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Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should Be Embraced and Broadened

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Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened

*Peter Robinson**

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I. INTRODUCTION

The National Conference of Commissioners on Uniform State Laws and House of Delegates of the American Bar Association recently approved the Uniform Mediation Act ("UMA") with an eye toward unifying the law of mediation confidentiality in the United States. Soon, numerous states and other organizations will consider modifying statutes, court rules, or professional standards to conform to the UMA. One of the important aspects of mediation confidentiality is how it applies when enforcing a mediated agreement.¹ In some jurisdictions, mediation confidentiality interferes with the application of contract law when enforcing a mediated agreement to produce absurd results. This article will examine the UMA's exception to mediation confidentiality when enforcing a mediated agreement, and conclude that for some jurisdictions it is a step in the right direction and, generally, should be expanded.

1. Two scholars whose contributions on this topic have greatly benefited the author are Ellen E. Deason (*Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U. Cal. Davis L. Rev. 33 (2001)) and Scott H. Hughes (*The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marq. L. Rev. 9 (2001)), whose observations sparked an interest in how courts were handling the conflict between mediation confidentiality and the application of the common law of contracts in enforcement proceedings.

II. THE UMA'S EXCEPTION TO MEDIATION CONFIDENTIALITY FOR THE ENFORCEMENT OF MEDIATED AGREEMENTS

The UMA's exception to mediator confidentiality in proceedings regarding the enforcement of mediated agreements is in Section 6. The pertinent parts provide:

Section 6. Exceptions To Privilege

...

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator 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 interest in protecting confidentiality, and that the mediation communication is sought or offered in:

...

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection . . . (b) (2)

Before analyzing this exception and suggesting that it be expanded, it is important to recognize that this standard is more permissive than the current law in some states. Providing context for comparison will enable a better discussion of the UMA proposal.

III. SOME JURISDICTIONS EMPLOY EXTREMELY LIMITED EXCEPTIONS TO MEDIATION CONFIDENTIALITY

Many states have statutes that preclude the breaching of mediation confidentiality with the only "exception" to be the presentation of the settlement agreement to the court.² A few states have decided against creating an absolute shield around mediation communications so that mediation confidentiality can be breached to prevent fraud or manifest injustice.³ The stricter approach to mediation confiden-

2. See Deason, *supra* n. 1, at 46 n.33 (citing relevant state statutes: Colo. Rev. Stat. Ann. § 13-22-302(2.5) (West 1997); Conn. Gen. Stat. § 52-235d(b)(2) (Supp. 2000); Fla. Stat. Ann. § 44.102(3) (West Supp. 2001); Mont. Code Ann. § 26-1-813 (3) (1999); N. C. Gen. Stat. § 7A-38.1 (f) (1999); 42 Pa. Consol. Stat. Ann. § 5949(b)(1), (c) (West 2000); Va. Code Ann. § 8.01-576.10 (2000) (court ADR program); Wash. Rev. Code Ann. § 5.60.070(1)(e) (West 1995)).

3. *Id.* at 48 nn. 38-40 (noting Louisiana, Ohio, and Wisconsin statutes allow courts to breach mediation confidentiality if the judge determines that it is necessary to avoid fraud or manifest injustice;

tiality would prevent courts from exploring and justly deciding controversies that might arise out of mediated agreements.⁴

California's mediation confidentiality provisions are illustrative of jurisdictions with extremely limited exceptions to mediation confidentiality.⁵ In addition to declaring the contents of a mediation confidential, California's statute requires all parties to expressly agree to the mediator's release of information regarding a mediation (other than whether an agreement was reached) to a civil court.⁶ Another area of California's Evidence Code goes so far as to declare that mediators are incompetent to testify in civil proceedings except in contempt or disciplinary situations.⁷

Two provisions of the California statutory scheme extend mediation confidentiality to prevent testimony in enforcement proceedings. One code section states that mediation confidentiality shall extend to the same extent after the mediation ends.⁸ Another section specifies the language that needs to be included in the mediated agreement for the mere written agreement to be admissible for enforcement purposes.⁹ The result is a mediation confidentiality statutory scheme

citing: La. Stat. Ann. § 9:4112(B)(1)(c) (2000); Ohio Rev. Code Ann. § 2317.023(C)(4) (Anderson 1998); Wis. Stat. Ann. § 904.085(4)(e) (West 2000)).

4. See *infra* § IV.B.2.a-g.

5. Cal. Evid. Code Ann. § 1119(a)-(c) (West 2001):

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

6. Cal. Evid. Code Ann. § 1121 (West 2001):

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

7. Cal. Evid. Code Ann. § 703.5 (West 2001):

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

8. "Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends." Cal. Evid. Code Ann. § 1126 (West 2001).

9. Cal. Evid. Code Ann. § 1123 (West 2001):

that makes *no* provisions for exceptions for contract enforcement proceedings unless all the parties, including the mediator, waive mediation confidentiality.¹⁰

It should not be a surprise that the courts struggled to apply such a strict mediation confidentiality statute with limited exceptions generally and no exceptions for enforcement purposes. One court created an implied exception to the statute based on a balancing test to protect a constitutional “due process right” to cross-examine and impeach a witness in a juvenile delinquency proceeding.¹¹

A year later, another court expanded the balancing test creating a judicial exception to mediation confidentiality in a proceeding to enforce a mediated settlement agreement.¹² *Olam v. Congress Mortgage Co.* was decided by U.S. Magistrate Judge Wayne Brazil¹³ applying California mediation confidentiality law. *Olam* involved an allegation by a 65-year-old woman that her signature on a mediated agreement settling a pending civil action had been obtained through “undue influence.”¹⁴ Both of the parties waived the mediation confidentiality protection provided by Evidence Code 1119 and requested that the mediator testify in an

Written settlement agreements; conditions to admissibility:
A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

- (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- (b) The agreement provides that it is enforceable or binding or words to that effect.
- (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
- (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

10. Cal. Evid. Code Ann. § 1122(a)(1) (West 2001):

Communications or writings; conditions to admissibility:

- (a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:
 - (1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

11. *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 469 (1998). In *Rinaker*, the California court of appeal required a mediator to testify in a juvenile delinquency hearing. *Id.* at 465. Prior to that hearing, a mediation was conducted in a parallel civil harassment suit brought by the victim of the alleged juvenile offenders. *Id.* at 467. At the subsequent juvenile delinquency hearing, defense counsel informed the judge that during mediation the victim, who was the complaining witness in the delinquency proceeding, had admitted he had not actually seen the perpetrators of the alleged criminal acts. *Id.* Defense counsel also stated that the testimony of the mediator was essential for impeachment purposes if the witness’s testimony in the delinquency hearing was at variance with the witness’s statement in mediation proceeding. *Id.* The trial court found that California’s mediation confidentiality statutes did not apply because the delinquency hearing was criminal in nature. *Id.* at 468. The California court of appeal countered that juvenile delinquency proceedings are civil in nature but that the trial court’s decision should stand because of due process concerns regarding the cross-examination of adverse witnesses. *Id.* at 470. The California court of appeal established precedent for a balancing test pitting the public policy of mediation confidentiality against other public policy values and if the latter outweighs the former then confidentiality must yield. *Id.*

12. *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

13. It is important to recognize that Magistrate Brazil is a knowledgeable and respected supporter of mediation, so his decision regarding the piercing of mediation confidentiality in the *Olam* proceeding is worthy of careful consideration..

14. *Olam*, 68 F. Supp. 2d at 1118.

evidentiary hearing regarding the enforceability of the mediated agreement.¹⁵ The mediator, who was on the staff of the court, was deemed to have a statutory privilege that was not waived.¹⁶ The question for the court was whether the mediator's testimony could be compelled without the mediator waiving his privilege.¹⁷

In a lengthy and thoughtful opinion, Judge Brazil carefully acknowledged the importance that confidentiality provides to the mediation process.¹⁸ Notwithstanding, the court employed the two-prong test set out in *Rinaker*, balancing the type and magnitude of harm from compelling the mediator to testify, against the type and magnitude of harm that would result if the mediator's testimony were not accessible in the pending proceeding.¹⁹

The plaintiff alleged that she had been subjected to undue influence in the mediation, and that she lacked capacity to understand or consent to the purported agreement reached in the mediation.²⁰ If the court found that these allegations were true, the agreement, as a matter of law, should be voided. Moreover, the referring court should likely be interested in learning about circumstances of whether a party or mediator coerced another into reaching an agreement in court-connected mediation.

Determining that the only reliable evidence as to the plaintiff's condition at the mediation could come from the mediator, Magistrate Judge Brazil described the harm of compelling mediator testimony by acknowledging that, ". . . [t]o force [mediators] to give evidence that hurts someone from whom they actively solicited trust (during the mediation) rips the fabric of their work and can threaten their sense of the center of their professional integrity."²¹ He reasoned that this harm was at least partially discounted in this case because all parties to the mediation wanted the mediator to testify.²² He also reasoned that harm of compelling mediator testimony "can vary with the nature of the testimony that is sought."²³ Outweighing that admittedly valid concern, however, was "the fundamental duty of a public court in our society to do justice."²⁴ Judge Brazil also acknowledged an interest in reassuring "the community and the court about the integrity of the mediation process that the court sponsored."²⁵ After painstakingly weighing the relative harms in the *Olam* litigation, the court ordered the mediator to testify.²⁶

About a year later, the California Supreme Court used a case involving sanctions to declare that implied or judicially created exceptions to mediation confidentiality are invalid.²⁷ In *Foxgate Homeowners Assn., Inc. v. Bramalea Cal. Inc.*, the trial court appointed a retired judge as both a special master for discovery and as a mediator.²⁸ The order of appointment empowered the special master/mediator

15. *Id.* at 1129.

16. *Id.* at 1129 n. 23.

17. *Id.* at 1129.

18. *Id.* at 1130-33.

19. *Id.* at 1136.

20. *Id.* at 1118.

21. *Id.* at 1134.

22. *Id.*

23. *Id.*

24. *Id.* at 1136.

25. *Id.* at 1137.

26. *Id.* at 1139.

27. *Foxgate Homeowners Assn. v. Bramalea Cal. Inc.*, 25 P.3d 1117 (Cal. 2001).

28. *Id.* at 1120.

to make orders governing the attendance of parties and their representatives at mediation conferences.²⁹ It also provided that all privileges applicable to mediation would be in effect.³⁰ The special master/mediator scheduled the initial mediation sessions and instructed the parties to show up with their experts.³¹ At the first mediation session, which was supposed to be a discussion among all parties' experts in the construction defect case, the defendant showed up without his experts, essentially making the process pointless.³² The plaintiff moved for sanctions, based on the defendant's "bad faith" refusal to meaningfully participate in the mediation process, claiming that such actions caused it to incur unnecessary expenses in expert witness fees.³³ Foxgate's moving papers were supported by a report from the special master/mediator to the court recommending sanctions.³⁴ The defendant objected to the special master/mediator's report, citing California Evidence Code Sections 1119 and 1121 prohibiting mediator reports of the mediation to the court, but the trial court accepted the report of the special master/mediator and awarded \$30,578.43 in sanctions.³⁵

On review, the California Court of Appeals upheld consideration of as much of the special master/mediator's report as consisted of a "strictly neutral account of the conduct and statements being reported along with such other information as required to place the matters in context."³⁶ The *Foxgate* appellate court reasoned that judicial construction is permitted "of an apparently unambiguous statute where giving literal meaning to the words of the statute would lead to an absurd result."³⁷ The court acknowledged the importance of confidentiality in mediation, but emphasized that good faith participation in court-ordered mediations was equally important, and that mediation confidentiality should not serve as a shield to protect sanctionable conduct nor to strip the court of its power to police and control its own processes.³⁸ In *Foxgate*, the California Supreme Court disagreed with the lower court of appeals that a judicially created exception to the mandated confidentiality was necessary to carry out legislative intent or "to avoid an absurd result."³⁹ Rather, it declared:

Section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation. Section 1121 also prohibits the mediator, but not a party, from advising the court about *conduct* during the mediation that might warrant sanctions. It also prohibits the court from considering a report that includes information not expressly permitted to be included in a mediator's report.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1121.

35. *Id.* at 1122.

36. *Id.* at 1123.

37. *Id.* at 1122.

38. *Id.* at 1122-23.

39. *Id.* at 1125.

The submission to the court, and the court's consideration of, the report of Judge Smith violated Sections 1119 and 1121.⁴⁰

Without citation, the court declared: ". . .the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process."⁴¹ The court noted that competing policy matters, including concerns about bad faith participation during a mediation that are otherwise sanctionable during litigation, trial proceedings, or professional misconduct in mediation, are policy matters for the legislature.⁴²

According to the court, the legislative intent was in fact to ensure confidentiality so that the candid discussion essential to effective mediation is promoted.⁴³ The court's decision on one level appears obvious -- mediation confidentiality can only be breached where expressly permitted by statute.⁴⁴ Yet, the court acknowledged that such absolute protection must yield to "supervening" rights such as the constitutional due-process based exception recognized in *Rinaker v. Superior Court*.⁴⁵

It is important to note that the *Foxgate* decision distinguished *Olam* on the grounds that in *Olam* both parties had waived their mediation confidentiality privilege. The distinction is illusory because the California statute (and the UMA) empowers the mediator with an independent right to assert his mediator privilege. Thus, after *Foxgate*, the law in California is a strict mediation confidentiality statute with the Supreme Court of California forbidding judicially created exceptions. Since there is no statutory exception to mediation confidentiality for proceedings to enforce a mediated agreement, courts are left to resolve enforcement questions without piercing mediation confidentiality.

IV. STRICT MEDIATION CONFIDENTIALITY CREATES ABSURD ENFORCEMENT RESULTS

Many mediators view the strict confidentiality approach as necessary to protect the mediation process.⁴⁶ Mediation confidentiality's interference with enforcement proceedings will be relatively rare because parties to a settlement agreement almost always voluntarily satisfy the terms of the settlement agreement.⁴⁷ While statistically infrequent, judicial involvement in a proceeding to enforce a mediated agreement often reveals legitimate and complicated concerns about the practice of mediation that sometimes question the integrity of the process. Requiring strict confidentiality in those infrequent instances when a party

40. *Id.* at 1125-26.

41. *Id.* at 1128.

42. *Id.*

43. *Id.* at 1126.

44. *Id.*

45. *Id.* at 1127.

46. *See id.* at 1126 n.12 (noting that every mediation association in California that filed an *amicus* brief encouraged the court to maintain confidentiality).

47. *See Olam.*, 68 F. Supp. 2d at 1125.

requests court intervention through an enforcement proceeding severely handicaps the courts as they address some of the most profound concerns about mediation.

A. Issues Raised in Proceedings to Enforce Mediated Agreements

Consider the allegations that have confronted courts across the country in proceedings to enforce or avoid mediated agreements:

Whether an agreement was reached:

- after reaching an oral agreement in a mediation, one party later adds additional terms to the written settlement agreement;⁴⁸
- after reaching a written mediated agreement that provides for a future “full and complete release, mutually agreeable to both parties,” one party includes a clause or term in the release that was not discussed at the mediation;⁴⁹
- after reaching a mediated settlement agreement that mutually released the parties from all claims, the defendant submitted a general release that contained new terms;⁵⁰
- after agreeing to the general terms of a one-page mediated agreement, the retired judge mediator later expanded the agreement to a thirty-three page order;⁵¹
- the parties entered an agreement in principle or bare bones agreement that did not address all issues;⁵²
- one party maintained that the mediated settlement agreement was only an agreement to agree and not intended to be a final and binding settlement;⁵³
- the parties agreed to a schedule of payments that would be secured by a promissory note, but later could not agree on the promissory note’s rate of interest;⁵⁴

48. *Riner v. Newbraugh*, 563 S.E.2d 804, 806-07 (W. Va. 2002).

49. *Chappell v. Roth*, 548 S.E.2d 499, 500 (N.C. 2001).

50. *Jaynes v. Austin*, 2001 WL 1176424 (6th Cir. Sept. 25, 2001).

51. *Weddington Prod., Inc. v. Flick*, 71 Cal. Rptr. 2d 265, 267-68 (1998).

52. *Stempel v. Stempel*, 633 S.2d 26 (Fla. Dist. App. 1994); *Thermos Co. v. Starbucks Corp.*, 1998 WL 299469 at *2 (N.D. Ill. May 29, 1998). See also *Bartos v. Farm Credit Bank of St. Paul*, 1990 WL 32385 at *1 (Minn. App. Mar. 27, 1990).

53. *Walk Haydel & Assoc. Inc. v. Coastal Power Prod. Co.*, 720 S.2d 372, 373 (La. App. 1998); *Coulter v. Carewell Corp.*, 21 P.3d 1078, 1081 n.2, (Okla. Civ. App. 2001).

54. *Montanaro v. Montanaro*, 946 S.W.2d 428, 431 (Tex. App. 1997).

- the parties reached an agreement regarding a disputed boundary, but disagreed whether this resolution included the placement of a fence;⁵⁵
- the parties disagreed about whether an agreement consisting of two pages scribbled by the mediator and signed by both parties and their attorneys was an enforceable agreement or merely a summary of terms for further discussion;⁵⁶
- the parties agree to the settlement amount, but not the tax consequences;⁵⁷

Fraud:

- a party injured in an auto accident was led to believe that the policy limit was \$100,000 when it was actually \$1.25 million;⁵⁸
- a party asserts that the final draft of a complex settlement agreement removed the conveyance of mineral rights that were previously agreed to;⁵⁹
- a party's counsel made misrepresentations regarding whether a key witness would testify if the case were to proceed to trial;⁶⁰
- a party was lied to by her own attorney, the mediator, and a third party;⁶¹
- a party relied on misrepresentations by her union that she was only entitled to six months back-pay when she may have been entitled to eighteen months of back pay;⁶²
- a wife asserted that her husband had misrepresented his financial information during a divorce proceeding;⁶³
- a party maintains that the mediator wrongly informed them that they should settle because any award they would receive would go directly to pay the creditors listed in his bankruptcy;⁶⁴

55. *Howard v. Ramsey*, 2001 WL 228015 at *1 (Ohio App. Mar. 9, 2001).

56. *Sunburst Estates II Homeowners Assn v. Sunburst Estates I Homeowners Assn.*, 2001 WL 1515815 at *4 (Cal. App. Nov. 29, 2001).

57. *Moore v. Lieberman*, 2001 WL 490777 at *1 (Conn. Super. Apr. 23, 2001).

58. *Brinkerhoff v. Campbell*, 994 P.2d 911, 913 (Wash. App. 2000).

59. *Brown v. Brown*, 2002 WL 1343222 at *2 (Tex. App. June 21, 2002).

60. *Graf v. Sholes*, 1998 WL 297519 at *1 (Minn. App. June 9, 1998).

61. *Vela v. Hope Lumber & Supply Co.*, 966 P.2d 1196, 1198 (Okla. Civ. App. 1998).

62. *Palmer v. U.S. West Communications, Inc.*, 2002 WL 1288701 at *2 (10th Cir. June 12, 2002).

63. *Crupi v. Crupi*, 784 S.2d 611, 614 (Fla. Dist. Ct. App. 2001); *Boyd v. Boyd*, 67 S.W.3d 398, 404-05 (Tex. App. 2002).

- a party in a construction defect case asserted that they were told that the settlement agreement would be binding upon the sub-contractors;⁶⁵
- one party averred that the opposition presented appraisers with false information;⁶⁶

Conditions Precedent to Binding Agreement:

- the final term of a mediated settlement agreement stated it was “subject to execution of a formal agreement consistent with the terms herein”;⁶⁷
- a mediated agreement provided that counsel “will draft more formal settlement documents for review and approval by the other counsel”;⁶⁸
- a mechanic’s report, which was a condition precedent to the parties’ mediated agreement, was contested;⁶⁹
- one party alleges an implied condition precedent that an accounting firm would correctly apply an agreed upon net-loss formula;⁷⁰
- a party delayed making a payment specified in the mediated agreement because it considered the court’s execution of a stipulation judgment a condition precedent to its performance under the mediated agreement;⁷¹
- conditions precedent to formation of settlement agreement were never fulfilled;⁷²

Mistake:

- a scrivener’s error in a mediated agreement led to a \$600,000 wind-fall for one party;⁷³

64. *Chitkara v. New York Tel. Co.*, 2002 WL 31004729 at *1 (2nd Cir. Sept. 6, 2002).

65. *Vick v. Waits*, 2002 WL 1163842 at *1-2 (Tex. App. June 4, 2002).

66. *Cox v. Hicks*, 2001 WL 881356 at *3 (Tenn. Ct. App. Aug. 7, 2001).

67. *Golding v. Floyd*, 539 S.E.2d 735, 736 (Va. 2001).

68. *Lerer v. Lerer*, 2002 WL 31656109 at *3 (Tex. App. Nov. 26, 2002).

69. *Forysiak v. Laird Marine & Mfg.*, 2001 WL 1256402 at *2 (Ohio App. 6th Dist. Oct. 19, 2001).

70. *Tarrant Distrib. Inc. v. Heublein Inc.*, 127 F.3d 375, 379 (5th Cir. 1997).

71. *Clayton v. Henry*, 1999 WL 89945 *1 (Tex. App. Feb. 24, 1999).

72. *In re Hudgins*, 188 B.R. 938, 942 (Bankr. E.D. Tex. 1995).

73. *DR Lakes Inc. v. Brandsmart U.S.A. of W. Palm Beach*, 819 S.2d 971, 972-73 (Fla. Dist. Ct. App. 2002).

- both parties were mistaken as to the cash value of insurance policies used as consideration in a mediated agreement.⁷⁴
- one party alleged that there was a mistake regarding whether to credit a pre-mediation payment of \$40,000 toward the \$75,000 agreed to at the mediation;⁷⁵
- a party settled a contested claim to participate in an ESOP for \$150,000, but a subsequent IRS determination established his right to participate and receive \$900,000;⁷⁶

Duress:

- a governmental agency made repeated threats of criminal prosecution unless the civil case was immediately settled in the mediation;⁷⁷
- a mediator threatened to inform the trial judge that the failure to reach agreement was one party's fault and that this party would not get custody of frozen embryos;⁷⁸
- the mediator would not allow a party to leave the mediation without an agreement although he was complaining of chest pains and had a history of heart problems;⁷⁹
- a party claimed that their own attorney coerced them into signing their settlement agreement;⁸⁰
- a party maintained that the only reason they signed the agreement was because the other party applied economic duress upon them;⁸¹
- a party asserted that the mediator as well as the opposing party and their counsel pressured her to sign the settlement agreement while she was in the middle of a family health emergency;⁸²
- a party imparted that she only signed the agreement so she could go home after attending a fourteen hour mediation held on the day of

74. *Cain v. Saunders*, 813 S.2d 891, 893 (Ala. Civ. App. 2001).

75. *Feldman v. Kritch*, 824 S.2d 274, 276 (Fla. Dist. Ct. App. 2002).

76. *Liquidation of Prof. Med. Ins. Co. v. Lakin*, 88 S.W.3d 471, 475 (Mo. App. W.D. 2002).

77. *F.D.I.C. v. White*, 76 F. Supp. 2d 736, 737 (N.D. Tex. 1999).

78. *Vitakis-Valchine v. Valchine*, 793 S.2d 1094 (Fla. Dist. Ct. App. 2001).

79. *Randle v. Mid Gulf, Inc.*, 1996 WL 447954 at *1 (Tex. App. Aug. 8, 1996).

80. *Lype v. Watkins*, 1998 WL 734429 at *1 (Tex. App. Oct. 22, 1998).

81. *E.I. DuPont De Nemours & Co. v. Custom Blending Intl. Inc.*, 1998 WL 842289 at *1-2 (Del. Ch. Nov. 24, 1998).

82. *McKinlay v. McKinlay*, 648 S.2d 806, 808 (Fla. Dist. Ct. App. 1995).

her first husband's funeral where her car was seriously damaged when it was hit during the course of the mediation;⁸³

- party claimed that she was left almost completely alone for the entirety of a fifteen hour mediation session, was in a weakened physical and emotional state, and was in great physical pain.⁸⁴

Agreements Against Public Policy:

- the mediation process violated the due process rights of a mother waiving her parental rights;⁸⁵

- a plaintiff with ADEA claims unknowingly and involuntarily waived her rights in a mediated agreement;⁸⁶

- the parties agreed to perform an illegal act in the mediated agreement.⁸⁷

Ambiguity of the Terms of the Agreement:

- an issue of whether a mediated agreement entitled a party to half of stock options realized by her husband after the mediated agreement was signed but before entry of judgment;⁸⁸

- a question of whether a settlement agreement in a workers' compensation case also settled discrimination and wrongful termination claims;⁸⁹

- a dispute whether a specified payment was strictly limited for educational purposes for an MBA at William and Mary;⁹⁰

- a dispute whether an agreement to pay wife's credit cards was limited to the two disclosed at the mediation or should be extended to the seven she had;⁹¹

- the parties disagreed over whether their performance was to be delivery of \$68,500.80 worth of machinery parts or to give a 30% dis-

83. *Berg v. Bregman*, 2002 WL 31256677, *3 (Cal. Ct. App. Oct. 8, 2002).

84. *Olam*, 68 F. Supp. 2d at 1141.

85. *In re T.D.*, 28 P.3d 1163, 1167 (Okla. Civ. App. 2001).

86. *Jacobs v. N.Y. Fin. Ctr. Hotel*, 1997 WL 375737 at *1 (S.D.N.Y. July 7, 1997).

87. *In re Kasschau*, 11 S.W.3d 305, 309 (Tex. App. 1999).

88. *Ansley v. Ansley*, 2002 WL 1991193 at *1-2 (Tex. App. Aug. 30, 2002).

89. *Grimes v. Andrews*, 997 S.W.2d 877, 881 (Tex. App. 1999).

90. *Baker v. Baker*, 1999 WL 1318855 at *1-2 (Va. Cir. Ct. Aug. 5, 1999).

91. *Ex parte Littlepage*, 796 S.2d 298, 299 (Ala. 2001).

count on future orders of machinery parts for a total discount of \$68,500.80;⁹²

• parties disagreed over the meaning of the phrase: “discount for present value.”⁹³

Strict mediation confidentiality’s absurd enforcement results are demonstrated by contrasting how the above cases would be approached in two instances: the first is an unfettered application of contract law; the second is if the contested agreement had been created with the assistance of a mediator in a jurisdiction with strict confidentiality like California.

B. The Enforcement of Settlement Agreements is Normally Governed by the Law of Contracts

In the absence of mediation confidentiality, the law of contracts governs settlement agreements.⁹⁴ The law of contracts consists of the collection of requirements that define when a commitment rises to the level of triggering legal enforceability.⁹⁵ Needless to say, the volumes of cases and treatises regarding the law of contracts cannot be summarized here. However, it should be noted that such sources reflect centuries of experience in defining and articulating fairness and justice in the administration and enforcement of agreements.⁹⁶ For the purposes of this article, suffice it to liberally paraphrase “the Teacher” in saying, “There are few new contract issues under the sun.”⁹⁷ Specifically, many of the scenarios described above could benefit from the “rules of law” that developed out of preceding cases with similar facts.⁹⁸

A simple examination of the “Restatement of the Law of Contracts, Second Edition” reveals that the laws of contract culminate in standards defining the conditions necessary for, among other things:

- the formation of a binding agreement (including capacity, offer, acceptance, and consideration);⁹⁹
- the voiding of an otherwise binding agreement (including mistake, misrepresentation, duress, and undue influence);¹⁰⁰

92. *Cleveland Trencher Co., Inc. v. Transtexas Transmission Co.*, 2002 WL 31272366 at *1 (Tex. App. Sept. 30, 2002).

93. *Lau Family Partn. Ltd. v. Nirtag U.S., Inc.*, 2002 WL 997741 at *1 (Tex. App. May 16, 2002).
 94. *Kendrick v. Barker*, 15 P.3d 734, 738 (Wyo. 2001); *McEnany v. W. Del. County Cmty. Sch. Dist.*, 844 F. Supp. 523, 534 (N.D. Iowa 1994); *Coulter*, 21 P.3d at 1082; *Feldman*, 824 S.2d at 277.

95. 17 C.J.S. *Contracts* § 3 (2002).

96. See Ronald C. Griffin, *Contracting in the Americas: Part I*, 34 Washburn L.J. 232, 234-36 (Spring 1995).

97. See *Ecclesiastes* 1:9 (stating “[T]here is no new thing under the sun.”) (King James).

98. See Deason, *supra* n. 1, at 38 (observing that, “[t]o the extent contract principles embody society’s view of appropriate consent, applying them to avoid unjust enforcement of agreements can be crucial to maintaining party autonomy and keeping informed consent at the heart of mediation”).

99. *Restatement (Second) of Contracts* §§ 9-94 (1981).

100. See *id.* §§ 151-177.

- declaring an otherwise binding agreement unenforceable on the grounds of public policy (promises in restraint of trade or marriage; promises involving the commission of a tort or violation of a fiduciary duty; term exempting from liability harm caused intentionally, recklessly, or negligently; term exempting from consequences of misrepresentation; or unconscionability);¹⁰¹
- the meanings of the terms of a binding agreement (interpretation, supplying an omitted essential term, the effect of a written agreement/the parol evidence rule, course of dealing and customary practice, and construing conditions in agreements);¹⁰²
- the effect of performance and non-performance (effect on other party's duties of a failure to render or offer performance, partial performance or breach, and circumstances significant in determining whether a failure is material);¹⁰³
- impracticability of performance and frustration of purpose (death or incapacity of person necessary for performance, prevention by governmental regulation or order, partial and temporary impracticability);¹⁰⁴ and
- assignment and delegation.¹⁰⁵

For agreements created in the absence of a mediator, the above cases identifying issues affecting the enforcement of mediated agreements would be resolved by applying the pertinent doctrines of contract law to each alleged scenario.

1. Contract Law Relies on the Totality of the Circumstances to Resolve Issue Arising Out of Agreements

Standard contract law for assessing the enforceability of an agreement often requires a review of circumstances occurring during contract formation. A court's view should be broad enough to consider "all of the relevant circumstances of the transaction."¹⁰⁶ Under this broad approach, a reviewing court seeks to ascertain the parties' intentions and give effect to the contract.¹⁰⁷ The broad approach is favored because it tends to show what was in the minds of the parties in light of all the surrounding circumstances.¹⁰⁸ As Professor Wigmore so aptly put it, "Having themselves locked up the idea in the words, they must furnish the key to

101. *See id.* §§ 178-199.

102. *See id.* §§ 200-230.

103. *See id.* §§ 231-260.

104. *See id.* §§ 261-272.

105. *See id.* §§ 316-343.

106. Arthur L. Corbin, *Corbin on Contracts* § 4.12 at 630-31 (Joseph M Perillo ed., rev. ed., West 1993).

107. *Id.*

108. *Id.* *See also* *Weston v. Ball*, 116 A. 99, 100 (N.H. 1922).

unlock it.”¹⁰⁹ The key is found in all of the circumstances that surround the contractual agreement.¹¹⁰

The “totality of the circumstances” standard is as broad as it sounds: courts have looked well beyond information within the four corners of a settlement document, examining factors regarding the parties and their representatives, the attitude of the parties, and the surrounding circumstances of the negotiations leading up to the settlement.¹¹¹ In the context of a settlement agreement that purports to waive or release federally-based claims, for example, courts have construed the “totality of the circumstances” surrounding the settlement to include an array of factors consisting not only of the individual party’s education and business experience, the clarity of the agreement, and presence of counsel, but also aspects that could only be adduced by looking to the negotiation process itself.¹¹² This includes the party’s “input in negotiating the terms of the settlement, the amount of time . . . for deliberation before signing, whether the party actually read the release and considered its terms before signing it, and whether the release was induced by improper conduct on the defendant’s part.”¹¹³ In applying these factors, a court reviewing the settlement of an employee’s disability discrimination claims looked to the employee’s “level of input into the settlement,” the number of hours he had to deliberate on the proposed settlement, and the “pace” and structure of the settlement meeting, as well as how others involved in the settlement conference behaved toward him in weighing the “totality of the circumstances.”¹¹⁴

Totality of the circumstances specifically includes “evidence of prior or contemporaneous agreements and negotiation.”¹¹⁵

109. John Henry Wigmore, *Evidence in Trials at Common Law* vol. 9, § 2465, 223 (James H. Chadbourn ed., rev. ed., Little, Brown & Co. 1981).

110. See Restatement (Second) of Contracts § 202 (1981).

111. *Cornell v. Delco Electronics Corp.*, 103 F. Supp. 2d 1116, 1120-21 (S.D. Ind. 2000).

112. *Id.*

113. *Id.* (citing with approval, *Pierce v. Atchison, Topeka and Santa Fe Ry., Co.* 65 F.3d 562, 571 (7th Cir. 1995). See also *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399, 403 (2nd Cir. 1989); *Torrez v. Public Service Co. of New Mexico, Inc.*, 908 F.2d 687 (10th Cir. 1990).

114. *Cornell*, 103 F. Supp. 2d at 1122.

115. *Restatement (Second) of Contracts* § 214 (1981):

Evidence of Prior or Contemporaneous Agreements and Negotiations:

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

- (a) that the writing is or is not an integrated agreement;
- (b) that the integrated agreement, if any, is completely or partially integrated;
- (c) the meaning of the writing, whether or not integrated;
- (d) illegality, fraud, duress, mistake, lack of consideration or other invalidating cause;
- (e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

2. Resolving Mediated Agreement Enforcement Issues by an Unfettered Application of Contract Law

a. Cases Questioning Whether there was a Definite Agreement on all Essential Terms

Contract law requires a “definiteness of essential terms” for an agreement to be considered enforceable. Professor Williston summarizes this requirement as follows:

It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable courts to give it an exact meaning.¹¹⁶ In particular . . . a provision that some matter shall be settled by future agreement has often caused a promise to be too indefinite for enforcement. The Restatement suggests as an illustration of this a building contract which is definite in all particulars except for a provision that the form of window fastening shall be afterwards agreed upon This would not make the entire building contract unenforceable; by contrast, if the nature of the window fastenings were fixed by the agreement while the dimensions of the building were left to future agreement, there would be no enforceable obligation. Obviously, the question is one of degree.¹¹⁷

Simply, as one court has stated it, “[A] meeting of the minds of the parties is a sine qua non of all contracts.”¹¹⁸ The more modern view reflected in the UCC and Restatement (Second) of Contracts is to “. . . ask essentially two questions: first, did the parties intend to contract, and second, is there a reasonably certain basis for giving an appropriate remedy.”¹¹⁹

Courts have often applied this principle of contract law to resolve whether mediated agreements should be enforced. Whether to enforce the mediated agreement hinges on the degree of essentialness of the alleged indefinite term. Thus, the above cases involving whether there was an agreement on all essential terms would be resolved by determining whether the disputed term was essential enough to constitute a failure to agree on an essential term.¹²⁰ If the disputed terms were

116. *1 Williston on Contracts* § 4:18, 414-20 (4th ed. 1990).

117. *Id.* at § 4:28, 602-05 (quoted in *Weddington*, 71 Cal. Rptr. at 278).

118. *Riner*, 563 S.E.2d at 809 (quoting *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 157 W. Va. 93, 199 S.E.2d 308 (1973) (quoting *Martin v. Ewing*, 112 W. Va. 332, 164 S.E. 859 (1932))).

119. *See Williston* § 4:18, at 425.

120. *See Chappell*, 548 S.E.2d 499 (refusing to enforce entire settlement agreement when a portion of agreement does not constitute “a meeting of the minds”); *Riner*, 563 S.E.2d 804 (finding no valid agreement when one party subsequently added terms that were not discussed during the mediation which released them from all current and future claims and assigned future expenses related to the performance of the settlement agreement to the opposing party); *DeGarmo v. DeGarmo*, 499 S.E.2d 317 (Ga. 1998) (where the Georgia Supreme Court split with three justices dissenting over the issue of whether a mediated agreement that specified certain issues for resolution in the future resolved all essential terms); *Weddington*, 71 Cal. Rptr. 2d 265 (reversing enforcement of mediation agreement after finding a lack of agreement to the essential terms of a licensing agreement, the essence of the

terms were determined to be essential, the mediated agreement would not be enforced for failure to reach a comprehensive agreement.¹²¹ If the additional disputed terms were determined to be ministerial or non-essential, the mediated agreement would be enforced.¹²² Mediated agreements have also been voided when essential terms have been found to be ambiguous and beyond interpretation.¹²³

b. Cases Questioning Whether a Mediated Agreement was Accomplished by Duress or Coercion

Contract law recognizes that sometimes one party forces the other party to agree to the terms of a contract. This is remotely related to a lack of a meeting of minds of the parties. If one party forces the other to terms with which they do not agree, there is no meeting of minds, only the force of one mind dominating the written instrument.¹²⁴ Essentially there is a lack of agreement. Duress and coercion can be evidenced by pressure placed on one party via threats of legal or bodily harm.¹²⁵ Basically, duress is “. . . any wrongful act or threat which overcomes the free will of a party.”¹²⁶ Duress is evidenced by a restraint, intimidation, or compulsion to such an extent as to induce another person to commit an act which they are not legally bound to commit and contrary to their will.¹²⁷

Some jurisdictions apply an objective standard requiring the alleged coercive event to be of such severity, either threatened, impending, or actually inflicted, so

parties' conflict); *Thermos*, 1998 WL 299469 (determining that the main issue regarding the redesign of the coffee tumbler was never settled, thus, the oral mediated agreement was not binding); *Schwartz v. Adamson*, 1999 WL 170676 (Minn. App. Mar. 30, 1999) (refusing to enforce a settlement agreement because there was a lack of agreement as to whether windows in the plaintiff's home would need to be replaced); *Walk Haydel*, 720 S.2d 372 (enforcing a handwritten settlement agreement that contained figures and conditions precedent and releases but did not resolve all the issues between the parties); *Sunburst Estates II*, 2001 WL 1515815 (finding a mediated agreement executed and signed by parties and counsel unenforceable and lacking mutual assent on the basis that, among other things, one side viewed the document “as merely setting forth terms for further discussion” and “did not intend to be bound by the mediator's notes.”); *Stempel*, 633 S.2d 26 (affirming a judgment that added “ministerial” terms to a bare bones mediated agreement); *Montanaro*, 946 S.W.2d 428 (finding agreement on all essential terms in a mediated agreement despite the inability to agree on the terms of an acceleration clause and rate of interest in a promissory note that served as security for specified payments); *Moore*, 2001 WL 490777 (finding that a failure to agree on the tax structure of a settlement constituted a failure to agree on all essential terms).

121. See *Weddington*, 71 Cal. Rptr. 2d 265; *Chappell*, 548 S.E.2d 499; *Riner*, 563 S.E.2d 804; *Thermos*, 1998 WL 299469; *Schwartz*, 1999 WL 170676; *Sunburst Estates II*, 2001 WL 1515815; *Moore*, 2001 WL 490777.

122. See *Walk Haydel & Assoc.*, 720 S.2d 372; *Montanaro*, 946 S.W.2d 428.

123. *In re U. S. Brass Corp.*, 277 B.R. 326 (E.D. Tex. 2002) (describing where a mediated agreement never defined the term “unit” but provided that payment for each “unit” would be \$940, and was declared unenforceable because of vagueness); *F&K Supply, Inc. v. Willowbrook Development Co.*, 732 N.Y.S.2d 734 (N.Y. App. Div. 2001) (finding that a mediated agreement which only vaguely alluded to “certain claims” and did not clarify which members of the group of multiple defendants were represented by and bound by the agreement was impenetrably vague and uncertain and, thus, unenforceable).

124. John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 9.2 (4th ed. 1998).

125. *Id.*

126. *Id.*

127. *McClellan v. McClellan*, 873 S.W.2d 350, 351 (Tenn. App. 1993).

as to overcome the mind and will of a person of ordinary firmness.¹²⁸ However, the overwhelming weight of authority treats duress as a subjective test. Thus, the operative inquiry is whether the person has been overcome in such a manner as to cause them to operate in a manner contrary to their free will.¹²⁹ If answered in the affirmative, the contract may be voided for duress. For either the subjective or the objective test, the court must examine the words and actions of the parties involved. The courts may well inquire whether the complaining party vocalized their concerns at the time of contract formation.¹³⁰

Courts have often applied this principle of contract law to resolve whether mediated agreements should be enforced. The enforceability of the mediated agreement has depended upon the type and degree of pressure exerted, and the effect it had on the other party.¹³¹ Some courts have specified that the “duress” must emanate from one who is a party to the contract.¹³² Thus, courts have examined the words and actions of the parties and mediator in creating the mediated agreement and determined whether one party’s assent to the agreement was contrary to his free will. In most cases, the allegation of duress was rebuffed and the mediated agreement enforced.¹³³ There are cases where the mediated agreement was not enforced because of duress.¹³⁴

128. *Id.*

129. Calamari & Perillo, *supra* n. 124, at § 9.2.

130. *In re Marriage of Baltins*, 260 Cal. Rptr. 403 (Cal. App. 1st Dist. 1989).

131. See *Palmer* 2002 WL 1288701 (although plaintiff felt pressure to accept the settlement, the evidence did not show the type of duress needed to avoid the contract); *Olam.*, 68 F. Supp. 2d 1110 (sixty-five-year old female party to mediated agreement asserted that her assent was the product of undue influence because she was susceptible to pressure due to emotional and physical distress; she was completely exhausted at the end of a fifteen hour mediation during which she was left alone almost the entire time, was not spoken to, and in great physical pain); *Randle*, 996 WL 447954 (appellate court overturned summary judgment enforcing the mediated agreement upon finding possible duress where a party to a mediation was placed in grave danger that was not warranted under the circumstances; the party had a history of heart trouble, had not taken his medication that day and was beginning to experience chest pains; when he informed the mediator of his need to leave and why, he was told that he could not leave until a settlement was reached.); *Vitakis-Valchine*, 793 S.2d 1094 (court remanded case to determine if mediator engaged in misconduct by threatening a divorcing party that he would tell the judge that it was her fault that a settlement agreement was not reached and that she would never get custody of frozen embryos and that the parties had five minutes and then had to “get out of here”); *F.D.I.C.*, 76 F. Supp. 2d 736 (court found no duress despite assertions of potential criminal charges being filed against a party if they did not settle a civil case in the mediation); *Berg*, 2002 WL 31256677 (party to mediation settlement agreement claimed that the signed agreement was a product of undue influence because: the mediation took fourteen hours; she was incapacitated by medications, fatigue and the fact that the mediation was taking place on the same day as her ex-husband’s funeral, her car was struck and sustained substantial damage during the mediation; and that she was influenced to sign by her attorney; the court found that because she did not complain nor outwardly display any signs of incapacity her agreement was absent undue influence); *Goodman v. Hokom*, 2001 WL 1531187 (Cal. App. 2d Dist. Dec. 4, 2001) (party to mediation settlement agreement later asserts claim of duress; court finds claim is unfounded); *Custom Blending Int’l., Inc.*, 1998 WL 842289 (in which a court rejected a theory of duress because the other side threatened protracted and expensive litigation already pending); *Crupi*, 784 S.2d 611 (where a claim of coercion on the grounds of taking Xanax and feeling pressure to settle was denied).

132. *Vitakis-Valchine*, 793 S.2d 1094; *Lype v. Watkins*, 1998 WL 734429 (Tex. App. Oct. 22, 1998); *In re Marriage of Banks*, 887 S.W.2d 160 (Tex. App. 1994).

133. See *Olam*, 68 F. Supp. 2d 1110; *F.D.I.C.*, 76 F. Supp. 2d 736; *Berg*, 2002 WL 31256677; *Custom Blending Int’l. Inc.*, 1998 WL 842289; *Crupi*, 784 So. 2d 611.

134. See *Randle*, 1996 WL 447954; *Vitakis-Valchine*, 793 S.2d 1094.

c. Cases Questioning Whether an Agreement should be Voided because of Mistake

A mutual mistake occurs when both parties to an agreement believe and rely on information or an assumption that, while they believe it to be true, is actually false.¹³⁵ If the mistake results in an exchange of values that is deeply iniquitous, then the contract can be voided unless the risk of such a mistake was allocated as part of the terms of the contract.¹³⁶ A court will dissolve a contract for mutual mistake but rarely for a unilateral mistake.¹³⁷ This is usually because the party with a unilateral mistake entered the contract with limited knowledge that he thought to be sufficient to consummate the deal.¹³⁸ When a party enters a deal relying on his later discovered insufficient knowledge that party will not be let out of the deal unless the other party knew or had reason to know that the party with the limited knowledge was relying on such knowledge and that it was insufficient.¹³⁹ An example of a mutual mistake is when both parties believe a fact to be true and it is not. For a court to find a mutual mistake that voids a contract, it would determine that neither party could possibly know the meaning attached by the other party. If and when this type of case arises, there is no meeting of the minds; hence, there never was a contract.¹⁴⁰

135. Mistake Defined: A mistake is a belief that is not in accord with the facts.

Restatement (Second) of Contracts, *supra* n. 115, § 151:

When Mistake of Both Parties Makes a Contract Voidable

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

Restatement (Second) of Contracts § 152.

136. *Calamari & Perillo*, *supra* n. 124, § 9.26.

137. *Restatement (Second) of Contracts* § 153.

When Mistake of One Party Makes a Contract Voidable.

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in §154, and

- (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
- (b) the other party had reason to know of the mistake or his fault caused the mistake.

Id.

138. *Restatement (Second) of Contracts* §154.

When a Party Bears the Risk of a Mistake

A party bears the risk of a mistake when

- (a) the risk is allocated to him by agreement of the parties, or
- (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Id.

139. *Id.*

140. See e.g. *Beck v. Reynolds*, 903 P.2d 317 (Okla. 1995) (court refused to enforce a settlement agreement where both parties negotiated based on the mistaken belief that the defendant's insurance coverage totaled \$200,000 when it actually totaled \$1.1 million).

Courts have applied this concept of contract law to resolve whether mediated agreements should be enforced.¹⁴¹ The enforceability depends upon whether both parties rely on mistaken information, and whether one of the parties knew or should have known the meaning attached to a material term by the other. Courts have refused to enforce mediated agreements due to mutual mistake¹⁴² and enforced the mediated agreements because any mistake was merely unilateral.¹⁴³

d. Cases Questioning the Enforceability of an Agreement because of Fraud

Contract law voids agreements that are the result of fraud. Fraud requires a false representation that is known or should have been known to be false by the representing party, with the intent to deceive the other party into making a contract.¹⁴⁴ It is crucial for the defrauded party to show deception and reliance in proving the fraud.¹⁴⁵ The defrauded party must show that they believed the falsehood and relied on the falsehood in forming the contract.¹⁴⁶ Further, where a duty of disclosure exists, non-disclosure (as opposed to affirmative misrepresentation) can be treated as grounds to invalidate a contract.¹⁴⁷ Therefore, misrepresentation or concealment may be grounds to invalidate a contract.

Courts have applied this contract law principle to determine whether to enforce mediated agreements.¹⁴⁸ The enforceability depends on whether the state-

141. *DR Lakes Inc.*, 819 S.2d 971 (court refused to enforce a mediated settlement agreement when a scrivener's error led to a \$600,000 windfall to the plaintiff); *Feldman*, 824 S.2d 274 (plaintiffs sued insurance company on uninsured motorist claim and were paid \$40,000 as a pre-mediation payment; after entering a mediated settlement agreement to settle the case for \$75,000, the insurance company wanted to rescind the agreement because it claimed that both parties made the mistake of not including the pre-mediation payment as a partial payment of the \$75,000; the court enforced the settlement agreement as it was written; it found through the testimony of the mediator that there was no mutual mistake as no other figures were discussed except the \$75,000 and that if there was a mistake it was unilateral and on the part of the insurance company); *Liquidation of Prof. Med. Ins. Co.*, 2002 WL 1396084 (court denied request to rescind mediated settlement agreement because the alleged mistake was, among other things, regarding a future contingent legal right and not a question of fact). *But see Cain*, 813 S.2d 891, *cert. denied*, (in which an Alabama appellate court split 3-2 in support of a trial court that refused to accept testimony regarding an alleged mutual mistake in the making of a mediated settlement agreement).

142. *See DR Lakes Inc.*, 819 S.2d 971.

143. *See Feldman*, 824 S.2d 274.

144. *Calamari & Perillo*, *supra* n. 124, § 9.14. *See e.g. Harriman v. Maddocks*, 518 A.2d 1027 (Me. 1996) (court found sufficient evidence to overturn summary judgment where plaintiff alleged that they were fraudulently induced to sign a complete release form when they were led to believe that it applied only to vehicle damage).

145. *Calamari & Perillo*, *supra* n. 124, § 9.15.

146. *Id.* (citing with approval *Eslamizar v. American States Ins. Co.*, 894 P.2d 1195 (Or. App. 1995)).

147. *See id.* at §§ 9.13, 9.20. *See also Avary v. Bank of Am.*, 72 S.W.3d 779 (Tex. App. 2002).

148. *See Boyd*, 67 S.W.3d 398 (affirming trial court's ruling that divorce settlement was unenforceable because husband failed to disclose a \$230,000 bonus as part of their marital property); *Graf*, 1998 WL 297519 (overturning trial court finding of fraud where one party to a mediation was told by her attorney during the course of the mediation that one of their material witnesses would not testify if they proceeded to trial; party later found out that the statement was false and sought to void the mediated settlement agreement); *Palmer*, 2002 WL 1288701 (finding that "[a]s a general rule, actionable fraud cannot consist of unfulfilled predictions or erroneous conjectures as to future events. . . . Merely expressing an opinion in the nature of a prophecy as to the happening of a future event is not actionable."); *Crupi*, 784 S.2d 611 (upholding a mediated divorce settlement despite allegations by the ex-

ments were sufficiently false,¹⁴⁹ whether they were knowingly false,¹⁵⁰ and whether the reliance is justified.¹⁵¹ Courts have found cases where sufficient evidence of potential fraud in mediation negotiations has been present¹⁵² and absent.¹⁵³

e. Cases Questioning the Enforceability of an Agreement as Contrary to Public Policy

Contract law refuses to enforce some agreements contrary to public policy, which means generally they are agreements that society has decided not to condone.¹⁵⁴ These are sometimes called illegal or unconscionable contracts. For example, in most states, it is illegal to contract for sexual relations. There are essentially “two kinds of agreements that violate public policy: first, those that obviously tend to injure public morals, public health, or confidence in the administration of law; and second, those that destroy the security of individuals’ rights to personal safety or private property.”¹⁵⁵

Courts have applied this concept of contract law to resolve whether to enforce a mediated agreement.¹⁵⁶ When deciding whether to enforce the mediated agree-

wife that her ex-husband had fraudulently misrepresented his financial information during the mediation); *Avary*, 72 S.W.3d 779 (determining that there was sufficient evidence of a fraudulently induced settlement agreement to defeat summary judgment and remand for discovery regarding this and other related issues); *Brinkerhoff*, 994 P.2d 911 (reversing trial court’s order of enforcement and remanding so that an evidentiary hearing may be conducted to determine if misrepresentations were made in a mediation); *Gelfand v. Gabriel*, 2002 WL 1397037 at *4 (Cal. App. June 27, 2002) (trial and appellate courts found that the discovery of “facts subsequent to the settlement that would have disputed plaintiff’s claim does not render plaintiff’s representations made at the time of the mediation fraudulent,” proof must be offered to show that the plaintiff knew the representation was false and then justifiably reliance on that representation).

149. See *Crupi*, 784 S.2d at 613.

150. See *Palmer*, 2002 WL 1288701.

151. The Second Circuit wrote:

The nature of mediation is such that a mediator’s statement regarding the predicted litigation value of a claim, where that prediction is based on a fact that can be readily verified (in this case, that the Title VII claim proceeds will go to creditors in plaintiff’s pending bankruptcy), cannot be relied on by a counseled litigant whose counsel is present at the time the statement is made.

Chitkara, 2002 WL 31004729 at *2.

152. See *Avary*, 72 S.W.3d 779; *Brinkerhoff*, 994 P.2d 911; *Boyd*, 67 S.W.3d 398.

153. See *Graf*, 1998 WL 297519; *Crupi*, 784 S.2d 611; *Palmer*, 2002 WL 1288701; *Gelfand*, 2002 WL 1397037 at *4.

154. *Restatement (Second) of Contracts* § 179.

Bases of Public Policies Against Enforcement

A public policy against the enforcement of promises or other terms may be derived by the court from

- (a) legislation relevant to such a policy, or
- (b) the need to protect some aspect of the public welfare, as is the case for the judicial policies

against, for example,

- (i) restraint of trade (§§ 186-188),
- (ii) impairment of family relations (§§ 189-191), and
- (iii) interference with other protected interests (§§ 192-196, 356).

155. *Schmidt v. U.S.*, 912 P.2d 871, 875 (W.D. Okla. 1996).

156. See *In re T.D.*, 28 P.3d 1163 (applying strict judicial scrutiny to a mediated agreement that waived parental rights and found the agreement unenforceable as against public policy because due

ment, the court looked to whether the agreement could be performed without violating the law, the agreement accomplishes an end that is contrary to the public good like releasing a parent from all accrued and future child support obligations, or whether a party surrendering important rights was acting voluntarily and with intelligent comprehension of their actions.¹⁵⁷

f. Cases Involving Conditions Precedent to Contracts

A condition precedent is any event that the parties agree must happen before the contract becomes binding.¹⁵⁸ For example, if Party A tells Party B that “if you walk across the Brooklyn Bridge at 6 p.m. tomorrow, I will wash your car for \$50.” The condition preceding any duty on the part of Party A to wash B’s car is if B walks across the Brooklyn Bridge at 6 p.m. the next day. If B does not, then the offer to wash B’s car is null and void.

Courts have been called on to determine if mediated agreements contained explicit condition precedents and if those conditions had been satisfied,¹⁵⁹ as well as allegations of implied conditions precedent.¹⁶⁰ Courts have looked to whether the future event was merely contemplated or whether it was specified as a condition to settlement.¹⁶¹

g. Cases Involving Ambiguous Contract Terms

Contract law determines how to deal with an allegation that a contract term is ambiguous. Courts will examine the agreement and determine if its words or phrases are ambiguous as a matter of law.¹⁶² In making this determination the court should first give the words “a reasonable, lawful, and effective meaning.”¹⁶³ If the parties are from a specialized field such as insurance or science, then any term of art from that industry should be given its general meaning within that industry.¹⁶⁴ If all of the words, as presented, point to a singular reasonable mean-

process rights were not protected); *In re Kasschau*, 11 S.W.3d 305 (refusing to enforce a mediated agreement because it provided for the destruction of evidence of illegal tape recordings of telephone conversations).

157. *In re T.D.*, 28 P.3d 1163.

158. *Restatement (Second) of Contracts* § 224: “Condition Defined: A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.”

159. See *Golding*, 539 S.E.2d 735 (noting where a clause in a mediated agreement specifying that the agreement was “subject to the execution of a formal agreement” was deemed to create a condition precedent); *Lerer*, 2002 WL 31656109 (where a provision in the mediated agreement providing that counsel “will draft more formal settlement documents” was deemed not to be a condition precedent); *Forsyiak*, 2001 WL 1256402 (describing where an expert’s report was deemed a condition precedent to the mediated agreement; once the expert “determined that the engines were operable, then the case was settled”); *Clayton*, 1999 WL 88945 (rejecting a party’s claim that the court’s execution of a stipulated judgment was a condition precedent to its performance under the mediated agreement).

160. *Tarrant Dist., Inc.*, 127 F.3d 375 (refusing to imply that an accounting firm’s correct application of a net loss formula was a condition precedent to a binding mediated agreement).

161. See *Golding*, 539 S.E.2d 735.

162. *Lamb Plumbing & Heating Co. v. Kraus-Anderson of Minneapolis, Inc.*, 296 N.W.2d 859, 862 (Minn. 1980).

163. *Restatement (Second) of Contracts* § 203(a).

164. See *id.* § 202(3)(b).

ing, the court will declare that the contract is not ambiguous and end its interpretation analysis there. Thus, if the contract is unambiguous and fully integrated, the parol evidence rule requires the contract to be interpreted and administered according to the terms in the four corners of the agreement.¹⁶⁵

In contrast, a court could find as a matter of law that either a contract is not fully integrated¹⁶⁶ or that its terms are ambiguous.¹⁶⁷ In either of these instances, the parties will submit to the court their understanding of the meaning of the word or phrase at the time of contract formation. In support of their meaning they will generally offer evidence of what was said and done by the parties during contract formation.¹⁶⁸ The court should consider “words and conduct in light of all the circumstances, and if the principal purpose of the parties is ascertainable, it is given great weight.”¹⁶⁹ Beyond normal, everyday meaning of a word, it is the express meaning provided by the parties during contract formation which will carry the greatest weight when interpreting a contract.¹⁷⁰

Courts have applied contract law to resolve allegations of ambiguity in mediated agreements.¹⁷¹ Sometimes, the courts did not have to pierce mediation confi-

165. See Calamari and Perillo, *supra* n. 124, at §§ 3.2 and 3.4.

166. *Restatement (Second) Contracts* § 210(1)-(2):

Completely and Partially Integrated Agreements

(1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.

(2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.

167. See *American States Ins. Co. v. Hartford Cas. Ins. Co.*, 950 F. Supp. 885 (C.D. Ill. 1997).

168. *Restatement (Second) of Contracts* § 212:

Interpretation of Integrated Agreement

(1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

(2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

169. *Restatement (Second) of Contracts* § 202:

Article I. Rules in Aid of Interpretation

(1) Words and other conduct are interpreted in the light of all the circumstances and if the principal purpose of the parties is ascertainable it is given great weight.

(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.

(3) Unless a different intention is manifested, where language has a generally prevailing meaning, it is interpreted in accordance with that meaning; technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

(4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement. Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

170. See *id.* § 203(a) and (b).

171. *Ansley*, 2002 WL 1991193 (determining that the ambiguous terms of mediation settlement agreement included husband's stock options obtained after the signing of the mediated settlement agreement but prior to the issuance of the actual divorce decree); *Cleveland Trencher Co.*, 2002 WL 31272366 (disagreeing with party's assertion that there were two reasonable interpretations of a clause and found the agreement unambiguous as a matter of law).

dentiality because it found the agreement was not ambiguous and should be interpreted within the four corners of the document.¹⁷² In some cases, courts found the mediated agreement was not ambiguous, but pierced mediation confidentiality in the process of making that determination.¹⁷³ Finally, some courts have found that the mediated agreement was ambiguous, and pierced mediation confidentiality to ascertain the parties' intentions at the time of contract formation.¹⁷⁴

C. Strict Confidentiality Interferes with the Application of Contract Law to Mediated Agreements

At this point, a sampling of cases in which parties have petitioned courts to intervene in the enforcement of mediated agreements has been identified. The resolution of those cases has been demonstrated utilizing an unfettered approach to contract law. The resolution of most of these cases would be dramatically different under a strict standard of mediation confidentiality.

1. The Discussions and Negotiations in Formulating Mediated Agreements are often Necessary to Apply Contract Law in Enforcement Proceedings and Exactly Forbidden by Strict Mediation Confidentiality

The discussions and negotiations in formulating the contract are frequently integral to a contract law analysis.¹⁷⁵ The essentialness or materiality of a term could depend on whether that term had been discussed during the negotiations.¹⁷⁶ The determination of duress or coercion requires evidence of the allegedly intimidating statements and behaviors and their impact on the coerced party.¹⁷⁷ Whether

172. *Jaynes*, 2001 WL 1176424 (rebutting a claim that a party was entitled to a hearing to resolve a factual dispute regarding the parties' intent by finding the written mediated agreement was complete and unambiguous); *Dodd v. Joy*, 1999 WL 140163 (Tex. App. Mar. 17, 1999); *In re Marriage of Schieber*, 1998 WL 764454 (Wash. App. Div. 1 Nov. 4, 1998). See also *Tarrant Dist. Inc.*, 127 F.3d 375; *Granger v. Granger*, 804 S.2d 217 (Ala. Civ. App. 2001) (finding agreement was final and binding and the potential ambiguity could be clarified by a motion to the trial court).

173. *Ex parte Littlepage*, 796 S. 2d 298 (Ala. 2001) (overturning a lower court's finding of ambiguity, but considering the testimony of the mediator in making that ruling); *Lau Family*, 2002 WL 997741 (allowing affidavit of a party submitted at trial that revealed the contents of the mediation to be used to determine that the mediated agreement was clear and unambiguous).

174. *English v. Machen*, 2001 WL 832356 (Tex. App. July 19, 2001) (considering extrinsic evidence to interpret an attorney's fees provision in a mediated agreement); *Baker*, 1999 WL 1318855 (authorizing a hearing to interpret an ambiguous term in a mediated agreement).

175. See *supra* § IV.B.1.

176. See *Chappell*, 548 S.E.2d at 500.

177. See *Olam*, 68 F. Supp. 2d 1110 (comparing testimony of various mediation participants to determine that claims of duress were unfounded); *Randle*, 1996 WL 447954 (overturning summary judgment enforcing the mediated agreement upon finding possible duress where a party to a mediation was placed in grave danger that was not warranted under the circumstances; the party had a history of heart trouble, had not taken his medication that day and was beginning to experience chest pains; when he informed the mediator of his need to leave and why, he was told that he could not leave until a settlement was reached); *Vitakis-Valchine*, 793 S. 2d 1094 (remanding case to determine if mediator engaged in misconduct by pressuring a party to a divorce mediation by threatening her that he would tell the judge that it was her fault that a settlement agreement was not reached and that she would never get custody of frozen embryos and that the parties had five minutes and then had to "get out of here"); *FDIC*, 76 F. Supp. 2d 736 (finding no duress despite multiple assertions of potential criminal charges being filed against a party if they did not settle a civil case in the mediation); *Berg*, 2002 WL

a mistake was unilateral (relief generally not provided) or mutual (the agreement is voidable) could be decided by, among other things, whether the alleged mistaken term was discussed in the negotiations.¹⁷⁸ Fraud can only be established by examining the alleged misrepresentation in a negotiation,¹⁷⁹ the state of mind of the person making the representation,¹⁸⁰ and the reasonableness of the reliance.¹⁸¹ Contracts against public policy, such as waiver of paternal rights without due process, require an examination of the disclosures and states of mind in the negotiations.¹⁸² Upon finding that a contractual term is ambiguous, the meaning is determined by determining the parties' intentions at the time of contract formation.¹⁸³

For agreements created in mediations, the discussions and negotiations formulating the agreement are likely to bear on the above types of issues and will almost certainly have occurred in the mediation. While there are occasions when critical contract law factors occur pre- or post-mediation,¹⁸⁴ the agreements are usually concluded during the mediation. The statements and behaviors that surround the formation and acceptance of an agreement will color the meanings and intentions manifested by the respective parties. It is usually the statements and behaviors made at *the time* of contract formation that will be relevant to a court's determination of a party's intentions and understanding of the terms of the agreement.¹⁸⁵ Since the occurrences within the mediation transformed the parties from disagreeing to agreeing, it is the occurrences within the mediation that would explain the what, why, and how of each party's intended consent.¹⁸⁶ While this

31256677 (claiming signature was a product of undue influence because: the mediation took fourteen hours; she was incapacitated by medications, fatigue and the fact that the mediation was taking place on the same day as her ex-husband's funeral, her car was struck and sustained substantial damage during the mediation; and that she was influenced to sign by her attorney; the court found that because she did not complain or outwardly display any signs of incapacity, her agreement was absent undue influence).

178. *Feldman*, 824 S. 2d 274 (observing that the mistaken issue had not been discussed in the mediation and, thus, the court reasoned it was a unilateral rather than mutual mistake). *See also Bartos*, 1990 WL 32385 (reasoning there was no mistake because a term had been discussed in the mediation and not included in the agreement).

179. *Crupi*, 784 S. 2d 611 (finding that statements were not sufficiently false to support a claim of fraud).

180. *Palmer*, 2002 WL 1288701 (finding a lack of factual support to find that a party's statements were knowingly false and meant to deceive).

181. *Chitkara*, 2002 WL 31004729 (finding unreasonable reliance on the false statement as grounds for denying an allegation of fraud).

182. *In re T.D.*, 28 P.3d 1163.

183. *See supra* n. 165.

184. *See Weddington*, 71 Cal. Rptr. 2d 265; *Thermos Co.*, 1998 WL 299469; *Schwartz*, 1999 WL 170676.

185. *Restatement (Second) of Contracts* § 202 cmt.b:

Circumstances

The meaning of words and other symbols commonly depends on their context; the meaning of other conduct is even more dependent on the circumstances. In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made. When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in light of the circumstances...The circumstances for this purpose include the entire situation, as it appeared to the parties, and in appropriate cases may include facts known to one party which the other had reason to know. . . .

186. *See infra* nn. 206, 213-15.

appears to be generally accurate, there are many cases where courts have applied contract law in proceedings to enforce mediated agreements without piercing mediation confidentiality.¹⁸⁷

The contents of a mediation are exactly what mediation confidentiality is intended to protect. If the applicable mediation confidentiality standard does not provide an exception for enforcement proceedings and is strictly construed as in the *Foxgate* case, the very information necessary for the contract law analysis is unavailable. A recent Texas case provides an example of this result.¹⁸⁸ The plaintiffs in *Vick* sued for breach of a settlement agreement and fraud.¹⁸⁹ The defendants sought summary judgment on the fraud cause of action because plaintiffs could not offer any evidence of false representations made to plaintiffs.¹⁹⁰ In response, plaintiff's affidavit listed numerous false representations defendants made during a mediation.¹⁹¹ The trial and appellate courts agreed with defendant that all alleged misrepresentations in the mediations were confidential.¹⁹² Since the plaintiff did not meet his burden of proof to identify admissible false representations, his suit was dismissed on summary judgment.¹⁹³

Note that *Foxgate* distinguished *Olam* on the grounds that in *Olam* both parties waived mediation confidentiality -- not by distinguishing it as an enforcement proceeding compared to *Foxgate's* sanction's context.¹⁹⁴ The implication is that *Olam* would not have been distinguishable had one party asserted mediation confidentiality.

In strict mediation confidentiality jurisdictions, parties in enforcement proceedings will need to proceed without access to statements or materials occurring in or developed during the mediation process. When a party is not permitted to disclose what happened in a mediation, he will be hard pressed to prove an alleged defect in the making or implementation of a mediated agreement.¹⁹⁵

2. Strict Mediation Confidentiality Transforms Mediated Agreements into Super Contracts

By depriving courts of the information necessary to employ a standard contract law analysis, strict mediation confidentiality has the effect of transforming the mediated agreement into a "super contract."¹⁹⁶ Courts dealing with the en-

187. *Chappell*, 548 S.E.2d 499; *Jaynes*, 2001 WL 1176424; *In re Kasschau*, 11 S.W.3d 305; *Walk Haydel & Assoc. Inc.*, 720 S. 2d 372; *Stempel*, 633 S. 2d 26; *Montanaro*, 946 S.W.2d 428; *Cleveland Trencher Company*, 2002 WL 31272366; *Palmer*, 2002 WL 1288701; *Liquidation of Prof. Med. Ins. Co.*, 2002 WL 1396084; *Thermos Co.*, 1998 WL 299469; *Boyd*, 67 S.W.3d 398; *F&K Supply Inc.*, 732 N.Y.S.2d 734; *Ansley*, 2002 WL 1991193; *Tarrant*, 127 F.3d 375; *Schieber*, 1998 WL 764454; *Grimes*, 997 S.W.2d 877; *Granger*, 804 S.2d 217; *Clayton*, 1999 WL 89945.

188. *Vick*, 2002 WL 1163842.

189. *Id.* at *1.

190. *Id.* at *1.

191. *Id.* at *3.

192. *Id.* at *3.

193. *Id.* at *4.

194. *Foxgate*, 25 P.3d at 1127 (noting that *Olam* was a settlement enforcement proceeding and is distinguishable because parties waived confidentiality).

195. See *Vick*, 2002 WL 1163842 at *4.

196. Magistrate Judge Wayne Brazil, Remarks, *Olam Revisited* (S. Cal. Mediation Association Annual Conference, Nov. 4, 2000).

forcement of mediated agreements would have to choose between a hamstrung attempt in applying contract law or a more carte blanche deference to the mediated agreement.

A court could enforce strict mediation confidentiality by applying contract law analysis without piercing the sanctity of the mediation.¹⁹⁷ Without access to what would probably be the critical evidence, the party with the burden of proof would lose. A party seeking to set aside a mediated agreement (alleging fraud, coercion, mistake, unconscionability, or a lack of agreement on essential terms) would be prohibited from introducing the usual type of evidence because of strict confidentiality.¹⁹⁸ In this instance, strict mediation confidentiality deprives the party objecting to the agreement of access to the evidence that could prove his point. The compromised ability to challenge the contract creates a more binding than usual agreement: thus, the term “super contract.”¹⁹⁹

The other way a court could enforce strict mediation confidentiality could be to rule that agreements reached in mediation are not subject to the same scrutiny as other agreements.²⁰⁰ This judicial deference to mediated agreements could be justified because the creation of the agreement was supervised.²⁰¹ On the other hand, this judicial deference could be critiqued because of the vast range in mediator qualifications and sophistication,²⁰² and because some alleged abuses could be mediator initiated.²⁰³ In any event, exaggerated judicial deference to mediated agreements again creates a “super contract.”

3. *The Mediated Super Contract Has Serious Ramifications*

As super contracts, mediated agreements in strict mediation confidentiality jurisdictions are effectively exempt from the established standards for the enforcement of agreements: contract common law. These standards evolved over centuries to protect parties from abuses or injustices in the enforcement of agreements. Strict mediation confidentiality essentially deprives mediation participants of many of the protections embodied in contract law principles.²⁰⁴

197. For example, the court in *Vick* noted that a cause of action for fraudulent inducement was still appropriate, but that evidence from the mediation could not be admitted in support of the claim.

198. See *Vick*, 2002 WL 1163842 at *4.

199. The fact scenario in *Lyons v. Booker*, 982 P.2d 1142 (Utah App. 1999) illustrates how this judicial approach could also raise the bar for the party trying to prove the existence of an enforceable mediated agreement.

200. See *Chappell*, 548 S.E.2d at 500 (quoting the appellate court’s reasoning that the “defendants must overcome a ‘strong presumption that a settlement reached by the parties through court-ordered mediation under the guidance of a mediator is a valid contract.’” The court later declared “[w]e recognize that settlement of claims is favored in the law, and that mediated settlement as a means to resolve disputes should be encouraged and afforded great deference.”)

201. See e.g. Cal. Civil Code § 646.5 (providing an expedited enforcement of settlement agreements that have been put on the record before a court).

202. Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 Harv. Negot. L. Rev. 235, 239 (2002).

203. See e.g. *Vitakis-Valchine*, 793 S.2d 1094.

204. Cf. *Cadle Co. v. Castle*, 913 S.W.2d 627, 632 (Tex. App. 1995) (splitting en banc court 10 to 2 declaring a summary proceeding to enforce mediated agreements was contrary to public policy because “it effectively deprives a party of the right to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit contested factual issues to judge or jury). See also *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996) (finding that a party seeking enforcement of

Where protections are absent, abuses could flourish. While mediation confidentiality protects and empowers participants in their moment of apprehension, it also makes parties vulnerable to the unscrupulous in enforcement proceedings.²⁰⁵ For example, an individual intending abusive negotiation strategies (like fraud or coercion) could insist on negotiating in a mediation and then cling to his right of confidentiality when enforcing the suspect agreement. Mediation of transactional agreements and estate planning processes could expand as a way to increase the durability of those agreements/legal documents. Again, the unscrupulous heir planning to exert undue influence in the making of a will might request the participation of a “mediator” so the content of the estate planning conversations would be shielded.

Finally, the competent drafting of a mediated agreement must be emphasized. As a super contract, many of the usual remedies for incomplete drafting will not be available. For example, there is no remedy for a scrivener’s \$600,000 error. Thus, mediation participants must employ a heightened degree of scrutiny when drafting and reviewing the mediated agreement in a strict mediation confidentiality jurisdiction.

D. This Clash of Titans (Contract Common Law in Enforcement Proceedings v. Mediation Confidentiality) has Resulted in Unpredictable Legal Outcomes and Reasoning

An examination of case law regarding the enforcement of mediated agreements reveals diametrically conflicting legal outcomes and four judicial approaches. There are cases in which courts have hindered the application of contract law because of mediation confidentiality with and without explanation, and cases in which courts have pierced mediation confidentiality to apply contract law, also with and without explanation. Such a variety of approaches is not surprising considering the important values behind mediation confidentiality and contract common law in enforcement proceedings. An analysis of the legal decisions in this area will provide context in evaluating the UMA’s proposed uniform standard on this issue.

1. Piercing Mediation Confidentiality Without Explanation

It may be surprising that the vast majority of the time, when enforcing a mediated agreement, courts act as if mediation confidentiality did not exist.²⁰⁶ If this

a written mediated settlement agreement from which the other party had withdrawn consent “must pursue a separate breach-of-contract claim, which is subject to the normal rules of pleading and proof” before a judgment can be rendered).

205. Lynne H. Rambo, *Impeaching Lying Parties With Their Statements During Negotiation: Demystifying the Public Policy Rationale Behind Evidence Rule 408 and Mediation-Privilege Statutes*, 75 Wash. L. Rev. 1037 (2000).

206. See *Golding*, 539 S.E.2d 735 (ruling that extrinsic evidence should not have been admitted to ascertain the intentions of the parties to a mediated agreement because of a condition precedent: mediation confidentiality was not mentioned.); *Littlepage*, 796 S. 2d 298 (reviewing trial record replete with mediator and party testimony about what occurred at the mediation and then discussing a more limited use of parol evidence in contract interpretation cases: mediation confidentiality was never addressed.); *Coulter*, 21 P.3d 1078 (resolving issue of whether a mediated agreement was contingent upon the

plaintiff signing a release by, among other things, considering a mediator's affidavit which stated that it was his custom to advise the parties that the attorneys would prepare a release, that he had no reason to believe that he did not make the same comments to the parties in this action and that he was confident that the parties understood that the attorneys would prepare a release: mediation confidentiality was never mentioned); *Sunburst Estates II*, 2001 WL 1515815 (observing, without mentioning mediation confidentiality, that at the time the mediated agreement was signed, the attorney for one side did not recall anything being said regarding ratification or about the representative for his organization's lacking authority); *Vitakis-Valchine*, 793 S. 2d 1094 (Fla. Dist. Ct. App. 2001) (ruling that the mediated agreement could be set aside due to mediator's misconduct – which was alleged by a party revealing what the mediator did and said in the mediation. When describing Florida's court annexed mediation system, the court noted that “[c]ommunications during the mediation are privileged and confidential” but never explained why the mediator and party testified regarding mediation communications); *Lype*, 1998 WL 734429 (considering plaintiffs' affidavits claiming their former attorney misrepresented “the nature and consequences of the mediation proceeding and coerced them into signing the agreement”: mediation confidentiality was never explained); *Custom Blending Intl*, 1998 WL 842289 (finding that a duress claim failed as a matter of law because, among other things, the party claiming to have been coerced admits it never complained to the mediator about the allegedly coercive behavior: mediation confidentiality was never acknowledged.); *Crupi*, 784 S. 2d 611 (declaring, “[h]owever, at the evidentiary hearing on her motion to set aside [the mediated settlement agreement], which was entirely appropriate and necessary, the parties focused on the factors necessary to determine ‘fairness.’” The court recounted the testimony of a witness to the mediation about whether the appellant was in her right mind and thought she had come to an agreement that day: mediation confidentiality was never explained); *In re Marriage of Banks*, 887 S.W.2d 160 (considering the statements of the mediator in the mediation when considering claims of duress and undue influence without explaining the breach of mediation confidentiality); *Graf*, 1998 WL 297519 (noting that at an evidentiary hearing to enforce a mediated agreement both parties agreed that plaintiff should testify to statements [by his attorney] at the mediation that were the basis of his fraud or mistake claim); *Chitkara*, 2002 WL 31004729 (determining that reliance on a certain type of mediator statement in a mediation cannot serve as the basis for fraud or material misrepresentation: mediation confidentiality was never addressed); *Brinkerhoff*, 99 Wash. App. at 699-700 (finding that the supporting declarations revealed the contents of the mediation and remanded “for an evidentiary hearing in which the parties are entitled to call and cross-examine witnesses to resolve factual disputes about what was said on the day of the mediation”: mediation confidentiality was never considered); *Herrin v. The Med. Prot. Co.*, 89 S.W.3d 301 (Tex. App. 2002) (reviewing summary judgment that dismissed multiple causes of actions arising out of a mediation, the appellate court reviewed the record revealing the contents of the mediation and found genuine issues of material fact: mediation confidentiality was never addressed); *Gelfand*, 2002 WL 1397037 (resolving an allegation that a party had not voluntarily assented to a mediated settlement agreement by considering declarations revealing mediation communications by the mediator and attorneys: mediation confidentiality was never addressed); *Berg*, 2002 WL 31256677 (determining the enforceability of a mediated agreement by relying on declarations and testimony at a hearing that centered on alleged statements made at the mediation: mediation confidentiality was never discussed); *Brown*, 2002 WL 1343222 at *4, n. 5 (noting where in a proceeding to enforce a mediated agreement the trial court sustained an objection with instructions for the attorneys to not “get into anything discussed at settlement – mediation” but ultimately created a record replete with references to statements at the mediation); *Dodd*, 1999 WL 140163 (where in a hearing to determine, among other things, whether a mediated agreement's provision to appoint appraisers in the future constituted an “agreement to agree,” the trial court accepted testimony as to why the identity of the appraisers was left open: mediation confidentiality was never addressed); *Baker*, 1999 WL 1318855 (where a decision authorizing the admissibility of parol evidence to interpret a mediated agreement never mentions mediation confidentiality); *Lau Family*, 2002 WL 997741 (where affidavits revealing the contents of the mediation were considered before determining that extrinsic evidence should only be admissible if the contract is ambiguous: mediation confidentiality was never raised.); *Pruncutz v. Quinney*, 2001 WL 1627650 (Tex. App. Dec. 20, 2001) (where a jury resolving an issue of interpreting a term in a mediated agreement heard testimony about statements in the mediation: confidentiality was not addressed); *Inglish*, 2001 WL 832356 (where the extrinsic evidence used to interpret an ambiguous term in a mediated agreement included testimony from both parties and their attorneys about their understandings at the time it was drafted: mediation confidentiality was never mentioned).

approach is justified by statute, it is rarely explained.²⁰⁷ Rather, the issue is usually not discussed, possibly because counsel failed to raise the confidentiality objection.²⁰⁸ Inadmissible evidence is regularly admitted unless one of the parties objects.²⁰⁹ The reasons attorneys failed to raise mediation confidentiality in enforcement proceedings (strategic consideration, expectation/knowledge that courts would be hostile to such an objection, or ignorance of the possibility) would make an interesting study. This ignorance of mediation confidentiality in enforcement proceedings is especially appalling when it occurs after a higher court has declared that judicial exceptions to mediation confidentiality are impermissible.²¹⁰

2. Piercing Mediation Confidentiality With Explanation

There are a number of cases in which mediation confidentiality has been raised in enforcement proceedings and the courts have explained why it was necessary to pierce confidentiality. The easy case is when there is statutory authority for piercing mediation confidentiality.²¹¹ Other explanations have included theories of overt waiver based on the parties' agreement or behavior,²¹² and implied waiver that emanated from initiating proceedings to enforce or set aside a mediated agreement.²¹³ Other explanations have looked to the purposes and legislative intent of mediation confidentiality.²¹⁴ Still others considered the duty of a public court to do justice in light of competing constitutional or public policy interests.²¹⁵

207. *Id.* (the facts and texts of the opinions in *supra* n. 206 support this contention).

208. See *Riner*, 563 S.E.2d at 809 n.8. *But see Brown*, 2002 WL 1343222 at *4, n.5 (noting that where even after having such an objection sustained, one court then appeared to disregard its own ruling and consider multiple accounts of what was said and done in a mediation).

209. Kenneth S. Brown et al., *McCormick on Evidence*, §52 (5th ed. 1999).

210. See e.g., *Gelfand*, 2002 WL 1397037; *Berg*, 2002 WL 31256677 (both cases were decided after the California Supreme Court published its decision in *Foxgate*).

211. See e.g., *Sharon Motor Lodge, Inc. v. Tai*, 2001 WL 1659516 (Conn. Super. Ct. Dec. 3, 2001) (where the court explained it was permitting evidence from the mediator regarding whether an agreement had been reached because it satisfied the statutory standard of "circumstances in which a court finds that the interest of justice outweighs the need for confidentiality").

212. See *Howard*, 2001 WL 228015 (noting that the parties agreed to resolve a dispute regarding the terms of a mediated agreement by abiding by the understanding of a relatively objective third party's understanding of what was agreed to; their claim of mediation confidentiality on appeal was dismissed); *Allen v. Leal*, 27 F. Supp. 2d 945, 947 n.4 (S.D. Tex. 1998) ("[t]he Court fully recognizes the importance and gravity of the rules of confidentiality governing mediation. However, because the plaintiffs 'opened the door' by attacking the professionalism and integrity of the mediator and mediation process, this Court was compelled, in the interests of justice, to breach the veil of confidentiality."). See also *Moore*, 2001 WL 490777 at *1, n.1. *But see DR Lakes Inc.*, 819 S. 2d 971 (noting that the court rejected the waiver rationale when counsel discussed what occurred during the mediation at a non-jury hearing on the motion to enforce settlement and in response to the other party's opening statement, prior to the court ruling on the privilege issue).

213. *Randle*, 1996 WL 447954 (noting where the court ruled that a party cannot sue for specific performance of the mediated agreement while at the same time assert mediation confidentiality over the mediation communications at the heart of opposing party's duress defense); *McKinlay*, 648 S. 2d at 810 (noting where the appellate court found that a wife seeking to set aside a mediated agreement by challenging the conduct and integrity of the mediation proceedings could not with only her side of the story presented, [invoke] a statutory privilege to preclude testimony or a proffer from other witnesses such as the mediator. ". . . [I]t was error and a breach of fair play to deny husband the opportunity to present rebuttal testimony and evidence").

214. See *DR Lakes*, 819 S. 2d at 974 (noting where the court pierced mediation confidentiality by reasoning that "[m]ediation could not take place if litigants had to worry about admissions against

3. Uphold Mediation Confidentiality With Explanation

Perhaps tellingly, there are comparatively few cases explaining why a court upheld mediation confidentiality in an enforcement proceeding.²¹⁶ The *Vick* court relied on a strict statutory construction declaring: "The Texas ADR Act does not include an exception for claims of fraud, and this court will not create an exception to the confidentiality provisions of the Texas ADR Act."²¹⁷ The court in *Willis v. McGraw* canceled a hearing on a motion to enforce a mediated settlement agreement and denied the motion, citing that a bright line rule of non court involvement is appropriate to assure the salutary purposes of mediation confidentiality, to wit: "to reassure the parties and counsel they would suffer no prejudice, perceived or actual, as a result of the full, frank, conciliatory, and sometimes heated, exchanges that occur inevitably during the mediation process."²¹⁸ The court in *Lyons v. Booker* generally cited the same reasons as the *Willis* court, and felt so strongly about it that they ordered the existing motion and moving papers that breached confidentiality sealed, recused the three appellate judges who were privy to the breach from further proceedings in this case, admonished counsel, and

interest being offered into evidence at trial, if a settlement was not reached. Once the parties in mediation have signed an agreement, however, the reasons for confidentiality are not as compelling. We cannot imagine that the legislature intended that a party to a contract reached after mediation should not have the same access to the courts to correct a \$600,000 mutual mistake, as a party entering into the same contract outside of mediations."); *Feldman*, 824 S. 2d 274 (upholding the piercing of mediation confidentiality in a proceeding to enforce a mediated agreement citing *DR Lakes Inc.*; *F.D.I.C.*, 76 F. Supp. 2d 736 (noting that "the Court does not read the ADRA or its sparse legislative history as creating an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation. Indeed such a privilege would effectively bar a party from raising well-established common law defenses such as fraud, duress, coercion, and mutual mistake. It is unlikely that Congress intended such a draconian result under the guise of preserving the integrity of the mediation process."); *Few v. Hammock Enterprises Inc.*, 132 N.C. App. 291 (N.C. App. 1999) (where the court makes a distinction between when a judge is determining whether the parties reached an agreement and its terms, on one hand, and when a finder of fact is determining the merits of either the present or future substantive claims, on the other hand *see also* Deason, *supra* n.1, at 57-58, for a discussion of how the *Few* decision instigated statutory changes in North Carolina.)). *See also Cain*, 813 S. 2d at 904 *cert. denied*, (Murdock, J., dissenting) (reasoning that "[t]he use of the mediation process does not immunize the resulting contract from scrutiny under otherwise applicable substantive law pertaining to the enforceability of contract"; he argues that mediation confidentiality should be similar to Rule 408 of the Alabama Rules of Evidence regarding inadmissibility of offers of compromise in settlement discussions "to prove liability for or invalidity of the claim or its amount" but not inadmissible if asserted as a defense to a claim if the settlement agreement is being sued upon).

215. *See Olam*, 68 F. Supp. 2d 1110; *see also supra* § III; *Rinaker*, 74 Cal. Rptr. 2d 464 (noting where the court authorized piercing mediation confidentiality to allow impeachment of inconsistent testimony in a civil proceeding in which a party's liberty is at risk (juvenile delinquency) and thus constitutional due process concerns are triggered). *See also Avary*, 72 S.W.3d 779 (overturning summary judgment after noting that actions to enforce mediated settlement agreements implicate confidentiality concerns related to "(i) the parties intent in entering into a settlement agreement, (ii) any ambiguity in the agreement, and (iii) affirmative defenses to a claim for breach of the agreement mediation," the court held that plaintiff should be allowed to pierce mediation confidentiality to pursue a new and independent tort alleged to have been perpetrated during the course of the mediation).

216. *Vick*, 2002 WL 1163842; *Willis v. McGraw*, 177 F.R.D. 632 (S.D. W.Va. 1998); *Lyons*, 982 P.2d 1142; *Smith v. Smith*, 154 F.R.D. 661 (N.D. Tex. 1994).

217. *Vick*, 2002 WL 1163842 at *3.

218. *Willis*, 177 F.R.D. at 632 (referencing "the analogous setting of preargument conferences in the courts of appeal" and citing precedence for maintaining the confidentiality of those conferences).

threatened that further violations may subject counsel to more severe sanctions.²¹⁹ The *Smith* court upheld a magistrate's quashing of a subpoena for a mediator, but declined to adopt the recognition of a privilege declaring that conferring a new privilege will require carefully balancing the competing interests: the perceived need to preserve the appearance of the mediator's impartiality, and neutrability against the rights of litigants to obtain all available evidence.²²⁰

4. Uphold Mediation Confidentiality Without Explanation

A recent decision by the Supreme Court of West Virginia signaled that court's belief that at least the *mediator's* confidentiality should not be breached in proceedings to enforce mediated agreements.²²¹ After two hearings on the matter, the trial court ordered the Riners to execute an expanded "Settlement Agreement and Release" prepared by Newbraugh in addition to the mediated settlement agreement prepared by the mediator, which the Riners had already signed – but was objected to by Newbraugh.²²² On review, the court first clarified that West Virginia Trial Court Rule 25.14 providing, "If the parties reach a settlement and execute a written agreement, the agreement is enforceable in the same manner as any other written contract" does not provide the exclusive means for the enforcement of mediated settlement agreements.²²³ While discussing whether the additional terms in Newbraugh's agreement were material, the court went out of its way to express concern about the extent of mediator testimony. The court cited West Virginia Trial Court Rule 25.12 providing that "mediator[s] may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated."²²⁴ The court noted that while neither party has raised the issue, it was concerned because "the trial court's questioning of the mediator went beyond the basic issue of whether in fact an agreement was reached and identified the terms of that agreement."²²⁵ The *Riner* court identified conflicting court rules: one providing that mediated agreements are enforceable in the same manner as any other written agreement; another providing that mediators may not testify regarding confidential information arising out of the dispute mediated.²²⁶ Without acknowledging the tension in these rules, the court made clear that in West Virginia, the mediator's confidentiality will take precedence in proceedings to enforce mediated agreements.²²⁷

219. *Lyons*, 982 P.2d at 1144.

220. The same judge decided *Datapoint Corp. v. Picturitel Corp.*, 1998 WL 25536 at *2 (N.D. Tex. Jan. 14, 1998) four years later where he ordered a mediated agreement and its terms disclosed declaring ". . . even if this order has some chilling impact on parties' willingness to settle, this is simply the price for allowing litigants to explore some of the most basic and fundamental issues that arise in litigation -- witness and party bias and prejudice."

221. *Riner*, 563 S.E.2d at 808.

222. *Id.* at 805.

223. *Id.* at 805-806.

224. *Id.* at 808.

225. *Id.* at 809.

226. *Id.*

227. *Id.*

This variety of outcomes -- either maintaining or piercing confidentiality in enforcement proceeding -- and of judicial reasoning is not desirable. One objective of the law is to provide predictable standards by which citizens can order their affairs.²²⁸ Clarifying when and how mediation confidentiality will be pierced in proceedings to enforce mediated agreements will be a significant contribution of the UMA for adopting jurisdictions.

V. THE UMA PROVIDES AN EXCEPTION TO MEDIATION CONFIDENTIALITY FOR THE PARTIAL APPLICATION OF CONTRACT LAW WHEN ENFORCING MEDIATED AGREEMENTS

The UMA is an improvement for strict mediation confidentiality jurisdictions because it explicitly acknowledges that, at times, mediation confidentiality must defer. One of the designated exceptions to mediation confidentiality is "a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of mediation."²²⁹ While this exception provides the means to apply contract law when enforcing mediated agreements, the UMA reflects a strong commitment to the interests of mediation confidentiality by imposing numerous conditions and one problematic limitation on the implementation of the exception.

A. *The Conditions to Exercise the Exception*

In order to exercise the exception to mediation confidentiality, the UMA requires an *in camera* determination by a judge, administrative agency, or arbitrator that all the other conditions have been satisfied.²³⁰ The UMA only authorizes exceptions to mediation confidentiality in supervised settings after specific findings by a neutral authority. That neutral authority must utilize an *in camera* process when making its findings²³¹ so as to still substantially maintain the protections of mediation confidentiality.

The evidence sought by breaching mediation confidentiality must not be otherwise available.²³² Mediation confidentiality should not be pierced because it is the easier way to acquire evidence available by other means. This extreme remedy is only available in situations where it is the only means to a significant end. This provision demonstrates the UMA's commitment to protecting mediation confidentiality if possible, but also acknowledges that when enforcing a mediated agreement, the necessary evidence sometimes requires the disclosure of the contents of the mediation.²³³

Finally, the need for the evidence must substantially outweigh the interest in protecting confidentiality.²³⁴ While some commentators have expressed concern

228. See Oliver Wendell Holmes, *The Path of the Law*, Harv. L. Rev. 10, 457 (1897).

229. Unif. Mediation Act § 6(b)(2) (2002) [hereinafter U.M.A.].

230. *Id.*

231. *Id.*

232. *Id.*

233. See generally *supra* § IV.C.1.

234. U.M.A. § 6(b)(2).

about this requirement,²³⁵ it should not be problematic in the context of enforcing a settled case. Courts have already noted that the interest in protecting mediation confidentiality is diminished in the context of enforcing a mediated agreement.²³⁶ The primary fear that statements in the mediation would be used against the speaker if the case failed to settle is absent. Indeed, if the parties intend the mediated agreement to be enforceable, that alone could be construed as a waiver of mediation confidentiality for enforcement purposes.²³⁷ Possibly, the more egregious allegations of wrongdoing in a mediation, like fraud or coercion, would both enhance the need for evidence and diminish the interest in protecting confidentiality and thus access the exception to mediation confidentiality.

B. The Scope of the Exception

If the above conditions are satisfied, mediation confidentiality can be pierced in “a proceeding to prove a claim to rescind or reform, or a defense to avoid liability on a contract arising out of mediation.”²³⁸ Since the contents of a mediation become admissible *in a proceeding* to prove a claim to rescind, either the moving or resisting party would be able to pierce mediation confidentiality. Thus, should a party be able to object to a contract without piercing mediation confidentiality, the responding party might be able to pierce mediation confidentiality if necessary in his defense of the contract.

Rescind means “to abrogate or cancel a contract unilaterally or by agreement” or “to make void; to repeal or annul.”²³⁹ Reform refers to reformation which is “an equitable remedy by which a court will modify a written agreement to reflect the actual intent of the parties, usually to correct fraud or mutual mistake. . . .”²⁴⁰ It is the mechanism for correcting inadvertent or intentional errors in the “content or legal effect of the writing.”²⁴¹ Reformation limits courts to modifying the writing reflecting the agreement, and should not apply to affect the underlying agreement.²⁴² While the usual remedy for duress is to rescind the contract, reformation

235. See Hughes, *supra* n. 1, at 42-44 (stating that the author believes the “substantially outweigh” standard is “vague” and “unworkable” and will be extremely difficult to apply due to the case by case contextually dependent nature of the test).

236. See *DR Lakes Inc.*, 819 S.2d at 974; *Feldman*, 824 S.2d at 276-77; *Sharon Motor Lodge*, 2001 WL 1659516.

237. See Deason, *supra* n. 1, at 52-53.

238. U.M.A. § 6(b)(2).

239. Black’s Law Dictionary 1308 (Bryan A. Garner ed., 7th ed., West 1999). See also e.g. Cal. Civ. Code Ann. § 1689 (West 2002):

“The ability to rescind a contract is available when there has been a breach in the execution of the contract. . . or where there has been fraud, duress or undue influence in the creation of the contract, if one of the party’s consideration fails and/or the contract is deemed to be illegal.” *Id.*

240. Black’s Law Dictionary, *supra* n. 239, at 1285.

241. See Calamari & Perillo, *supra* n. 124, § 9.35 (“Misrepresentations concerning the qualities of the subject matter or other factors which affect the desirability of the bargain or economic equivalence of the exchange are not grounds for reformation. Such relief would require the court to remake the agreement itself”).

242. Calamari and Perillo state:

Note the limited scope for reformation. Contracts are not reformed for mistake, writings are. The distinction is crucial. With rare exceptions, courts have been tenacious in refusing to remake a bargain entered into because of mistake. They will, however, rewrite a writing that does not express the bar-

has been utilized to rewrite an agreement to conform to an earlier understanding, the terms of which were modified by duress in the final written contract.²⁴³

Note that the scope of proceedings in which piercing mediation confidentiality is authorized is broader than currently allowed by some states.²⁴⁴ Rescission and reformation are contract law remedies designed to undo the agreements or reconstruct their written terms. Consideration should be given to whether referencing two general contract law remedies and all defenses is broad enough to ensure access to the breadth of contract law in all possible enforcement proceedings.²⁴⁵ For example, an enforcement proceeding might involve a question of conditions precedent or issues of interpretation in which neither party is requesting rescission or reformation.²⁴⁶ The party raising the interpretation issue may want the writing to stand as written, with a specific meaning ascribed to a disputed term. It might have been better to authorize mediation confidentiality exceptions when “necessary to enforce a written agreement that came out of mediation”²⁴⁷ or declare: “The effect of a mediated settlement agreement shall be determined under principles of law applicable to contract.”²⁴⁸ However, the *Riner* decision shows that the standard should specify that mediation should be pierced in enforcement proceedings.²⁴⁹

C. The Limitation to the Exception

The UMA’s authorized piercing of mediation confidentiality is severely limited. Even if all the above conditions and scope issues are satisfied, mediators “may not be compelled to provide evidence of a mediation communication.”²⁵⁰ Thus, for mediators, the UMA extends the strict mediation confidentiality concept to the detriment of contract common law in enforcement proceedings.

In a contested matter, the absence of potentially the only objective account will severely handicap a court in applying contract law in enforcement proceedings.²⁵¹ The rationale and results of this dual standard between participants and mediators are suspect.²⁵² The cases in which courts have depended upon mediator testimony while resolving contract law enforcement issues are myriad.²⁵³

gain. Stated another way, courts give effect to the expressed wills of the parties; they will not second guess what the parties would have agreed to if they had known the facts.

Calamari & Perillo, *supra* n. 124, §9.35.

243. *Id.* (citing with approval *Leben v. Nassau Sav. & Loan Assn.*, 337 N.Y.S.2d 310 (N.Y. App. Div. 1972)).

244. See La. Rev. Stat. Ann. § 9:4112(B)(1)(c) (2000); Ohio Rev. Code Ann. § 2317.023(C)(4) (Anderson 1998); Wis. Stat. Ann. § 904.085(4)(e) (West 2000) (authorizing the piercing of mediation confidentiality only for fraud or to prevent manifest injustice); See also *supra* § III.

245. See Restatement (Second) of Contracts § 214(e) (1981) (using, in a different context, the standard of “ground for granting or denying rescission, reformation, specific performance or other remedy”).

246. See e.g. *Lerer*, 2002 WL 31656109.

247. See e.g. Conn. Gen. Stat. Ann. § 52-235d(b)(2) (West 2002).

248. Minn. Stat. Ann. § 572.35 (1) (West 2003).

249. See discussion of the *Riner* case, *supra* § IV.D.4.

250. U.M.A. §§ 6(b)(2)-(c).

251. Deason states: “In practical terms, a mediator’s testimony may be crucial to evaluating the contract defense.” Deason, *supra* n. 1, at 90.

252. See Hughes, *supra* n. 1.

253. *Littlepage*, 796 S.2d 303; *Riner*, 563 S.E.2d 802; *Coulter*, 21 P.3d 1078; *Feldman*, 824 S.2d 274.

VI. THE UMA'S EXCEPTION TO MEDIATION CONFIDENTIALITY WHEN ENFORCING MEDIATED AGREEMENTS SHOULD BE EXPANDED

The UMA is seriously flawed in excluding the mediator from providing evidence of a mediation communication in enforcement proceedings. Note that Section 6's Exception to Privilege isolates contract enforcement proceedings and participant misconduct or malpractice proceedings as the only two areas where a confidentiality exception exists for all others, but not for mediators. Mediator testimony about the mediation is specifically authorized:

- When there is an intentional plan to commit a crime in the future or to conceal current criminal activity;²⁵⁴
- If there have been any threats of bodily harm, the discussion of a plan to commit a crime involving bodily harm or any other crime of violence;²⁵⁵
- An "open records" statute or other requirement of law that prevents mediations of a certain type to be open to the public or at least not subject to concealment;²⁵⁶
- To prove or disprove a complaint of professional misconduct or malpractice filed against a mediator;²⁵⁷
- Offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult;²⁵⁸
- A court proceeding involving a felony or misdemeanor.²⁵⁹

The requirements of a finding by a neutral authority that the evidence is not otherwise available and that the need for evidence substantially outweighs the interest in protecting confidentiality are prerequisites to breaching mediation confidentiality only in contract enforcement proceedings. Even with these protections, the UMA maintains mediation confidentiality for the mediator. This mediator exemption will have the effect of maintaining the strict mediation confidentiality approach for many cases. The result will be that many courts will need to resolve contract enforcement issues without the benefit of contract law.

The UMA's approach of piercing mediation confidentiality in enforcement proceedings for the parties only and not for the mediator will interfere with the application of contract law when enforcing mediated agreements in at least the following circumstances:

254. U.M.A. § 6(a)(4).

255. U.M.A. § 6(a)(3).

256. U.M.A. § 6(a)(2).

257. U.M.A. § 6(a)(5).

258. U.M.A. § 6(a)(7).

259. U.M.A. § 6(b)(1).

A. Conflicting Factual Testimony by the Parties

Hearings about whether an issue was discussed in the mediation or an alleged scrivener's error could easily result in conflicting testimony by the parties. Without the mediator's testimony, in an enforcement proceeding a court will most likely decide the case by finding one witness more credible than the other²⁶⁰ or that there is no agreement because of a failure of definiteness on all essential terms.²⁶¹

B. Mediations with a Prevalence of Private Meetings

It is common for mediators to meet privately (caucus) with each party in a mediation. Many mediations of legal disputes consist of a short joint opening session and then a series of caucuses. The result is a shuttle diplomacy model of mediation in which the parties are face to face for an introductory opening and at the end to confirm the mediated agreement or declare impasse.²⁶² In this kind of mediation, the negotiations and discussions often critical to the application of contract law occur between the mediator and a party and/or party's attorney. The UMA provides that the only account of these communications available in an enforcement proceeding will be the party and/or her attorney. Even the most honest party may have a skewed perspective and will be hard pressed to provide an objective characterization of his conversations with the mediator. Less scrupulous parties could offer un rebuttable exaggerated testimony. The law may require a trier of fact to accept as true un rebutted testimony that satisfies a party's burden of production of evidence.²⁶³

260. See e.g. *Berg*, 2002 WL 31256677; *Brown*, 2002 WL 1343222; *Goodman*, 2001 WL 1531187; *Gelfand*, 2002 WL 1397037.

261. See *Wedington*, 71 Cal. Rptr. 2d 265 (finding a lack of agreement to the terms of a licensing agreement which was the essence of the parties' conflict); *Chappell*, 548 S.E.2d 499 (voiding settlement agreement when it was determined that one party had added a "hold harmless" provision that was not agreed upon nor discussed during the mediation); *Riner*, 563 S.E.2d at 809 (finding no valid agreement when one party subsequently added terms that were not discussed during the mediation which released them from all current and future claims and assigned future expenses related to the performance of the settlement agreement to the opposing party); *Thermos Co.*, 1998 WL 299469 (determining that the main issue regarding the redesign of the coffee tumbler was never settled, thus, the mediated agreement was not binding); *Schwartz*, 1999 WL 170676 (refusing to enforce a settlement agreement because of the lack of agreement as to whether windows in the plaintiff's home would need to be replaced).

262. See *Brinkerhoff*, 994 P.2d at 915 (noting that "the two groups spent most of their time in separate rooms"); *Vitakis-Valchine*, 793 S.2d 1094 (quoting the mediator's description of "Kissinger-style shuttle diplomacy" and noting that the other party "had no knowledge of any improper conduct on the part of the mediator." Note that UMA § 6(a)(5) provides that there is no privilege, even for the mediator, when a mediation communication is offered "to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator." An interesting question is whether allegations of mediator misconduct in an effort to avoid liability in an enforcement proceeding would be governed by this provision or by UMA § 6(b)(2)); *Berg*, 2002 WL 31256677 (noting where counsel testified that he did not even see the opposing party until after the settlement agreement had been executed at the conclusion of a fourteen hour mediation). See also *Riner*, 563 S.E.2d 804 (noting where the parties left the mediation meeting without an agreement, but the mediator continued his efforts by a series of telephone calls).

263. Kenneth S. Broun et al., *McCormick on Evidence* §338 (5th ed., West 1999).

C. *Complex Multi-Party Mediations*

An exaggerated form of the shuttle diplomacy approach to mediations is commonly employed in complex disputes with large numbers of parties. For example, construction defect or toxic tort cases could involve hundreds to thousands of parties represented by fifty or more attorneys.²⁶⁴ It is not unusual for mediators to work on these cases intermittently for months if not years. There are often days of mediation meetings with categories of participants. For example, all subcontractors will meet one day; a week later, all the parties with insurance coverage issues will meet. There are instances where, by design, only the mediator knows the information critical to the contract law enforcement analysis. An example is when a mediator amalgamates confidential contributions from a group of defendants for a global settlement. Each defendant's contribution must remain confidential because other defendants and the plaintiff might be irritated if they knew the exact contributions of certain defendants.²⁶⁵

If one defendant attempted to renege on his contribution, only the mediator would know his prior contribution commitment. If evidence from the mediator is not allowed in this type of complex multi-party case, only the account of the party attempting to renege on the agreement will be admissible. The result will be mediated agreements being transformed from "super contracts" to "vulnerable contracts." The exception to mediation confidentiality in the UMA should be expanded so that if all the other conditions are satisfied, mediators can be compelled to testify regarding the mediation in an enforcement proceeding.

VII. CONCLUSION

An unfettered application of contract law is desirable in proceedings to enforce mediated agreements. The current law in some states requires a strict standard of mediation confidentiality that interferes with the application of contract law in proceedings to enforce mediated agreements. The UMA authorizes piercing mediation confidentiality by anyone except the mediator if certain conditions are satisfied while enforcing a mediated agreement. The conditions provide reasonable protection for the interests of mediation confidentiality. The exemption of mediators from the mediation confidentiality exception when enforcing mediated agreements has the effect of preventing a meaningful piercing of mediation confidentiality when enforcing many mediated agreements. The exceptions to mediation confidentiality in the UMA for enforcing mediated agreements should be adopted, but should also authorize mediator testimony.

264. See Shawn A. Copeland et al., *Current Issues in Toxic Tort Litigation* (ALI-ABAA Course of Study Materials, Toxic Tort and Environmental Matters: Civil Litigation, Course No. SC 64 Jan. 22, 1998) (available in SC 64 ALI-ABA 33, 50-51).

265. Retired Federal District Judge Lane Phillips has gone so far as to have each defendant deposit the money into an escrow account and then issue one check to the plaintiff. Lane Phillips, Presentation, *Does Mediation Work for the Litigating Lawyer?* (ABA Mid-Year Conference, Dispute Resolution Section, Feb. 5, 1999).

