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Confidentiality in Mediation: Status and Implications

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COMMENT

CONFIDENTIALITY IN MEDIATION: STATUS AND IMPLICATIONS

I. INTRODUCTION

Mediation is becoming an increasingly popular alternative to formal adjudication. Large mediation programs handling huge numbers of both civil and criminal cases have sprung up in several of the largest cities in the nation. In Tulsa, Oklahoma, when the police write a citation, they often write "mediation" in place of a dollar amount.[1] The mediation program in Columbus, Ohio, handled over 9,000 cases in a one year period.[2] Of those 9,000 cases, 500 ultimately resulted in criminal charges,[3] and twelve resulted in one of the disputants murdering the other.[4]

As mediation becomes more widely used as an alternative to litigation, a new problem has emerged which threatens its continued viability—Confidentiality. As early as 1982, the ABA Special Committee on Dispute Resolution coined the term "subpoena crisis" as a shorthand reference for the most persuasive topic of conversation in the office—how to assist mediation program administrators in resisting compelled disclosure of mediation records.[5] This crisis prompted many programs to circumvent the problem by instructing their mediators to refrain from writing anything down or to destroy their records as soon as the mediation was concluded.[6] Circumstances such as these raise serious questions concerning the effect the "confidentiality crisis" will have on the future of mediation.

A review of the literature concerning confidentiality reveals an almost universal agreement that confidentiality is necessary to the survival of mediation

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1. SPECIAL COMM. ON DISPUTE RESOLUTION, PUBLIC SERVICES DIV. AMERICAN BAR ASS'N, ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND THE LAW: WILL REASON PREVAIL? 41 (eds. Ray, Kestner, Freedman, and Clare Aug. 9, 1983) (panel discussion series, topic 3-1983) [hereinafter MEDIATION].
2. *Id.* at 49.
3. *Id.* at 51.
4. *Id.* at 49-52.
5. *Id.* at 53.
6. *Id.* at 58.

as a viable form of alternative dispute resolution.[7] Both state and federal judges are beginning to recognize the desirability of mediation as an alternative to adjudication and the necessity of protecting the confidential communications which are key to its effectiveness.[8] Virtually every established mediation program uses confidentiality as a part of the agreement to mediate[9] and most scholarly articles on the topic call for at least some form of legislative or judicial protection of this confidentiality in mediation proceedings.[10] But, it is almost as true today as it was in 1984 that, "[u]nder current law . . . it is far from clear that a mediator can back up a promise that everything said in mediation will remain confidential."[11] Surveys indicate that the number of unreported cases involving a subpoena for mediators or for information disclosed in mediation is on the rise.[12]

The purpose of this comment is to give mediators a response to the question, "Will everything said in the mediation really remain confidential?"[13] The current status of the law governing confidentiality of mediation will be summarized, and relevant cases will be reviewed to determine their impact on specific issues.

II. THE MEDIATION PROCESS

Mediation has been defined as "a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement for resolving a dispute or planning a transaction."[14] In its simplest

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7. *See, e.g.*, Freedman & Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. DISP. RESOL. 37, 37-39 (1986) (parties will not disclose deep-seated feelings and underlying motivations without confidentiality; it would be unfair to the less sophisticated party to allow the proceedings to be used outside the mediation, and mediators must remain neutral in fact and perception); Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U.L. REV. 181, 196 (1982); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 441, 444-45 (1984) ("Confidentiality fosters an atmosphere of trust essential to mediation.").

8. *See infra* notes 66-74 and accompanying text.

9. Note, *supra* note 7, at 441. *See generally* MEDIATION, *supra* note 1, at 80.

10. *See generally* MEDIATION, *supra* note 1, at 68-90; Friedman, *supra* note 7, at 211; Murphy, *In the Wake of Tarasoff: Mediation and the Duty to Disclose*, 35 CATH. U.L. REV. 209, 221-22, 226-27 (1985); *Proposed Legislation on Critical Issues in Mediation*, 2 OHIO ST. J. DISP. RESOL. 121, 125-27 (1986) (panel discussion on proposed amendments to FED. R. EVID. 408 and proposed model state statutes).

11. Note, *supra* note 7, at 441; *see also* Freedman & Prigoff, *supra* note 7, at 39; Murphy, *supra* note 10, at 209-11, 226-27.

12. Freedman & Prigoff, *supra* note 7, at 42.

13. In this comment the term "confidential" is used to denote information which is both confidential and privileged. This comment is written from the perspective that both are equally necessary if parties are to feel free to disclose private or damaging information in the mediation. Legally the terms are quite different. Confidentiality bars public disclosure by the holder of the information but is no impediment to that information being used in a court of law. Privilege renders the information inadmissible but does not necessarily prevent its disclosure to the public. *See* Hayden, *Should There be a Psychotherapist Privilege in Military Courts-Martial?*, 123 MIL. L. REV. 31, 33 (1989).

14. Comment, *Mediation and Medical Malpractice Disputes: Potential Obstacles in the Traditional Lawyer's Perspective*, 1990 J. DISP. RESOL. 371, 373.

terms mediation may be characterized as one mediator trying to get two participants to do that which they least desire to do—talk to each other. Mediation is less about disputes and more about people. Mediation is a communication process; solving legal problems is simply a byproduct.[15] Mediators may give advice and structure discussions, but whatever they do is directed toward achieving a durable agreement which is acceptable to both parties.[16] Perhaps the most significant difference between mediation and adjudication is that mediation often structures future relationships between the parties, something for which adjudication is ill-suited.[17]

A. The Role of Confidentiality in Mediation

A growing number of courts throughout the nation describe their perceptions of the mediation process in published opinions.[18] They seem to accept the proposition that confidentiality is an important ingredient in any successful mediation.[19] A federal district court in New York noted that for mediation to be effective parties must disclose their private views, needs, and future tactics.[20] They will only be willing to do this if they can be assured that these confidential communications will not later be used against them.[21]

In addressing such an assurance, the District of Columbia Circuit Court of Appeals was asked by a labor group to oust the National Mediation Board's jurisdiction over a labor dispute thus paving the way for arbitration or a strike.[22] The court held that it would not require the mediator to testify as to his reasons for refusing to discontinue mediation.[23] Mediation was characterized as a subtle and delicate process,[24] where the mediator functions as a catalyst, and where privacy is a key element without which the process has little hope of success.[25]

In *Local 808, Building Maintenance, Service and Railroad Workers v. National Mediation Board*,[26] the District of Columbia Circuit Court of Appeals reaffirmed and extended its earlier praise and deference for the mediation process. The court held that mediation is the antithesis of justiciability.[27] To remain

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15. MEDIATION, *supra* note 1, at 48.

16. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731, 762 (1984).

17. Note, *supra* note 7, at 443.

18. *See infra* notes 20-33, 67-74 & 108-40.

19. *See infra* notes 20-33 & 223-28.

20. *In re* Joint E. and S. Dists. Asbestos Litig., 737 F. Supp. 735, 739 (E. and S.D.N.Y. 1990).

21. *Id.*

22. International Ass'n of Machinists and Aerospace Workers v. National Mediation Bd., 425 F.2d 527, 529 (D.C. Cir. 1970).

23. *Id.* at 540.

24. *Id.* at 534.

25. *Id.* at 538.

26. 888 F.2d 1428 (D.C. Cir. 1989).

27. *Id.* at 1435.

effective the mediator must be perceived as impartial by the parties.[28] The court described mediation as a "black box" where mediators work their own brand of magic to break deadlocks by constantly adapting to changing dynamics in an effort to promote amicable resolution.[29] The mediation process is an "art form" fundamentally different from adjudication.[30] It focuses on breaking impasses and must be insulated from outside intervention to succeed.[31] The court concluded that parties must be free to advance possible solutions without fear that these solutions will later be used against them or bind them if they prove unsatisfactory.[32]

Progress is often achieved during private caucuses where one party discloses information to the mediator which if known by the other side would be embarrassing or result in an extreme bargaining disadvantage. Such insight into the private motivations of the parties allows the mediator to devise innovative solutions which would be impossible unless the mediator was privy to the actual private goals of the parties. All of this is threatened by calling mediators before a court and forcing them to divulge confidences. It would destroy both that mediator's effectiveness and the potential client's willingness to risk exposure. It would undermine the future viability of mediation and significantly reduce the chances for future success.[33]

B. The Role of Trust in Mediation

Confidentiality is vitally important to mediation because it facilitates disclosure. People will not disclose personal needs, strategies, and information if they feel it might be used against them.[34] In normal interpersonal relationships trust is built on past positive experiences. Conversely, in mediation, two people who know from past experience they should not trust each other are thrust together against their will and expected to give their most immediate enemy the tools needed to cause great emotional pain and financial damage. As a result, confidentiality facilitates mediation in the same way trust facilitates friendship. Confidentiality deprives the disputants of the ability to use the information they gain from the mediation to the detriment of the other party thus paving the way for meaningful interaction between the parties in a relatively non-threatening environment.

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28. *Id.*
29. *Id.*
30. *Id.* at 1436.
31. *Id.*
32. *Id.*
33. *Id.*; *Asbestos Litig.*, 737 F. Supp. at 739.
34. *See generally* Rempel and Holmes, *How Do I Trust Thee?*, PSYCHOLOGY TODAY, Feb. 1986, at 28-34.

C. Practical Implications

Most parties to a mediation, if they consider the issue at all, assume that everything said in the mediation will not be disclosed publicly or used against them in a court of law. One ABA survey indicates that of the 288 programs surveyed, most respondents assumed that their mediation proceedings were privileged even though they likely were not.[35]

Perhaps mediators do not overtly make such blanket promises, but the parties may justifiably draw such conclusions from the conduct of the mediator. Virtually every mediation begins with the mediator eliciting a promise, often in writing, that all proceedings will be held in confidence by everyone present.[36] In order to induce a party to divulge private feelings and the true nature of the conflict, the mediator may assure the party that anything said will not be repeated outside the mediation without permission.[37] The resulting disclosure of such information is evidence of the party's belief that their disclosure is confidential. Surely, no one would admit damaging information if they expected it to be discussed openly in their community or used against them in a later trial. The very nature of a caucus between one party and the mediator justifies the inference that the mediator will not disclose the information to the other party without permission. In addition, all persons present promise to keep everything private. The average person tends to assume that people are bound by their word.[38] If the mediation is court ordered or if a prosecutor recommends the mediator, the parties may give the mediator's assurances even greater weight.

The nuances of the unenforceability of promises made without consideration, evidentiary privilege, and contracts being void as against public policy are lost on lay persons. Mediators should take steps to discover their client's beliefs about confidentiality and frankly disclose the true status of the law in their jurisdiction. Inducing disclosure of private information from a reluctant party on a representation of confidentiality which the mediator knows to be false is an unacceptable practice.[39]

III. CONFIDENTIALITY UNDER EXISTING LAW

Mediation is primarily a settlement device. Consequently, it is assumed that any protection applicable to settlement negotiations generally should be applicable to mediation, at least to the extent that the mediation serves as a vehicle for bona fide settlement negotiations as defined by the applicable doctrine.[40]

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35. *See* Freedman & Prigoff, *supra* note 7, at 42.
36. *Id.* at 38.
37. Friedman, *supra* note 7, at 197.
38. *Cf.* Freedman & Prigoff, *supra* note 7, at 42.
39. *Cf.* Stulberg, *Mediator Immunity*, 2 OHIO ST. J. DISP. RESOL. 85, 87 (1986).
40. *See infra* notes 45-57 and accompanying text.

A. Common Law

At common law, only the actual offer of settlement was excluded from evidence in a trial.[41] Often, parties were dismayed to learn that even parts of their offers to settle contained independent statements of fact which could be used against them in court.[42] In fact, even the actual offer to settle was admissible if offered to prove something other than liability, such as agency, bias, or impeachment.[43] In fact, the common law exclusion was no obstacle to the clever attorney.[44] Clearly, under the common law no mediator could expect to honor his promise of confidentiality if the dispute later went to court.

B. The Federal Rules

1. Federal Rule of Evidence 408[45]

The advent of the Federal Rules of Evidence expanded the confidentiality of settlement negotiations. Although the rule does not expressly cover mediation, it provides protection for statements made in an attempt to settle disputes.[46] Hence, the rule at least tangentially extends to statements made by parties to a dispute during a mediation.[47] Most likely, it does not block introduction of the mediator's perceptions, statements and conduct, but the courts have yet to address this issue.

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41. Green, *A Heretical View of Mediation Privilege*, 2 OHIO ST. J. DISP. RESOL. 1, 15-16 (1986); Note, *supra* note 7, at 447.

42. Freedman & Prigoff, *supra* note 7, at 40; Green, *supra* note 41, at 16; Note, *supra* note 7, at 447.

43. *Cf.* Truck Ins. Exch. v. L. N. Hale, 95 Ariz. 76, 79, 386 P.2d 846, 847 (1963).

44. *See generally* Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 957-58 (1988).

45. About half of the states have adopted analogous rules. Note, *supra* note 7, at 448.

46. FED. R. EVID. 408.

47. Friedman, *supra* note 7, at 205 (FED. R. EVID. 408 and FED. R. CRIM. P. 11(e)(6) should be easily extended to cover mediation).

Federal Rule of Evidence 408 provides that an offer of compromise shall be inadmissible to show liability or invalidity of a claim.[48] While affording substantially more confidentiality than the common law, the rule is far from a guarantee of complete confidentiality of the information presented in a mediation.

Rule 408, by its terms, does not apply in cases where the validity or amount of a claim is not in dispute,[49] nor where the offer or settlement does not involve some valuable consideration. As written, the rule might remove many neighborhood justice and minor criminal diversionary mediations from its scope. Often, in such cases the mediation is concerned with exploring underlying feelings and hidden agendas rather than any tangible dispute over liability or value.[50] Such proceedings might not even be settlement negotiations as contemplated by Rule 408.[51]

Rule 408 fails to protect confidentiality in another way. It allows admission of settlement offers and accompanying conduct and statements when offered to prove or disprove anything other than liability.[52] The scope and nature of disclosures common to mediation are often much broader than other forms of dispute resolution[53] and suggest that a mediation would provide a wealth of impeachment, bias, and various other information, as well as suggesting avenues of inquiry for interrogatories and depositions.

Aside from the exceptions to Rule 408 which create a window into the mediation itself, the rule fails in a more serious way—it affords no protection whatsoever for the final mediated agreement.[54] Thus, if an agreement is reached in which one party admits liability or guilt, that agreement could be used against him in a later criminal trial initiated by the state, or a civil trial initiated by a third party. If the liable party fails to perform the agreement, it could be used against him in a later civil trial by the original party. Even though such use is necessary

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48. Federal Rule of Evidence 408 states:

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

FED. R. EVID. 408.

49. *See* Murphy, *supra* note 10, at 233.

50. MEDIATION, *supra* note 1, at 44. (mediation involves two parties getting the facts out and negotiating. The rule covers only the negotiation).

51. Freedman & Prigoff, *supra* note 7, at 40.

52. Hudspeth v. Commissioner, 914 F.2d 1207, 1214 (9th Cir. 1990); Note, *supra* note 7, at 449-50.

53. Friedman, *supra* note 7, at 197 n.121.

54. *Id.* at 206-07.

to preserve the enforceability of mediated agreements, parties have a right to be informed about this breach of confidence. As a result, mediated agreements are far from confidential under Rule 408.

In addition to the evidentiary loopholes discussed above, Rule 408 fails to guarantee the privacy necessary to achieve the broader goals of mediation.[55] Rule 408 does not prevent discovery of the mediation proceedings, nor does it bar public disclosure of the substance of the proceedings by those present at the mediation.[56] In order for mediation to succeed, the parties must feel that any personal information they reveal will not be used against them.[57] Proving liability is not the only damaging use of such information. Unless parties can feel safe that sensitive information will not leave the room, they will be reluctant to disclose and the mediation process will suffer.

2. Federal Rule of Criminal Procedure 11(e)(6)

Federal rule of criminal procedure 11(e)(6) is the criminal counterpart to Rule 408. While motivated by similar policy concerns, Rule 11 bars evidence of offers to plead guilty.[58] The rule, by its express terms, would not exclude the admission of statements made at a mediation between two private parties or the agreement which they signed.[59] Consequently, the potential for mediation resulting in later criminal conviction should be of great concern to any mediator who promises confidentiality to parties.

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55. *Cf.* Green v. Uccelli, 207 Cal. App. 3d 1112, 117-19, 255 Cal. Rptr. 315, 316-18 (1989) (court sealed the record of a divorce proceeding. One of the attorneys involved in the case made public some information disclosed during the trial. The opposing party sued the attorney under California's public disclosure tort. The court dismissed the action, holding the order sealing the records of the proceedings bound only the clerk.).

56. Freedman & Prigoff, *supra* note 7, at 40; Green, *supra* note 41, at 18.

57. *See International Ass'n of Machinist & Aerospace Workers*, 425 F.2d at 534-43; *cf. Asbestos Litig.*, 737 F. Supp. at 738-39.

58. FED. R. CRIM. P. 11(e)(6).

59. Federal Rule of Criminal Procedure 11(e)(6) provides:

> Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
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> (A) a plea of guilty which was later withdrawn;
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> (B) a plea of nolo contendere;
>
> (C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
>
> (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

FED. R. CRIM. P. 11(e)(6); *cf.* United States v. Gullo, 672 F. Supp. 99, 103 (W.D.N.Y. 1987).

3. Federal Rule of Evidence 501

a. The Legal Framework

Federal rule of evidence 501 provides authority for courts to extend common law privilege to the mediation context.[60] It leaves the privilege issue to the resolution of the individual court. Historically, courts employ a four part test when evaluating a claim of privilege:

> (1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained by the correct disposal of litigation.[61]

While extension of a mediation privilege is arguably justified,[62] the passage of new state laws limiting the use of information gained in mediation sessions limit the harms attendant to disclosure and thereby undermine the fourth element of the test.[63] In addition, scholars argue that confidentiality is not essential to the success of mediation.[64]

However, there seems to be a growing recognition among judges throughout the United States of the importance of mediation and the vital role confidentiality plays in the process. The very adoption of Federal Rule of Evidence 408 betrays the belief of those who drafted and approved it—the belief that the settlement process in general was worthy of special treatment.[65]

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60. Rule 501 states:

> General Rule
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> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

61. Friedman, *supra* note 7, at 209 (citing J. WIGMORE, EVIDENCE §§ 1061-62 (3d ed. 1940)).

62. Freedman & Prigoff, *supra* note 7, at 43-44.

63. Under confidentiality laws less information would be disclosed so less injury to the relationship would result. The confidentiality law, if it performed as intended would obviate the need for a privilege and thus reduce the likelihood a court would grant a privilege.

64. Green, *supra* note 41, at 2.

65. Hulter v. Commissioner, 83 T.C. 663, 665 (1984).

b. *Emerging Judicial Attitudes Relative to the Privilege Issue*

If mediation is to thrive it must have the support and confidence of the Judiciary. Courts will be reluctant to embrace a common law mediation privilege or to construe and enforce confidentiality laws if they do not have faith in the desirability and effectiveness of the mediation process. A growing body of case law suggests that any skepticism which the Judiciary might initially have held toward the mediation process is dissipating.[66] The following cases demonstrate the willingness on the part of many state and federal judges to endorse the expanded use of mediation and surrender some judicial power. This surrender comes in the form of evidentiary privileges and special procedural dispensations, in order to create an environment in which mediation can flourish. Such judicial endorsement of the process may foreshadow a readiness to confront the more difficult issues such as privilege and confidentiality.

The judges of a Florida Court of Appeals fully endorsed mediation in the custody context and strongly advised all of the trial courts of the state to follow the lead of one circuit which had implemented a mediation program to settle custody disputes.[67] The Florida Court of Appeals noted that 1,116 of the 1,276 cases referred to mediation were settled—an 86% success rate.[68]

Minnesota courts recognized a mediation privilege even before their legislature's newly passed statutory privilege became effective.[69] The courts recognized a compelling need for confidentiality in the mediation process because it fosters party confidence in the mediator and the process as well as supporting the perception of the mediator's impartiality.[70]

One New York trial judge construed New York's Mediation Confidentiality statute as non-waivable.[71] He stressed the need for confidentiality as recognized by the legislature as support for this construction of the statute.[72] And the Supreme Court of Illinois held that there was a "strong public policy protecting the confidentiality of labor-negotiating strategy sessions."[73]

This emerging judicial ratification of the mediation process may lead courts to find a common law privilege for mediation. Despite the logic of a mediation

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66. *See infra* notes 67-74 and accompanying text.

67. Anderson v. Anderson, 494 So. 2d 237, 238 (Fla. Dist. Ct. App. 1986).

68. *Id.*

69. *In re* Parkway Manor Healthcare Center, 448 N.W.2d 116, 121 (Minn. Ct. App. 1989).

70. Sonenstahl v. L.E.L.S., Inc., 372 N.W.2d 1, 6 (Minn. Ct. App. 1985) (privilege extended to mediation proceedings after state legislature passed mediation confidentiality statute but before its effective date).

71. People v. Snyder, 129 Misc. 2d 137, 138-39, 492 N.Y.S.2d 890, 891-92 (N.Y. Sup. Ct. 1985) (prosecutor subpoenaed records of mediation between defendant and victim which occurred before defendant allegedly shot victim dead).

72. *Id.*, 492 N.Y.S.2d at 892.

73. Illinois Educ. Labor Relations Bd. v. Homer Community Consol. School Dist. No. 208, 132 Ill. 2d 29, 38, 547 N.E.2d 182, 187 (1989).

privilege, no court has found one to exist absent statutory support. It is important to note, however, that any privilege granted is not likely to extend to student/trainee mediators who do not yet meet the definition of a professional.[74]

C. State Confidentiality Laws

Already, many states have adopted laws affording confidentiality to mediation.[75] These laws range from limited immunity from subpoena[76] to full immunity which would bar any disclosure even to the point of preventing challenge or construction of the agreement.[77]

The newness of these laws leaves open the question of how they will fair against first amendment and freedom of information challenges.[78] At least one federal district court has already held that freedom of information and free press concerns prevailed over the settlement contract entered into by the parties which required destruction of discovery material.[79] If mediation ever evolves into a process of settling disputes which are of interest to the public, these state confidentiality statutes are sure to be challenged on first amendment grounds.

State confidentiality statutes are the most effective and viable means available to protect mediation,[80] but even these laws are not without exceptions. Many jurisdictions leave unchanged mandatory reporting of ongoing child abuse and criminal conduct.[81] This poses special problems for mediators in family law and criminal diversion programs. Any mediator who promises that anything said will remain confidential is almost certain to be proven wrong, but to warn of potential disclosure in these contexts could have a devastating effect on success.[82]

Like Federal Rule of Evidence 408, many of the state laws lack reference to the confidentiality of any settlement agreement reached by the parties and so leave open the possibility that it might be used in later criminal or civil trials. Conversely, some state statutes, if applied literally, preclude testimony as to

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74. Friedman, *supra* note 7, at 209.

75. Green, *supra* note 41, at 15 n.22 (fourteen states have at least partial confidentiality statutes, including: Arkansas, California, Colorado, Connecticut, Iowa, Florida, Michigan, Montana, New Hampshire, New York, New Jersey, North Carolina, Oklahoma and Oregon).

76. *Id.*

77. *See* Note, *supra* note 7, at 452-53; N.L.R.B. v. Joseph Macaluso, Inc., 618 F.2d 51, 53-56 (9th Cir. 1980).

78. The Attorney General of Florida concluded that mediation records were not shielded from public access. 81 Op. Fla. Att'y Gen. 157 (1981). The same would likely not be true under present day Florida law. *See Anderson*, 494 So. 2d at 237.

79. United States v. Kentucky Utils., 124 F.R.D. 146, 150 (E.D. Ky. 1989); *see infra* text accompanying notes 96-99.

80. *See supra* notes 40-75 and accompanying text.

81. Murphy, *supra* note 10, at 209-10, 242. But, New York's Attorney General has rendered an opinion that the New York confidentiality law does shield admission of child abuse. *Id.* at 220-21.

82. *Id.* at 222-23.

whether the mediated agreement was achieved under fraud or duress or whether it was achieved at all.[83]

Many of the state laws only protect disclosures related to the topic of the mediation.[84] Such a provision is ill-suited to mediation. In a courtroom, all activity revolves around well defined (pleaded) issues, and relevancy is the accepted rule. Mediation, however, operates on a completely different definition of relevance.[85] Anything likely to promote consensus is relevant; it is crucial. The scope of disclosure in mediation is dictated by the true nature of the dispute. A dispute diverted to a mediation program after charges of criminal tampering (for instance, tire slashing) may have nothing to do with vandalism and everything to do with a fight the two disputants had 20 years earlier in grade school.[86] If the criminal charge is settled in the first 20 minutes and the mediation continues for three more hours, are all of those disclosures open to the prying eyes of the courts? Such questions must be answered before mediators can make reliable promises of confidentiality.

Any reliance on state law as a source of confidentiality should be tempered by general observations. First, state confidentiality statutes do not bind federal judges in criminal matters.[87] Second, state civil confidentiality statutes do not necessarily apply to criminal trials.[88]

D. Contracts Limiting Admissibility of Disclosures

Agreements purporting to limit access to information disclosed in a mediation are of dubious effect at best.[89] Given the strong public policy favoring courts making decisions based on all available evidence, these contracts could be declared void as against public policy.[90]

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83. Note, *supra* note 7, at 452-53.

84. *See, e.g.*, FLA. STAT. § 44.201 (1988); IOWA CODE § 679.12 (1987); MO. REV. STAT. § 435.014(2) (1988); N.Y. JUD. LAW § 849-b(6) (Consol. 1989); VA. CODE ANN. § 8.01-581.22 (1988); WASH. REV. CODE § 7.75.050 (1988).

85. Freedman, *Confidentiality: A Closer Look*, ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND THE LAW: WILL REASON PREVAIL? 75 (eds. Ray, Kestner, Freedman, and Clare 1983) (panel discussion series, topic 3-1983).

86. *Cf.* MEDIATION, *supra* note 1, at 29-31, 44.

87. *See Gullo*, 672 F. Supp. at 99 (court found a privilege under FED. R. EVID. 501 on the strength of New York's confidentiality law).

88. *Cf.* Williams v. State, 178 Ga. App. 216, 217, 342 S.E.2d 703, 704 (1986). The defendant signed an agreement admitting he took $60,000 from his employer and agreeing to repay it. The agreement was introduced against him in a criminal proceeding when he failed to make the required payments. He was convicted. *Id.* at 216, 342 S.E.2d at 704.

89. Murphy, *supra* note 10, at 221.

90. Freedman & Prigoff, *supra* note 7, at 41; Note, *supra* note 7, at 450-51.

1. Judicial Disfavor of Anti-Admissibility Agreements

In *State v. Castellano*,[91] the Florida Court of Appeals held that even though a mediator may have told[92] the parties that everything said in the mediation was confidential, this guarantee did not bar the mediator from testifying. The defendant was charged with the first degree murder of a man with whom he was mediating a dispute.[93] He claimed self defense and wanted the mediator to testify as to threats which the victim had made during the mediation sessions.[94] The court held that the rule barring admissions of offers of compromise and settlement negotiations was inapplicable to criminal cases and that if the legislature considers confidentiality essential to the viability of mediation it should pass a law to that effect.[95] The court did not address whether a confidentiality statute preventing a defendant from introducing exculpatory evidence could withstand constitutional challenge.

In *United States v. Kentucky Utilities Co.*,[96] the federal government and an utility settled a suit with anti-trust ramifications on the condition that all discovery documents in the possession of the government were to be held confidential and destroyed as quickly as possible. The court reversed an initial protective order when members of the press intervened seeking access to the remaining documents.[97] The court held that it was not bound by confidentiality agreements of this kind[98] and that the press, acting in the interest of the public, had a right to the documents held by the government.[99]

While it is possible that courts would view mediation agreements differently than protective orders and agreements, that is by no means certain. To the extent that mediation programs receive public funds they may be subject to freedom of information laws,[100] and even private programs remain unprotected if the state confidentiality laws are held violative of the First Amendment right of free press.[101]

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91. 460 So. 2d 480 (Fla. Dist. Ct. App. 1984).

92. Enticing reluctant parties into a mediation on assurances of confidentiality would likely constitute actionable fraud. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. DISP. RESOL. 47, 57 n.47 (1986).

93. *Castellano*, 460 So. 2d at 481.

94. *Id.*

95. *Id.* at 481-82. The Florida legislature did pass such a law shortly after this case. *See* FLA. STAT. § 44.201.

96. 124 F.R.D. 146.

97. *Id.* at 149-53.

98. *Id.* at 149-50.

99. *See id.* at 152-53.

100. Note, *supra* note 7, at 451.

101. *But see generally* Note, *The Public's Need to Know vs. Effective Settlement Techniques: The First Amendment Confronts the Summary Jury Trial*, 1990 J. DISP. RESOL. 149, 151-61 (discussing the Sixth Circuit's recent holding that closing a summary jury trial to the press and public did not violate the first amendment).

2. Judicial Receptiveness for Anti-Admissibility Agreements

The viability of mediation based anti-admissibility agreements may be increasing. Several courts find a strong public policy supporting confidentiality of mediation sessions.[102] To the extent that courts see such agreements as furthering the public policy favoring mediation, they are less likely to be voided as against the public policy favoring admissibility of all available evidence.

In *Pipefitters v. Mechanical Contractors Association of Colorado*,[103] the court held that the public interest in obtaining every person's evidence was outweighed by the need to preserve an effective labor mediation program.[104] The court concluded that the key element in successful federal labor mediation is that parties are able to discuss confidential concerns frankly with federal mediators without fear of disclosure.[105] It noted that Congress recognized the importance of confidentiality when it exempted information gained in mediation proceedings from federal freedom of information laws.[106] While the *Pipefitters* decision provides hope that confidentiality agreements will be enforced, it should be noted that the court was acting under the authority of a statute which made the information sought confidential.[107]

In *Sonenstahl v. L.E.L.S., Inc.*,[108] the Minnesota Court of Appeals found a compelling need to protect the confidentiality of labor mediations between police officers and the city. A group of detectives sought to force the mediator to testify that the union negotiators had repeatedly turned down offers to raise the detective's salaries in order to get concessions on overall salaries.[109] The court held that the information sought was privileged, citing the state's newly passed but not yet effective mediation confidentiality statute as a policy motivation.[110] *Sonenstahl* supports the assumption that there is an emerging public policy supporting mediated settlements which may be strong enough to overcome the courts' desire to make decisions on all available evidence. Again, this court looked to legislative enactments as part of the justification for the balance it struck.

The Illinois Supreme Court likewise found the existence of a "strong public policy protecting the confidentiality of labor-negotiating Strategy sessions."[111] The court in *Illinois Education Labor Relations Board v. Homer Community Consolidated School District No. 208*[112] relied upon the National Labor Relations

102. *See infra* notes 103-34 and accompanying text.
103. No. 79-C-1382 (D.Colo. June, 26 1980) (WESTLAW, DCT database).
104. *Id.* at 2.
105. *Id.* at 1.
106. *Id.*
107. *Id.*
108. 372 N.W.2d 1.
109. *Id.* at 6.
110. *Id.* at 6-7.
111. *Education Labor Relations Bd.*, 132 Ill. 2d at 38, 547 N.E.2d at 187.
112. 132 Ill. 2d 29, 547 N.E.2d 182.

Board refusal to compel a federal mediator to reveal information gained during a mediated session.[113] It seems that courts are more likely to find such public policies in the labor mediation context and when there is some tangible governmental action to support such a conclusion.

Perhaps the strongest manifestation of the emerging public policy driving the proliferation of mediation programs surfaces in *People v. Snyder*.[114] Two men were mediating a dispute which eventually ended in one party allegedly killing the other.[115] The district attorney subpoenaed the records of the mediation from the Community Dispute Resolution Center in Erie County.[116] The records were protected by New York's confidentiality law and the court quashed the subpoena.[117] The state argued that the defendant had waived any privilege.[118] The court held that the public policy of the state was to insure a mediation atmosphere free from restraint and intimidation by guaranteeing absolute confidentiality.[119] On the strength of this policy and the clear language of the statute the court held that the privilege was absolute. Not even the parties could waive the privilege.[120]

Snyder yields two important inferences. First, the public policy favoring confidentiality is so strong that it outweighs the wishes of the individual. Second, and more importantly, the policy is not designed solely to protect the needs of the individual. It is a societal goal to resolve disputes without resort to the courts, and if the courts must close their eyes to relevant evidence to accomplish that goal, that is a detriment the society is willing to endure.

The Georgia Court of Appeals considers mediation proceedings to be confidential in the context of criminal proceedings.[121] In *Byrd v. State*,[122] the defendant was charged with stealing. He allegedly converted $800 paid on a remodeling contract to his own use.[123] The consumer filed charges after the contractor failed to begin work.[124] The trial court ordered mediation of the dispute at the Neighborhood Justice Center of Atlanta, Inc.[125] The disputants reached an agreement which defendant signed but failed to perform.[126] After eight months of non-performance the case proceeded to trial and the prosecutor

113. *Id.* at 39, 547 N.E.2d at 187.
114. 129 Misc. 2d 137, 492 N.Y.S.2d 890.
115. *Id.* at 137, 492 N.Y.S.2d at 891.
116. *Id.*
117. *Id.* at 140, 492 N.Y.S.2d at 892.
118. *Id.* at 137, 492 N.Y.S.2d at 891.
119. *Id.* at 139, 492 N.Y.S.2d at 892.
120. *Id.* at 138-39, 492 N.Y.S.2d at 892.
121. Byrd v. State, 186 Ga. App. 446, 449, 367 S.E.2d 300, 303 (1988).
122. 186 Ga. App. 446, 367 S.E.2d 300.
123. *Id.*
124. *Id.* at 446-47, 367 S.E.2d at 301.
125. *Id.* at 447-48, 367 S.E.2d at 302.
126. *Id.* at 446, 367 S.E.2d at 301.

sought to introduce the mediated settlement as an admission of guilt.[127] There was no confidentiality statute, but the court refused the evidence on policy grounds.[128]

The court reasoned that no one would sign a settlement document if they knew it could later be used against them.[129] It concluded that confidentiality was essential to the integrity of the mediation process.[130] As justification for its holding, the court pointed to the Federal Rules of Criminal Procedure's protection of plea bargaining and the public policy favoring out of court settlements.[131] It also noted that pretrial diversions such as in those found in *Byrd* were against the public policy of the state and Constitutional concerns implicating Fourth and Fifth amendment protections.[132] The court stated that a different outcome might occur if this were a private, totally voluntary mediation, rather than a court ordered diversion program.[133] Three members of the court joined in a strong dissent and would admit the evidence for use as an admission of consciousness of guilt.[134]

Further evidence of the growing trend toward court protection of mediation may be found in the handling of confidentiality challenges under various sunshine laws. The federal Freedom of Information Act specifically exempts from public disclosure information which government mediators gain as a result of mediation.[135] In *Minnesota Education Association v. Bennett*,[136] the Minnesota Supreme Court resolved a conflict between the mediation statute and an open meetings law applying to school boards. The mediator authorized a private caucus by the school board to decide if it would raise the limit of its salary offer.[137] The other party claimed the sunshine law mandated that the meeting be open to the public.[138] The court held that since the statute authorized confidential mediation sessions it was permissible for the mediator to authorize a private caucus, not withstanding the open meetings law.[139] A Florida Court of Appeals avoided resolving a similar conflict by holding that since no final action could be taken by the public entity at the mediated session, the sunshine law did not apply.[140]

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127. *Id.* at 448, 367 S.E.2d at 302.
128. *Id.* at 447-49, 367 S.E.2d at 302-03.
129. *Id.* at 448, 367 S.E.2d at 302.
130. *Id.*
131. *Id.* at 448, 367 S.E.2d at 303.
132. *Id.* at 449, 367 S.E.2d at 303.
133. *Id.*
134. *Id.* at 452, 367 S.E.2d at 304.
135. *Pipefitters*, No. 79-C-1382, slip op. at 1 (D. Colo. June, 26 1980).
136. 321 N.W.2d 395 (Minn. 1982).
137. *Id.* at 396.
138. *Id.*
139. *Id.* at 399.
140. News-Press Publishing Co. v. Lee County, 570 So. 2d 1325, 1327 (Fla. Dist. Ct. App. 1990) (mediation between cities as to the location of a bridge).

E. Informal Agreements with Courts and Prosecutors

Several diversion programs achieve great success with informal agreements that any information disclosed in mediation will be excluded by local judges and not used by prosecutors.[141] The success of these arrangements is obviously dependent on the personalities involved, but two observations may be helpful. First, they are clearly unenforceable in any legal sense.[142] Second, entanglements between the courts and mediators raise inescapable inferences of state action thereby triggering constitutional concerns such as right to counsel, due process, privilege against self-incrimination and equal protection.[143]

IV. REPRESENTATIVE CASES

Those seeking to predict the resolution of a particular confidentiality issue should not overlook the substantial latitude vested in individual judges. Even when a confidentiality statute exists in a jurisdiction it must be interpreted and applied. The resolution of threshold factual issues determines whether the statute applies to the given fact pattern and to what extent it applies. The individual judge's attitude toward mediation in general and toward the case in particular may skew the outcome of such preliminary issues. Much latitude is available to allow judges to achieve the result they desire, especially where the controlling statute lacks previous attention by other courts.

A court's resourcefulness in circumventing a privilege statute may be seen in *In re Rosson*.[144] State law provided for mandatory mediation of all child custody disputes.[145] Proceedings held pursuant to the law were privileged, but the statute allowed the local court to adopt a local rule allowing the mediator to report her recommendations to the court if the mediation was unsuccessful.[146]

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141. Friedman, *supra* note 7, at 200-01.

142. *Id.* at 203.

143. A federal district court in New York held that a state law making mediation proceedings confidential withstood a substantive due process challenge because it was rationally related to a legitimate state end. New York State Inspection, Sec. and Law Enforcement Employees Dist. Council 82 v. New York State Pub. Relations Bd., 629 F. Supp. 33, 51 (N.D.N.Y. 1984).

The Michigan State Supreme Court was found to be immune from liability for promulgating a mediation rule which allowed local courts to adopt mandatory mediation programs. The court noted in dicta its feeling that the rule was constitutional. Alia v. Michigan Supreme Court, 906 F.2d 1100, 1102 (6th Cir. 1990).

In *McLaughlin v. Superior Court* the Court declared unconstitutional a local rule allowing child custody mediators to give their opinions as to the most desirable placement of the child if the mandatory mediation failed. The infirmity in the rule was in the fact that the mediation was confidential and the parties were not allowed to cross examine the mediator as to the grounds for his recommendation. *McLaughlin*, 140 Cal. App. 3d 473, 482-83, 189 Cal. Rptr. 479, 486-87 (1983).

144. 178 Cal. App. 3d 1094, 224 Cal. Rptr. 250 (1986).

145. *Id.* at 1099 n.4, 224 Cal. Rptr. at 254 n.4.

146. *Id.* at 1103-04, 224 Cal. Rptr. at 257.

The local court in the instant case had no such local rule,[147] but admitted the mediators recommendations into evidence at trial after the parties failed to reach an agreement.[148]

The court of appeals held that the statute made the mediation privileged but that the privilege belonged to the court and not the parties.[149] Consequently, the trial court's actions were upheld due to its power to waive the privilege over the participants' objections.[150] The court based this placement of the privilege with the court, instead of the parties, on the statutory provision allowing the court to adopt a local rule allowing mediators to disclose recommendations to the court.[151]

Perhaps the most comprehensive treatment of the confidentiality issue is contained in *United States v. Gullo*.[152] Defendant Gullo was charged with the use of extraordinary means to collect an extension of credit under 18 U.S.C. sections 872 and 874.[153] The victim went to the police which referred him to the Community Dispute Resolution Settlement Center.[154] Defendant signed an agreement to arbitrate.[155] The arbitration process began with mediation but provided for binding arbitration if the mediation proved unsuccessful.[156] The agreement provided that "the neutral will hold all information received during the hearing as confidential and will not voluntarily divulge that information."[157] The center was established and funded under a state statute which identified a compelling need for viable methods of alternative dispute resolution and provided substantial funding for such programs.[158] The chief administrator of the courts administered the program.[159] The act empowered private organizations staffed by their own trained personnel to handle community and minor criminal disputes.[160] It made all proceedings confidential and inadmissible in the state courts.[161] This defendant, however, was before a federal court on federal criminal charges. The defendant claimed that any statements made by him during the arbitration were involuntary and unconstitutionally obtained and, therefore, sought their suppression.[162]

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147. *Id.*
148. *Id.*
149. *Id.* at 1105, 224 Cal. Rptr. at 258.
150. *Id.*
151. *Id.*
152. 672 F. Supp. 99.
153. *Id.* at 101.
154. *Id.* at 102.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 102-03.
161. *Id.*
162. *Id.* at 102.

The federal district judge in *Gullo* held that since this was a voluntary community program rather than a criminal pretrial diversion program there was no state action to support the constitutional challenges raised.[163] The court also rejected defendant's contention that the statements were privileged as a plea bargain because no charges were pending against the defendant at the time the statements were made.[164]

Defendant also claimed that the statements were privileged under Federal Rule of Evidence 501 which leaves the determination of privilege to the statutes and common law.[165] The federal court stated that it was not bound by the New York law making mediations privileged, but it did consider the state law justification for finding a common law privilege.[166]

The court applied a four part balancing test. First, it noted a strong public policy favoring admission of all relevant facts in a criminal case.[167] Second, it recognized that confidentiality is the very core of successful mediation.[168] Third, it noted that the state failed to demonstrate any particularized need for the information in this particular case, and so that was not a factor to be balanced.[169] Finally, the court considered the damage to the local policy if the privilege was not recognized.[170] While the court considered it unlikely that people would refuse to participate because they feared their statements and actions might later be used against them in a federal prosecution, it did feel that any disclosure would undermine the overall effectiveness of the system.[171] After balancing these considerations the court ultimately held that the mediation proceedings in question were privileged and excluded all statements, terms and conditions of the settlement from use at trial.[172]

Gullo emphasizes the important point that state laws making mediation proceedings confidential are not binding on federal courts.[173] While it is unlikely that disputes which are mediated fall under federal jurisdiction, it has already happened at least once and should not be ignored by mediators promising confidentiality. *Gullo* is also important because it evidences the emerging judicial respect for a process which was dismissed only a few years earlier and virtually unheard of a decade before. With the increasing state movement toward establishing alternative dispute resolution as a public policy, courts seem more willing to adjust their perceptions concerning the role of courts in the dispute resolution process and to accommodate the needs of the newer forum. Certainly,

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163. *Id.* at 103.
164. *Id.*
165. *Id.*
166. *Id.* at 103-04.
167. *Id.* at 104.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 103.

more accommodation is needed if mediation is to flourish, but cases like this one represent substantial cause for hope.

V. DEFINING MEDIATION

The advent of state laws protecting the confidentiality of mediation proceedings may force the courts to address a previously academic question: What constitutes a "mediation"? By definition, state confidentiality laws separate into two categories. Many are part of enabling legislation which establish mediation programs, such as divorce or labor mediation, and require confidentiality of proceedings pursuant to that legislative mandate.[174] Often, a state agency conducts such mediation.[175] Such laws pose little definitional problems.

The blanket assertion that records and statements disclosed during a "mediation" are confidential categorizes a second category of confidentiality law.[176] Such laws, often found in evidence codes, are not linked to any specific programs and at most require only the presence of an approved mediator.[177] Even after defining mediation, the courts are forced to apply that definition to the facts of each case. The diverse and flexible nature of mediation programs makes such application difficult.

Insight into the difficulties of defining "mediation" may be seen in *Lange v. Marshall*.[178] An attorney, accused of malpractice, claimed that he could not be guilty of legal malpractice because he was acting as a mediator.[179] The defendant attorney claimed that because of his friendship with both parties, he had refused to represent either in the divorce, but he did agree to draft the papers if

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174. *See, e.g.*, MO. SUP. CT. R. 17.

175. *See generally Education Labor Relation Bd.*, 123 Ill. 2d 29, 547 N.E. 2d 182.

176. *See, e.g.*, MO. REV. STAT. § 435.014 (1988).

177. *See generally* Green, *supra* note 41, at 15-16. What definitional substance is present in the statutes may be more indicative of an attempt by the proposing group to elevate their "profession" above other grassroots settlement processes. One author has labeled the mediator based push for confidentiality statutes as nothing more than "short sighted professional self-interest." *Id.* at 2.

One must ask whether requiring mediation to take place under the auspices of an approved program, or be conducted by a trained, approved mediator, or that the agreement to mediate be a signed writing, are legitimate attempts to regulate the quality of mediation, or simply attempts by mediators to gain recognition of their chosen profession and corner the market on settlement negotiations. *See generally id.* at 2, 30. If mediation eventually achieves the confidentiality its promoters desire, businesses and other sophisticated litigants may begin to see the cost of a mediator as a small price to pay to ensure that a candid remark during settlement negotiations will not be used against them in later court action. Evidentiary privilege is justified by the nature of the process not the qualification of the moderator. *Cf. generally* Chaykin, *supra* note 92, at 78 n.138.

178. 622 S.W.2d 237 (Mo. Ct. App. 1981).

179. *Id.* at 238. The Supreme Court of Vermont has disapproved of the process of one attorney's mediating a divorce and then drafting the stipulation and presenting it in court. Such practice was held to raise ethical concerns and result in the judge making his decision based on less than the full information produced by the advocacy process. *See* Barbour v. Barbour, 146 Vt. 506, 511-12, 505 A.2d 1217, 1220-21 (1986).

they could agree on the terms.[180] After reaching an agreement, the papers were prepared and signed.[181] Later, the woman became unhappy with the agreement and retained another lawyer.[182]

Eventually, this new attorney acquired a more advantageous settlement for her through litigation.[183] She sued the defendant attorney on grounds that he failed to inquire into her husband's financial affairs and that he did not adequately apprise her of her legal rights.[184] The attorney claimed he had clearly informed the parties that he was acting as a mediator rather than a lawyer.[185] He believed that to inform the woman of her legal rights or to investigate the financial status of the parties would be a violation of his duty to remain neutral.[186] The court awarded no damages due to the failure of the woman to prove that the attorney's actions proximately caused the damages.[187]

Lange illustrates the difficulties in deciding what processes constitute mediation for statutory purposes. The Missouri confidentiality statute, enacted in 1989, provides:

> 1. If all the parties to a dispute agree *in writing* to submit their dispute to any *forum* for arbitration, conciliation or mediation, then no person who serves as arbitrator, conciliator or mediator, nor any agent or employee of that person, shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the arbitration, conciliation or mediation.
>
> 2. Arbitration, conciliation and mediation proceedings shall be regarded as settlement negotiations. Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.[188]

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180. *Lange*, 622 S.W.2d at 237.
181. *Id.* at 238.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. MO. REV. STAT. § 435.014 (emphasis added).

Under the Missouri statute it is unclear whether the *Lange* case would qualify as a mediation.[189] The statute seems to require both a written agreement to mediate and that the mediation be conducted by a *forum* rather than an individual mediator.[190] In *Lange*, if the attorney and the parties communicated by letter, it is entirely possible that both parties sent letters to the attorney agreeing to mediate. Such letters might constitute the required agreement.

The term "forum" is more problematic. The statute might contemplate a forum dedicated exclusively to mediation. It could, however, be a generic term, broad enough to encompass any arena capable of sustaining the inherent elements of mediation, such as a room with a table and chairs and a third party neutral to act as mediator. Adoption of the narrow definition results in the demise of independent mediators. Under the broader definition a law firm could constitute a forum.

Section two of the Missouri statute contains the protection for the content of the mediation.[191] Presumably, the requirements set forth in section one would apply to section two, but the statute remains unclear. Section two could be read as independent of section one because it affords a different kind of protection. Courts resolve ambiguity in favor of reading statutes as non-redundant.[192] Hence, a court might be reluctant to read the section one requirements into section two because to do so would result in some redundancy. If section two is read independent of section one then courts defining the term "mediation" can look only to the plain meaning of the term and the context in which it is used.

Heelan v. Lockwood[193] demonstrates another example of the problem of defining mediation. After being fired, a former manager sued his employer.[194] An attorney, who held himself out as a third-party-neutral mediator, then approached the employee.[195] During the ensuing settlement talks, the employee disclosed confidential information.[196] Upon failure of the settlement attempts, the employer hired the "mediator" to litigate the case for him.[197] The employee moved for disqualification because of the attorney's privity to confidential information gained through the settlement talks.[198] The attorney denied that he had held himself out as a mediator and resisted disqualification.[199] The court

189. Missouri Supreme Court rule 17.01-.08, adopted after the statute took effect, represents a more comprehensive scheme answering many of the concerns raised here. It represents a separate scheme allowing local courts to establish a mediation program and rules governing its conduct. MO. SUP. CT. R. 17.01-.08.

190. *See* MO. REV. STAT. § 435.014.1.

191. MO. REV. STAT. § 435.014.2.

192. *See, e.g., In re* Estate of Dewitt, 603 S.W.2d 931, 935 (Mo. 1980).

193. 143 A.D.2d 881, 533 N.Y.S.2d 560 (N.Y. App. Div. 1988).

194. *Id.* at 882, 533 N.Y.S.2d at 561.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 882-83, 533 N.Y.S.2d at 561.

199. *Id.* at 883, 533 N.Y.S.2d at 561.

held that any appearance of a conflict of interest justified disqualification and removed the attorney.[200]

Heelan is an example of the dynamic nature of the mediation relationship. The employee believed he was in mediation. The attorney did not. The opinion does not disclose the specific nature of the proceedings at issue, but it leaves the impression that only the attorney and the employee were present. Certainly, this is not the typical conception of mediation. The mediation at issue may have consisted of several telephone calls and one or two face-to-face negotiations. Such proceedings are not typical of mediation, but it is unclear why they do not merit the same protection as more traditional mediation. The *Heelan* case also shows how mediation is viewed from both a subjective and an objective vantage. The key issue is whether the parties are attempting to settle their differences. All other requirements may be merely procedural obstacles depriving deserving proceedings of statutory confidentiality.[201]

The flexible character of mediation makes the adoption of bright line rules a difficult task. Some legislatures may choose to settle the issue by requiring signed agreements and approved programs staffed by trained mediators before the proceedings will be considered privileged. While such an approach has the advantage of ease of application, it may undermine the effectiveness of mediation. Such could result in the demise of informal programs staffed with volunteer mediators. It is far from clear, however, that private, informal mediation is less deserving of the state's blessing than more formal programs. Confidentiality statutes should protect programs which merit protection by the contribution they make to the larger goals of the society. To the extent that groundless definitional requirements promote form over substance, mediation will become less effective and more bureaucratic—more like courts of law.[202]

VI. DEFINING THE LIMITS OF PROTECTION

In jurisdictions where a statute protects the confidentiality of mediated proceedings, the courts are forced to construe the coverage of the applicable statute. The typical statute affords protection for all communications and disclosures made during a mediation, so long as they are relevant to the topic of the mediation.[203] In addition to defining the type of proceedings covered by the statute, courts must define other parameters of coverage. Likely issues include: (1) whether the statute covers discussions as to why and if the mediation should be undertaken; (2) what constitutes a "communication" or "disclosure"; (3) whether proceedings between the parties without the mediator present are protected; (4) whether discussions between one party and the mediator without the other party

200. *Id.*

201. *See generally* Green, *supra* note 41, at 2, 30; *Cf.* MEDIATION, *supra* note 1, at 48.

202. *Cf.* MEDIATION, *supra* note 1, at 48.

203. *See* Murphy, *supra* note 10, at 222-23.

present are protected; and (5) (likely the most problematic) was the communication relevant to the topic of the mediation.

Newark Board of Education v. Newark Teachers Union[204] is an example of how a court may circumvent a confidentiality statute to obtain relevant evidence. The board of education and the teacher's group engaged in labor mediation under a rule which provided that information disclosed by a party to a mediator in the performance of his duties would not be divulged voluntarily or by compulsion.[205] The rule also made the mediator's files and records confidential, as well as any papers received by the mediator from the parties.[206]

At trial the school board sought production of union counter-proposals and notes taken by the union's representative during the mediation.[207] The documents sought were produced at the mediation for settlement purposes.[208] The union representative gave these documents to the mediator for transmittal to the school board representative.[209] The court held that the confidentiality provisions of the rule did not include the documents because the mediator did not read the documents.[210] It reasoned that the rule's purpose is to preserve the mediator's appearance of impartiality rather than the confidentiality of the mediation proceedings.[211] Consequently, access to material which the mediator merely delivered from one party to another was not covered by the rule.[212]

In *Krueger v. Washington Federal Savings Bank*,[213] the Minnesota Court of Appeals decided whether a state confidentiality statute[214] extended protection to discussions as to why a mediation should take place. Krueger was a farmer.[215] The state statute gave farmers the right to request mediation before a lender instituted foreclosure proceedings.[216] The mediation was voluntary but required the lender to attend at least one session.[217] Krueger requested mediation and the lender attended the required meeting.[218] No accord was reached and the foreclosure was instituted.[219] When a second lender threatened foreclosure, Krueger requested mediation with the second lender and sought an injunction to

204. 152 N.J. Super. 51, 377 A.2d 765 (Ct. App. Div. 1977).
205. *Id.* at 61, 377 A.2d at 770.
206. *Id.*
207. *Id.* at 57, 377 A.2d at 768.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. 406 N.W.2d 543 (Minn. Ct. App. 1987).
214. MINN. STAT. § 583.26 Subd. 7(b) (1986).
215. *Krueger*, 406 N.W.2d at 544.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 545.

force the first lender to attend as well.[220] The first lender refused and subpoenaed the mediator to testify about the earlier discussions and as to why the first mediation was undertaken, presumably to demonstrate the pointlessness of a second mediation.[221] The trial court quashed the subpoena on the mediator's unopposed motion, but the court of appeals reversed, holding that any privilege which might exist did not prevent access to discussions as to why the mediation should take place.[222]

In *N.L.R.B. v. Joseph Macaluso, Inc,*[223] the Ninth Circuit Court of Appeals decided that a mediator's testimony concerning whether both parties actually agreed on a settlement could not be compelled. The union claimed that an agreement was reached during mediation while the employer claimed otherwise.[224] The trial court initially granted a subpoena for the mediator to testify as to what actually happened, but later revoked it holding that testifying would undermine the mediator's credibility as a neutral in future mediations.[225] The Ninth Circuit affirmed.[226] It noted as a primary consideration, the effect on the mediator's status as a neutral party.[227] Confidentiality was only a means to an end—preserving the effectiveness of the mediator for future disputes.[228]

Macaluso raises an interesting paradox. The purpose of mediation is to promote settlement.[229] Confidentiality is necessary for the mediation process to achieve binding settlements.[230] In this case, assuming a settlement was actually reached, the need for confidentiality prevents access to the mediator's testimony. But, the mediator's testimony was vital to enforcing the settlement which was the ultimate goal of the mediation. One of the greatest challenges facing drafters of confidentiality legislation is to strike a balance between the need for confidentiality and the need to enforce settlements.

Many confidentiality statutes simply state that all communications made during a mediation will be inadmissible.[231] Such blanket grants of privilege will seem especially harsh if one party claims that the settlement reached was the result of fraud and attempts to introduce evidence from the mediation as proof of the fraud. If enforced as written, such statutes seem to immunize fraudulent conduct.

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220. *Id.*
221. *Id.*
222. *Id.*
223. 618 F.2d 51 (9th Cir. 1980).
224. *Id.* at 53.
225. *Id.*
226. *Id.* at 52.
227. *Id.* at 54-55.
228. *Id.* at 54-56.
229. *Cf.* Chaykin, *supra* note 92, at 64.
230. *Cf.* Note, *supra* note 7, at 444-45.
231. *See, e.g.*, ME. R. EVID. 408(b) ("Evidence of conduct or statements by any party or mediator at a court-sponsored domestic relations session is not admissible for any purpose.").

In *Harriman v. Maddocks*,[232] the court held such a blanket statute did not bar insureds from introducing evidence that an adjuster had fraudulently induced them to sign a release shortly after an automobile accident.[233] The adjuster claimed that the confidentiality statute barred introduction of such evidence.[234] Maine Rules of Evidence 408 substantially tracks Federal Rule of Evidence 408, and adds: "Evidence of conduct or statements by any party or mediator at a court-sponsored domestic relations session is not admissible for any purpose."[235] The court summarily rejected the argument that the rule barred evidence of fraudulent inducement, holding that the rule barred admission of settlement negotiations only when offered to prove liability.[236]

E. J. Wilson v. Attaway,[237] exemplifies the greatest challenge to confidentiality statutes. Plaintiff was arrested as a result of an altercation during a mediation session.[238] Plaintiff then filed a civil suit against the other participant alleging that the arrest violated his constitutional rights.[239] The mediator witnessed the altercation which formed the basis of the criminal charge and made reference to the incident in his report.[240] The Eleventh Circuit Court of Appeals held that it was not an abuse of discretion to refuse admission of the report into evidence at trial.[241] The court reasoned that the statute setting up the mediation service which conducted the mediation provided for confidentiality and to allow the mediator's report to be used against one of the parties would undermine the mediation process.[242]

In re Waller[243] further illustrates the complexities courts are likely to encounter when deciding issues of standing and coverage. The court avoided deciding whether an attorney representing a client in a mediation could assert the privilege in disciplinary proceedings against him for ethical violations allegedly committed during the mediation.[244]

The original action concerned a medical malpractice suit filed against several health care providers.[245] The court ordered mediation and further ordered that "no statements by parties or counsel shall be disclosed or admissible."[246] During

232. 518 A.2d 1027 (Me. 1986).
233. *Id.* at 1028 (insureds claimed the adjuster told them the release covered only property damage when, in fact, it was a full release of all claims arising from the accident).
234. *Id.* at 1030.
235. *Id.* at 1031.
236. *Id.* at 1029, 1031.
237. 757 F.2d 1227 (11th Cir. 1985).
238. *Id.* at 1245.
239. *Id.* at 1237.
240. *Id.* at 1245.
241. *Id.*
242. *Id.*
243. 573 A.2d 780 (D.C. 1990).
244. *Id.*
245. *Id.* at 781.
246. *Id.*

the course of the mediation the mediator revealed to the plaintiff's attorney that the surgeon who actually operated on plaintiff was not named as a defendant.[247] Plaintiff's attorney explained that the surgeon was not named because he was a client of the attorney.[248] The mediator then told the attorney that this was a conflict of interest and that the attorney should inform the judge.[249] The attorney maintained that there was no conflict and refused to tell the judge.[250] After several unsuccessful attempts to convince the attorney to disclose the relevant facts to the judge, the mediator decided that the matter was not confidential under the judge's order because it was not related to the mediation and informed the judge of the relevant facts.[251]

When asked by the trial judge to explain the matter, the attorney initially maintained, that the entire matter was his way of testing the confidentiality of the mediation.[252] The trial judge referred the matter to the bar committee.[253] The committee disciplined the attorney for the misrepresentation during the mediation.[254] The matter was appealed to the State Board on Professional Responsibility which reversed the committee's findings.[255] It avoided the confidentiality issue by disciplining the attorney for his admittedly false statement to the trial court that he was simply testing the integrity of the mediator.[256] The matter was then appealed to the District of Columbia Court of Appeals. The court affirmed the Board's decision without addressing the issue of whether the attorney could claim the privilege to prevent discipline for statements made during the mediation.[257]

Waller reveals the willingness of a court to allow circumvention of the plain language when it perceives a miscarriage of the drafters' intent. The statement to the court which ultimately resulted in Waller's discipline was prompted by the court's inquiry into, arguably, confidential proceedings. Yet neither the State Board nor the court of appeals felt it necessary to determine the issue of whether the in court statements were the result of an impermissible inquiry. Acting in reliance on a clear court order, an attorney frankly disclosed information to a mediator which later led to his discipline. Ironically, this case suggests that

247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 781-82.
253. *Id.* at 781.
254. *Id.* at 784.
255. *Id.* at 780.
256. *Id.* at 783.
257. *Id.*

participants might be well advised to test the confidentiality of the mediator before disclosing important facts.[258]

VII. IMPLICATIONS

No mediator can tell a client with complete confidence that everything said during the course of the mediation will remain confidential in all circumstances. Topicality requirements or definitional technicalities pose serious threats to absolute confidentiality, even in states with blanket confidentiality statutes. It is very likely that there are mediators practicing today who know that and still induce their clients to disclose embarrassing and potentially damaging information with promises of confidentiality. Such mediators should realize that they incur a duty on such promises and may find themselves defending suits for breach of contract, invasion of privacy, or fraud. If the mediator is paid, such fraudulent misrepresentations could even trigger criminal sanctions.[259]

Mediation is communication. It often requires disclosure of embarrassing and potentially damaging information. Such self-disclosure is a very threatening process for most people. It requires a willingness to assume the risk of rejection and abuse, but it is absolutely necessary to the proper functioning of the mediation process. Mediation is built on trust.[260] Without trust participants will not disclose their true needs. But before participants can trust each other they must trust the mediator. If mediators are to be trusted they must be truthful. Frankly informing parties to a mediation of the limitations to confidentiality may in the short run discourage some disclosures and hence reduce effectiveness. In the long run, however, it is the only viable solution.

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258. In two other cases the courts have avoided difficult decisions respecting confidentiality of mediated statements by resolving the cases on procedural grounds. In *Oster v. Oster*, the trial court made a child custody award on evidence disclosed in a mediation. The Court of Appeals reversed the case as not final without commenting on the confidentiality issue. *Oster*, 536 So. 2d 835, 836 (La. Ct. App. 1988). In *Columbia Management Co. v. Wyss*, the court held that admitting evidence of the amount one party told a third party neutral he would take to settle the case in a settlement negotiation was harmless error if it was error at all. 94 Or. App. 195, 206, 765 P.2d 207, 215 (1988).

259. For a discussion of specific causes of action available against mediators see generally Chaykin, *supra* note 92, at 53-77.

260. *Cf.* Chaykin, *supra* note 16 at, 744-45.