variation of one or both of the following responses, "Everybody knows mediation needs confidentiality," or "Isn't mediation so different that it deserves its own standard for the creation of a privilege?" I have interpreted these uniform responses as creating a proposed standard for the recognition of the UMA Privilege Against Disclosure.⁷² I term it the "everybody knows it's important" standard. I do not offer this nomenclature to be snide, in fact I have not offered this nomenclature at all. These are the justifications presented to me for the creation of a mediation privilege by people with expertise or experience in the mediation field. It is my sense that their arguments are indicative of those generally offered by the field as a whole. I use their standard to provide a comparison to the standard of "reason and experience."

The historical application of the "reason and experience" standard has created a presumption against privileges. Without that standard the unique importance of privileges will be lost. Privileges will be created for a relationship simply because "everybody knows it's important," without qualifying or quantifying "everybody" or the level of importance. The "everybody knows it's important" standard is almost, if not completely, subjective and much easier to satisfy than "reason and experience." If the "everybody knows it's important" standard is applied to the creation of a mediation privilege, then it should be applied to all proposed privileges, and that would change privilege protection as we know it. If the lesser standard is applied then we should see the creation of many other new privileges for relationships which everybody knows should be protected simply because they are important. I offer the following possibilities using such a standard.

Everybody knows familial relationships are important and that information is shared within the family that could result in social embarrassment or even criminal charges if it were to be revealed. Following the "everybody knows it's important" standard, we should have a parent-child privilege, a stepparent-child privilege, a grandparent-grandchild privilege, a sibling-sibling privilege, and perhaps a cousin-cousin privilege.

Many of the above privileges may be rooted in the need for children or minors to have someone to confide to. This type of relationship is not limited to family members. Under the "everybody knows it's important" standard we could

70. Ariz. R. Evid. 501 (2001); S.C. R. Evid. 501 (2000); 6 Guam Code Ann. § 504 (2001); Ind. R. Evid. 501 (1996); Nev. Rev. Stat. § 175.221 (1999); Colo. R. Evid. 501 (1997). *See also* Colo. R. Crim. P. 26 (1998).

71. *See Pub. Serv. Co. of New Mexico v. Lyons*, 10 P.3d 166 (N.M. App. 2000).

72. It is my sense that these responses would apply to any mediation privilege, but I am limiting the responses to the UMA privilege for purposes of this article.

certainly see the foster parent-foster child privilege, the academic teacher-minor student privilege, the guidance counselor-minor student privilege, and the unlicensed social worker-minor privilege. It is possible that this type of relationship could exist when anyone serves as a mentor or confidant to minors. If so, there could be privileges such as the coach-minor athlete privilege and the non-academic instructor-minor pupil privilege.⁷³ This type of protection could logically be extended to similar relationships without minor parties. We could see the teacher-student privilege asserted between instructors and students at the college or graduate school level,⁷⁴ the unlicensed social worker-adult case member privilege, and the coach-adult athlete privilege.

Everybody recognizes that business and economic relationships are vitally important to our society and for the functioning of our society. Information is exchanged among business associates or between service providers and customers that could cause social embarrassment, civil liability, or even criminal proceedings if it were subject to forced revelation. Under the "everybody knows it's important" standard we could have the business partner-business partner privilege, the joint stock holder privilege, the broker-client privilege, the banker-customer privilege, and the realtor-buyer or seller privilege.

If the standard is merely "everybody knows it's important" then we will have privileges applied to very common relationships. It could certainly be argued that bosses and secretaries regularly exchange information that could be socially embarrassing or subject to professional or criminal sanctions if it were revealed. Disruption of the boss-secretary relationship could have a very large cumulative effect on society as a whole. In light of those concerns, and following the logic of the "everybody knows it's important" standard, we could reasonably have a boss-secretary privilege.

Some readers may disagree with the potential privileges identified above. Their responses, again, may be some variations of "Those relationships should not be privileged, but mediation should be, it's different." With all due respect to that view, I disagree. All relationships differ to some extent. If a simple standard for privilege creation is applied so that mediation can be privileged, then that standard should be applied when groups want to create other privileges. With every new privilege created under the "every body knows it's important" standard, each existing privilege would become worth less because privileges as a whole becomes less unique.⁷⁵ Eventually privileges will become common. The unique level of protection sought by proponents of the Privilege Against Disclosure will be lost because of the very standard used to create it.

73. The non-academic instructor-pupil privilege could apply to any instructional relationship in which the pupil is likely to view the instructor as a confidant for personal information. This type of relationship is likely to include virtually any special skills or interest instruction, especially when undertaken in small groups or over an extended period of time. Examples may include dance or music instruction, or activities such as 4-H.

74. This privilege was proposed by Professor Charles Ehrhardt, Ladd Professor of Evidence, Florida State University College of Law through email correspondence with the author.

75. I also suspect that as more privileges are created, courts will be more likely to find exceptions to them both because the unique value of privilege has been decreased by the creation of new privileges and because, if fully enforced, each privilege would keep more relevant evidence from the trier of fact. At some point a multitude of privileges will substantially interfere with the administration of justice.

If the Privilege Against Disclosure could pass the standard of "reason and experience" it would preserve the import of privilege protection and the privilege should pass Rule 501 analysis if and when it is asserted at federal common law. I understand why proponents of the Privilege Against Disclosure would want to apply the lesser "everybody knows it's important" standard. As I will explain, their mechanism cannot pass either the empirical justification or Wigmore's four-part analysis under Rule 501.⁷⁶ However a "reason and experience" standard should be applied to help ensure that privileges remain unique and important, and that privilege is a privilege.⁷⁷

B. Reason and Experience: "Experience" and Empirical Examination

Many commentators have discussed confidentiality and the mediation process. Almost all of these commentators venture forth as if from some firm location, as if they have some bedrock or touchstone firmly underlying their analysis. All too often that bedrock is the belief that mediation needs confidentiality.⁷⁸ I choose the term "belief" carefully. I respect the view that mediation needs confidentiality protection, but I submit that view is a belief and nothing more.⁷⁹ There is no empirical evidence establishing that the mediation process requires confidentiality. Absent empirical proof, state legislatures have acted too hastily in crafting confidentiality protections for the mediation process. That folly would be further perpetuated by adopting the Privilege Against Disclosure.

76. *But see Folb*, 16 F. Supp. 2d 1164; *Sheldone v. Penn. Turnpike Commn.*, 104 F. Supp. 2d 511 (W.D. Pa. 2001) (recognizing forms of a mediation privilege under Rule 501).

77. State legislatures' failure to apply "reason and experience" to the creation of new privileges can quickly make privileges common. Since the enactment of Rule 501, the federal courts have confirmed the eight privileges existing at common law prior to 1973 and enacted one new one, the psychotherapist-patient privilege. *See Miller, supra* n. 24, at 775-76. There are now nine federal common law relational privileges. *Id.* at 793. In contrast, the state of Connecticut alone currently has twenty-nine privileges. *Id.* Since 1974, the federal judiciary has created one new privilege, while Connecticut has created twenty. *Id.*

78. *See e.g. Freedman & Prigoff, supra* n. 29, at 38 ("Effective mediation requires candor. A mediator, not having coercive power, helps parties reach agreement by identifying issues, exploring possible bases for agreement, encouraging parties to accommodate each other's interests, and uncovering the underlying causes of conflict. Mediators must be able to draw out baseline positions and interests which would be impossible if the parties were constantly looking over their shoulders." . . . "Compromise negotiations often require the admission of facts which disputants would otherwise never concede").

But see Hughes, supra n. 10, at 14 ("[T]here is no empirical work to demonstrate a connection between privileges and the ultimate success of mediation"); Green, *supra* n. 10, at 2 ("I take the heretical position among mediators in arguing that the current campaign to obtain a blanket mediation privilege rests on faulty logic, inadequate data, and short-sighted professional self-interest"). For a related discussion, *see generally Rambo, supra* n. 9 (arguing that confidentiality has very little effect on an honest party's willingness to speak about the facts during negotiation).

79. The arguments set forth by proponents of a mediation privilege share a common deficiency with the arguments raised in support of a president-secret service privilege in *In re Sealed Case*. The court in that case stated that the arguments put forth by the secret service, except for the argument regarding the nation's interest in the "security of the President," were "based in large part on speculation—thoughtful speculation, but speculation nonetheless." *In re Sealed Case*, 148 F.3d at 1076 (quoting *Swidler & Berlin v. U.S.*, 524 U.S. 399, 410 (1998)).

Mediation confidentiality proponents generally offer variations of two policy concerns in support of mediation's "need" for confidentiality.⁸⁰ First, they maintain that mediation needs confidentiality because confidentiality allows the parties to participate fully in mediation by protecting both general communications and specific settlement offers from disclosure to the courts or third parties.⁸¹ Second, they assert that confidentiality protects the integrity of the mediator's role in the mediation process.⁸² As I will discuss in the following subsections, neither of these assertions is supported by analogous empirical evidence drawn from psychotherapist-patient privilege research, attorney-client confidentiality and privilege research, and therapeutic communication confidentiality and privilege research.

80. One author contends there is a third related policy concern. He contends that because the scope for matters addressed under mediation is broader than the scope of matters addressed under our civil or criminal justice systems, the potential for harm to parties lacking confidentiality is equally increased. See Paul R. Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System - An Overview and Legal Analysis*, 29 Am. U. L. Rev. 17, 73 (1979).

81. See e.g. Jaime Allison Lee & Carl Giesler, *Confidentiality in Mediation*, 3 Harv. Negot. L. Rev. 285, 290-92 (1998) (identifying both bases); Litt, *supra* n. 1, at 1021 ("Confidentiality is critical in eliciting the candor of the parties in mediation, which is, in turn, critical for the success of the mediation process." "The assurance of confidentiality also permits the parties to rely on the mediator's neutrality").

See also Pamela A. Kenra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. Rev. 715, 722 (1997) ("Confidentiality lies at the heart of the mediation process. Mediation would not be nearly as effective if the parties were not assured their discussions would remain private"); Eileen P. Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 Cap. U. L. Rev. 181, 196 (1981) ("The importance of confidentiality in programs established for the mediation of minor disputes cannot be over-stated. Confidentiality is essential to achieve the full cooperation of participants and, consequently, the integrity and ultimate success of the program"); Phillip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 Admin. L. Rev. 315, 324 (1984) (arguing that "one of the central functions of mediation is to encourage the parties to speak candidly about their interest, needs, fears, and desires. If a party has any concern over whether what it tells the mediator in confidence, or what it does in the negotiations, might be revealed to its detriment, any rational party would not be as forthcoming"); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 Fla. St. L. Rev. 153, 181-82 (1999) ("[T]he essence of mediation is the preservation of confidential communications"); Joshua J. Engelbart, Student Author, *Federal Mediation Privilege: Should Mediation Communications be Protected from Subsequent Civil & Criminal Proceedings*, 1999 J. of Dis. Res. 73, 78 ("The promise that communication will remain confidential is crucial to the success of mediation proceedings") *But see* Rambo, *supra* n. 9, at 1040 (taking the position that "confidentiality does not have the widely assumed effect on negotiating parties' willingness to speak freely about the facts of their cases").

82. See e.g. Lee & Giesler, *supra* n. 81, at 291-92; Freedman & Prigoff, *supra* n. 29, at 38 ("The mediator must remain neutral in fact and in perception. The potential of the mediator to be an adversary in a subsequent legal proceeding would curtail the disputants freedom to confide during the mediation. Court testimony by a mediator, no matter how carefully presented, will inevitably be characterized so as to favor one side or the other. This would destroy a mediator's efficacy as an impartial broker").

See also *Macaluso*, 618 F.2d at 54 (holding that the National Labor Relations Board properly revoked the subpoena issued for a mediator of the Federal Mediation and Conciliation Service because the "public interest in maintaining perceived and actual impartiality of federal mediators does outweigh the benefits derivable from [mediator's testimony]"). The Ninth Circuit Court of Appeals upheld the revocation of the subpoena reasoning that allowing the mediator's testimony in court would be contrary to Congressional aims in creating the Federal Mediation and Conciliation Service and would interfere with the effective labor relations that foster national industrial stability. *Id.*

1. *Jaffee v. Redmond* and Psychotherapist-Patient Confidentiality

In *Jaffee*, the United States Supreme Court recognized a federal common law psychotherapist-patient privilege under Rule 501.⁸³ The *Jaffee* analysis helps us to determine whether the Privilege Against Disclosure is supported by "reason and experience" and whether it would satisfy that standard if applied by state legislatures.⁸⁴ The necessity of using empirical evidence to evaluate proposed privileges cannot be overstated.⁸⁵ The *Jaffee* Court looked to a variety of empirical factors in rendering its decision. The Court recognized the empirical fact that all fifty states, and the District of Columbia, had adopted some form of psychotherapy privilege.⁸⁶ The Court gave a great deal of weight to the fact that the underlying

83. *Jaffee*, 518 U.S. at 9-13. In *Jaffee*, police officer Mary Lu Redmond shot and killed a suspect who was allegedly brandishing a knife. After the shooting, Redmond participated in approximately fifty counseling sessions with a licensed clinical social worker. The victim's estate, through Jaffee as Administrator, brought suit for the violation of the deceased's constitutional rights and wrongful death. Jaffee sought access to notes made by Redmond's licensed clinical social worker during the counseling sessions. Redmond sought to protect the records by asserting a federal common law psychotherapist-patient privilege. *Id.* at 4-6.

84. The reasoning in *Jaffee* is particularly applicable to discussion of a mediation privilege because psychotherapy, like mediation, is a fairly recent development in the United States. See Cantu, *supra* n. 16, at 376 ("The psychotherapist-patient privilege, however, dates only to the 1950s, and has not produced the expectations of confidentiality created by the long history and deep cultural roots of the other privileges. Without those expectations, it bears a greater burden in showing that the benefits of preserving confidentiality outweigh the resulting loss of evidence").

85. See *Jaffee*, 518 U.S. 1 (citing *Branzburg*, 408 U.S. at 693-94).

86. *Jaffee*, 518 U.S. at 12-15, n. 11.

At the time of the *Jaffee* decision all fifty states recognized a psychotherapy privilege, but not all recognized the same type of privilege. Cantu, *supra* n. 16, at 375-76. Thirteen states treated the privilege as identical to the attorney-client privilege. *Id.* at 375. Twenty-two states revoked the privilege in trials involving specific crimes (most commonly child abuse and homicide). *Id.* at 375-76. Ten states terminated the privilege if the patient posed an immediate threat to an identifiable third party. *Id.* at 376.

Three states specifically allowed the courts to balance the value of the evidence sought against the privacy of the patient on a case by case basis. *Id.* *Jaffee* looked to the states' recognition to establish a federal common law privilege, but not all of the states recognized the same thing. See Cantu, *supra* n. 16, at 389 ("Federal courts have no clear scientific theory upon which to base a uniform national privilege").

In many ways the Privilege Against Disclosure suffers from this same concern, a position that looks uniform on its face but is not. The difference is that the sources cited by the UMA are even less consistent. See Ehrhardt, *supra* n. 25, at 117 ("As contrasted with the psychotherapist privilege, there is more variance in the protections adopted by the states and not as strong a consensus expressing a consistent policy determination from which it can be reasoned that 'reason' and 'experience' support the recognition of a broad mediation privilege").

The UMA identifies that twenty-five states have enacted confidentiality statutes of general application. U.M.A. Reporter's Notes for § 5(1), at 20. To simply stop analysis at that point would seem to create some empirical justification for a mediation privilege. It would seem that half of the states have confidentiality protection...perhaps that means that a majority want it. However the analysis is not that simple. The UMA goes on to note that of those twenty-five states, twenty-one have used a privilege structure to create confidentiality. *Id.* Further research reveals great disparity among those devices. Four states (Massachusetts, Ohio, Rhode Island, and Texas) attempt to create absolute confidentiality through privilege. See Mass. Gen. Laws ch. 233 § 23C (1985); Ohio Rev. Code Ann. § 2317.023 (1996); R.I. Gen. Laws § 9-19-44 (1992); Tex. Civ. Prac. & Rem. Code § 5.60.070 (1993). Approximately ten states (Arizona, Iowa, Louisiana, Montana, Oregon, Pennsylvania, Virginia, Washington, Wisconsin, and Wyoming) create a privilege similar to the UMA, at least to the extent that it is not intended to be absolute. See Ariz. Rev. Stat. Ann. § 12-2238 (1993); Iowa Code § 679C.2 (1998); La. Rev. Stat. Ann.

state law expressly extended privilege protection to licensed social workers.⁸⁷ Perhaps most importantly, the court noted that the importance of a psychotherapist-patient privilege was reinforced by the fact that it was among the exclusive list of privileges enumerated under the proposed (and rejected) Article V of the Federal Rules of Evidence.⁸⁸

It is not my intention to go into an in-depth analysis of whether the Court decided *Jaffee* properly or improperly, but I must address the aspects of *Jaffee* that have a direct bearing on the enactment of the Privilege Against Disclosure. Currently twenty-five states have general confidentiality protection for mediation.⁸⁹ Under the logic of the *Jaffee* court, the adoption of a privilege by a certain number of states provides at least part of the empirical justification for federal common law recognition of a privilege.⁹⁰ This type of empirical analysis may be beneficial for a federal court attempting to determine the extent of adoption of a general privilege⁹¹ at the state level, but the *Jaffee* Court was not using the number of states having a psychotherapist-patient privilege to determine the efficacy of that general privilege. The Court was implicitly relying on the states to have already made that determination.⁹² For state legislatures the efficacy of a proposed privilege should be the primary issue. State adoption of a privilege should not rest on the number of other jurisdictions adopting a general privilege, but on the empirically demonstrated value of the specific privilege under consideration. State legislatures analyzing a proposed privilege should look to studies or research addressing the effect and value of that proposed privilege.

Jaffee created a federal psychotherapy privilege. At the time *Jaffee* was decided there was a body of empirical research available addressing the need, or lack

§ 9:4112 (1997); Mont. Code Ann. § 26-1-813 (1999); Or. Rev. Stat. Ann. § 36.220 (1997); Pa. Const. Stat. Ann. § 5949 (1996); Va. Code Ann. § 8.01-576.10 (1994); Wash. Rev. Code § 5.60.070 (1993); Wis. Stat. § 904.085(4)(a) (1997); Wyo. Stat. Ann. § 1-43-103 (1991). Four states (Kansas, Maine, South Dakota, and Nevada) use a form of privilege structure, but it is a derivative of the protection of settlement discussions or negotiations provided by Federal Rule of Evidence 408. See *infra* text accompanying n. 310. It is not a relational privilege such as the one proposed by the UMA. See Kan. Stat. Ann. § 60-452 (1964); Me. R. Evid. 408 (1997); S.D. Codified Laws § 19-576.10 (1994); Nev. Rev. Stat. § 48.109(3) (1993). One state (Ohio) relies at least partially on a Rule 408 analysis. See Ohio Rev. Code Ann. § 2317.023 (1996). The Utah provision cited by the UMA appears to be for a pilot program for visitation arising out of divorce. See Utah Code Ann. § 30-3-38(4) (2000). It does not mention confidentiality. In the final analysis, less than one third of the states (fifteen) use a privilege even tenuously analogous to the Privilege Against Disclosure.

87. *Jaffee*, 518 U.S. at 16-17.

88. *Id.* at 2.

89. U.M.A. Reporter's Notes for § 5(1), at 20.

90. *Jaffee*, 518 U.S. at 12-13 (holding that "because state legislatures are fully aware of the need to protect the integrity of the fact-finding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of [a] privilege"). But see Morgan, *supra* n. 30, arguing that legislatures are not in the best position to view and understand the effects of privilege on the fact finding functions of the courts.

91. I use the term "general privilege" because the state psychotherapist-patient privileges underlying the *Jaffee* decision were not uniform. See Cantu, *supra* n. 16.

92. *Folb*, 16 F. Supp. 2d at 1178-79 (quoting *Jaffee*, 518 U.S. at 12-13) ("In assessing a proposed privilege, a federal court should look to a consistent body of state legislative and judicial decisions adopting such a privilege as an important indicator of both reason and experience. Put simply, 'the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one'").

thereof, for confidentiality in psychotherapy, but the court did not mention those findings. That empirical evidence contradicts several of the policies in favor of the privilege asserted by the Court. The Court held:

Significant private interests support recognition of a psychotherapist privilege. Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment.⁹³

The Court referenced the Advisory Committee's Notes, "[t]here is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment."⁹⁴ This view reflects what is known as the "Strong Form Hypothesis."⁹⁵ The Strong Form Hypothesis holds that the creation of a psychotherapy privilege will increase the number of patients visiting psychotherapists, encourage patients to begin therapy earlier, and perhaps most significantly for this discussion, and reduce the tendency of patients to with-hold information during psychotherapy.⁹⁶ The Strong Form Hypothesis is very similar to the previously identified public policy arguments in support of mediation confidentiality.⁹⁷

The Strong Form Hypothesis was tested extensively by Daniel Shuman and Myron Weiner in three surveys.⁹⁸ The first tested the attitudes of participants before and after the recognition of a psychotherapist-patient privilege in Texas. The second survey compared responses in South Carolina and West Virginia before recognition of the privilege to those in Texas after recognition. The third compared attitudes toward confidentiality in Ontario, Canada, where there was no privilege, to those in Quebec, Canada, where a general right to privacy covered psychotherapist-patient

93. *Jaffee*, 518 U.S. at 2.

94. *Id.* at 10 (quoting Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)).

95. *Cantu*, *supra* n. 16, at 385.

96. *Shuman & Weiner*, *supra* n. 50, at 33-37.

97. *See supra* text accompanying nn. 80-82.

There is another method of examining the necessity of privilege. The analysis has been variously defined as: humanitarian, *see Green*, *supra* n. 10, at 34; deontological, *see Shuman & Weiner*, *supra* n. 50, at 5; or privacy, *see Developments in the Law--Privileged Communications*, 98 *Harv. L. Rev.* 1450, 1480-81 (1985) (hereinafter referred to as Note). The rationale behind this type of view is that the Strong Form Hypothesis, and its derivatives, are too narrowly based on instrumental concerns, and do not give sufficient weight to human values such as privacy, dignity, autonomy, intimacy, and individuality. The logic is that privilege is important, not because relationships will falter in the absence of privilege, but because it is inappropriate for society to intrude in this private sphere. *Green*, *supra* n. 10, at 34.

I have discounted this perspective for two reasons. First, it is ambiguous and self-serving. It would protect a relationship with privilege merely by asserting it was an important relationship. *See* related discussion *supra* Section II(A). Second, and specific to the question of a mediation privilege, until mediator services are offered for altruistic purposes, they should be viewed as foremost an economic activity. *See Green*, *supra* n. 10, at 35 ("While some mediators . . . might assert that mediation promotes individual autonomy, self-development, and emotional release - humanitarian values on which the zone-of-privacy based privileges rest - any general mediation privilege seems to fit more easily into the instrumentalist-based group of privileges because, at bottom, it is defended as furthering the rendition of professional [mediator] services").

98. *See generally* *Shuman & Weiner*, *supra* n. 50, at 77-113.

communications. Shuman and Weiner found no support for the Strong From Hypothesis in any of their studies.

The Texas study sought to compare participant attitudes before and after the state instituted a psychotherapist-patient privilege in 1979.⁹⁹ The study attempted to specifically address the contention that:

If the existence of a psychotherapist-patient privilege removes disincentives to seeking psychotherapy, there should be an increase in the number of persons in psychotherapeutic treatment coincidental with a privilege's enactment.¹⁰⁰

Researchers posited that an increase in the number of patients would result in an increase in the number of insurance claims for psychotherapeutic treatment.¹⁰¹ The study found that enactment of the privilege "had no measurable impact on insurance financed psychotherapy."¹⁰² There was no statistically significant change in the number of claims filed before and after the enactment of the privilege.

The *Jaffee* Court held that confidentiality was a sine qua non for successful psychiatric treatment. That argument mirrors the justification set forth by proponents of mediation confidentiality.¹⁰³ It strikes me that the issue is not whether confidentiality protection encourages disclosure, but whether a lack of protection would inhibit disclosure. If a lack of protection would not inhibit disclosure, there is little reason for creating general mediation confidentiality protections. The Texas study is very informative on this contention.

Texas lay respondents were asked about their willingness to disclose information under three conditions: no mention of privilege, mention of privilege, and statement of no privilege.¹⁰⁴ There was no significant difference in disclosure between no mention of privilege and mention of privilege.¹⁰⁵ It is highly unlikely that respondents were relying on the existence of a privilege otherwise known to them. The study found that only one quarter of lay respondents knew or guessed that there was an applicable privilege in Texas.¹⁰⁶ It seems reasonable to surmise that

99. *Id.* at 81. For the Texas study, questionnaires were distributed to 200 lay adult education students. One hundred and twenty-one (sixty percent) were completed and returned. *Id.* at 82. Patient questionnaires were distributed by thirty-one psychiatrists. Seventy-nine (fifty percent) were anonymously completed and returned. *Id.* One hundred and eighty-six therapist questionnaires were sent to members of the North Texas Psychiatric Society. Eighty-four (forty-five percent) were completed and returned. *Id.* Judicial questionnaires were used as a guide for a group of Southern Methodist University Law students who interviewed forty-eight of the fifty-six state and federal judges in Dallas County. *Id.*

100. *Id.* at 87.

101. *Id.*

102. *Id.* at 88.

103. See e.g. Freedman & Prigoff, *supra* n. 29.

104. Shuman & Weiner, *supra* n. 50, at 83.

105. *Id.*

106. *Id.* See also Miller, *supra* n. 24, at 783 (asserting that empirical studies support the contention that few lay people are aware of protected relationships and that the candor of their communications in a protected relationship is not influenced by the existence of a privilege).

if a confidentiality privilege was an important concern for respondents, they would ask to be informed about it. For the most part, they did not.¹⁰⁷

The results further showed that lay persons were not restricted in disclosures by the lack of privilege discussion or the general mention of privilege.¹⁰⁸

Willingness to discuss all items dropped significantly under a no privilege condition,¹⁰⁹ but I perceive this finding as a function of the lay person's perception that the therapist would reveal information, as opposed to a lack of a specific legal protection creating confidentiality. Although patients regarded confidentiality as important, they looked to the character of the therapist rather than the law to ensure confidentiality.¹¹⁰ In general patients relied more heavily on the psychotherapist's ethics than on a privilege statute.¹¹¹ Nearly forty percent of patients had withheld information from their psychiatrist,¹¹² but no statistical relationship existed between the lack of privilege and the withholding of information.¹¹³ Lay persons displayed "little concern about disclosure of information to insurance carriers, state agencies, or potential employers, and [only] mild concern . . . about release to a lawyer for trial."¹¹⁴

The results of the South Carolina/West Virginia study were very similar to those of the Texas study. There was no significant difference in disclosures under conditions of no mention of privilege and mention of privilege, but there was a significant drop when the condition was a statement of no privilege.¹¹⁵ "There was little concern about disclosure to insurance carriers, state agencies, and potential employers, and [only] mild concern . . . about disclosure at trial."¹¹⁶ Both Texas and South Carolina/West Virginia respondents indicated that the therapist's ethics and the traditional confidentiality of the therapist-patient relationship were of greater importance than a law forbidding disclosure.¹¹⁷

Shuman and Weiner also utilized results from studies in Quebec and Ontario. As previously noted, Ontario had no privilege protecting psychotherapist-patient confidentiality, while Quebec did. While it was not statistically significant,

107. Shuman & Weiner, *supra* n. 50, at 111.

108. *Id.* See also Daniel O. Taube & Amiram Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures*, 21 Prof. Psychol. Res. and Prac. 72, 74 (1990) ("The results support the hypothesis that current limitations on confidentiality in psychotherapy matter only to some patients and in some circumstances").

109. Shuman & Weiner, *supra* note 50, at 83.

110. *Id.* at 84.

111. *Id.* at 84. See also James C. Beck, *When the Patient Threatens Violence: An Empirical Study of Clinical Practice after Tarasoff*, 10 Bull. Am. Acad. Psychol. & L. 189, 190 (1982) (finding that psychotherapy requires trust, not necessarily legal confidentiality).

112. Shuman & Weiner, *supra* n. 50, at 84.

113. *Id.* at 112.

114. *Id.* at 83. See also John McGuire, et al., *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Prof. Psychol. Res. & Prac. 375, 377 (1985) (finding that patients concerned with privacy focused on the possibility that the therapist might reveal confidences to the employer, family, or friends of the patient, not the courts).

115. Shuman & Weiner, *supra* n. 50, at 89.

116. *Id.*

117. *Id.* at 93. The authors also summarized the findings of other research to conclude that "[p]atients indicated clearly that what was most important as a guarantee of confidentiality was their trust of the psychiatrist as a person and a professional with an ethical duty to maintain confidentiality and not any legal guarantee." *Id.* at 111.

more Quebec patients withheld information from their therapists than Ontarian patients. Respondents in both groups “valued professional ethics above a statutory guarantee of confidentiality.”¹¹⁸

The premise that mediation needs confidentiality implicitly holds that the existence of confidentiality is important to parties contemplating or using mediation and that confidentiality causes parties to reveal information they would not reveal in the absence of confidentiality. These enormous and fundamental assumptions are not supported by the previous empirical evaluation in psychotherapist-patient research, nor are they supported in the following attorney-client confidentiality research.

2. Attorney-Client Confidentiality and Privilege

In 1962 the Yale Law Journal conducted research on the importance and effect of attorney-client privilege rules.¹¹⁹ The primary purpose of the study was to compare the privilege protection accorded to members of the bar to the protection granted to other professions.¹²⁰ Results showed that lawyers, significantly more than laymen, believed that privilege encouraged free disclosure.¹²¹ The results also generated large questions as to how important attorney-client privilege protection was to lay persons and how pervasive they understood that protection to be.

Approximately three-quarters of lay respondents understood, generally, that lawyers would not disclose confidential matters.¹²² A significant percentage of respondents believed that lawyers would have an obligation to reveal confidential communications under court questioning.¹²³ Perhaps most significantly the respondents split almost evenly on the question of whether an outright elimination of the attorney-client privilege would deter client disclosures.¹²⁴ Survey results show that a substantial majority of lay persons would continue to use lawyers even if secrecy were limited.¹²⁵ The attorney-client privilege is the oldest recognized form of common law privilege.¹²⁶ In many ways it set the original standard for privileged

118. *Id.* at 102.

119. *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226 (1962) (hereinafter referred to as Note). See Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 377-379 (1989) (succinctly summarizing the results of the Yale study).

120. Zacharias, *supra* n. 119, at 377.

121. See Note, *supra* n. 119, at 1232.

122. *Id.* at 1239.

123. *Id.* at 1262.

124. *Id.* at 1236. See also Jonathan Auburn, *Legal Professional Privilege: Law and Theory* 67 (2000) (The author discusses the fact that evolution of the attorney-client privilege, including an increasing number of exceptions from that protection, have had no measurable effect on attorney-client relations. Further, Auburn states that “there are many reasons to doubt whether the sky would fall and the administration of justice be severely damaged if further exceptions to the privilege were recognized. First, the privilege has existed for centuries. Its scope and operation have changed over this time, yet there is nothing to suggest that this has had any effect on lawyer-client relations”).

125. Zacharias, *supra* n. 119, at 378.

126. At least one authority would maintain that “[t]he earliest reference to any relational privilege . . . is the refusal of Roman law to compel the testimony of an attorney against a client during the pendency of a case.” See Shuman & Weiner *supra* n. 50, at 49 (citing M. Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Cal. L. Rev. 487, 488 (1928)).

communications. Yet, at least in terms of fostering client disclosure of information, the Yale study certainly challenges the assumption that the attorney-client relationship needs privilege protection.¹²⁷ If the attorney-client relationship does not need privilege to foster client disclosure of information, it follows that mediation may not need a privilege to promote disclosures either.

In 1989 Professor Fred Zacharias conducted what he termed the "Tompkins County Study on Confidentiality."¹²⁸ The purpose of the study was to attempt to assess practices regarding attorney-client confidentiality, attorney understanding of attorney-client confidentiality, and the perceptions of client understanding and reliance on confidentiality.¹²⁹ About half of the lay respondents in the Tompkins County Study predicted that they would withhold information from attorneys if no firm obligation of confidentiality existed.¹³⁰ Nearly thirty percent of the clients stated that they had given information to their attorney "that they would not have given without a guarantee of confidentiality."¹³¹ It could be argued that these findings create an empirical basis for establishing the necessity of confidentiality. However, what respondents said and what they did were two different things.

Just over half the respondents said they would withhold information without a firm obligation of confidentiality, but approximately seventy-three percent of the lay respondents reported that their first attorneys never told them anything about confidentiality.¹³² If the attorney never discussed confidentiality, then there certainly was no firm obligation of confidentiality extended to the client.¹³³ The combination of these two response rates shows that clients say they want a firm obligation, but that one is seldom offered. It follows that either clients are not disclosing to lawyers, because no obligation has been given, or clients disclose even without the firm obligation they say they require.¹³⁴

The value of confidentiality presupposes that people will reveal information if they believe that the information will be kept in confidence. People do not

127. Attorneys may have a significant interest in attorney-client confidentiality for the real and perceived benefits it provides to the attorney. The attorney-client privilege can be asserted by the attorney to protect himself or herself from compulsory testimony. The promise of general confidentiality, if made by the attorney and even if inaccurately stated, may serve to promote a sense of trust between attorney and client. There may also be an economic incentive. The existence of an attorney-client privilege may allow attorneys to offer a level of secrecy in relationships with clients that attorneys may feel promotes business relationships. See *infra* text accompanying n. 154.

128. See Zacharias, *supra* n. 119. The survey utilized the responses of 63 attorneys and 105 lay respondents in Tompkins County, New York. Of the 105 lay respondents, 73 had consulted attorneys in the past and will be referred to as "clients." *Id.* at 379.

129. *Id.*

130. *Id.* at 380.

131. *Id.* at 380-81.

132. *Id.* at 382-83. Approximately seventy-nine percent of clients claimed to know of general confidentiality even in the absence of any explanation by the attorney. *Id.* It is also possible that some of these lay respondents were informed about confidentiality by their attorney but did not remember it after the fact. If that is the case, it could certainly be inferred that confidentiality was not a primary concern of clients during consultations with attorneys.

133. It is possible that clients had a general awareness of an attorney-client privilege through its frequent mention in movies and on television.

134. I believe the answer is the latter. Approximately seventy-two percent of attorneys reported that they felt they would get the same information from clients even if they never informed clients about confidentiality. Zacharias, *supra* n. 119, at 385 n. 172.

necessarily act in accordance with this principle. Respondents in the Tompkins County study admitted that eleven percent of the time they did not disclose information to attorneys when there was a privilege and when almost eighty percent of the respondents were generally aware of that privilege.¹³⁵ It may well be that this reported percentage is lower than the percentage actually withholding such information. "Over forty-two percent of the surveyed clients [believed] confidentiality to be absolute."¹³⁶ However, only twenty percent believed that "attorneys as a matter of practice always keep information confidential."¹³⁷ Viewing this last response from the opposite perspective reveals that eighty percent of the clients surveyed believed that attorneys, at least sometimes, revealed what should have been confidential information. Assuming that party beliefs in mediation are similar to the attitudes shown in the Tompkins County study, it is likely that mediation parties will withhold information even if a privilege exists.

The Tompkins County study identified another concern that must be addressed when attempting to empirically determine the "need" for confidentiality, non-lawyers (and perhaps lawyers) were unclear as to exactly what confidentiality meant.¹³⁸ This concern is analogous to mediation and its oft-cited promise that "whatever is said in this room stays in this room."¹³⁹ Although mediators may tell the parties that the proceedings are confidential, the mediator's promises do not create an evidentiary privilege or other protection that will be judicially recognized.¹⁴⁰ Approximately seventy-two percent of Tompkins County attorneys surveyed admitted that they told clients only generally that all communications were confidential.¹⁴¹ Only about twenty-eight percent acknowledged to their clients that exceptions to the privilege existed.¹⁴² Only one client surveyed recalled any specific mention of any exception.¹⁴³ Almost sixty-five percent of the attorneys thought that more than three-quarters of their clients believed confidentiality to be absolute.¹⁴⁴

135. *Id.* at 386.

136. *Id.* at 383.

137. *Id.*

138. People may also be unclear as to when confidentiality protection actually exists. See Note, *supra* n. 119, at 1255-1262 (finding that sixty percent of subjects felt that the absence of legal confidentiality would seriously hamper accountant-client discussions). There was no accountant-client privilege.

139. Recently I had the opportunity to attend a lecture featuring a very accomplished and respected mediator. This person has been involved in literally hundreds of mediations, several of which were prominently featured in local or national media. He served as the mediator for a simulation. The simulation was conducted under an abbreviated time frame. The mediator cut his opening remarks short. He explained confidentiality as "whatever is said in this room, stays in this room." After the simulation I asked him how he normally explains confidentiality, and I explained my concern with his misrepresentation. His answer was that, time permitting, he would have taken the parties through an in-depth analysis of confidentiality rules and their exceptions. I have no reason to disbelieve him, but I find it interesting that his default approach to mediation confidentiality was still "whatever is said in this room stays in this room."

140. Ehrhardt, *supra* n. 25, at 92. However, at least one author takes the position that mediation has an absolute guarantee of confidentiality. See Kentra, *supra* n. 81, at 722 ("In addition to being future-oriented, flexible, economical, and less stressful than litigation, mediation ensures confidentiality, which is one of the most attractive and powerful attributes of the mediation process").

141. Zacharias, *supra* n. 119, at 386.

142. *Id.*

143. *Id.*

144. *Id.* at 387.

Nearly half of the clients believed the law required absolute confidentiality.¹⁴⁵ While this view was not voiced by the attorneys surveyed, it may be the case that there was a professional fear that clients would not use lawyer services as readily or frequently if the exceptions to confidentiality protection were understood and explained.¹⁴⁶

3. Therapeutic Communications

A significant number of respondents in attorney-client confidentiality research believed confidentiality protection to be absolute. There is no mechanism, including the UMA Privilege Against Disclosure, that can create complete confidentiality.¹⁴⁷ Research on therapeutic communications has addressed the question of whether lay persons would reveal information, under the promise of confidentiality, if they were made aware of limitations to that protection.

In 1986, two behavioral scientists conducted a study to assess the public's knowledge and attitude regarding the confidentiality of therapeutic

145. *Id.* The issue that raises perhaps the most concern is that a significant percentage of attorneys surveyed knowingly allowed their clients to operate under misunderstandings of confidentiality. "What makes this overstatement worse is that the same lawyers know or believe that their clients misunderstand the scope of confidentiality. [About forty-two percent] of the lawyers surveyed . . . thought less than half their clients understand confidentiality and its scope." *Id.*

146. At least one author would take this position a step further. "It is hard to resist the conclusion that the law of privilege is built on active deceit. Lawyers either do not discuss this issue with clients and foster an assumption of absolute confidentiality, or actively assert that this is the case. They never tell their clients about the limits to confidentiality." Auburn, *supra* n. 124, at 75. See Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 3 (1998) (arguing that this type of deceit is based on financial motives of lawyers by showing that: "[a]nother way to ask why encouraging communications with the legal profession is so important is to inquire who benefits from these communications. Stated this way, the questions answers itself: confidentiality benefits lawyers because it increases the demand for legal services. The legal profession, not clients or society as a whole, is the primary beneficiary of confidentiality rules").

147. See *infra* text accompanying nn. 296-327.

The UMA clearly recognizes that its Privilege Against Disclosure will not provide complete confidentiality. The Act anticipates courts balancing the needs for information against the parties' need for protection against involuntary disclosure under certain circumstances. See U.M.A. § 7. Section seven provides in pertinent part:

(b) There is no privilege under Section 5 (Privilege Against Disclosure) if a court, administrative agency, or arbitration panel finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the importance of the policy favoring the protection of confidentiality, and the mediation communication is sought or offered in:

- (1) a court proceeding involving a felony;
- (2) or a proceeding to prove a claim or defense to reform or avoid liability on a contract arising out of the mediation, except as otherwise provided in subsection (c).

Id.

communications.¹⁴⁸ Ninety-six percent of those surveyed wanted to be apprised of information pertaining to confidentiality,¹⁴⁹ but only thirty-three percent of responding psychologists orally informed clients of possible legal or ethical limitations on confidentiality.¹⁵⁰ Seventy-five percent of all respondents felt that their psychologists maintained confidentiality to facilitate the therapeutic relationship and to maintain trust.¹⁵¹ Sixty-nine percent of respondents believed that psychologists considered everything discussed in the context of psychotherapy to be confidential.¹⁵² Forty-two percent identified that there would be a "negative impact" if they were told before the first session that certain information was not confidential.¹⁵³ The study concluded that although "subjects desire[d] to be told of the limitations to confidentiality, the majority would react negatively to such information . . ."¹⁵⁴ The researchers put it best when summarizing their data, "[h]ence the clinician is thrust between Charybdis and Scylla - clients desire to be told of the limitations to confidentiality, but when told, they may not subsequently participate in psychotherapy."¹⁵⁵

A separate study was conducted to empirically measure the effects of confidentiality laws on patients' self-disclosures in psychotherapy.¹⁵⁶ The results of this study support those of the 1986 study. The results of the study showed that "patients who were more informed about the limits to confidentiality admitted to having fewer socially unacceptable thoughts and behaviors . . . than did uninformed patients . . ."¹⁵⁷ The study concluded that laws that limit privacy protection for confidentiality may discourage certain patients from being candid in the first place and that such laws may actually hinder the treatment they were intended to facilitate.¹⁵⁸ To promote patient disclosures, it may be better to have no privilege than one with exceptions, especially if patients are aware of those exceptions.

148. See generally David J. Miller & Mark H. Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 Prof. Psychol. Res. & Prac. 15 (1986). The scientists obtained questionnaire responses from high school students, undergraduate psychology students, former clients from a community mental health center, and former clients from a university counseling center. *Id.* at 15.

149. *Id.*

150. *Id.* at 17.

151. *Id.* at 18.

152. *Id.* at 15.

153. *Id.* at 18. An additional twenty-seven percent stated they would have ambivalent feelings if informed of the limitations on confidentiality protection, e.g. "It might make one hesitant at first . . . I don't know." *Id.* "Twenty-one percent said they would react positively, e.g. 'I would feel that the therapist was being honest.'" *Id.* But see Gibbs L. Arthur, Jr. & Carl D. Swanson, *Confidentiality and Privileged Communication* 9-10 (Am. Counseling Assn. 1993) ("The general public, clients, and mental health professionals appear to share an expectation of privacy in the counseling relationship; clients prefer to know in advance about confidentiality limitations; the degree of confidentiality assurances seem neither to enhance nor diminish later client disclosiveness; and findings to date are mixed and inconclusive about whether client knowledge of confidentiality limitations at the beginning of counseling inhibits subsequent disclosiveness").

154. Miller & Thelen, *supra* n. 148, at 18.

155. *Id.*

156. Taube & Elwork, *supra* n. 108, at 72-75.

157. *Id.* at 74.

158. *Id.*

*C. Reason and Experience:
"Reason" under the Wigmore Analysis*

In addition to its empirical analysis under the "experience" standard, the *Jaffee* court also cited a variety of public and private policy concerns supporting recognition of the psychotherapist-patient privilege.¹⁵⁹ These fall under the "reason" standard, as they are societal justifications for the creation or recognition of a privilege. According to the Court, the psychotherapist-patient privilege facilitates effective treatment by providing an atmosphere in which the patient can speak freely, without fear of disclosure.¹⁶⁰ Publicly, the privilege facilitates the "provision of appropriate treatment for individuals suffering from the effects of a mental or emotional health problem."¹⁶¹ The Court was clear that its past privilege decisions have supported a privilege when it served a public good of transcendental importance.¹⁶² The question is whether a mediation privilege would serve such a public good.

The utilitarian analysis for whether or not a privilege should be created or applied to protect a public good has consistently been the Wigmore analysis for privilege.¹⁶³ The following Wigmore analysis draws on some of the empirical findings previously discussed and some private and public policy concerns relevant to individual mediation disputes or practice procedures. A proposed privilege must satisfy each step of the analysis in order to be recognized. The Privilege Against Disclosure in the UMA fails each step of the following Wigmore analysis:

1. The communication must originate in confidence that it will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and

159. *Jaffee*, 518 U.S. at 10-12.

160. *Id.* at 10.

161. *Id.* at 11.

162. *Id.* (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981)) ("The purpose of the attorney-client privilege is to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and administration of justice'"). See also *Trammel*, 445 U.S. at 53 (justifying a modified spousal privilege because it "further[s] the important public interest in marital harmony").

163. See e.g. *Kentra*, *supra* n. 81, at 728 ("Traditionally, when determining a claim of privilege, the courts have employed the four-part Wigmore balancing test." . . . "In the context of a mediation privilege, courts would likely apply this same four-part test"); *Weinberg*, *supra* n. 29, at 3 (identifying that the standard test for the prerequisite for creation of a common-law privilege is the satisfaction of the four-part Wigmore analysis); *Green*, *supra* n. 10, at 31 (identifying the Wigmore analysis as the standard "utilitarian calculus" for recognition of a common-law privilege); *Engelbart*, *supra* n. 81, at 78 ("When considering whether or not to create a common-law privilege, the court uses the four-part Wigmore balancing test").

To see how the federal courts use the Wigmore analysis in examining the "reason" component of Rule 501, see *Nixon*, 418 U.S. 683; *Macaluso*, 618 F.2d at 51. For a view of how state courts use the Wigmore analysis see *Grossberg*, 1998 WL 117975 at *2; *Driscoll*, 193 N.W.2d at 856.

4. The injury to the relation caused by disclosure of the communication must be greater than the benefit gained.¹⁶⁴

Step 1: The communication must originate in confidence that it will not be disclosed

The question of whether a mediation communication arises in confidence that it will not be disclosed is obviously circular. If the mediator promises confidentiality, and the parties believe and accept that promise, then Step 1 is satisfied. If no promise is made by the mediator, or if the promise is not believed or accepted by one or more parties, then the communication fails Step 1. At least one author, while critical of a mediation privilege generally, would admit that Step 1 would likely be satisfied.¹⁶⁵ I do not agree and my position is supported by analogous empirical evidence.

Currently there is no way of knowing what percentage of mediators inform parties of confidentiality or what percentage of parties rely upon that information in choosing to make disclosures during mediation. There is simply no empirical evidence on either of these specific points. However, the Tompkins County study revealed that approximately seventy-three percent of the lay respondents reported that their first attorneys never told them anything about confidentiality.¹⁶⁶ In a separate study, sixty-seven percent of responding psychologists never orally informed clients of possible legal or ethical limitations on confidentiality.¹⁶⁷ If these percentages are similar to those of mediators, then it is likely that there is no guarantee of confidentiality being made that can be relied upon.¹⁶⁸ It is also likely that parties to mediation may not be relying on the mediator's promises of confidentiality, even if made. The Tompkins County study found that while forty-two percent of the surveyed clients believed attorney-client confidentiality to be absolute,¹⁶⁹ only about twenty percent believed that "attorneys as a matter of practice always keep information confidential."¹⁷⁰

It is possible that parties could be relying on mediation confidentiality learned through some other source when no promise or explanation was given by the mediator. Such reliance is doubtful for two inter-related reasons. First, currently only twenty-five states have general mediation confidentiality statutes of any kind.¹⁷¹ At the risk of being obvious, that means half of the states have no general protection. Second, laypersons do not appear to be generally aware of the existence of legal

164. Wigmore, *supra* n. 19, at § 2285.

165. Green, *supra* n. 10, at 32.

166. Zacharias, *supra* n. 119, at 383.

167. Miller & Thelen, *supra* n. 148, at 17.

168. It is possible that a higher percentage of mediators discuss confidentiality with clients, given the strong focus on discussion of confidentiality in opening statements provided through many mediation trainings.

169. Zacharias, *supra* n. 119, at 383.

170. *Id.*

171. U.M.A. Reporter's Notes for § 5(1), at 20 (labeled 2. The privilege structure).

confidentiality protections, especially in areas of more recently developed privileges.¹⁷²

Step 2: The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties

This step of the Wigmore analysis requires that confidentiality must be essential to a full and satisfactory maintenance of the relationship between the parties. This consideration assumes that the relationship at issue should be maintained and will not be so without confidentiality. If the relationship should not be maintained, then there is no need for privileged confidentiality.

Mediation can apply to a virtually limitless variety of disputes and "relationships," some of which will not, should not, or cannot be maintained. There is likely no ongoing relationship between a plaintiff and defendant in a personal injury lawsuit who utilize mediation prior to trial. Courts have refused to extend spousal privileges to couples who were still married, but irreparably separated.¹⁷³ There may be relationships that cannot be preserved.¹⁷⁴ It is not possible to determine that there is a common relationship that must be maintained between all parties using mediation. Absent such a relationship, the Privilege Against Disclosure must fail Step 2 of the Wigmore analysis.

172. See *supra* text accompanying n. 114. People may be more generally aware of confidential relationships that have existed for longer periods of time and that have been recognized in all states. See Zacharias, *supra* n. 119, at 382-282 ("Of the clients who said their attorney told them nothing about confidentiality [72.9%], 79.1% of clients claimed to know of confidentiality nonetheless"). *Id.*

See also Freedman & Prigoff, *supra* n. 29, at 42 ("The argument is made that mediation is conducted everywhere without a privilege and it has not really suffered. This argument is flawed by the fact that most mediation is now done under the assumption that communications are privileged under the law, even if they are not really privileged"). With all due respect to these authors, I am unclear how they arrive at such a conclusion. This quote cites a then ongoing survey sent to 288 community mediation centers. The footnote lists some of the categories of questions posed to these centers, but does not identify any response data. The cite concludes by stating that "A summary report and analysis of the survey is now in progress. It should be noted that not all of the programs responded to the survey, so the results are, to some degree, incomplete." *Id.* at 42 n. 21. Perhaps the authors had reviewed, but not finalized analysis of, data leading them to believe that the majority of parties to mediation believed in the existence of privilege protection. They do not provide any such empirical evidence in support of their position.

173. See *In re Witness Before Grand Jury*, 791 F.2d 234, 239 (2d Cir. 1986) (holding that where a couple is permanently separated but legally wed, the privilege is not applicable); *U.S. v. Fulk*, 816 F.2d 1202, 1204 (7th Cir. 1987) (holding that when husband and wife were permanently separated at the time of the communication, the privilege is not applicable).

174. See *Trammel*, 445 U.S. at 41 ("When one spouse is willing to testify against another in a criminal proceeding- whatever the motivation - there is probably little in the way of marital harmony for the privilege to preserve"). See also Weinberg, *supra* n. 29, at 29 (noting that spousal privileges do not survive annulment because, with annulment, there never was a marital relation to be preserved or protected).

Step 3: The relation must be one which the opinion of the community must be sedulously fostered

Step 3 is the most nebulous concern of the Wigmore analysis. In the context of the mediation process the "relation" which must be sedulously fostered could refer to any of several possibilities. At a minimum, the mediation process has a relationship between the disputing parties, a relationship between the mediator and the parties, and the relationship that is the mediation process itself.¹⁷⁵ It is difficult to establish that society would recognize any of these as needing to be sedulously fostered.

There is a variety of relationships between the individual parties in mediation. The question is whether the base relationship of the parties is one that society would or should protect by privilege. Frequently some relationships using mediation will not need to be maintained at all, such as adversaries in "one-shot" civil disputes. There are other forms of mediation where it would appear that the relationship of the parties may be sufficient to warrant privilege protection. Parent-child mediation comes readily to mind. Few would argue that this relationship is not an important, if not paramount, relationship in society. Yet there is no federal parent-child confidentiality privilege.¹⁷⁶ Family mediation is another example,¹⁷⁷ yet there is no federal sibling privilege protection.¹⁷⁸ The Supreme Court has even refused to recognize a blanket privilege shielding secret service assigned to the president of the United States from revealing communications made by the president in their presence.¹⁷⁹ There is no privilege protection for these types of relationships when they exist outside of the mediation process. There is no reason to accord them privilege protection merely when they are addressed in the mediation process.

It is even more difficult to argue that society would, or should, sedulously protect the relationship between mediator and party. The primary problem with such an argument is that there is little consensus on what that relationship is. A mediator may serve the role of problem solver, although without binding authority, in an evaluative mediation.¹⁸⁰ The role of the mediator may be a source of empowerment for the parties in a Transformative style of mediation.¹⁸¹ The mediator may be responsible for creating communication, or repairing damaged channels of communication, between the parties in a facilitative mediation. Mediators may

175. The relationship that is the mediation process itself includes the simultaneous relationships between the parties, between the mediator and an individual party, between the mediator and the parties collectively, and between the mediation process and society as a whole.

176. *Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting).

177. By "family mediation" I mean mediation designed to address conflict between siblings.

178. *Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting).

179. See generally *Nixon*, 418 U.S. 683.

180. See generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7 (1996) (creating and defining the terms "evaluative" and "facilitative" mediation).

181. See generally Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation* (1st ed., Josey-Bass 1994).

perform all of these roles in a single mediation. It is difficult, if not impossible, to specifically identify what is the basis of the mediator-party relationship.¹⁸²

It is also difficult to define what the mediator-party relationship is because there is little consensus on what it takes to be recognized as a mediator. The other historically recognized privileges largely have a licensure consideration.¹⁸³ There is some standard defining the legal status of those seeking to utilize the privilege.¹⁸⁴ This is not true in mediation.¹⁸⁵

182. It could be argued that the nature of the relationship can be found in a general definition of the mediation process. Mediation could be defined simply as a mechanism using a third party to facilitate resolution of a dispute. Under this definition the role of the mediator is to provide assistance to carry out that objective. However, even a definition as innocuous as this would not satisfy all concerns. I seriously doubt that the Transformative proponents would agree that the resolution of a dispute is necessarily a goal of the mediation process. There is no uniform basis underlying the mediator-party relationship.

183. See *Nature of the Professional Relationship Required Under Privileged Communication Rule*, 24 Iowa L. Rev. 538 (1949) (hereinafter referred to as Note).

Traditional notions of privilege require the following for a professional relationship warranting privilege protection:

1. There must be one who is legally a doctor, lawyer, or minister;
2. At the time the communication in question was made, he must have been acting in his professional capacity, and;
3. The person making the communication, if in possession of his faculties, must have regarded the professional man as his doctor, lawyer, or minister.

Id.

A licensure requirement may strictly determine whether a particular privilege may be enforced. See Scott N. Stone & Ronald S. Liebman, *Testimonial Privileges* 385 (Shepard's/McGraw Hill 1983) (identifying that dentists, chiropractors, Christian Science practitioners, and veterinarians have not been protected by assertion of the physician-patient privilege). See also Wigmore, *supra* n. 19, at § 2382 (identifying that a veterinary surgeon and pharmacist would not be protected by the physician-patient privilege, but that a dentist or practitioner of any "reputable medical profession" should be).

The exception to the general rule requiring licensure is the priest-penitent privilege. It does not have a licensure requirement and courts are likely reluctant to impose such a requirement on religious officials due to First Amendment concerns. At least one court has defined "clergyman," for purposes of the privilege, as "a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting them." *In re Grand Jury Investigation*, 918 F.2d 374, 380 (3d Cir. 1990) (quoting proposed Fed. R. Evid. 506, 56 F.R.D. 141 (1972)). Another court has suggested that while it was reluctant to impose a strict licensure requirement on clergy, it would not apply the privilege to "clergy" of a "mail order church" formed for the sole purpose of attempting to avoid taxation. *U.S. v. Dube*, 820 F.2d 886, 889-90 (7th Cir. 1987).

184. See Scottish Law Commission, *Discussion Paper No. 92: Confidentiality in Family Mediation* 124-25 (Edinburgh 1991) ("We would suggest that if the view is accepted that the creation of a privilege is a matter of importance, justified only on the grounds of compelling public policy, it is not appropriate that one of the conditions for the application of a privilege should be the mere assertion by an individual or agency that he or she or it provides mediation services. It appears to us that it may be preferable that the application of a statutory privilege should be controlled by a system of official approval of the organization or individuals to whose mediation services the privilege is to attach").

185. See Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy, Practice* 115 (Law. Coop. Publ. Co. 1989) ("Probably the key difference among mediation privileges, and the issue on which there is little agreement among commentators, is in the definition of 'mediation.' The varying approaches taken by the states reflect not only a fear that too much valuable information will be lost if the definition is too broad, but also a possibly conflicting desire to encourage mediation in a variety of formats. Unlike the privilege for lawyers and psychiatrists, the mediation privilege [would be] applied to an unlicensed profession").

The UMA defines a mediator as an individual who conducts a mediation.¹⁸⁶ The UMA defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."¹⁸⁷ Put more simply, and assuming that there is a recorded agreement to mediate,¹⁸⁸ virtually any person helping to resolve a dispute is a mediator engaged in mediation. Such a broad definition of mediation might certainly include some types of negotiation that run contrary to traditional public policy concerns.¹⁸⁹

New privileges "are not lightly created nor expansively construed."¹⁹⁰ In a society that has refused to recognize new privileges for protection of "legislative acts" by members of state legislatures,¹⁹¹ a Privilege Against Disclosure of academic peer review materials,¹⁹² a privilege for journalists and their sources,¹⁹³ a privilege for editors and reporters,¹⁹⁴ a privilege for scientific researchers,¹⁹⁵ and the previously discussed decision in *Nixon* which denied privilege to communications made by the president of the United States in the presence of secret service agents,¹⁹⁶ it is difficult to imagine that a blanket privilege would be desired or enforced for anyone simply calling themselves a mediator or claiming to have used the mediation process.

The third type of relationship that must be considered is that of the mediation process itself. To create a privilege for mediation, society must approve or accept mediation as a process. That acceptance does not appear to exist. There are several sources that maintain mediation actually causes detriments for users and society as a whole. Some critics argue that users of mediation are subject to "second class" justice.¹⁹⁷ Others argue that unsophisticated users may lack awareness of their legal rights or the ability to walk away from the mediation process.¹⁹⁸ At least one person has argued that the confidential settlement of certain types of disputes through mediation masks true risks or costs to society.¹⁹⁹ Others would go so far as to maintain that an out-of-court settlement, by definition, is always less than full

186. U.M.A. § 3(5).

187. *Id.* § 3(3).

188. See U.M.A. § 4(a).

189. As an example, it was reported that the prime evidence in a trial on racketeering charges against twenty-one defendants was testimony about a "mediation" by the "Boys from New Jersey" called to settle a controversy between rival gangs claiming ownership of a Florida investment operation. Rogers & McEwen, *supra* n. 184, at 115-6 (citing "*Jersey Boys*" *Mediate a Dixie Mob Dispute*, Newark Star Ledger (July 22, 1987)).

190. See *e.g.* *Nixon*, 418 U.S. at 710.

191. See *U. S. v. Zolin*, 491 U.S. 554 (1989).

192. See *U. of Pa.*, 493 U.S. at 189.

193. The seminal case for a journalist-source privilege is *Branzburg*, 408 U.S. 665. *Branzburg* rejected the privilege on constitutional grounds. However, at least one federal court has recognized a limited version of the privilege. See *U. S. v. Cuthbertson*, 651 F.2d 189 (3d Cir. 1981).

194. See *e.g.* *Herbert v. Lando*, 441 U.S. 153 (1979).

195. See *Wright v. Jeep Corp.*, 547 F. Supp. 871 (E.D. Mich. 1982).

196. See *Nixon*, 418 U.S. 683.

197. See *e.g.* *The Politics of Informal Justice* (Richard L. Abel ed., Acad. Press 1982); Jerold S. Auerbach, *Justice Without Law?* (Oxford Press 1983).

198. See *e.g.* Stephen B. Goldberg, et al., *Dispute Resolution* 490 (Little, Brown & Co. 1985).

199. See generally Aseem Mehta, Student Author, *Resolving Environmental Disputes in the Hush-Hush World of Mediation: A Guideline for Confidentiality*, 10 Geo. J. Leg. Ethics 521 (1997).

justice.²⁰⁰ These commentators certainly cast doubt on the idea that society is prepared to recognize the legitimacy and benefits of mediation and to accord it privilege protection.

It is difficult to accord privilege to the mediation process for another reason. Other privileges have been recognized or protected because of their clearly defined goals,²⁰¹ but there is no consensus as to the goal of mediation. Mediation is frequently used as a settlement tool, yet few authors assert that settlement is the primary goal of mediation.²⁰² At least two authors argue that the goals of mediation should be empowerment of the parties through valuing personal strength and compassion for others.²⁰³ Another would maintain that the goal of the mediation process is to allow the parties to find a resolution that suits them, one not constrained by societal approval or legal remedies.²⁰⁴ At least one author surmises that the primary interest in mediation is the privacy of dispute resolution.²⁰⁵ Finally, a body of work seems to contend that the goal of mediation is a voluntary decision entered into by parties with full information generated by a frank discussion of interests.²⁰⁶ This final argument implies that confidentiality fosters full disclosure which, in turn, creates fully reasoned decisions. This argument brings us full circle to the original problem for those advocating a mediation privilege, there is no empirical evidence

200. See Green, *supra* n. 10, at 83 (citing Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 *Law & Inequality* 21 (1984)).

201. See *Trammel*, 445 U.S. 40 (identifying the specific goals of priest-penitent, attorney-client, and physician-patient privileges).

202. See *Making Sense of Rules of Privilege Under the Structural (II)logic of the Federal Rules of Evidence*, 105 *Harv. L. Rev.* 1339, 1356-7 (1992) (hereinafter referred to as Note) ("[T]he fundamental nature of mediator-party relationship does not hinge on complete confidentiality of communications; it hinges on dispute resolution"); Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future so Bright We Gotta Wear Shades*, 31 *St. Mary's L.J.* 949, 957 (2000) ("A primary objective of these alternative processes is to provide parties with assistance in moving beyond barriers to settlement"); Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 *J. of Dis. Res.* 1, 9 (1995) (arguing that mediation proceedings are undertaken with the goal that the disputing parties will reach a mutually agreed upon settlement that satisfies the interest of all parties); Patrick D. Pinkston, *Transforming Mediators: Ensuring that Clients Get What They Pay For* (2001) (unpublished LL.M. thesis, University of Missouri, on file with the author) (arguing that to the degree parties want mediators to help settle disputes, mediators have a responsibility to oblige).

203. See generally Baruch Bush & Folger, *supra* n. 181.

204. Deborah R. Sundermann, *The Dilemma of Regulating Mediation*, 22 *Hous. L. Rev.* 841, 847 (1985). See also Christopher H. Macturk, Student Author, *Confidentiality in Mediation: The Best Protection Has Exceptions*, 19 *Am. J. Trial Advoc.* 411, 414 (1995) (quoting Stephen B. Goldberg, et al., *Dispute Resolution* 92 (Little, Brown & Co. 1985)) (arguing that the mediation process is "above all 'better suited to tailoring outcomes to the needs of the parties'").

205. Green, *supra* n. 10, at 4-5 ("It is the parties' interest in private dispute resolution that is the justification for the process in the first place.") See also Freedman & Prigoff, *supra* n. 29, at 38 (noting that "[p]rivacy is an incentive for many to choose mediation." "[T]he option presented by the mediator to settle disputes quietly and informally is often a primary motivator for parties choosing this process").

206. See e.g. *Protecting Confidentiality in Mediation*, 98 *Harv. L. Rev.* 441, 445 (1984) (asserting that parties need to be frank with each other and with a mediator for effective mediation); Engelbart, *supra* n. 81, at 76 ("Mediation is designed to encourage the parties to discuss relevant issues, facts, interests, and emotions. Promoting frank and honest discourse between the parties and the mediator allows for [the creation of broad solutions]. The mediator uses the blanket promise of confidentiality to promote free-flowing exchange. As a result, parties' reveal personal and business secrets, share deep-seated feelings about others, and make admissions of fact and law").

that supports the contention that confidentiality creates a greater degree of disclosure.

Followed to finality, the basis of the last argument is that a belief in confidentiality would foster complete disclosure. The problem is that the exchange of information does not seem to follow this rationale. Respondents in the Tompkins County study admitted that eleven percent of the time they did not disclose information to attorneys when there was a privilege²⁰⁷ even when almost eighty percent of the respondents knew of the privilege.²⁰⁸ Shuman and Weiner found that, even when a privilege existed, Canadian patients withheld information.²⁰⁹ If respondents were fully informed of the limitations to confidentiality processions, it is likely that they would disclose even less.²¹⁰

Step 4: The injury to the relation caused by disclosure of the communication must be greater than the benefit gained

Step 4 of Wigmore's analysis requires that the injury to the relation caused by disclosure of a mediation communication must be greater than the benefit gained (by availability for use in litigation).²¹¹ Proponents of a mediation privilege cannot fashion a viable argument on this point because there is no empirical basis upon which to make such an argument.²¹²

Eileen Friedman answered Step 4 by asserting that "the detriment to the mediation process that results from the loss of confidentiality is so great that it should outweigh the benefits in any individual case for disclosure of statements or records made in mediation."²¹³ This position, however, is simply a restatement of the standard in question, not a basis for deciding the argument. This is nothing more than a return to the general mantra that mediation needs confidentiality and that without confidentiality parties would not make the level of disclosure necessary to carry out effective mediation. That belief is not supported by the empirical evidence.²¹⁴ Absent empirical evidence, mediation privilege proponents cannot substantiate that the damage caused by disclosure outweighs the value of use at trial

207. Zacharias, *supra* n. 119, at 386.

208. *Id.* at 383.

209. Shuman & Weiner, *supra* n. 50, at 102.

210. Miller & Thelen, *supra* n. 148, at 18.

211. Friedman, *supra* n. 81, at 209.

212. The Step 4 deck is stacked against those asserting a mediation privilege when empirical validation is required. See Auburn, *supra* n. 124, at 65 ("[T]he confidentiality side of the privilege equation will usually be a benefit that is speculative in nature. This may be in contrast to a detriment, in the form of evidence denied, that is real and imminent").

At least one author is skeptical that courts would find that a mediation privilege satisfies step 4. See Green, *supra* n. 10, at 34 ("[G]iven the unwillingness of courts to strike the balance between injury to the relationship and benefit to the justice system in favor of executive privilege and reporter's privilege, it is doubtful that courts will conclude that the balancing of interests called for by the fourth of the Wigmore conditions comes out in favor of a mediation privilege").

213. Friedman, *supra* n. 81, at 209.

214. See Shuman & Weiner, *supra* n. 50, at 83; Note, *supra* n. 119, at 1236; Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. of Dis. Res. 25, 41 (1992) (stating that research by the American Bar Association demonstrated that open, or non-confidential, mediations are as successful as confidential mediations when measured by settlement rate).

because they cannot substantiate that a lack of privilege would cause a decrease in disclosures.

The UMA Privilege Against Disclosure fails all four steps of the Wigmore analysis.²¹⁵ This failure is significant because the Wigmore analysis analyzes whether a relationship is sufficient in the public interest or perception to warrant privilege protection. If it is not, it should not be accorded privilege status because to do so would decrease the protection for relationships truly deserving privilege.

215. *But see* Kirtley, *supra* n. 202, at 15-19 (arguing that a mediation privilege would pass the first three steps of the Wigmore analysis, and could be drafted so as to satisfy the fourth).

I do not agree with Professor Kirtley. His conclusions largely mirror the generally held mediation and confidentiality beliefs, as opposed to being supported by any empirical evidence. Kirtley maintains that step 1 is satisfied because "we have seen that mediation predominantly occurs in private settings and under circumstances in which the participants have agreed not to disclose their communications. Moreover, it is likely the mediator will have told the parties their discussions are confidential." *Id.* at 16. This conclusion rests entirely upon the parties having an original confidence that their disclosures will not be disclosed. We cannot assume that mediators discussed confidentiality. If the mediators are similar to the lawyers in the Tompkins County Study, it is likely that they did not discuss confidentiality with the parties. *See supra* text accompanying n. 140. It is then unlikely that an original confidence was ever created.

Kirtley argues that step 2 is satisfied simply because "the overwhelming weight of scholarly authority supports the proposition that confidentiality is essential to the functioning of mediation." Kirtley, *supra* n. 202, at 16. As previously discussed, it is more accurate to say that the vast majority of scholarly weight asserts that confidentiality is important to mediation, not that it demonstrates any empirical support for such a contention.

Kirtley argues that step 3 is satisfied because, in addition to the scholarly support he cited in step 2, "the best evidence of public opinion as to whether mediation relationships ought to be fostered is the flurry of legislative and court rule activity creating mediation privileges . . ." *Id.* at 17. However, legislation is not necessarily indicative of public opinions, it may merely be the result of an effective lobby by a small group having an interest in a particular subject. *See* Wigmore, *supra* n. 19, at § 2380 (discussing the physician-patient privilege and noting "[t]he real support for the privilege seems to be mainly the weight of professional medical opinion pressing upon the legislature"). *See also* Miller, *supra* n. 24, at 787 (quoting Alan F. Westin, *Privacy and Freedom* 1494 (2d ed., Atheneum 1973)) ("There does seem to be a correlation between the existence of a privilege and the degree of political influence of the beneficiaries. Fundamental privileges in American jurisprudence protect lawyers, doctors, religious leaders, and the State from being forced to reveal information. Furthermore, 'the vast majority of new privileges have been created by statute, a process certainly requiring the exercise of political power'").

Kirtley briefly discusses the contention that "the existence of evidentiary privileges is based on political power." Kirtley, *supra* n. 202, at 18. He dismisses this argument by attempting to rationalize that broad societal interests may still be carried out, perhaps inadvertently, when legislation is a function of small special interest groups. "At the extreme, the power rationale questions the legitimacy of all privileges. But to acknowledge that power may underlie privileges is not to say that valuable social interests may not also be involved." *Id.* It is precisely this type of argument that underlies many of the positions of proponents of a mediation privilege. A privilege may have been created because it carries out a societal good...but maybe not. Mediation may need confidentiality...but maybe not. Confidentiality may increase disclosure...but maybe not. In order to resolve this uncertainty we must look to empirical evidence, otherwise we just have competing opinions. Mere opinions are not sufficient to justify the creation of a legal privilege.

Kirtley finally argues that step 4 could be satisfied with "a narrow rule of mediation privilege which reduces the loss of evidence to the justice system while maintaining the benefits of confidentiality for mediation where most appropriate." *Id.* This contention assumes that we can value confidentiality in the mediation process and create a mechanism that balances that need with the need for information available to a finder of fact. The problem is that there is no empirical evidence to support the assertion that mediation needs confidentiality. Any mechanism seeking to balance the weights of the these competing interests is merely guessing because it cannot know the actual weight of confidentiality.

It is not intellectually honest to create a privilege simply because it seems to provide a quick or simple solution to a confidentiality concern. A privilege should be created when there is a demonstrated empirical need for the privilege and when the privilege creates a benefit to society as a whole. In contrast, the UMA Privilege Against Disclosure is not supported by analogous empirical evidence or a utilitarian societal justification under the Wigmore analysis. As I will next discuss, the proposed Privilege Against Disclosure should not be accorded privilege protection because privilege has not been, and should not be, applied to a relationship of adversarial interests.

III. PRIVILEGE IS NOT AN APPROPRIATE MECHANISM FOR CREATING MEDIATION CONFIDENTIALITY

A. There is no Historical Precedent for Applying Privilege to a Relationship of Adversarial Interests

Privilege is the ability to not reveal information where persons in other circumstances would have no protection from compelled revelation. As I will discuss in this section, privilege has been used, and should be used, to protect relationships of common interests where any third party presence is merely incidental to the base relationship protected by the privilege. The UMA Privilege Against Disclosure fundamentally contradicts this historic and appropriate use of privilege. It would apply privilege to a relationship where information was revealed to an adversarial interest, in the presence of a third party (the mediator), without whom the underlying relationship (the mediation) could not exist.

In order to fully analyze the use and purpose of the Privilege Against Disclosure we must first examine the historical development of other privileges. While much has been surmised about the true origins of the concept of privilege and the roots of specific privileges, the actual origins are largely unknown. Most modern privileges are creations of statute.²¹⁶ The most commonly cited rationale for privileges is that they “encourage vital interpersonal relationships which might be seriously prejudiced by the prospect of breached confidentiality.”²¹⁷

There are at least five privileges of wide spread adoption and lengthy historical acceptance: the privilege against self-incrimination, the attorney-client privilege, the husband-wife privilege, the priest-penitent privilege, and the physician-patient privilege.²¹⁸ All of these, except the privilege against self-incrimination, are based on the existence of some form of relationship.²¹⁹ Rule 501's standard of

216. See *Jaffee*, 518 U.S. at 13.

217. Weinberg, *supra* n. 29, at 2.

218. There are other privileges, such as the informer, accountant-client, journalist-informant, psychiatrist-patient, and psychologist-patient, which are not as widely acknowledged or lack the historical acceptance of the privileges I will discuss.

219. I will not be discussing the privilege, and constitutional right, against self-incrimination because it has little value in analysis of the Privilege Against Disclosure. I will discuss privileges in which information was revealed to another (relational privileges). The self-incrimination privilege is asserted to prevent the compulsion of initial disclosure, not the disclosure of information already revealed.

I will also not discuss the forms of privilege created by Federal Rules of Evidence 407

"reason and experience" directs courts to continue the "evolutionary development of testimonial privileges."²²⁰ Undoubtedly some proponents of the Privilege Against Disclosure will attempt to argue that the privilege is simply part of the evolution of general privilege protection. That position is inaccurate. The protection of privilege has never been extended to a relationship of adversarial interests, while the Privilege Against Disclosure is based on a relationship where the parties have adversarial interests. The Privilege Against Disclosure applies to subsequent adversarial proceedings before a court, administrative agency, arbitration panel, adjudications in juvenile court or criminal misdemeanor tribunals, or possibly felony criminal proceedings.²²¹ The UMA anticipates disputes going to mediation because the parties have competing interests. It further anticipates that information will be revealed during the mediation process that parties would not be revealing to each other in the absence of that process.²²²

1. The Attorney-Client Privilege

Aside from the privilege against self-incrimination, the only privileges recognized at common law were attorney-client and husband-wife.²²³ "The most commonly asserted justification for the attorney-client privilege is that it encourages free and full consultation by the parties to [the] relationship, unfettered by the client's apprehension of compulsory disclosure."²²⁴ The valid invocation of the privilege generally rests upon five factors.²²⁵ First, the attorney must have been consulted in a professional capacity.²²⁶ Second, the attorney must be a duly licensed practitioner or at least believed to be so by the client.²²⁷ Third, the consultation between the

("Subsequent Remedial Measures"), 408 ("Compromise and Offers to Compromise"), and 409 ("Payment of Medical or Similar Expenses"). These rules are not like traditional relational privileges or the Privilege Against Disclosure. See Note, *supra* n. 202, at 1339. They focus on extrinsic activities. *Id.* Instead of acting to ensure confidentiality, they merely block the particular evidentiary uses of the material they cover. *Id.*

220. *Jaffee*, 518 U.S. at 2 (quoting *Trammel*, 445 U.S. at 47).

221. See U.M.A. Reporter's Notes for § 5 (noting that application of the Privilege Against Disclosure to criminal felony proceedings is subject to a special weighing process due to differing policy interests of the states).

222. See Ehrhardt, *supra* n. 25, at 119 ("A mediation privilege differs in at least one significant aspect to most other 'common law' privileges. In the latter, only the professional and the protected party have knowledge of the contents of the privileged communication. In the case of the mediation privilege, knowledge of the communications in the joint session is possessed by the opposing party").

223. There is an argument that a form of the priest-penitent privilege was also recognized at English common law. See *The English Reports* vol. 175, 934 (1930) (citing W.M. Best, *The Principles of the Law of Evidence* vol. 1, 596 (1876)). See also Harold W. Tiemann, *The Right to Silence: Privileged Communication and the Pastor* 36 (John Knox Press 1964) (quoting *The English Reports* vol. 175 (1930) ("The sanctity of confession . . . has been recognized [under English common law]").

The first American publication on privilege appears to be Zephaniah Swift, *A Digest of the Law of Evidence* (Hartford 1810 & photo reprint 1872). See Note, *supra* n. 97, at 1457 ("Swift reiterated the attorney-client and spousal privileges. Responding to a growing debate over the propriety of recognizing other privileges, Swift noted, but dismissed as unsupported, physician's and clergyman's claims to similar privileges"). *Id.* at 1457-8.

224. Weinberg, *supra* n. 29 at 8.

225. *Id.* 9-10.

226. *Id.* at 9

227. *Id.*

parties must relate to legal advice or service.²²⁸ Fourth, the communication must concern the matters upon which the service or advice is solicited.²²⁹ Worded differently, the communication must be made as part of the purpose of the client in soliciting advice on the matter in question. Fifth, there must have been either an express or implied intent of confidentiality.²³⁰

The prevailing view of the attorney-client privilege was set forth by Wigmore.²³¹ According to Wigmore, the attorney-client privilege was recognized in the late sixteenth century.²³² The early rationale for the privilege was a respect for the honor or status of being a lawyer,²³³ and the privilege actually belonged to the attorney, not the client.²³⁴ It is almost impossible to find authors who dispute Wigmore's position. However, a contrary view is espoused by Jonathan Auburn who reviewed several cases from the Chancery Court in the late sixteenth century.²³⁵ He concluded that it is not possible to come to a definitive answer to the origin and rationale for the attorney-client privilege.²³⁶ He maintains that the privilege was not a blanket protection for lawyers.²³⁷ They could be called as witnesses, but would be discharged from their duty to answer questions predicated on certain matters,²³⁸ and those matters were tightly restricted to ones arising out of the lawyer's involvement in the case at hand.²³⁹

Looking at the perspectives of both authors, it appears accurate to say that the rationale for the attorney-client privilege is in two parts. First, the privilege arises out of a respect for the occupation of lawyers and their role in society. Second, the privilege is based on the understanding that information is exchanged between lawyers and clients which the lawyer needs in order to best represent the client. Such information could be severely damaging to the client if revealed by the lawyer without the client's permission and such information may not be revealed to the lawyer if the client were afraid it would be subsequently disclosed by the lawyer. This justification rests on the idea that the lawyer is working for the client and that the lawyer represents the client's interests.²⁴⁰ While the lawyer and the client may have different personal values, preferences, or beliefs, the interests of the lawyer and

228. *Id.* The attorney-client privilege does not necessarily apply to all services provided by the attorney. "Where an attorney renders services substantially equivalent to those of an accountant, it has been held that no privilege may be asserted." *Id.* at 38.

229. *Id.* at 9-10.

230. *Id.* at 10.

231. See generally Wigmore, *supra* n. 19.

232. Wigmore, *supra* n. 19, at § 2290. Wigmore identifies the case of *Berd v. Lovelace* (1577) as the earliest recorded recognition of an attorney-client privilege in English law. *Id.*

233. Wigmore, *supra* n. 19, at § 2290.

234. *Id.*

235. Auburn, *supra* n. 124, at 5-6. See also Radin, *supra* n. 126 (arguing that the attorney-client privilege stems from Roman law and that by the 4th century A.D. advocates and attorneys were made incompetent as witnesses in the case in which they acted).

236. *Id.*

237. *Id.*

238. Auburn, *supra* n. 124, at 5.

239. *Id.*

240. *Trammel*, 445 U.S. at 51 ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out").

client are not adverse to each other in the attorney-client relationship. The lawyer is the agent of the client, not her adversary.²⁴¹

The UMA maintains that its Privilege Against Disclosure is "analogous to the attorney-client privilege" because the attorney-client privilege "sometimes applies in situations of differing interests among clients, notably in the context of joint defense in which interests of the clients may conflict in part and yet one may prevent later disclosure by another."²⁴² The UMA drafters are searching for an established privilege to compare their proposed protection to, but this argument is fundamentally flawed and dangerously misleading to any who might rely on it.

There may be an attorney-client privilege between an attorney and multiple clients in a single proceeding. That does not mean that there is client-client confidentiality in that situation.²⁴³ The purpose of the joint defense privilege is to preserve the same public policy interests as traditional attorney-client privilege.²⁴⁴ While the attorney-client privilege might prevent a lawyer from revealing information to non-parties, there is no protection when the parties to a lawsuit later become adverse to each other.²⁴⁵ Courts have been clear that neither an attorney²⁴⁶ or a party²⁴⁷ can utilize the attorney-client privilege when parties engage in subsequent litigation against each other. This "subsequent litigation exception" is based on the view that joint defenders, who later become adverse, cannot reasonably be allowed to deny each other the use of information that they have by virtue of the other's own disclosure.²⁴⁸ This is exactly the type of situation that is likely to occur

241. Two authors argue that protection for attorney-client communications is at least partly based on the attorney's role as a servant, obliged to keep his master's secrets. See Shuman & Weiner, *supra* n. 50, at 49 ("Just as a slave could not testify against a master because the slave was part of the family, and, therefore, a party to its mutual fidelity, so the attorney had a similar moral duty which the law recognized").

242. U.M.A. Reporter's Notes for § 5(3)(b).

243. See Paul R. Perito et al., *Joint Defense Agreements: Protecting the Privilege, Protecting the Future*, 4 Crim. Just. 6, 7 (1990) ("The joint defense privilege does not protect conversations between defendants outside the presence of counsel . . ."). See also *Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381 (S.D.N.Y. 1975); *Continental Oil Co. v. U.S.*, 330 F.2d 347 (9th Cir. 1964).

244. Perito et al., *supra* n. 243, at 8. See Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. Miami L. Rev. 321, 324-25 (1981) (identifying *Chahoon v. The Commonwealth*, 62 Va. (21 Gratt.) 822 (1871) as the first United States case recognizing the attorney-client privilege in joint defense and asserting that a primary justification for the Privilege is "an increasingly common fact about litigation today: codefendants need to pool their resources to present the best defense").

245. Perito et al., *supra* n. 243, at 9 (citing *In re LTV Sec. Litig.*, 89 F.R.D. 595 (N.D. Tex. 1981)) ("Because shared information was not intended to be confidential between defendants, courts have held that communications may be introduced into evidence in subsequent litigation in which former defendants squarely face each other" Courts have also held that "communications may be protected by the joint defense privilege even though defendants may have potential cross-claims against each other"). See also Welles, *supra* n. 244, at 331-37 ("[I]f former clients disagree among themselves and subsequently become opposing parties in a lawsuit the privilege is inapplicable").

246. See e.g. *Quintel Corp., N.V. v. Citibank, N.A.*, 567 F. Supp. 1357 (S.D.N.Y. 1983) (holding that "an attorney who represents two parties with respect to a single matter may not assert the [attorney-client] privilege in a later dispute between those clients").

247. See e.g. *Central Nat. Ins. Co. of Omaha v. Med. Protective Co. of Fort Wayne, Indiana*, 107 F.R.D. 393 (E.D. Mo. 1985) (holding that "when a lawyer represents two clients in a matter of common interest . . . , the [attorney-client] privilege cannot be claimed by one client with respect to communications between that client and the attorney in a subsequent action between the two clients").

248. See *Ohio Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 32 (N.D. Ill. 1980).

in mediation. One party reveals information to the other during the mediation process. The dispute is not resolved in that mediation. The parties go to court and the first party desires to offer information revealed by the second during mediation. Their interests are adverse. This is the "subsequent litigation exception" in a different context. There is no analogous attorney-client privilege protection for the mediation process.

The attorney-client privilege, by its very title, is premised on a one-on-one relationship. Generally, the presence of a third party during the attorney-client discussion negates the privilege and renders the client and attorney unable to assert it for protection of communications.²⁴⁹ There is an exception. When other individuals are present and necessary to the process, such as secretaries, stenographers, or clerks, the privilege is not obviated.²⁵⁰ The UMA compares its proposed privilege to the attorney-client privilege. However, the two are really nothing alike. The UMA privilege covers a relationship of adverse parties with competing interests. The attorney-client privilege applies to the relationship of a client, and an attorney representing her interests.

2. The Husband-Wife Privilege

Like the attorney-client privilege, the husband-wife privilege addresses a common goal, as opposed to adverse interests. The purpose of the privilege is to "encourage mutual confidences between husband and wife to preserve the marital status."²⁵¹

The privilege was created for the protection of the institution of marriage.²⁵² When the interests of the husband and wife become sufficiently adverse the privilege may not be recognized.²⁵³ In *Trammel*, the Supreme Court held that the traditional operation of the spousal privilege had been changed.²⁵⁴ In the past, one spouse could invoke the privilege to prevent the other from testifying against them in a criminal proceeding. The privilege had been used to exclude all adverse spousal testimony, regardless of the desire of the otherwise testifying spouse. The Court cited Jeremy Bentham for the rationale that "such a privilege goes far beyond making 'every man's house his castle,' and permits a person to convert his house to a 'den of

249. Weinberg, *supra* n. 29, at 10.

250. *Id.*

251. Tiemann, *supra* n. 223, at 78.

252.

Id. A less socially acceptable basis also underlies this historical view of a single interest. In 1628, Lord Coke held that "it hath been resolved by the Justices that a wife cannot be produced either against or for her husband." *Trammel*, 445 U.S. at 43-44 (quoting 1 Edward Coke, *A Commentarie Upon Littleton* 6b (1628)). The principle behind this decision was that a husband and wife were one and, since the wife had no recognized legal existence apart from her husband, the husband was the one that legally mattered. *Trammel*, 445 U.S. at 44.

253. See *In re Witness*, 791 F.2d at 239; *Fulk*, 816 F.2d 1204.

254. *Trammel*, 445 U.S. at 47.

thieves."²⁵⁵ The Court was clear that when interests are adverse, the husband-wife privilege is not applicable.²⁵⁶

As with the attorney-client privilege, the general rule is clear that when a third party is present and overhears the intra-spousal communication there is no privilege protection.²⁵⁷ Either party may testify or be compelled to testify, even after the death of the third party.²⁵⁸ It is readily foreseeable that third parties may be exposed to communications between husband and wife, the most likely third parties are children of the spouses. The presence of children may create an exception to the waiver of privilege, but the level of security created by this exception is highly suspect. If the spousal communication occurs in the presence of young children who pay no attention to what is said, the privilege survives.²⁵⁹ The privilege does not survive if the children are older.²⁶⁰

3. The Priest-Penitent Privilege

Perhaps the most written about privilege is the one generally referred to as priest-penitent.²⁶¹ I suspect that there has been so much written about this privilege because of the many religious institutions it applies to. Stated generally, the priest-penitent privilege recognizes the "human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."²⁶² The privilege did not exist at common law and comes from a variety of sources and beliefs.

For the Roman Catholic Church, confession is one of the seven sacraments. Confession is required at least once each year. The confession is given to the priest "under seal," or under the mandate that information divulged to the priest is not to be disclosed absent express consent by the penitent.²⁶³ For the Roman Catholic priest, "no matter what a court of law may require, no matter what personal inconvenience or incarceration may result, unless he has the permission of the

255. *Id.* at 51-52. The Court held that a spouse could elect to assert the privilege on his own behalf, but could not invoke the privilege to block the testimony of the other spouse who wished to testify. Much of the rationale focused on changes in societal perceptions which now recognize a woman as more than mere chattel. *Id.* at 52-53.

256. *Id.* at 52.

257. *See* Tiemann, *supra* n. 223, at 78.

258. *Id.*

259. *Id.*

260. *Id.*

261. Many of these works have been authored, or co-authored, by clergy or those otherwise affiliated with religious institutions. *See id.* *See also* Richard M. Gula, *Ethics in Pastoral Ministry* (Paulist Press 1996). I suspect they have analyzed this privilege because, even though they may have been well educated in their particular religious disciplines and are likely to have been confronted with practical privilege issues in their daily activities, they were still uncertain of the ethical and legal limits of confidentiality protections.

262. *Trammel*, 445 U.S. at 51.

263. *See* Edward A. Hogan, Jr., *A Modern Problem on the Privilege of the Confessional*, *Loy. L. Rev.* 1, 3-4 (1951) (citing Canon 889, section 1) ("The sacramental seal is inviolable, and hence the confessor shall be most careful not to betray the penitent by any word or sign or in any other way . . .") (Canon 2369 identified the primary importance of this privilege, "[a confessor] . . . who dares to break the seal of confession directly, remains under excommunication reserved *modo specialissimo* to the Apostolic See"). *Id.* at 4.

penitent, he cannot reveal the contents of the confession."²⁶⁴ To do so would break divine, natural, and ecclesiastic law and would subject him to permanent excommunication from the church.²⁶⁵ Catholic recognition of the secrecy of confessional dates back to at least 440 A.D.²⁶⁶

The Protestant minister has had a much more convoluted dilemma. "Except for those who consider themselves Anglo-Catholic Episcopalians, confession . . . to a pastor is not a sacrament."²⁶⁷ Protestantism has not defined any clear-cut pastoral counseling relationship, so the minister has no Canon or church doctrine to assert as law preventing disclosure.²⁶⁸ It is easy to see that this type of dilemma could exist in many religions.

The current basis of the federally recognized priest-penitent privilege probably comes from two beliefs best summarized by the Lutheran church. First, while that church lacked the protection of the Catholic seal, maintaining secrecy of confession was paramount in and of itself.²⁶⁹ Second, a confession occurred between any Christian brothers, not just a parishioner and a priest.²⁷⁰ These two guidelines appear to have set the stage for modern priest-penitent protections. The questions now are not whether a particular religion has a specific law creating a privilege or whether the person receiving confession has a certain title,²⁷¹ the questions are whether religious confession or disclosure took place and whether the confessor reasonably relied upon confidentiality. If so, communications will be protected under this broad privilege.²⁷²

Again, there are no adversarial interests under the priest-penitent privilege. The penitent is confessing and seeking advice, comfort, and guidance.²⁷³ Existence of adverse interests during confession generally destroys the applicability of the priest-penitent privilege. As an example, the privilege has been held not to apply to

264. Tiemann, *supra* n. 223, at 20.

265. *Id.*

266. *Id.* at 31.

The first statute addressing priest-penitent confidentiality, termed the *Articuli Clerici*, was enacted by the English Parliament in 1315. See Tiemann, *supra* n. 223, at 40. This statute became the basis of the later privilege of confession allowing clergy to maintain the confidence of any confession other than treason. See W.M. Best, *The Principles of the Law of Evidence* vol. II, §§ 356-60 (Weare C. Little & Co. 1876).

267. Tiemann, *supra* n. 223, at 21.

268. *Id.* at 22.

269. *Id.* at 50.

270. *Id.*

271. The question of whether the individual receiving the communication qualifies as clergy has seldom been an issue in cases involving privilege. See Stone & Liebman, *supra* n. 183, at 364 (finding that apart from Smith's Case, 2 NY City Hall reporter 77 (1817), the privilege has not been limited to specific sects). *Id.*

272. See e.g. *In re Grand Jury Investigation*, 918 F.2d at 377 ("[W]e hold that a clergy-communicant privilege does exist. We further hold that this privilege protects communications to a member of the clergy, in his or her spiritual or professional capacity, by persons who seek spiritual counseling and who reasonably expect that their words will be kept in confidence").

273. See *Minutes of the Church Council of the American Lutheran Church* 16 (Minneapolis: The American Lutheran Church, 1960).

a confession made to a prison chaplain in the presence of a custodial officer.²⁷⁴ The situation that may be most similar to mediation is communication between clergy and a husband and wife in church marital counseling. In that situation there are three parties, as in mediation, but there are no competing interests. So long as there is a single objective, the preservation of the marital institution,²⁷⁵ the privilege should apply.

4. The Physician-Patient Privilege

At common law there was no physician-patient privilege.²⁷⁶ The most commonly asserted basis for the privilege is that it is necessary:

to evoke and encourage the utmost confidence between the patient and his physician and to preserve it inviolate, so that the patient will freely and frankly reveal to his physician all of the facts, circumstances, and symptoms of his malady or injury, or lay bare his body for examination, and thus enable his physician to make a correct diagnosis of his condition and treat him safely and effectively.²⁷⁷

This privilege may present the strongest argument for protection, the risk of death in the absence of full disclosure.²⁷⁸ “Unless patients are assured that physicians cannot be compelled to disclose confidences, patients will not seek medical care or will not reveal to their physicians all the information necessary for effective treatment.”²⁷⁹

274. See *U.S. v. Webb*, 615 F.2d 828 (9th Cir. 1980). The interests are adverse because the confessor is admitting a crime and the officer is charged with enforcing laws. But see *People v. Brown*, 368 N.Y.S.2d 645 (1974) (refusing to allow an officer who overheard a defendant's telephone conversation with a minister to testify as to the context of that conversation). See also *State v. Deases*, 518 N.W.2d 784 (Iowa 1994) (holding that a defendant's statements to a prison doctor were privileged despite the presence of guards who heard them, as the guards were essential for providing medical care to the inmate).

275. See Tiemann, *supra* n. 223, at 122 (“Couples contemplating divorce or experiencing serious marital difficulties must be able to speak freely to the minister and to each other, in the presence of the minister, about whatever is contributing to the breakup of the marriage”).

276. Weinberg, *supra* n. 29, at 20.

277. Shuman & Weiner, *supra* n. 50, at 47 (quoting C. De Witt, *Privileged Communications Between Physician and Patient* 27 (Thomas 1958)).

278. See Wigmore, *supra* n. 19, at § 2380a (quoting Commissioners on Revision of the Statutes of New York, 3 N.Y. Rev. Stat. 737 (1836)) (“The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger”).

279. Shuman & Weiner, *supra* n. 50, at 47. But see *id.* at 47-8 (“This argument assumes not only that the patient is aware of the applicable law of privilege and considers it before consulting with a physician, but also that the patient would avoid treatment or withhold information necessary for effective treatment in the absence of a privilege. Few contend seriously that these assumptions accurately reflect patient decision-making behavior in the case of physical problems”).

As with all the preceding privileges, there are no competing or adverse interests in the physician-patient relationship. The patient wishes to get healthy and the physician is the agent to effectuate that wish. As with the other privileges discussed, the protection generally does not apply if third parties are present during disclosure,²⁸⁰ although the protection survives if the persons present are family of the party needing treatment or necessary for that medical treatment.²⁸¹

The UMA seeks to create the Privilege Against Disclosure. That privilege would apply to a relationship of competing interests and it would apply privilege when at least one third party (the mediator) always exists.²⁸² Applying privilege to such a relationship is fundamentally contrary to any historical privilege protection. As with the previously discussed "everybody knows it's important" standard, the Privilege Against Disclosure would be created because some person, group, or interest wants it, and not because there is a historical basis for such application. I understand that a mediation privilege is important to the drafters of the UMA. I understand that there are those in the mediation community who feel a mediation privilege is important to the field as a whole. I also understand that the UMA privilege cannot be analyzed in a vacuum. The rules that will be applied to the recognition of this privilege are likely to be applied to the recognition of other privileges. Privilege protections are important or powerful only if they are respected. That respect comes from the fact that they are unique; they are privileges, they are not common.

The Privilege Against Disclosure would change all of the rules that have been applied at common law, and should be applied by legislatures, to the analysis and creation of a privilege: there would be no requirement of empirical justification, no satisfaction of the Wigmore or other utilitarian analysis, and no conformity with historical precedent. The immediate result of enactment of the UMA privilege would be to allow the creation of privileges based on subjective standards or analysis. The end result would be that privileges would become common and they would lose the very feature that gave them power and protection to begin with.

280. See e.g. Tiemann, *supra* n. 223, at 79. See also *State v. LaRoche*, 442 A.2d 602 (N.H. App. 1982) (holding that an emergency medical technician who was in the emergency room, but not working under the supervision of the attending physician, may testify as to what the defendant disclosed to the physician).

281. See e.g. *Deases*, 518 N.W.2d 784 (holding that the physician-patient privilege can apply to communications made in the presence of third parties if those parties are necessary for treatment).

282. The Privilege Against Disclosure would go even farther than merely applying when a third party (the mediator) is present during communications. The privilege may actually be asserted by that third party. See U.M.A. § 5 ("(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing, a mediation communication of the mediator"). The privilege could even be asserted by a non-party. Section 5(3) also states that "a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant"). *Id.*

*B. The Privilege Against Disclosure Should not be Adopted
Because the Privilege May Decrease the Likelihood of Knowing and
Informed Resolution of Disputes*

There is a broad policy concern preventing privilege from being applied to relationships of adversarial interests. In the previously discussed privileges, information revealed or not revealed by the holder of the privilege²⁸³ may cause injury to that holder,²⁸⁴ but that injury is largely self-inflicted. By contrast, the Privilege Against Disclosure allows one party to damage the other through the disclosure of information, while simultaneously being protected by the privilege.

A party to a mediation may reveal information to the other side that causes damage to the receiving party. This injury is most likely to happen when one side lies to or misleads the other and the party receiving the information believes the misrepresentation or does not have the resources to examine the veracity of the statement. In this context, the Privilege Against Disclosure may actually encourage parties to lie during mediation. Their false statements cannot be used against them, for any purpose, at trial or in a similar forum because the privilege would prevent mediation communications from being introduced at subsequent adversarial proceedings.

At least one author, Professor Lynn Rambo, has discussed the type and accuracy of information disclosed by parties in general settlement discussions.²⁸⁵ These general settlement discussions are analogous to information exchanged by parties in a mediation where the goal is resolution of the dispute. Rambo specifically addressed the contentions that cases most often settle when parties admit to weaknesses in their cases and that a party will feel free to admit such weaknesses when confidentiality exists.²⁸⁶ She found both contentions to be unrealistic.²⁸⁷ She found that confidentiality may encourage disclosure of information relevant to resolving a dispute, but not necessarily related to the true underlying facts.²⁸⁸ She contended that using confidentiality to preclude impeachment protects only dishonest parties.²⁸⁹

The likelihood of a party disclosing false or misleading information may be increased by the existence of privilege protection and the adversarial interests of the parties. It may also be fostered by the less than common interests between the mediator and a party. Unlike traditional privileges where a degree of necessity or

283. For purposes of article a "holder of the privilege" means the person in a privileged relationship providing information to the service provider in that relationship, i.e. the client in an attorney-client privilege relationship, the penitent in a priest-penitent privilege relationship, or the patient in a physician-patient privilege relationship. The service provider may hold privilege protection as well.

284. I am certainly not contending that all holders of a privilege fully disclose all relevant information to their service provider, or that the information they do disclose is true. However, I do believe that the more true and complete the information given to the service provider is, the more likely it will be that the service provider is better able to perform the services at issue, and the more likely it will be that the holder of the privilege benefits from the result.

285. See generally Rambo, *supra* n. 9.

286. *Id.* at 1069.

287. *Id.*

288. *Id.* at 1079.

289. *Id.* at 1081

loyalty is likely to exist between a service provider and a customer, parties to mediation may not feel any necessity to disclose information to the mediator and they may not feel any loyalty to her either.²⁹⁰ Parties to a mandatory mediation may have no intention of resolving a dispute at mediation or participating in the process in any meaningful manner. As opposed to traditional privilege relationships where the holder is more likely to benefit from sharing true information with the service provider, a party to a mediation may be more likely to benefit from providing a mediator with false or misleading information. Such information may mislead or confuse adversarial parties and mislead or misdirect the mediator. The Privilege Against Disclosure allows parties in mediation to use privilege protection to injure other parties. It is for this reason that privilege has not been, and should not be, applied to relationships of adversarial interests.

IV. CREATING MEDIATION CONFIDENTIALITY THROUGH CONTRACT PROVISIONS

I do not maintain that mediation can never benefit from confidentiality, I maintain that any benefits are situationally specific. Confidentiality may be a priority to some parties in some mediations. The perception of confidentiality may encourage those parties to disclose information they would otherwise conceal.²⁹¹

290. Note, *supra* n. 202, at 1357 ("The relationship between mediator and party differs in important ways from the relationships protected by traditional relational privileges. First, the relationship is likely to be a one time affair, lasting only as long as a single dispute continues. Second, the traditional relational privileges all promote some notion of loyalty between the litigating party and the privileged communicator. Because a mediator must have the same relationship with both parties, she cannot have the same type of loyalty interest at stake. Finally, the relationships protected by relational privilege rules are voluntary and can be dissolved more or less freely. In contrast, mediation - and thus the relationship between mediator and party - is compulsory in some contexts").

291. My position is predicated on parties operating under an express choice of confidentiality or no confidentiality. Given only those choices, I believe they would be more likely to disclose, and to disclose more fully, when confidentiality existed. I do not believe that disclosures would be increased, or the extent of disclosures would be increased, if parties were fully aware of the limitations to confidentiality protections. See *supra* nn. 148-158.

I also do not believe that disclosures would generally be decreased in a situation where confidentiality was not addressed. Research demonstrates that when confidentiality is made an issue, the existence of confidentiality becomes important and may influence disclosure and the extent of disclosure. When confidentiality is not made an issue, disclosures are not effected by the existence or non-existence of confidentiality. See *supra* nn. 104-113 (finding no statistically significant difference in disclosures between groups where confidentiality was not discussed and where confidentiality was mentioned generally (i.e. confidence was not made an issue), but finding a dramatic change when people were told specifically that there was no confidentiality (i.e. confidence was made an issue)).

The question that logically follows is "Doesn't everybody want confidentiality in mediation? (In other words, "Isn't confidentiality always an issue?") The answer is no. Lay persons do not appear to be greatly concerned with confidentiality. See Note, *supra* n. 119, at 1232. Confidentiality is likely to become important in mediation when lawyers are involved. See J. Brad Reich, *Med-Rec: the Next Logical Step in the Evolution of Lawyer Driven Mediation* (2001) (unpublished manuscript on file with the author) (discussing the increasing importance and control of lawyers in "lawyer driven mediation" and identifying that the interests and priorities of the lawyers largely control the structure of the mediation process). At least one study has shown that lawyers are a primary source of information for users and prospective users of mediation and other alternative dispute resolution devices. See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 Harv. Negot. L. Rev. 137, 170 (2000). If confidentiality is important to lawyers, and lawyers influence client demands or concerns of

The parties to a mediation are in the best position to know what they want and need from that mediation process.²⁹² If the parties want confidentiality in a specific situation, they can attempt to create it through contractual provisions. Confidentiality is a situationally specific issue. It is not a general public concern mandating the creation of a statutory privilege.²⁹³

In this section, I will argue there is no mechanism that truly guarantees confidentiality within mediation,²⁹⁴ but that well drafted contract provisions allow the parties to exercise self-determination and to delineate and control, to the best of their abilities, how information revealed during the mediation process should be treated. Contract provisions allow the parties the best opportunity to clearly state whether they want confidentiality, how extensive they both want and can expect that confidentiality to be, and how that confidentiality protection should be enforced. Contract provisions should be drafted prior to commencing mediation²⁹⁵ and should be intended to control the present and future treatment of information revealed during mediation.

A. Contract Provisions May Make Parties to Mediation Aware of Limitations on Confidentiality and Allow Them to Make Better Informed Decisions Regarding the Disclosure of Information During Mediation

The use of contract provisions may allow parties to better understand what they want and can reasonably expect confidentiality to be in a particular mediation. This increased understanding of the scope and limitations of confidentiality protection may allow parties to make better informed decisions regarding the disclosure of information during the mediation process.

Jurisdictions have attempted to define confidentiality protection through mechanisms including common law, statutory protections such as privileges or

mediation, confidentiality may be made into an important issue for clients and a lack of confidentiality may inhibit disclosure. This does not mean that confidentiality would have been important to clients, or that a lack of confidentiality would have caused a decrease in client disclosures, absent lawyers' influence.

292. Unsophisticated or inexperienced parties may need to consult an attorney or other sources to be fully aware of these wants and needs.

293. See Green, *supra* n. 10, at 32 ("[M]ediation has flourished without recognition of a privilege, most likely on assurance given by the parties and the mediator that they agree to keep mediation matters confidential." . . . "Thus, [assuming] the need for confidentiality in most cases is recognized, the need for a blanket privilege is not essential").

294. The various mechanisms used for creating confidentiality in voluntary mediation all have deficiencies, uncertainties, or limitations. *But see* Galton & Kovach, *supra* n. 202, at 967 (discussing statutory protections which may be argued to create absolute confidentiality in the separate context of court ordered mediation).

295. There may be an argument that parties may not know what form and extent of confidentiality protection they want until after mediation has begun, but a protection identified after disclosure is not a protection against past disclosure. Allowing parties to proceed through mediation without an agreement identifying the extent of confidentiality can create a situation where the issue of confidentiality quickly becomes moot, a party or parties may have already disclosed information gained during the mediation process.

categorical evidentiary exclusions, and interpretations of existing evidentiary rules.²⁹⁶ None of these create a true guarantee of confidentiality.²⁹⁷ While parties to mediation may not know it,²⁹⁸ each of these mechanisms is subject to court interpretation or enforceability,²⁹⁹ balancing of competing needs or interests,³⁰⁰ and categorical exclusions from protection.³⁰¹

Three of the more prominent sources of confidentiality were analyzed in the February, 2001, draft of the UMA.³⁰² The "categorical evidence approach"³⁰³ was dismissed as "too uncertain"³⁰⁴ because the drafters of the UMA³⁰⁵ believed that courts are hesitant to enforce provisions that eliminate an entire category of evidence.³⁰⁶ The "testamentary incapacity approach"³⁰⁷ was discussed and dismissed as "too constrained"³⁰⁸ because it would not have prevented compelled disclosures by the parties, only by the mediator.³⁰⁹ Finally, the "settlement discussion

296. State legislatures have enacted more than 250 mediation confidentiality statutes. See U.M.A. Reporter's Notes for § 2(1). Twenty-five have enacted confidentiality protections that apply generally to mediations in the state, while the other half include confidentiality protection within the provisions of specific substantive statutes, but lack general protections. *Id.* See generally Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N.D. L. Rev. 45 (1998); Macturk, *supra* n. 204. See also Ohio Cuyahoga Cty. Ct. R. 21.2, that appears to attempt to simultaneously create statutory categorical evidence protection, evidentiary exclusion, and testamentary incapacity. Ohio Cuyahoga Cty. Ct. R. 21.2 (1996).

297. See Leonard L. Riskin & James E. Westbrook, *Dispute Resolution and Lawyers* 221 (West Publ. Co. 1987) ("Confidentiality, although usually considered to be both an important aspect, and a functional necessity of mediation, is not universally guaranteed." "Traditional rules of evidence, court-created privileges, or contracts between the parties do not provide protection that is sufficiently great or clear to encourage the kinds of disclosures necessary to the fullest use of mediation"). *Id.* at 248.

298. It is unclear how frequently, or to what extent, mediators explain confidentiality and limitations on confidentiality to parties. If mediator explanations are similar to some lawyer explanations, it is highly unlikely that parties will be aware of limitations on confidentiality protection. See text accompanying nn. 132, 141-143. It is also highly unlikely that parties would be independently aware of the scope of mediation privilege protection. See Miller, *supra* n. 24.

299. See e.g. Fla. Stat. Ann. § 644.101 (West Supp. 1986).

300. See generally *Macaluso*, 618 F.2d at 54-55 (balancing the search for the truth and the congressional intent in creating the Federal Mediation and Conciliation Service). See also *Jaffee*, 518 U.S. at 9-13, 17-18; *Nixon*, 418 U.S. at 708-13; *In re Sealed Case*, 148 F.3d at 1075-79.

301. See generally Macturk, *supra* n. 204.

302. See Uniform Mediation Act with Prefatory Notes and Reporter's Notes* for § 5(5)(a)-(c) (prop. off. draft Feb. 2001).

*The February, 2001, Draft Uniform Mediation Act is a thirty-eight page document downloaded from www.pon.harvard.edu/guests/uma/NovUMAWP.htm. Approximately eight pages of the document are the provisions for the proposed Act. The remainder is composed of Prefatory Notes and Reporter's Notes.

303. The "categorical evidence approach" refers to creating a general evidentiary exclusion for a particular category of evidence. In the context of mediation, communications elicited during the mediation process would be entirely excluded from use as evidence at trial.

304. *Id.* See U.M.A. Reporter's Notes for § 5(5)(b) (Feb. draft).

305. *Id.*

306. This rationale is perplexing because the Privilege Against Disclosure could deprive a variety of tribunals, including courts, of an entire category of evidence as well.

307. The "testamentary incapacity approach" generally refers to making a mediator legally incompetent to testify as to communications made during mediation.

308. See U.M.A. Reporter's Notes for § 5(5)(c) (Feb. draft).

309. *Id.*

approach"³¹⁰ was dismissed as "too limited"³¹¹ because it would not apply to certain

310. The "settlement discussion approach" is based on Federal Rule of Evidence 408. See Fed. R. Evid. 408 (2000).

Rule 408 - Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Id.

The "settlement discussion approach" is particularly interesting when compared with the UMA search for mediation confidentiality protection. The settlement discussion approach uses Rule 408, or similar statutes, to create confidentiality in mediations. It has been argued that Rule 408 creates a general protection for communications made in mediation. See Ehrhardt, *supra* n. 25, at 96-97. But only a few states have applied their equivalent of Rule 408 to mediation specifically. See Macturk, *supra* n. 204, at 419.

Rule 408 is most interesting because of its purpose and inherent, but accepted, limitations. The purpose of Rule 408 is to promote negotiations that lead to settlement prior to trial. See Ehrhardt, *supra* n. 25, at 102. Where the equivalent of Rule 408 has been applied, its protection has been subject to at least three key exclusions. First, by its own language, Rule 408 does not protect evidence used for another purpose, such as impeachment or the establishment of bias. Second, Rule 408 protects only items in dispute and does not create confidentiality for items not in dispute. *Id.* See Jane Michaels, *Rule 408: A Litigation Minefield*, 19 Litig. 34, 35-36 (1992). Third, Rule 408 protects only information exchanged, it does not protect people transmitting or receiving that information. As an example, a person cannot use Rule 408 to quash a subpoena, although the Rule may limit the subjects which the person may be compelled to discuss. See Conrad, *supra* n. 296, at 48.

Without doubt, Rule 408 is a veritable minefield for those relying on its protection to keep settlement negotiations confidential, but there is no clarion cry to create an absolute Privilege Against Disclosure under Rule 408. Perhaps that is because while the courts and society recognize an interest in promoting the settlement of disputes, that interest is not sufficient to keep otherwise relevant evidence from the trier of fact under a wide variety of circumstances. However the UMA would create a privilege to prevent the type of exceptions found under Rule 408. See U.M.A. § 5(1)-(3) (Feb. draft).

The goals of mediation are unclear and subjective. See *supra* text accompanying n.n. 207-212. If we were to adopt the view of some authors and some lawyers that the purpose of mediation is settlement then we would be left with trying to justify a greater privilege for mediation, simply because it is mediation, than Rule 408 provides for the same goal and public policy in its protection of settlement discussions. See Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practices in Minnesota* 31 (Minn. Sup. Ct. Off. of CLE 1997) (Minnesota lawyer responses identified that the top two factors motivating them to voluntarily choose mediation were to "save litigation expenses" and because "settlement [was] more likely"). See also Bobbi McAdoo & Art Hinshaw, *Missouri Data* 13 (2000) (unpublished data summary on file with author) (Missouri lawyer responses identified that their top reason for voluntarily choosing mediation was that mediation "speed[s] settlement").

311. See U.M.A. Reporter's Notes for § 5(5)(a) (Feb. Draft).

proceedings and it would have several well recognized exceptions.³¹² According to the UMA each of these mechanisms was unable to create confidentiality for mediation communications, so it proposes the Privilege Against Disclosure. The problem is that the UMA privilege cannot guarantee mediation confidentiality either³¹³ and parties to mediation would not likely be aware of limitations on the privilege's scope of protection.³¹⁴

It is clear that when a mediation privilege has been legislated or otherwise recognized, it has not been absolute. Exceptions to confidentiality have been both expressly created and decided on a case by case basis. Mediation statutes include exceptions for "otherwise discoverable material,"³¹⁵ the "independent investigation exception,"³¹⁶ and "disclosure required by statute."³¹⁷ There are also exceptions covering the need to enforce mediated agreements,³¹⁸ exceptions relating to the overriding need for access to the information,³¹⁹ exceptions for subsequent litigation between the parties,³²⁰ exceptions dealing with professional misconduct,³²¹ exceptions necessary for the conduct of the mediation session,³²² exceptions regarding the commission of a future crime,³²³ and exceptions to prevent manifest injustice.³²⁴ Courts have created common law exceptions for cross examination in a juvenile proceeding,³²⁵ the necessity for ruling upon a motion for sanctions arising

312. UMA drafters felt the Settlement Discussion Approach would not apply to fora where the rules of evidence did not apply such as in discovery proceedings, administrative hearings, arbitration hearings, and certain pre and post trial proceedings. *Id.*

313. The UMA clearly anticipates limitations on the Privilege Against Disclosure. First, the proposed Privilege would apply to compulsory revelation of mediation communications in subsequent adversarial proceedings. See text accompanying n. 221. It would not provide confidentiality protection for voluntary disclosures in a non-adversarial context (i.e. the Privilege Against Disclosure would not prevent a party from revealing mediation communications at a press conference.) Second, the UMA specifically provides for limitations on its privilege protection through the use of a balancing test by the courts. See *supra* n. 147.

314. See *supra* text accompanying n. 298. In analogous studies very few attorneys informed clients as to limitations on confidentiality protection. See *id.* It is easy to surmise that mediators may behave similarly, especially if you give weight to the position that lawyers have an economic incentive to allow clients to believe that confidentiality is greater than it actually is. See *supra* text accompanying n. 154. A substantial number of mediators are also lawyers. Lawyer-mediators may bring the same economic priorities to the mediation process. See Note, *supra* n. 202, at 1356 ("what is truly at stake with a mediator's privilege is the promotion of the process of mediation rather than the protection of the relationship between mediator and party").

315. See e.g. Fla. Stat. Ann. § 61.183 (West Supp. 1997). See also Wash. Rev. Code § 5.60.070(1)(b) (Supp. 1994).

316. See e.g. Minn. Stat. Ann. § 494.02 (West 1990).

317. See e.g. Ariz. Rev. Stat. Ann. § 12-2238 (West 1994). See also Colo. Rev. Stat. Ann. § 13-22-307 (West Supp. 1996).

318. See e.g. Iowa Code Ann. § 679C.2 (West 2000). See also Me. Rev. Stat. Ann. § 4612 (1999).

319. See e.g. Colo. Rev. Stat. Ann. § 8-1-115 (West Supp. 1996).

320. See e.g. Ariz. Rev. Stat. Ann. § 12-2238(B)(2) (West 1994); Kan. Stat. Ann. § 5-512 (1996); Ohio Rev. Code Ann. § 2317.023 (Anderson 1996); Okla. Stat. Ann. tit. 12, § 1805(f) (West 1993); Tenn. Code Ann. § 36-4-130(b)(2) (1996); Va. Code Ann. § 8.01-581.22(ii) (Mite 1992).

321. See e.g. Minn. Stat. Ann. § 595.02 (West Supp. 1997).

322. See e.g. Kan. Stat. Ann. §§ 23-601 - 23-606 (1995).

323. See e.g. Colo. Rev. Stat. § 13-22-307(2)(b) (Supp. 1993).

324. See e.g. Ohio Rev. Code Ann. § 2317.023(c)(4); Wis. Stat. Ann. § 904.085(e) (West 1996).

325. See *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464 (1998).

out of court ordered mediation,³²⁶ and for the determination of the enforceability of agreement reached at mediation.³²⁷

As both statutes and common law demonstrate, there is no mediation privilege protection that is absolute. It is uncertain to what extent the Privilege Against Disclosure would actually create or protect mediation confidentiality. There is no reason to believe that the privilege, even if uniformly adopted, would be uniformly interpreted or applied and "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."³²⁸ On the other hand, a well drafted contract provision should recognize, on its face, that it does not create absolute confidentiality.³²⁹ It may even identify specific statutory exceptions to confidentiality in a particular jurisdiction.³³⁰ The ability to make an informed decision regarding disclosure, at least to the extent of understanding there is no absolute confidentiality for mediation communications, may be very important to the parties. Parties can then choose to participate in mediation and disclose information as they see fit.

B. The Level of Confidentiality Needed and Wanted in Mediation Varies and is Properly Defined by the Parties to a Particular Dispute

A multitude of commentators have posited that mediation needs confidentiality.³³¹ These authors seem to go forward as if there is some universal understanding of what confidentiality should be in mediation. Nobody seems to have asked the critical underlying question: "What do the parties in this particular mediation need confidentiality to be?"

326. See *Foxgate Homeowners' Assn. v. Bramalea Cal., Inc.*, 92 Cal. Rptr. 2d 916 (Cal. App. 2000), superseded by, 96 Cal. Rptr. 2d 441 (Cal. 2000) (holding that portions of a mediator's report about sanctionable conduct allegedly occurring during the mediation process, and evidence of statements made during that mediation, could be considered when ruling on a motion for sanctions).

On July 9, 2001, the Supreme Court of California over-turned the lower court's decision in *Foxgate* and held unanimously that there are no exceptions to the statutory confidentiality of mediation communications or to the statutory limits on the content of a mediator's reports. See *Foxgate Homeowners' Assn., Inc. v. Bramalea Cal., Inc.*, 108 Cal. Rptr. 2d 642 (Cal. 2001).

327. See *Olam v. Congress Mortg. Co., et al.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999), distinguished by, *Foxgate II*, 108 Cal. Rptr. 2d 642.

328. *Upjohn*, 449 U.S. at 393.

329. At a minimum a well drafted confidentiality contact provision should include language to the effect that "Information disclosed by the parties or the mediator during the mediation process may be revealed pursuant to court order or as otherwise required by law."

330. It should be the mediator's responsibility to identify these exceptions to parties who may not have sufficient expertise to be aware of statutory limitations on mediation confidentiality protection. If the parties are represented by counsel, that counsel may help identify these exceptions as well.

331. See generally *Freedman & Prigoff*, *supra* n. 29; *Riskin & Westbrook*, *supra* n. 296, at 221 ("Confidentiality (is) usually considered to be both an important aspect of, and in fact a functional necessity of, mediation"); *Galton & Kovach*, *supra* n. 202, at 952 ("Confidentiality is generally considered a fundamental hallmark of ADR and often, assumed to be essential to the process of mediation"). See also *Lee & Giesler*, *supra* n. 81, at 289 (arguing that "courts are willing to use their strongest judicial powers to preserve the confidentiality of the mediation process, an approach supported by the facts of th[is] cas[e] and also by a central tenet of mediation theory: that the process inherently requires a substantial guarantee of confidentiality to be effective").

Mediation is based on the principle of self-determination.³³² Voluntary mediation is, at its most basic level, a function of the decisions of the parties.³³³ The parties appear largely to choose to use mediation.³³⁴ Their choices control the structure of the mediation process, and their choices will determine whether an agreement is reached. The choices of the parties should also control the type and extent of confidentiality needed within a specific mediation. Many types of disputes may be mediated. Mediation may attract many levels of participants.³³⁵ Simply put, not all parties to mediation will want or need the same level of confidentiality.

Mediation is an alternative to traditional litigation. While some argue that mediation is increasingly becoming more like litigation,³³⁶ mediation has not lost the self-determination that is its base. The parties should be able to decide what confidentiality means to them and how extensive they want that protection to be. The most effective way to address those objectives is by drafting specific contract provisions before commencing mediation.³³⁷ A contract provision creating and defining confidentiality allows the parties to understand the obligations they are undertaking and the measure of protection they can likely expect.³³⁸ The provision should explicitly recognize that protection may be reduced or dissolved under certain circumstances.

I offer contract provisions as if no other form of protection was available to the parties. If such protection did exist, contract provisions could be used to

332. Model Standards of Conduct for Mediators, Standard 1 (Am. Arb. Ass'n et al.) ("A mediator shall recognize that mediation is based on the principle of self-determination by the parties").

333. I have also discussed mediation as an increasingly lawyer driven activity. See generally Reich, *supra* n. 291. The essence of that article was that lawyers greatly influence when mediation will occur, what interests will be addressed, and how the process will work. Even in lawyer driven mediation the truly final choices belong to the client or party. At a minimum, the parties always make the decision of whether or not agreement is reached.

334. My sense is that the majority of disputes are getting to mediation by voluntary choice, however I have never seen definitive data on this point. It may be that the majority of disputes are going to mediation as a result of court order.

335. Some parties to mediation may be sophisticated, or knowledgeable about their legal rights and personal priorities. Others may be unsophisticated and lack such knowledge. Less sophisticated parties may need or desire to exchange information with persons outside of the dispute or to have non-parties actually involved in the process. See Letter from Gregory Firestone to the Honorable Michael B. Getty, Chair, NCCUSL Uniform Mediation Act Committee on behalf of the Academy of Family Mediators, section 1 (Oct. 18, 2000). ("We are also aware that, in fact, some participants do talk with family members and others following mediation despite some state laws that currently provide that mediation is confidential").

The UMA has attempted to address the desire for non-party participation in the mediation process. See U.M.A. § 10 (May draft) ("An attorney or other individual designated by the party may accompany the party and participate in a mediation. A waiver of participation given before the mediation may be rescinded").

336. See e.g. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 Emory L.J. 1289 (1998).

337. See Freedman & Prigoff, *supra* n. 29, at 43 ("A confidentiality provision can be crafted with appropriate exceptions and flexibility to mitigate the disutilities of a blanket privilege").

338. On a related note, this understanding is becoming increasingly important with mediation services being conducted on-line. Absent a specific contractual provision, the parties may have little idea what confidentiality protection exists for their communication or under what law issues arising out of that protection will be decided.

clarify the parties' agreement and responsibilities regarding confidentiality.³³⁹ Contract provisions could be especially useful in jurisdictions which rely on "settlement discussion" or Rule 408³⁴⁰ protections.³⁴¹ The Rule 408 protection could be used as a starting point, with the parties utilizing contract provisions to identify any further expectations of confidentiality.³⁴²

C. Potential Concerns with Contract Provisions Creating Confidentiality

There is no perfect solution to the uncertainty of mediation confidentiality protection. Contract provisions allow the parties to specify what they want confidentiality to be in a particular mediation, but the use of contractual provisions also has potential weaknesses that must be addressed.

1. Contractual provisions are not binding on persons not party to the contract

If confidentiality is a priority to a party or parties in a mediation, then their concern for confidentiality may not be limited to the disclosure of information in subsequent adversarial proceedings. The party or parties may also be concerned with a general dissemination of information learned in mediation to the public.³⁴³

339. As an example, section 31-04-11 of the North Dakota Century Code generally renders evidence of any admission made in the course of mediation inadmissible as evidence in a subsequent judicial proceeding. It also prohibits the disclosure of such information except as required by statute. The code states that "this section does not limit compulsion or admissibility if:

1. The evidence relates to a crime, civil fraud, or violation under the Uniform Juvenile Justice Act;
2. The evidence relates to breach of duty by the mediator;
3. The validity of the mediated agreement is at issue; or
4. All persons who conducted or otherwise participated in the mediation consent to disclosure."

N.D. Cent. Code § 31-04-11 (1999). A contract provision could identify whether the parties had consented to disclosure under sub-section (4). That provision could assist a court in determining later issues of admissibility or disclosure based upon the existence of consent. *See id.* § 31-04-11(4).

340. *See* Fed. R. Evid. 408.

341. Rule 408, or its equivalent, appears to be the most uniform and common source of possible confidentiality protection. *See* Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* §§ 408-46, 408-59 (1995 & Supp. 1995) for a list of states adopting a similar statute.

342. *See* Green, *supra* n. 10, at 19. As an example, a contract provision could limit the disclosure of items discussed during mediation, even when those items may not be in dispute in a subsequent proceeding.

343. Persons using mediation for highly personal issues may be more concerned about disclosure to the public than use of information against them at trial. Fairly common examples include parties using dissolution of marriage mediation and parent-child mediation.

Shuman and Weiner addressed confidentiality between psychiatrists or psychologists and patients. Like mediation, psychiatry and psychology can also involve highly personal issues. The disclosure of information during these processes could create civil liability or criminal culpability, yet patients primarily wanted confidentiality for its protection from disclosure to the court of general public opinion, not a subsequent adversarial tribunal. Shuman & Weiner *supra* n. 50, at 83. *See supra* text accompanying nn. 123, 125.

The UMA Privilege Against Disclosure would not provide the type of confidentiality sought by these parties because its scope is limited to information elicited at legislative hearings or compelled revelation in subsequent adversarial proceedings.³⁴⁴

Contract provisions also cannot bind non-parties³⁴⁵ but, unlike the Privilege Against Disclosure, contract provisions can limit the risk of disclosure of mediation communications to and by general non-parties. Contract provisions can specifically limit the parties to the contract from disclosing information. By decreasing the initial dissemination of information, the contracting parties also decrease the likelihood that outside parties will be aware of information revealed during mediation and that those parties will have the opportunity to reveal that information to others.

It is likely that any form of confidentiality protection may be subject to judicial interpretation at some point. Non-parties seeking to pierce a confidentiality protection often turn to the courts for relief.³⁴⁶ Many courts have utilized forms of balancing tests, weighing the interests of the parties and the mediation process against the interests of the parties seeking disclosure.³⁴⁷ A clearly defined contract provision identifies the parties' expectations of confidentiality and the interests underlying those expectations. A clearly worded contractual provision may decrease the risk that a reviewing court will misconstrue the parties' interests or intent when seeking to define and balance competing interests. While there is no guarantee what a reviewing court will decide, contractual provisions may at least provide the courts with clear information upon which to render a decision.

2. Courts may void contractual confidentiality provisions as violative of public policy

The second concern with the use of contractual confidentiality protection is that a contract provision could be viewed as an attempt to suppress evidence and may be void as a matter of public policy.³⁴⁸ While some contend that "[c]onfidentiality in mediation is fundamentally at odds with a system of law favoring consideration of all relevant evidence,"³⁴⁹ various courts have recognized a significant difference between a contract created to suppress otherwise admissible or necessary evidence and one which more generally safeguards communications in order to promote a candid exchange of information. Those courts have held that contractual confidentiality protection will not be breached absent a sufficiently compelling reason.

344. See U.M.A. § 3(8) (May draft).

345. See Macturk, *supra* n. 203, at 417.

346. See *e.g.* *U.S. v. Ky. Utilities Co.*, 124 F.R.D. 146 (E.D. Ky. 1989), *rev'd*, 927 F.2d 252 (6th Cir. 1991).

347. See Conrad, *supra* n. 296, at 49.

348. Freedman & Prigoff, *supra* n. 29, at 41 ("In many situations, disputants agree at the outset of mediation that nothing said will be subsequently disclosed. These agreements are persuasive as to the parties' intent. However, courts may not uniformly uphold such agreements. Agreements to suppress evidence are generally void as against public policy").

349. See Freedman & Prigoff, *supra* n. 29, at 39.

In *Paranzino v. Barnett Bank of South Florida*,³⁵⁰ Paranzino sued Barnett Bank for breach of contract. The parties attended court ordered mediation while litigation was pending.³⁵¹ The parties did not resolve the dispute at mediation, but the parties did sign a contract binding them to keep information revealed at mediation in confidence.³⁵² Paranzino revealed facts and settlement offers to the Miami Herald. Barnett Bank moved for sanctions.³⁵³ The court dismissed the original case with prejudice, its most severe sanction.³⁵⁴ The appellate court upheld the sanction finding that "[i]f the trial court were to allow this willful and deliberate conduct to go unchecked, continued behavior in this vein could have a chilling effect upon the mediation process."³⁵⁵

In *Kentucky Utilities*, the Department of Justice and Kentucky Utilities settled an anti-trust action.³⁵⁶ The Lexington Herald-Leader newspaper then filed a motion to intervene, requesting copies of specific documents.³⁵⁷ The settlement agreement had required these documents to be destroyed.³⁵⁸ The newspaper sought a modification of that agreement.³⁵⁹ The court issued a ruling modifying the agreement.³⁶⁰ The Sixth Circuit reversed the decision employing a balancing test requiring the newspaper to prove its need for the documents outweighed the original parties' interests in preserving the terms of the Order and the public's interest in fostering and preserving settlements.³⁶¹

In both cases the courts specifically acknowledged the importance of protecting the confidentiality created by contract. In *Kentucky Utilities II*, the court recognized that society as a whole may benefit from the fostering of agreements promoted by confidentiality.³⁶² In *Paranzino*, the court was willing to use its strongest sanction to punish a party breaching a contract provision creating confidentiality in mediation.³⁶³ There may always be parties and persons unhappy with information unavailable to them who seek to use the court system to compel disclosure. It is the role of the courts to interpret laws, interpret contract language and intent, and to determine the scope and weight of public policy. It appears that the courts will continue to develop balancing tests, as in *Kentucky Utilities*,³⁶⁴ and use these tests to decide challenges to confidentiality protection.³⁶⁵ While there is no guarantee of confidentiality, a contractual provision can help the courts in these

350. 690 S.2d 725 (Fla. App. 1997).

351. *Id.* at 726.

352. *Id.*

353. *Id.*

354. *Id.* at 730.

355. *Id.* at 729.

356. *Ky. Utilities*, 124 F.R.D. at 147.

357. *Id.*

358. *Id.* at 148.

359. *Id.*

360. *Id.*

361. *U.S. v. Kentucky Utilities Co.*, 927 F.2d 252 (6th Cir. 1991) (hereinafter referred to as *Kentucky Utilities II*).

362. *Id.*

363. *Paranzino*, 690 S.2d 725.

364. *See Macaluso*, 618 F.2d 51.

365. The UMA anticipates courts using a balancing test in applying the Privilege Against Disclosure. *See supra* nn. 154, 313.

balancing tests by clearly setting forth the interests and expectations of the parties undertaking mediation. The courts will then have a clear expression of the parties' interests to use in their analysis.

3. Contractual agreements do not carry the same legal authority as privileges

A privilege is a unique protection. It exists because society has decided that the right or relationship protected by the privilege takes precedence over the principle that the trier of fact should have everyman's best evidence. It may be argued that contract provisions do not have the heightened legal status of, and will not be afforded the same level of protection, as a privilege.³⁶⁶ As a general legal principle that is undoubtedly true. However, in the mediation context, it is difficult to determine how much more weight or authority a privilege would carry than contract provisions.

At base level the extent of either protection is uncertain. Courts have upheld contract provisions creating confidentiality in the mediation process.³⁶⁷ It seems a reasonable assumption that courts have limited or voided contracts creating mediation confidentiality as well. Courts have both recognized a mediation privilege³⁶⁸ and refused to strictly apply such protection even when that protection existed by statute.³⁶⁹ Will contractual mediation confidentiality provisions always be enforced? No, but cases show that contract provisions carry legal import with the courts and are likely to be enforced. Will a privilege always be enforced? No, but it also appears they are likely to be enforced.

Privileges provide a unique level of protection, but that level of protection can be misleading because parties to mediation may not be aware of privilege limitations.³⁷⁰ For both privileges and contract provisions the likelihood of compelled disclosure is largely dependent on a court's determination of the value of the relationship seeking confidentiality. If mediators and parties are aware that contract provisions do not create absolute confidentiality, then the use of contract provisions is more intellectually honest than the use of privilege.³⁷¹ Parties using

366. See *Olam*, 68 F. Supp. 2d at 1120 ("[T]here may well be greater judicial reluctance to compel disclosure when the word 'privilege' attaches, especially if the privilege is hoary and central to long standing perceptions of professional self-interest").

367. See generally *Lee & Giesler*, *supra* n. 81.

368. See *Folb*, 16 F. Supp. 2d 1164; *Sheldone*, 104 F. Supp. 2d 511.

369. See *Rinaker*, 74 Cal. Rptr. 2d 464; *Foxgate*, 92 Cal. Rptr. 2d 916; *Foxgate*, 25 P.3d 1117; *Olam*, 68 F. Supp 1110.

370. See *Kentra*, *supra* n. 81, at 722 ("Mediation would not be nearly as effective if the parties were not assured their discussions would remain private"). This belief may even be perpetuated by the courts themselves. See *Lee & Giesler*, *supra* n. 81, at 294 ("In *Bernard*, participants' only formal notice of their confidentiality duties consisted of court orders that failed to address any potential exceptions, aside from consent. The court orders simply stated: "The entire mediation process is confidential").

371. Professor Kirtley sums up what may be the response of many privilege proponents to my position on contract provisions. See *Kirtley*, *supra* n. 202, at 2 ("Often written agreements to mediate are signed specifying, among other things, that parties will not reveal mediation information, the mediator cannot be subpoenaed and any exceptions to confidentiality. While such agreements may create expectations of confidentiality their enforceability is problematic. Because the law views courts as entitled to 'every man's evidence,' public policy forbids contracting to exclude evidence. Agreements between individuals

well-drafted contract provisions will not be misled into the false security of absolute confidentiality. They know up front that compelled disclosure is a possibility. They are not relying on a level of protection that does not exist and may cause them, and the mediation process as a whole,³⁷² injury. Well drafted, and understood,³⁷³ contract provisions allow the parties to specify what they want and expect from confidentiality in a particular mediation. Party awareness created by contract drafting and review may be greater than party awareness of a privilege largely predicated on a mediator's explanation, especially when that explanation may or may not occur and may or may not be accurate.

V. CONCLUSION

There is an old adage that counsels to "Buy cheap and sell early." Adopting the Privilege Against Disclosure would cause us to buy cheap and sell cheap, and it would make the purchase and sale of subsequent privileges even cheaper. With each new privilege created under the standard of "everybody knows it's important" both new and existing privileges become worth less. With each privilege created under the lack of standards necessary to allow enactment of the Privilege Against Disclosure, privilege protection moves farther from unique and closer to common.

The standard of "reason and experience" should be used by state legislatures considering the Privilege Against Disclosure. Some may complain that the standard is difficult to satisfy. It is supposed to be. Those seeking privileges are seeking the exception to the rule that a court and society is entitled to every man's best evidence. Their burden should be high. If the standard is easy to satisfy, many relationships will be privileged and privilege will lose the uniqueness that is its primary power and importance. The Privilege Against Disclosure fails both components of the "reason and experience" standard. There is no compelling empirical argument that mediation needs confidentiality and the privilege fails all four requirements of the Wigmore analysis as well.

are not permitted to restrict the court's access to testimony in pursuit of justice. As a result, mediation participants are ill advised to rely on contract theory as a means of preserving mediation confidentiality").

Kirtley broadly asserts that "public policy forbids contracting to exclude evidence." *Id.* However, courts have upheld confidentiality created by contract provisions. *See Paranzino*, 690 S.2d 725; *Kentucky Utilities*, 124 F.R.D. 146; *Kentucky Utilities II*, 927 F.2d 252. *See also* text accompanying nn. 349-352. Kirtley then argues that "mediation participants are ill advised to rely on contract theory." Kirtley, *supra* n. 202, at 11. I submit that mediation participants are more ill advised to rely on the mediator's blanket promise that "whatever is said in this room stays in this room" and are better served by relying on contract provisions that, even under Kirtley's own analysis, specifically identify "any exceptions to confidentiality." *Id.* at 10.

372. *See Lee & Giesler, supra* n. 81, at 296 ("The danger . . . is that participants will conclude that the initial assurances of confidentiality had no substantive meaning, and may question the integrity of the entire [mediation] process").

373. I recognize that there may be parties to mediation who may not understand clearly worded contract provisions. My sense is that the parties are more likely to understand contract provisions than be made aware of the extent of confidentiality protection by a mediator or through independent knowledge.

I am well aware of Mark Twain's general skepticism of numbers.³⁷⁴ I recognize that the data I have presented is susceptible to different interpretations.³⁷⁵ Even if it could be viewed as creating a compelling empirical and societal justification for the Privilege Against Disclosure, privilege is not an appropriate mechanism for creating mediation confidentiality. Privileges have never been applied to relationships of competing or adversarial needs. Ignoring the precedent of privilege will create protections that are worth less and that is not fair to the relationships that truly warrant privilege protection.

There is no mechanism that guarantees complete confidentiality. There is no empirical proof that mediation needs confidentiality, but a party or parties to a mediation may want it. If parties want a measure of confidentiality, they can attempt to create it through contract provisions. Contract provisions reflect mediation's principle of self-determination, and specify the parties' expectations and responsibilities for information revealed during the mediation process. Contract provisions can be used to create confidentiality protection when there is none. Contract provisions can increase or clarify protection desired by the parties in light of existing confidentiality protections.

I have called for intellectual honesty because so much of the justification for confidentiality in mediation, and the resulting Privilege Against Disclosure, is speculation or belief and the arguments are merely opinions. Granted they are dogmatic opinions, but they are opinions nonetheless. A privilege takes away probative evidence from a trier of fact. It renders a court unable to make a full determination based on all relevant facts because certain facts are specifically excluded by the privilege. Without question there are circumstances or relationships that justify such exclusion, but we must question the basis of these circumstances or relationship through intellectual honesty and empirical examination. If we do not do so, we sell that which should be precious, cheap. In effect we become inverse alchemists, turning scarce gold into common lead.

374. "There are three kinds of lies: lies, damn lies, and statistics." *Dictionary of Quotations* 318 (Robin Hyman ed., Natl. Textbook Co. 1985) (quoting Mark Twain, *Autobiography* (P.F. Collier & Son Co. 1924)).

375. I readily admit that the data I have presented can be interpreted in many different ways. However I submit that the data can reasonably be interpreted in two ways, while satisfaction of the "reason and experience" standard would require it to be interpreted in a third.

I submit that the data does not demonstrate that mediation needs confidentiality or that a legal privilege creates the disclosure of information in analogous relationships. Others could interpret the data as inconclusive, and take the position that they cannot determine if there is a correlation between confidentiality and disclosure. I do not believe that the data can reasonably be interpreted to provide a compelling justification for the contention that mediation needs confidentiality or that confidentiality in mediation promotes greater disclosure.