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Alan Kirtley

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# The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest

Alan Kirtley<sup>1</sup>

## I. INTRODUCTION

Mediation<sup>2</sup> has become a widely utilized form of dispute resolution.<sup>3</sup> Proponents of the process have long contended that the successful functioning of mediation is dependent upon mediation proceedings being confidential.<sup>4</sup> In the

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1. Assistant Professor of Law and Director of Clinics, University of Washington School of Law; B.A. and J.D., Indiana University (Bloomington). My interest in this subject arose out of my participation in the drafting of Washington State's mediation privilege statute. The statute was a project of the Alternative Dispute Resolution Section of the Washington State Bar Association. I thank John Mitchell, Debbie Maranville, Tom Andrews, Ken Gallant, Lynne Cox and Rob Aronson for their close and helpful readings, and Joe Lee for superb research assistance.

2. For a definition of "mediation" and a discussion of the process, see *infra* part II.

3. Compare ABA Special Committee on Dispute Resolution, *Dispute Resolution Directory* (1981) (141 programs listed) with ABA Special Committee on Dispute Resolution, *Dispute Resolution Program Directory* (1986-87) (listing over 300 programs). See also Kent L. Brown, Comment, *Confidentiality in Mediation: Status and Implications*, J. DISP. RESOL. 307, 307 (1991); Lawrence Freedman, *Confidentiality a Closer Look*, in ABA SPECIAL COMMITTEE ON DISPUTE RESOLUTION, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 47, 49 (Lawrence Freedman et al. eds., 1985).

4. See Brown, *supra* note 3, at 310; Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 37-38 (1986); Eileen P. Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U. L. REV. 181, 196 (1982); Phillip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN L.J. 315 (1989); Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17, 18 (1988); Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, J. DISP. RESOL. 25, 26 (1992) (Expressing that some degree of confidentiality may be required for mediation to be effective, but it is wrong to assume absolute confidentiality is necessary); Timothy Hoxie, Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 444-45 (1984) ("Confidentiality fosters an atmosphere of trust essential to mediation."); John R. Murphy III, Note, *In the Wake of Tarasoff: Mediation and the Duty to Disclose*, 35 CATH. U. L. REV. 209, 239-42 (1985); Note, *Making Sense of Rules of Privilege Under the Structural (Il)logic of the Federal Rules of Evidence*, 105 HARV. L.

last 15 years, despite a few opposing voices,<sup>5</sup> these urgings have materialized in a profusion of mediation privilege statutes<sup>6</sup> and rules.<sup>7</sup> The impetus for the

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REV. 1339 (1992) (arguing for a limited "activities" privilege for mediation); Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988); NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* 145-46 (1989) (arguing for a narrowly drawn privilege); Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 388-91 (1994) (supporting a privilege that is "mutable by private agreement").

5. Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986). Cf. NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* 67-71 (1987) (outlining the arguments of opponents to a mediation privilege).

6. Statutes dealing with community dispute resolution centers are referenced as "drc." ARIZ. REV. STAT. ANN. §§ 12-2238 (1994) (general), and 25-381.16 (1994) (divorce); CAL. CIV. PROC. CODE § 1297.371 (West Supp. 1994) (int'l commercial disputes); CAL. EVID. CODE § 1152.2 (West Supp. 1994) (general); CAL. FAM. CODE § 3177 (West Supp. 1994) (child custody); CAL. FOOD & AGRIC. CODE § 54453 (West Supp. 1994) (labor disputes); CAL. GOV'T CODE §§ 12984 (West Supp. 1994) (housing discrimination) and 12985 (West 1992) (housing discrimination); COLO. REV. STAT. ANN. §§ 8-43-205(2) (West 1994) (worker's comp.), 13-22-307 (West Supp. 1993) (general), and 14-12-105 (West 1989) (marriage counseling); CONN. GEN. STAT. ANN. §§ 10-153d (West Supp. 1994) (intergov't dispute), 10-153f (West Supp. 1994) (labor dispute), 31-96 (West 1987) (labor dispute) and 46b-53(a) (West Supp. 1994) (family law); FLA. STAT. ANN. §§ 44.101(3) (West Supp. 1994) (family), 44.102 (West Supp. 1994) (court ordered mediation), 44.201(5) (West Supp. 1994) (drc), 61.183 (West Supp. 1994) (divorce), 90.501 (West 1979) (evidence), 440.25(3)(b) (West 1991) (worker's compensation), 455.2235 (West Supp. 1994) (general), and 723.038(9) (West Supp. 1994) (mobile home park tenancies); ILL. ANN. STAT. ch. 710 para 20/6 (Smith-Hurd 1992) (general); IND. CODE ANN. §§ 20-7.5-1-13 (Burns 1987) (labor disputes), and 31-1-24-7 (Burns 1992) (family law); IOWA CODE ANN. §§ 13.14 (West Supp. 1994) (farm mediation), 22.7 (West Supp. 1989) (confidential records), 679A.12 (West 1987) (general); KAN. STAT. ANN. §§ 23-603 (1988) (domestic disputes) and 23-606 (1988) (domestic disputes); LA. CIV. CODE ANN. art. 9:351 (West 1991) (child custody); ME. REV. STAT. ANN. tit. 24 § 2857 (West 1990 & Supp. 1993) (mediation panels), tit. 26 § 965 (West 1988) (public employee labor disputes), 1026 (West 1988 & Supp. 1993) (U of Me. labor disputes), and 1285 (West 1988 & Supp. 1993) (judicial employee labor disputes); MASS. GEN. LAWS ANN. ch. 150, § 10A (West Supp. 1994) (labor disputes), and ch. 223, § 23C (West 1986) (general); MICH. COMP. LAWS ANN. §§ 691.1557 (West 1991) (drc), 423.25a (West 1978) (labor mediation), and 552.513 (West 1988) (domestic relations); MINN. STAT. ANN. §§ 494.02 (West 1990) (drc), 583.26 (West 1988 & Supp. 1994) (farm mediation), and 595.02 (West 1988 & Supp. 1994) (general); MO. ANN. STAT. § 435.014 (Vernon 1992); MONT. CODE ANN. §§ 26-1-811 (1993) (general), and 39-71-2410 (1993) (worker's comp.); NEB. REV. STAT. §§ 25-2914 (1994) (general), 43-2908 (Supp. 1993) (child custody), and 48-168(2)(b) (Supp. 1993) (worker's comp.); NEV. REV. STAT. § 48.109 (1991) (evidence); N.H. REV. STAT. ANN. §§ 328-C:9 (Supp. 1993) (marital mediators), and 458:15-a (1992) (divorce); N.J. STAT. ANN. § 34:13A-16 (West 1988) (labor disputes); N.Y. FAM. CT. ACT § 915 (West 1992) (family court conciliation) and N.Y. Jud. Law § 849-b(6) (McKinney 1992) (drc); N.C. GEN. STAT. § 50-13.1(e) (1993) (child custody); N.D. CENT. CODE §§ 6-09.10-10 (Supp. 1993) (farm and business aid), 14-09.1-06 (1991) (child custody), and 31-04-11 (Supp. 1993) (general); OKLA. STAT. ANN. tit. 12, § 1805 (West 1993) (general); OR. REV. STAT. § 36.205 (1993) (general), 107.179 (1993) (child custody), 107.600 (1993) (domestic relations-conciliation), and 107.785 (1993) (domestic relations-mediation); PA. STAT. ANN. tit. 43, § 211.34 (1992) (labor disputes); R.I. GEN. LAWS §§ 9-19-44 (Supp. 1993) (general), and 15-5-29 (1988) (domestic relations); S.C. CODE ANN. §§ 8-17-360 (Law. Co-op. 1986) (employee grievance); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053 (West Supp. 1994) (ADR procedures), and 154.073 (West Supp. 1994) (general); TEX. REV. CIV. STAT. ANN. art. 249-37 (West Supp. 1994) (int'l commercial disputes); UTAH CODE ANN. §§ 30-3-17.1 (1989) (divorce), and 78-31b-7 (1992) (general); VA. CODE ANN. § 8.01-581.22 (Michie 1992) (general);

mediation privilege has been to address the shortcomings of the existing law's protection of mediation.<sup>8</sup> These new rules of mediation privilege have emerged despite Wigmore's venerated axiom that "the public has the right to every [person's] evidence"<sup>9</sup> and against the current of judicial resistance to court created evidentiary privileges.<sup>10</sup>

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WASH. REV. CODE ANN. §§ 5.60.070 (West Supp. 1994) (general), 7.75.050 (West 1992) (drc), and 26.09.015 (West Supp. 1994) (family); WIS. STAT. ANN. §§ 767.11 (West 1993 & Supp. 1994) (family counseling), 904.085 (West Supp. 1994) (evidence); WYO. STAT. § 1-43-103 (Supp. 1994) (general); 5 U.S.C. § 574 (1994) (adr in the administrative process); 7 U.S.C. § 5101 (1994) (agricultural loan program); 29 C.F.R. § 1208.5 (1994) (National Mediation Board).

Model mediation privilege statutes/rules have been suggested. A group of persons prominent in the mediation field contributed to the development of a model mediation privilege provision. Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17, 71-73 (1988). The American Bar Association Standing Committee on Dispute Resolution also drafted a model provision for presentation to the ABA House of Delegates, but it has never been adopted. *Id.* at 65-70.

7. ALA. CIVIL CT. MEDIATION RULE 11 (general); ARIZ. MARICOPA COUNTY SUPER. CT. RULE 6.8 (domestic relations); ARIZ. PIMA COUNTY SUPER. CT. RULE 18.7 (conciliation court); ARIZ. PINAL COUNTY SUPER. CT. RULE 4.2(e) (domestic relations); ARIZ. YAVAPAI COUNTY SUPER. CT. RULE 10.1(E) (general); HAW. REV. STAT. § 624-45, R. 408; IDAHO R. EVID. 507; FLA. WORK. COMP. PROC. RULE 4.360; IND. ADR RULE 2.7 (general) and 2.12 (general); LA. STAT. ORLEANS CIV. DIST. CT. RULE 18; MD. SPECIAL PROCEEDINGS RULE S73A (child custody); MINN. 2ND JUD. DIST. CT. RULE 9.05 (family court); MINN. GEN. PRAC. RULE 310.05 (general); MO. BAR RULE 17.06; MO. RULES OF CIV. PRO. 88.08 (family); NEV. WASHOE COUNTY 2ND JUD. DIST. RULE 29 (family mediation program); N.H. SUPER. CT. RULE 170 (general); N.J. GEN. APPL. RULE 1:33 (administrative responsibility), and 1:40-4 (general); N.Y. CT. RULE § 116.3 (comm. disp. resol. program); OKLA. COUNTY 7TH JUD. DIST. RULE 62 (general); TEX. 4TH DIST. CT. OF APPEALS RULE 8 (ADR); U.S. BANKR. CT. S.D. CAL. RULE 7016-3 (mediation panels); U.S. BANKR. CT. M.D. FLA. RULE 2.7 (general); U.S. DIST. CT. M.D. FLA. RULE 9.07 (court-annexed mediation); U.S. DIST. CT. MASS. LOCAL RULE 16.4(C)(4)(f); U.S. DIST. CT. D. N.J. RULE 49 (general); U.S. DIST. CT. W.D. OKLA. RULE 48 (general); U.S. DIST. CT. E.D. WASH. LOCAL RULE 39.1(d)(3); U.S. DIST. CT. W.D. WASH. LOCAL RULE 39.1(c)(5) (general).

Note there is some question as to whether courts have the authority under FED. R. CIV. P. 83, and its state counterparts, to promulgate local court rules creating a mediation privilege. Compare ROGERS & MCEWEN, *supra* note 4, at 119, n.27, with Folberg, *Confidentiality and Privilege in Divorce Mediation*, DIVORCE MEDIATION: THEORY AND PRACTICE, 319, 332 (1988). A separation of powers issue may arise if a state's mediation privilege derived from a court rule conflicts with a statutory disclosure requirement such as child abuse. Kenneth S. Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 459-61 (1985).

8. See *infra* Part IV.

9. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2192, at 70 (1961) [hereinafter WIGMORE ON EVIDENCE].

10. *People v. Sanders*, 457 N.E.2d 1241 (Ill. 1983), *remanded*, 469 N.E.2d 287 (Ill. App. Ct. 1984) (expansion and creation of privileges should be left to the legislature); *Matter of Parkway Manor Health Care Ctr.*, 448 N.W.2d 116, 121 (Minn. Ct. App. 1989) ("In view of the longstanding judicial hostility toward evidentiary privileges. . ."); *State v. Castellano*, 460 So. 2d 480, 481 (Fla. Dist. Ct. App. 1984) ("[P]rivileges in Florida are no longer creatures of judicial decision."); *Drewitt v. Ranier Sch.*, 806 P.2d 1260 (Wash. Ct. App. 1991); *State v. Maxon*, 756 P.2d 1297 (Wash. 1988) (court refused to create a parent-child privilege). See generally, MCCORMICK ON EVIDENCE (3rd ed. 1984), § 75.

Interestingly, these new privilege rules, despite their common purpose, vary substantially in scope, content and operation. Frequently, the provisions reveal an outright lack of understanding of the mediation process and do not address the harms the privilege seeks to cure.<sup>11</sup> These differences also reflect the difficulty of creating a rule which strikes a proper balance between mediation's need for confidentiality and the public's interest in access to certain types of information.

This article will analyze the developing law of the mediation privilege. To begin with, the attributes and uses of the mediation process and the function of confidentiality in mediation will be examined. The existing legal means to protect mediation confidentiality, short of a privilege, will also be reviewed. Then an analysis of policy considerations underlying evidentiary privileges generally will be followed by an assessment of the theoretical underpinnings for a mediation privilege. Finally, a critique of the various forms taken by new mediation privilege statutes and rules will be undertaken. The State of Washington's mediation privilege statute<sup>12</sup> will serve as a comparative benchmark throughout

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11. ROGERS & MCEWEN, *supra* note 4, at 145-46.

12. WASH. REV. CODE § 5.60.070 (Supp. 1994) reads as follows:

(1) If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100, then any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding except:

(a) When all parties to the mediation agree, in writing, to disclosure;

(b) When the written materials or tangible evidence are otherwise subject to discovery, and were not prepared specifically for use in and actually used in the mediation proceeding;

(c) When a written agreement to mediate permits disclosure;

(d) When disclosure is mandated by statute;

(e) When the written materials consist of a written settlement agreement or other agreement signed by the parties resulting from a mediation proceeding;

(f) When those communications or written materials pertain solely to administrative matters incidental to the mediation proceeding, including the agreement to mediate; or

(g) In a subsequent action between the mediator and a party to the mediation arising out of the mediation.

(2) When there is a court order, a written agreement to mediate, or when mediation is mandated under RCW 7.70.100, as described in subsection (1) of this section, the mediator or a representative of a mediation organization shall not testify in any judicial or administrative proceeding unless:

(a) All parties to the mediation and the mediator agree in writing; or

(b) In an action described in subsection (1)(g) of this section.

WASH. REV. CODE § 5.60.072 (Supp 1994) reads as follows:

Notwithstanding the provisions of RCW § 5.60.070, when any party participates in mediation conducted by a state or federal agency under the provisions of a collective bargaining law or similar statute, the agency's rules govern questions of privilege and confidentiality.

the article. While not perfect, the Washington statute presents a considered approach to many of the scope, content and operational issues that will be discussed. The purposes of this article are to contribute to a clearer understanding of the workings (and non-workings) of individual mediation privilege provisions and to the thoughtful development of the mediation privilege.

## II. THE MEDIATION PROCESS

Many have defined "mediation."<sup>13</sup> At its essence, mediation is a process<sup>14</sup> of negotiations facilitated by a third person(s) who assists disputants to pursue a mutually agreeable settlement of their conflict.<sup>15</sup> In contrast to adjudicatory

The Washington statute draws heavily upon earlier privilege statutes from Virginia and Oregon. See VA. CODE ANN. § 8.01-581.22 (Michie 1992); OR. REV. STAT. § 36.205 (1993). Washington also has enacted mediation privilege provisions for community dispute resolution centers and domestic relations mediations. WASH. REV. CODE § 7.75.050 (1992); WASH. REV. CODE § 26.09.015(3) (Supp. 1994).

13. FLA. STAT. ANN § 44.1011(2) (West Supp. 1994) ("Mediation means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties."); TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (West 1991) ("Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them."); VA. CODE ANN. § 8.01-581.21 (Michie 1991) ("'Mediation' means the process by which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy. . . ."); Gerald W. Cormick, *The "Theory" and Practice of Environmental Mediation*, 2 ENVTL. PROF. 24, 27 (1980) (quoting the Office of Environmental Mediation's definition of mediation as a "voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement."); Comment, *Mediation and Medical Malpractice Disputes: Potential Obstacles in the Traditional Lawyer's Perspective*, J. DISP. RESOL. 371, 373 (1990) (Mediation is "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."); Joint Committee on Standards of Conduct: American Arbitration Association, American Bar Association & Society of Professionals in Dispute Resolution, *Standards of Conduct for Mediators*, p. 2 (Final Draft April 8, 1994) (on file with author) [hereinafter Joint Committee Standards] ("Mediation is a process in which an impartial third party -- a mediator -- facilitates the resolution of a dispute by promoting voluntary agreement (or 'self-determination') by the parties to the dispute.").

14. Brown, *supra* note 3, at 309 ("Mediation is a communication process; solving legal problems is simply a by product."); R. Kraybill, *A Procedure for Mediation Inter-Personal Disputes*, in *MEDIATION: A READER* (L. Buzzard & R. Kraybill eds., 1982). Given the informal nature and varied uses of mediation, the process takes on distinct forms in various settings. Nevertheless, a mediation generally proceeds through these stages: a mediator opening to explain the process (and reach an understanding regarding confidentiality); participant statements to offer their perspectives on the dispute; agenda building to define and organize the negotiations; negotiations in joint and/or private caucus sessions; and closure to clarify the terms of the agreement reached or explore next steps for the parties if resolution cannot be achieved.

15. While resolving existing disputes has been and is the predominate function of mediation, a growing use of mediation is for the negotiation of future relationships and transactions. Comment, *supra* note 13. For example, mediators assist prospective business partners plan and negotiate the terms of their transaction. Also, administrative agencies and stakeholders mediate the terms of proposed regulations to minimize litigation over the new rules. See 5 U.S.C. §§ 561-570 (1994); Philip J. Harter, *Negotiated Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

forms of dispute resolution -- hearings, arbitration and trials -- mediation is a contractarian process.<sup>16</sup> The salient features of mediation are an informal process,<sup>17</sup> a neutral mediator<sup>18</sup> without authority to command a result,<sup>19</sup> disputants who participate voluntarily<sup>20</sup> and settle of their own accord,<sup>21</sup> and pertinent to our purposes, confidentiality of mediation communications.

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16. Hoxie, *supra* note 4, at 443.

17. Mediation is also flexible. The informality and flexibility of mediation allow the parties and the mediator to custom make a process for the parties' dispute.

18. "Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from the mediation at any time." Joint Committee Standards, *supra* note 13, at 2. "In mediation, decision making authority rest with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives." FLA. STAT. ANN. § 44.1011(2) (West Supp. 1994). One author wrote:

The need for impartiality and neutrality does not mean that a mediator may not have personal opinions about a dispute's outcome. No one can be entirely impartial. What impartiality and neutrality do signify is that the mediator can separate his or her opinions about the outcome of the dispute from the desires of the disputants and focus on ways to help the parties make their own decisions without unduly favoring one of them. The final test of impartiality and neutrality of the mediator ultimately rests with the parties. They must perceive that the intervenor is not overtly partial or unneutral in order to accept his or her assistance.

CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 15 (1986).

19. In theory a party loses no control over the outcome of the dispute by mediating because the mediator is a facilitator of negotiations, not a decision maker. *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(b) (West Supp. 1994) ("A mediator may not impose his own judgment on the issues for that of the parties."). Even those mediators whose methods include suggesting particular outcomes have no overt authority to impose a specific settlement. Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 91 (1981). However, a mediation participant is likely to experience some, at least subtle, pressure to settle: pressure from the process, the mediator and/or the other party. For persons physically or emotionally incapable of withstanding such pressure, mediation is inappropriate. *See infra*, note 38 regarding the questionable appropriateness of mediating disputes between victims of abuse and their abusers.

20. "Participation in the dispute resolution process shall be voluntary and the form or technique utilized shall be by mutual agreement of the parties." MICH. COMP. LAWS ANN. § 691.1556 (West Supp. 1994); COLO. REV. STAT. § 13-22-302(3) (1993); OKLA. STAT. tit. 12, § 1804(A) (1993).

Normally, participation in mediation is completely voluntary: both coming to and remaining at the mediation. Increasingly, statutes and contractual clauses mandate that parties mediate, for example, in child custody disputes. *See* WASH. REV. CODE § 26.09.184(3) (Supp. 1994) (post-decree ADR required). While appearing at the mediation table may be mandatory, in only a few contexts, such as labor disputes, is continuing participation legally required. In the labor field, parties often have a duty to stay at the table and bargain "in good faith."

21. "[Mediation] is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement." FLA. STAT. ANN. § 44.1011(2) (West Supp. 1994); *see also* Brown, *supra* note 3, at 309 ("Mediators may give advice and structure discussions, but whatever they do is directed toward achieving a durable agreement which is acceptable to both parties.").

Mediation has its origins in prelegal societies around the world.<sup>22</sup> Mediation also has a long history in the American colonies and the United States.<sup>23</sup> Wide scale use of mediation in this country first occurred in the labor field,<sup>24</sup> resulting in the creation of the Federal Mediation and Conciliation Service in 1947.<sup>25</sup> Community programs to conciliate minor disputes and crimes were first developed in the 1920's.<sup>26</sup> In the 1960's, mediation was used by the Community Relations Service of the U.S. Justice Department in civil rights disputes.<sup>27</sup> Beginning in the 1970's, mediation and conciliation have been touted as the preferred processes to resolve family disputes.<sup>28</sup>

From these beginnings, mediation is now widely used to resolve a broad range of conflicts: from playground squabbles<sup>29</sup> to multi-party, international disputes.<sup>30</sup> Regularly mediated cases involve personal injuries, business disputes, divorce and child custody, the environment, criminal cases, farm foreclosures, and civil rights matters.<sup>31</sup> A few jurisdictions have instituted so-called multi-door courthouse programs placing access to alternative dispute resolution processes on an equal par with trials<sup>32</sup> and others mandate mediation of all civil court cases.<sup>33</sup> As a result of these developments, mediation is increasingly an alternative to the traditional justice system or at least a regular detour off the litigation trail. Mediation's growth in popularity stems from its attractiveness to disputing parties and its effectiveness in bringing about settlements.<sup>34</sup>

22. P.H. GULLIVER, *DISPUTES AND NEGOTIATION: A CROSS-CULTURAL PERSPECTIVE* (1979); HENDERSON, *CONCILIATION AND JAPANESE LAW* (1965); Glassman, *The Function of Mediation in China: Examining the Impact of Regulations Governing the People's Mediation Committees*, 10 UCLA PACIFIC BASIN L.J. 460 (1992). See generally MOORE, *supra* note 18, at 19-21.

23. *Id.*; JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW* 19-46 (1983); Hoxie, *supra* note 4, at 446 n.38.

24. MOORE, *supra* note 18, at 21; Hoxie, *supra* note 4, at 442.

25. 29 U.S.C. § 172 (1982).

26. R. SMITH, *JUSTICE AND THE POOR* 63 (3d ed. 1924); Merlin H. Staring, Note, *Conciliation in the Municipal Court for the District of Columbia*, 34 GEO. L.J. 352 (1946).

27. MOORE, *supra* note 18, at 21-22. The Community Relations Service was created by Congress as a portion of the Civil Rights Act of 1964. See 42 U.S.C. § 2000a-3(d) (1981).

28. JAY FOLBERG & ANN MILNE, *DIVORCE MEDIATION: THEORY AND PRACTICE* 5-16 (1988). See, e.g., OR. REV. STAT. § 107.600 (1993).

29. STEPHEN B. GOLDBERG, ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 10 (2nd ed. 1992). Dispute resolution is part of Michigan's compulsory school curriculum. MICH. COMP. LAWS § 380.1167 (Supp. 1994).

30. M. Scott Donahey, *International Mediation and Conciliation*, in *THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE*, Chap. 33 (Bette J. Roth et al. eds., 1993).

31. See generally Green, *supra* note 5, at 2-4 nn.4-10 (listing the various settings in which mediation is used).

32. GOLDBERG, *supra* note 29, at 432-33, 438-41.

33. Florida has mandatory mediation of civil cases in its highest trial court. FLA. STAT. ANN. § 44.102(2) (West 1991).

34. Mediation has proven to be highly effective. While data are limited, one study found that 66.1% of the small claims cases mediated ended in an agreement. Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, in *MEDIATION*



Mediation is user-friendly. Legal rules of procedure and evidence do not apply, witnesses are not called, attorneys often are not present, there are no limits on what information may be presented, no record is made and settlements need not be confined to strictly legal remedies.<sup>35</sup> Because of its informality mediation is a faster, cheaper<sup>36</sup> and less adversarial method of resolving disputes than traditional legal proceedings.<sup>37</sup> This informality is not without its risks.<sup>38</sup>

### III. THE FUNCTION OF CONFIDENTIALITY IN MEDIATION

Having no coercive power, a mediator is dependant upon increasing communication, if not trust, between disputants.<sup>39</sup> The willingness of mediation parties to "open up" is essential to the success of the process.<sup>40</sup>

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RESEARCH (Kenneth Kressel et al. eds., 1989). Extrapolations from this study are imprudent. Before mediation became popular, 90 to 95% of all civil cases settled before trial. Thus it is difficult to quantify mediation's "added value." Cf. Brown & Ayres, *supra* note 4. The predominate benefit of mediation is the savings of transactions costs through earlier settlements; mediation can result in settlements before cases are filed or earlier in the litigation process.

The perceived success of mediation in bringing about settlements has caused mediation to become a popular form of dispute resolution. Business agreements contain mediation clauses and new legislation often provides for or requires mediation as a dispute resolution mechanism. Provision of mediation services is a growth industry. Public resources are being devoted to court connected mediation programs. Private, non-profit organizations have sprung up to supply volunteer mediators for small claims and community conflicts. And, a host of private firms, many new, compete to offer mediation services for a fee. For many, mediation has become the attractive alternative to the courtroom.

35. MOORE, *supra* note 18, at 13-19.

36. A 1987 newspaper article reported that the Travelers Corporation, a large insurance company, had settled 2,700 casualty claims using ADR during the preceding 18 months with estimated savings of \$2.7 million. Alexander Stille, *ADR Helps Cut Costs, Survey Says*, NAT'L LAW J., at 9 (Aug. 31, 1987).

37. A third party mediator can create value in negotiations by overcoming barriers inherent even in the strategic interaction of rational, self-interested negotiators. Brown & Ayres, *supra* note 4.

38. Prejudice or power imbalances may arise in mediation which formal legal procedures are designed to curb. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075-78, 1082-85 (1984) (arguing generally in favor of public dispute resolution); Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1672-73 (1985); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, WIS. L. REV. 1359 (1985) (arguing that ADR processes may foster racial and ethnic prejudice because, as shown by social science research, people who hold prejudicial attitudes are more likely to express and act upon them in informal settings.).

Many have concluded that mediation is not appropriate where there is a history of domestic abuse or violence. Mary Pat Treuthart, *In Harm's Way? Family Law Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717 (1993); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992); Charlotte Germane, et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Dangers for Victims of Domestic Violence*, 2 BERKELEY WOMEN'S L.J. 175 (1986).

39. Prigoff, *supra* note 4, at 1-2; Hoxie, *supra* note 4, at 444-45.

40. The Wisconsin mediation privilege begins with this language: "The purpose of this section is to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled." WIS. STAT. § 904.085(1) (West 1994); Brown, *supra* note 3,

The mediation process is purposefully informal to encourage a broad ranging discussion of facts, feelings, issues, underlying interests<sup>41</sup> and possible solutions to the parties' conflict.<sup>42</sup> Mediation's private setting<sup>43</sup> invites parties to speak openly, with complete candor.<sup>44</sup> In addition, mediators often hold private meetings -- "caucuses" -- with each of the parties.<sup>45</sup> More overt assurances of confidentiality are common. Mediators regularly require all present to promise to keep mediation discussions confidential,<sup>46</sup> and routinely assure participants that the proceedings are confidential (whether or not legal protection is certain).<sup>47</sup>

Under such circumstances, mediation parties often reveal personal and business secrets, share deep-seated feelings about others, and make admissions of fact and law.<sup>48</sup> Without adequate legal protection, a party's candor in mediation

at 110 ("... 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.") citing *Local 808, Building Maintenance, Service and Railroad Workers v. National Mediation Board*, 888 F.2d 1428, 1436 (D.C. Cir. 1989); Joseph Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 Vt. L. Rev. 85, 96-97 (1981).

41. The idea of encouraging parties to negotiate based on their underlying interests, rather than positions, was popularized in *GETTING TO YES*. ROGER FISHER AND WILLIAM URY, *GETTING TO YES* 3-8, 41-57 (1981).

42. A mediation agreement can resolve the parties' dispute, and in addition, create a structure for conflict avoidance in their future interactions. Brown, *supra* note 3, at 309 ("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.")

43. Mediations between private parties are generally conducted in a private confidential setting. Mediations involving public issues raise special concerns which are beyond the scope of this article. Compare Will Pryor & Robert M. O'Boyle, *Public Policy ADR: Confidentiality in Conflict?*, 46 S.M.U. L. REV. 2207 (1993) (arguing in favor of private, confidential, non-binding mediation of public disputes) with Thomas S. Leatherbury & Mark A. Cover, *Keeping Public Mediation Public: Exploring the Conflict Between Confidential Mediation and Open Government*, 46 S.M.U. L. REV. 2221 (1993).

44. Disclosures made in such settings create reasonable expectations of confidentiality. Brown, *supra* note 3, at 311 ("Perhaps mediators do not overtly make such blanket promises [of confidentiality], but the parties may justifiably draw such conclusions from the conduct of the mediator.")

45. In caucus discussions the mediator seeks to discover a party's private factual information, underlying interests and negotiation strategies in order to better understand the dynamics of the conflict. The confidentiality of caucuses is the essential motivator for a party to make such disclosures. *Id.* at 309-11. "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." *Id.* at 311. Moore, *supra* note 18, at 263-71. *Cf.* Brown & Ayres, *supra* note 4, as to the beginning implications of mediations using private caucusing exclusively.

46. Such requests increase the disputants' sense of confidentiality since most persons assume that promises made will be honored. Brown, *supra* note 3, at 311. "The mediator's assurances of confidentiality lead to the parties' active participation in the mediation process." Friedman, *supra* note 4, at 197.

47. Many programs simply assume that mediation communications are privileged. Freedman, *supra* note 4, at 42 (referring to an ABA survey of dispute resolution programs).

48. Brown, *supra* note 3, at 310 ("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."); see also Prigoff, *supra* note 4, at 1-2.

might well be "rewarded" by a discovery request or the revelation of mediation information at trial.<sup>49</sup> A principal purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed mediation.<sup>50</sup> Participation will diminish if perceptions of confidentiality are not matched by reality.<sup>51</sup> Another critical purpose of the privilege is to maintain the public's perception that individual mediators and the mediation process are neutral and unbiased.<sup>52</sup>

#### IV. THE INADEQUACY OF PROTECTION UNDER NON-PRIVILEGE LAW

Before the widespread enactment of mediation privilege statutes, several non-privilege theories were advanced to address the need for confidentiality in mediation. Contract and evidence law were relied upon. The few cases protecting mediation communication, however, have done so principally by finding an intended privilege in underlying legislation.<sup>53</sup> These theories and cases afford limited and uncertain protection for mediation communications. Their shortcomings serve to highlight the need for an evidentiary privilege.<sup>54</sup>

##### A. Contract Theory

At the behest of the mediator, participants regularly begin mediation by agreeing to hold all communications confidential. Often written agreements<sup>55</sup> to mediate are signed specifying, among other things, that parties will not reveal mediation information, the mediator cannot be subpoenaed and any exceptions to confidentiality.<sup>56</sup> While such agreements may create expectations of confidentiality their enforceability is problematic. Because the law views courts as entitled to "every [person]'s evidence,"<sup>57</sup> public policy forbids contracting to

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49. Hoxie, *supra* note 4, at 445; *see infra* Part IV.

50. Freedman & Prigoff, *supra* note 4, at 42-43.

51. *Id.* at 37, 42; ROGERS & MCEWEN, *supra* note 4, at 100.

52. *See supra* notes 18-20 and accompanying text.

53. *See infra* section IV C.

54. Indeed the justification for a mediation privilege is expanded or diminished by the extent to which mediation confidentiality can be protected under other law.

55. For sample agreement forms, *see* CENTER FOR PUBLIC RESOURCES, CPR PRACTICE GUIDE: CONFIDENTIALITY IN ADR, B1-B25 (1989).

56. This is especially true when the dispute is of the type likely to be litigated if not settled or it is a case that has already been filed in court. Practice standards for lawyer-mediators in family law matters encourage mediators to obtain written agreements barring mediator disclosures. ABA Standards of Practice for Lawyer Mediators in Family Disputes, II A. Also, many community dispute resolution centers require their volunteer mediators to obtain written agreements to mediate that include a confidentiality provision. However, use of written mediation agreements is not universal. *See infra* notes 154-58 and accompanying text.

57. WIGMORE ON EVIDENCE, *supra* note 9, at § 2192, at 70 (the original reads every "man's" evidence).

exclude evidence.<sup>58</sup> Agreements between individuals are not permitted to restrict the court's access to testimony in its pursuit of justice.<sup>59</sup> As a result, mediation participants are ill advised to rely on contract theory as a means of preserving mediation confidentiality.<sup>60</sup> Moreover, mediation confidentiality agreements, even if enforceable as against those signing, are likely not to restrict third-party access to mediation information.<sup>61</sup> For example, in a chain reaction automobile accident involving multiple parties, those choosing to mediate face the potential of having their mediation discussions discovered and admitted at trial by non-mediating drivers.

Contract theory offers little to those interested in broadly protecting mediation communications. By enacting a mediation privilege, jurisdictions can create an explicit exception to the policy against exclusion of evidence. The universal applicability of a privilege addresses the contract theory's inability to affect third party behavior.

### B. Evidence Theory

Evidence law is another potential source of protection for mediation communications. Traditionally, evidence law has excluded evidence of compromise negotiations.<sup>62</sup> "I'll give you \$80,000 to bring this to a close today." Underlying the rule is a strong social policy of encouraging negotiated settlements

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58. *Id.* at § 2194b.

59. *Id.*

60. *State v. Castellano*, 460 So. 2d 480, 481-82 (Fla. Dist. Ct. App. 1984) ("The record reflects no authority for the mediator's statement that the parties' communications were confidential. The fact that he may have so advised the parties that their communications would be held confidential does not now excuse him from being compelled by [the defendant] to testify concerning what was said."). *Cf. United States v. Kentucky Utilities Co.*, 124 F.R.D. 146 (E.D. Ky. 1989) (press was entitled to discovery documents in anti-trust probe despite confidentiality clause in settlement agreement between the federal government and the utility); *see also Brown, supra* note 3, at 318-323; *Freedman & Prigoff, supra* note 4, at 41; *Friedman, supra* note 4, at 203 (confidentiality agreements in mediation of criminal cases agreed to by prosecutors are clearly unenforceable legally); *Hoxie, supra* note 4, at 450-51. *But see C.R. & S.R. v. E.*, 573 So. 2d 1088 (Fla. Dist. Ct. App. 1991) (priest accused of child molestation granted preliminary injunction enjoining child's parents from disclosing information from med/arb. proceeding); *Simrin v. Simrin*, 43 Cal. Rptr. 376, 379 (Ct. App. 1965) (upholding confidentiality agreement between a rabbi and a couple seeking marriage counseling as a matter of public policy). *See also Wayne D. Brazil, Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 1026-29 (1988) (presenting a more sanguine view as to the enforceability of confidentiality agreements); *ROGERS & MCEWEN, supra* note 4, at 136-37 (same).

61. *See Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87-88 (E.D.N.Y. 1981) (allowing discovery by a third party notwithstanding an agreement between the litigating parties to hold specified information confidential); *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 538 (2nd Cir. 1974) (ordering disclosure of trade secrets covered by confidentiality agreement). *Cf. Anchorage Sch. Dist. v. Anchorage Daily News*, 779 P.2d 1191 (Alaska 1989) (public records disclosure statute applied to school district settlement containing confidentiality clause).

62. *WIGMORE ON EVIDENCE, supra* note 9, at § 1061(a), 34; *CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE* § 274 (3rd ed. 1984) [hereinafter *MCCORMICK ON EVIDENCE*].

of disputes.<sup>63</sup> The operating premise is that negotiation discussions are not reliable evidence to resolve questions of damages or liability.<sup>64</sup> As a form of negotiation, mediation discussions arguably fall under this rule.<sup>65</sup> However, the rule's limited scope and uncertain application leave mediation communications vulnerable to discovery and disclosure at trial. Early cases restricted the exclusion of negotiation discussions to the specific terms of the offer of compromise,<sup>66</sup> and allowed introduction of admissions of facts.<sup>67</sup> A generation of controversy, and cases, followed as to whether a particular statement was within or outside the rule's ambit.<sup>68</sup> Of particular difficulty were so called "intertwined" statements containing elements of settlement propositions and admissions: "Since the valves may have been weak, I'll knock 25% off the original sales price."<sup>69</sup> Federal Rule of Evidence 408,<sup>70</sup> and its state counterparts,<sup>71</sup> have attempted to

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63. MCCORMICK ON EVIDENCE, *supra* note 62, at 811.

64. Advisory Committee's Note in FED. R. EVID. 408. However, as the offer of compromise approaches the amount claimed, the relevancy of the information increases and the basis for its exclusion is lessened. Also, given the competitive nature of most negotiations, admissions of liability would not be made facetiously. *Cf.* FED. R. CIV. P. 68 which disallows evidence of an unaccepted offer of judgment in a proceeding to determine costs.

65. A few local counterparts of FED. R. EVID. 408, which excludes evidence of offers to compromise, expressly include mediation discussions. *See* HAW. REV. STAT. § 626-1; HAW. R. EVID. 408 ("Evidence of . . . (3) mediation or attempts to mediate a claim which was in dispute, is not admissible . . ."); IDAHO R. EVID. 408 ("Compromise negotiations encompass mediation."); ME. R. EVID. 408(1) & (2); Rule 16.4(C)(4)(f) of the Local Rules of the United States District Court for the District of Mass. (mediation discussions are "confidential communication to the full extent contemplated by Fed. R. Evid. 408.").

66. WIGMORE ON EVIDENCE, *supra* note 9, § 1061 at 36; George M. Bell, *Admissions Arising out of Compromise -- Are They Irrelevant?*, 31 TEX. L. REV. 239, 241 (1953); Green, *supra* note 5, at 15-16.

67. *See* Advisory Committee's Note in FED. R. EVID. 408 ("The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be 'without prejudice,' or so connected with the offer as to be inseparable from it.").

68. *Id.*; Note, *supra* note 4, at 447-48; ROGERS & MCEWEN, *supra* note 4, at 103.

69. *Id.* at 103.

70. Federal Rule of Evidence 408, dealing with "Compromise and Offers to Compromise," states: 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. The rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

71. A majority of the states have adopted an evidence rule analogous to Federal Rule of Evidence 408. States adopting such a rule are noted in 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 408[08] (1986). States which have not adopted a Rule 408 equivalent retained the

put controversy to rest by expanding the scope of the exclusion to "include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself."<sup>72</sup> Evidence Rule 408's weakness is that it does not require exclusion of evidence from a negotiation offered for "another purpose," such as, to prove bias or prejudice of a witness, to negate a contention of undue delay, or to prove an effort to obstruct a criminal investigation or prosecution.<sup>73</sup> Since mediation discussions tend to be free flowing and often unguarded, revelations later serving as impeachment,<sup>74</sup> bias or "another purpose" evidence are likely.<sup>75</sup> The "another purpose" clause in the hands of creative counsel leaves little in mediation definitely exempt from disclosure.<sup>76</sup>

An additional significant limitation of Rule 408 is the fact that the rule offers no protection against discovery of mediation discussions.<sup>77</sup> Only privileged information is exempt from discovery.<sup>78</sup> Thus, Rule 408 leaves mediation participants open to demands of a party to the mediation or a third party for discovery of the substance of an entire mediation proceeding in an effort to obtain leads to admissible evidence.<sup>79</sup> Also, Rule 408 does not bar admission of evidence from negotiation in proceedings not governed by the rules of evidence: administrative hearings, miscellaneous criminal hearings<sup>80</sup> or criminal cases.<sup>81</sup> Rule 408's shortcomings in protecting mediation communications provide justification for a mediation privilege and suggest its design.<sup>82</sup> A mediation

narrower common law rule and its problems. See ROGERS & MCEWEN, *supra* note 4, at 104.

72. Advisory Committee's Note in FED. R. EVID. 408.

73. For text of FED. R. EVID. 408, see *supra*, note 70.

74. Davidson v. Beco Corp., 753 P.2d 1253 (Idaho 1987) (held that statements made in negotiations could be used to impeach trial testimony).

75. Brown, *supra* note 3, at 313; see ROGER & MCEWEN, *supra* note 4, at 108-09 (listing examples of evidence from negotiations offered for "another purpose").

76. Brazil, *supra* note 60, at 966-82.

77. A party may discover information that may be inadmissible at trial under Rule 408, so long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1).

78. "Parties may obtain discovery regarding any matter, not privileged. . . ." FED. R. CIV. P. 26(b)(1).

79. ROGERS & MCEWEN, *supra* note 4, at 110 n.82; Brown, *supra* note 3, at 314.

80. FED. R. EVID. 1101(d)(3).

81. State v. Castellano, 460 So. 2d 480, 481-82 (Fla. Dist. Ct. App. 1984) (held Florida's Evidence Rule 408 inapplicable to alleged threats made in mediation by the victim of a later crime to his alleged assailant). Rule 408 does not apply to the negotiation of a claim that later is the subject of a criminal trial. ROGERS & MCEWEN, *supra* note 4, at 106-7. In the same vein, FEDERAL RULE OF CRIMINAL PROCEDURE 11(e)(6), generally excluding plea bargain negotiations, does not by its terms cover mediation. As a result, statements by the accused or admissions contained in the settlement agreement could be used as evidence in a subsequent criminal prosecution. Brown, *supra* note 3, at 314.

82. Compare Harter, *supra* note 4, at 348-56 (arguing for fuller protection of mediation after concluding that protection under Rule 408 is inadequate) and Hoxie, *supra* note 4, at 449-50, 457-59 (same) with Green, *supra* note 5, at 35-36 (arguing for protection of mediators under slightly expanded version of Rule 408).

privilege should be of broad unambiguous scope, bar discovery, and exclude evidence in all types of proceedings.<sup>83</sup>

### C. Common Law

In nearly all cases in which a mediation privilege has been found, the court has relied heavily on the existence of a strong legislative policy supporting confidentiality for mediation.<sup>84</sup> Few examples exist where mediation discussions have been held to be privileged in the absence of such a legislative mandate.<sup>85</sup> Courts are reluctant to shield mediation in the absence of protective legislation.<sup>86</sup> This is not surprising given courts' current resistance to establishing new privileges.<sup>87</sup> Although early cases, particularly *Macaluso*,<sup>88</sup> have provided critical support for the evolving mediation privilege, the common law has not been the dominant force in the privilege's growth. As we shall see, that growth has been largely legislatively driven.<sup>89</sup>

83. See *infra* part VI for a discussion of these issues.

84. The prototypical case is *N.L.R.B. v. Joseph Macaluso, Inc.*, 618 F.2d 51, 53-56 (9th Cir. 1980). In *Macaluso*, the court interpreted the statute and regulations governing the Federal Mediation and Conciliation Services as necessitating a privilege for mediators to insure the continued usefulness of the FMCS in future disputes. *Id.* See also *Port Arthur v. United States*, 517 F. Supp. 987 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982) (privilege for Community Relations Service mediator); *Wilson v. Attaway*, 757 F.2d 1227, 1245 (11th Cir. 1985), *rev. denied*, 764 F.2d 1411 (11th Cir. 1985) (same); *People v. Reyes*, 816 F. Supp. 619 (E.D.Cal. 1992) (same); *Lake Utopia Paper, Ltd. v. Connelly Containers, Inc.* 608 F.2d 928, 930 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1076 (1980) (holding that confidentiality of federal Civil Appeal Management Plan pre-argument conferences discussions was essential to the proper functioning of the Plan). Several courts creating a common law privilege did so in the interim between passage and the effective date of a mediation privilege statute. *Sonstahl v. L.E.L.S., Inc.*, 372 N.W.2d 1, 6 (Minn. Ct. App. 1985) (privilege recognized for labor mediator); *Cohen v. Cohen*, 290 N.Y.S.2d 524 (N.Y. Sup. Ct. 1968) (privilege for divorce conciliation). *But see State v. Castellano*, 460 So. 2d 480, 482 (Fla. Dist. Ct. App. 1984) (refusing to create common law privilege, even though privilege statute had been enacted after the mediation, because authority to create privileges was vested in the legislature). *Cf. United States v. Gullo*, 672 F. Supp. 99, 103 (W.D.N.Y. 1987) (holding that statements made during mediation/arbitration entered into voluntarily were inadmissible in federal prosecution. The federal district court believed itself not to be bound by New York's mediation privilege statute, but gave it weight in balancing policy considerations.).

85. *Byrd v. State*, 367 S.E.2d 300 (Ga. App. Ct. 1988) (holding that accused's admissions during court ordered mediation were not admissible during subsequent prosecution for theft on grounds of public policy). *Cf. Simrin v. Simrin*, 43 Cal. Rptr. 376 (Cal. App. Ct. 1965) (marital counseling/conciliation with rabbi was confidential).

86. In *Castellano*, 460 So.2d 480 (Fla. Dist. Ct. App. 1984) the court, in the absence of a state statute, required a mediator to testify as to alleged threats by victim during mediation in support of defendant's self-defense claim in an attempted murder case. It should be noted that in such cases even if there were a mediation privilege, the criminally accused person's constitutional right to present a defense may well override the privilege. See U.S. CONST. AMEND. VI.

87. For cited authorities see *supra*, note 10.

88. 618 F.2d 51 (9th Cir. 1980).

89. See *infra* Part VI.

## V. WEIGHING THE COSTS AND BENEFITS OF THE MEDIATION PRIVILEGE

The response of many jurisdictions to the shortcomings of existing law has been to enact<sup>90</sup> or promulgate<sup>91</sup> rules of mediation privilege. Undoubtedly, the rules reflect policy decisions to nurture a process that settles disputes in a non-adversarial manner and protects participants from the risks of a failed mediation.<sup>92</sup>

By their sheer numbers, these provisions evidence a widely shared conclusion that any social costs associated with a mediation privilege are outweighed by the privilege's benefits. While it is unlikely jurisdictions arrived at this conclusion through penetrating analysis of the legal theories underlying evidentiary privileges, analysis of those theories as they apply to mediation provides an important, final backdrop to a review of the scope, content and operation issues raised by individual mediation privilege provisions.<sup>93</sup>

The traditional rationale for evidentiary privileges is that public policy requires the encouragement of confidential communications within certain special relationships without which these relationships cannot be effective.<sup>94</sup> These relationships are viewed as having sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.<sup>95</sup> This utilitarian justification for evidentiary privileges is best exemplified in Wigmore's traditional test for recognizing a 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 relationship between the parties;

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and

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90. See listing of statutes *supra*, note 6.

91. See listing of court rules *supra*, note 7.

92. Since only limited state legislative history exists, it is difficult to determine what motivated a particular jurisdiction's decision to enact a mediation privilege. However, several mediation privilege provisions begin with a purpose statement. The 1994 Supplemental Judicial Council Note to the Wisconsin privilege states: "The purpose of the rule is to encourage the parties to explore facilitated settlement of disputes without fear that their claims or defenses will be compromised if mediation fails and the dispute is later litigated." WIS. STAT. ANN. § 904.085 (West Supp. 1994); see also WASH. REV. CODE § 26.09.015(1) (Supp. 1994) ("The purpose of the mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child's close and continuing contact with both parents after the marriage is dissolved.").

93. See *infra* Part VI.

94. MCCORMICK ON EVIDENCE, *supra* note 62, at 171.

95. *Id.*



(4) The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.<sup>96</sup>

As to the first factor, we have seen that mediation predominately occurs in private settings and under circumstances in which the participants have agreed not to disclose their communications.<sup>97</sup> Moreover, it is likely the mediator will have told the parties their discussions are confidential.<sup>98</sup> Those who have mediated know that the exchange of never before disclosed information is commonplace in mediation. Mediation would suffer if the parties had to be wary of what they said for fear of disclosure by other participants. Wigmore's first condition is present for communications occurring during mediation.

As to the second factor, the overwhelming weight of scholarly authority supports the proposition that confidentiality is essential to the functioning of mediation.<sup>99</sup> When asked to protect mediation communications in the absence of a privilege statute, nearly all courts have done so based upon a recognition of the critical role confidentiality plays in the functioning of the mediation process.<sup>100</sup> However, critics of the mediation privilege point out that mediation flourished without the protection of a privilege.<sup>101</sup> Mediation succeeded without privilege protection because parties honored commitments, for the most part, to keep mediation discussions confidential. And in cases when compelled disclosure has been sought the courts have generally maintained confidentiality.<sup>102</sup> Such results from the courts are, however, not assured without legislation upholding mediation confidentiality.<sup>103</sup>

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96. WIGMORE ON EVIDENCE, *supra* note 9, at § 2285 (emphasis found in the original text).

97. See *supra* notes 42-46 and accompanying text.

98. See *supra* notes 45-46 and accompanying text.

99. See authorities cited *supra* note 4.

100. See *supra* notes 83-84 and accompanying text; *infra* notes 208-213 and accompanying text.

101. See Green, *supra* note 5, at 32. Cf. ROGERS & SALEM, *supra* note 5, at 67-68. With privileges in general, it has been suggested that there is little evidence as to the effect of the existence of a privilege on communications. Comment, *Developments in the Law: Privileged Communication*, 98 HARV. L. REV. 1450, 1474 (1985). However, although most are unaware of privilege rules and their legal effect, one study has shown that a group at the margin- 25%-30% -understand that certain communications would be privileged. *Id.* at 1475. Since mediators regularly explain the concept of confidentiality, it is likely parties understand and act upon the fact that mediation communications are to be kept private.

The author is aware of anecdotal evidence of the effect of confidentiality upon mediation communications. In the mediation of criminal matters, accused persons are often reluctant to discuss the facts or take any responsibility for the incident. When urged to open up, the most common response of the accused person is fear that what is said will be used against her or him in court. After further explanation of the meaning of confidentiality, such persons tend to open up, be willing to admit wrongdoing and take responsibility for their actions. Without the existence of a privilege, mediation in this context could not succeed. *Accord* Byrd v. State, 367 S.E.2d 300, 302 (Ga. App. Ct. 1988).

102. See *supra* notes 83-85 and accompanying text.

103. State v. Castellano, 460 So.2d 480 (Fla. Dist. Ct. App. 1984) holding that there was no basis for preventing compelled testimony of a mediator in the absence of legislation. "If confidentiality is essential to the success of the [mediation] program, the legislature is the proper branch of

For those states considering a mediation privilege, the best evidence of public opinion as to whether mediation relationships ought to be fostered is the flurry of legislative and court rule activity creating mediation privileges in sister states.<sup>104</sup> Also, as stated above the scholarly community supports the mediation privilege.<sup>105</sup> Condition three of Wigmore's test is met.

The fourth condition requires a cost/benefit analysis. Under Wigmore's test the loss to mediation communications through disclosures must be greater than the gain of having mediation information available to the justice system.<sup>106</sup> The difficulty with Wigmore's "empirical" approach is the need to measure the unmeasurable.<sup>107</sup> While fraught with empirical indeterminacy, the approach does establish a general framework for assessing the relative merits of a particular privilege.<sup>108</sup>

Candor is the dynamo that drives mediation. For mediation parties to speak freely their communications must be protected from disclosure. Mediation communications will be chilled if they become available to later discovery or admissibility in evidence. The risk of participating simply becomes too high.<sup>109</sup> Parties will be dissuaded from mediating or, at a minimum, their candor in mediation discussions will be curbed. Legally unrepresented participants will be particularly vulnerable to having a mediation session used as a discovery device.<sup>110</sup> All these results represent substantial injury to the mediation process.

A mediation privilege will result in some loss of evidence to the justice system. The evidence lost will be information not already barred by existing law. For example, those mediation discussions which are not excludable under Evidence Rule 408. However, the cost of the mediation privilege is not necessarily equal to the value of the evidence privileged by it.<sup>111</sup> Information that is disclosed in mediation only because of the existence of a privilege cannot be counted as a cost; "but for" the privilege the information would be unknown. An individual who may disclose in the confidential atmosphere of mediation that he has evaded

government from which to obtain the necessary protection." *Id.* at 482.

104. No survey data exists regarding views toward mediation confidentiality. In fact, many citizens on the street may not yet be familiar with the mediation process. But the fact that their legislative representatives and judicial officers in so many jurisdictions have created mediation privilege provisions is strong evidence of "community" support for the privilege.

105. *See supra*, note 4.

106. By placing the burden of justification on proponents of a new privilege, Wigmore's balance test has had the effect of curbing the development of new privileges. Comment, *supra* note 101, at 1479-80.

107. *Id.* at 1474-75.

108. *Id.* at 1473-74.

109. ROGERS & MCEWEN, *supra* note 4, at 99.

110. Prigoff, *supra* note 4, at 2. Many "choose" mediation over other forms of dispute resolution because of cost considerations. Mediation may be the only affordable means to resolve their dispute given the soaring cost of legal services and the limited availability of free legal services. It is especially unfair to subject unrepresented persons to having their mediation communications available as evidence in a later proceeding. ROGERS & MCEWEN, *supra* note 4, at 99.

111. Comment, *supra* note 101, at 1477.

income taxes, written bad checks, or falsified an insurance claim is unlikely to voluntarily share that information with the justice system. Furthermore, the impact of a mediation privilege on the "correct disposal of the litigation" can be minimized through carefully drawn exceptions and waivers.<sup>112</sup> For example, an exception allowing for discovery of facts and material that existed prior to the mediation tempers the privilege's affect upon the discovery process.<sup>113</sup>

Under Wigmore's empirical approach definitive conclusions are difficult to reach. However, a strong claim can be made that mediation satisfies the first three conditions of the test. The fourth condition can be met with a narrow rule of mediation privilege which reduces the loss of evidence to the justice system while maintaining the benefits of confidentiality for mediation where most appropriate.

A second theoretical basis for evidentiary privileges is privacy.<sup>114</sup> The privacy justification focuses on protecting the basic need for individual autonomy, and not, as with the traditional approach, the collective interest of encouraging certain communications. Privacy considerations are raised when a person is compelled to publicly reveal personal information or is forced to breach an entrusted confidence.<sup>115</sup> Because such privacy issues arise in mediation -- personal information is often disclosed and participants regularly pledge to maintain confidentiality -- the privacy theory lends support for a mediation privilege for individuals.<sup>116</sup> However, under the privacy theory any legally cognizable privacy interest is balanced against society's interest in ascertaining the truth.<sup>117</sup> Thus, both the privacy and traditional theories utilize an empirical assessment of the costs and benefits as the final step in determining whether a new privilege should be recognized. In the same vein as argued above, the significant privacy interests that emerge in mediation can be protected, while minimizing the impact on the justice system, with a narrowly crafted mediation privilege statute.

A third explanation for the existence of evidentiary privileges is based on political power.<sup>118</sup> Simply stated, privileges exist because the classes of persons affected have the political influence to secure privileged status.<sup>119</sup> At the extreme, the power rationale questions the legitimacy of all privileges. But to acknowledge that power may underlie privileges is not to say valuable societal interests may not also be involved.<sup>120</sup> Privilege law reflects shared normative

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112. See *infra* part VI.

113. See *infra* notes 264-281 and accompanying text.

114. Comment, *supra* note 101, at 1480-83.

115. *Id.* at 1481.

116. Less clear are the implications of the privacy theory for organizational mediation parties, although it has been suggested that limiting the theory to individuals is not a useful approach. *Id.* at 1482.

117. *Id.*

118. *Id.* at 1493-500.

119. What was once the right of upper class gentlemen in England has become the privilege of powerful professionals and institutions in America: lawyers, doctors, the Church, the media and government. *Id.* at 1494.

120. *Id.*

values that certain conversations are deserving of confidentiality despite consequences to the justice system. While political power is undoubtedly implicated in decision-making regarding the creation of privilege, as it is in all legal and political questions, under our democratic system legislatures and courts are charged with the obligation of accounting for the public interest in light of perceived shared social vision without allowing power to dominate. That calculus with respect to mediation has resulted in a profusion of mediation privilege rules.<sup>121</sup> Consistent with the power theory, these new privilege rules also reflect the effectiveness of those interested in the emerging field of mediation in accessing political and legal processes.

Regardless of the underlying theoretical basis, a host of legislatures and courts have created mediation privilege rules. Those rules represent the judgment of many that, on balance, the benefits of protecting mediation communications are worth the price of the privilege.<sup>122</sup> A mediation privilege conforms the law to the expectations of the participants,<sup>123</sup> and holds the potential for remedying the shortcomings of existing law.

## VI. MEDIATION PRIVILEGE PROVISIONS: SCOPE, CONTENT AND OPERATION ISSUES

Concluding that a mediation privilege is desirable leaves policy-makers with the difficult task of designing a rule which properly protects the process, the participants and the public interest. The true test of a provision is the extent to which it addresses the shortcomings of non-privilege law and the costs associated with making mediations privileged. The scope, content and operational features of the privilege must be clearly established. Any rule must account for the separate, perhaps conflicting interests of mediation parties and the mediator in maintaining confidentiality. The privilege ought to encompass the field of mediation and individual mediations from initial client contact to file closing. Those issues and others must be examined to determine how well the mediation privilege has made the transition from theory to implementing legislation and court rules. The analysis can be organized around these questions: 1) which mediation activities will be privileged; 2) who will be covered by the privilege; 3) in which later proceedings will the privilege apply; 4) who will hold the right to assert or waive the privilege; and 5) what information will be excepted from the privileged?

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121. See statutes and court rules cited, *supra* notes 6-7.

122. ROGERS & MCEWEN, *supra* note 4, at 114.

123. See Hyman, *supra* note 4, at 22.

### A. Mediation Activities to be Privileged

With mediation so widely practiced in varying forms, the initial challenge is crafting a mediation privilege which is neither over-inclusive nor under-inclusive.<sup>124</sup> The ideal statute would cover mediations where confidentiality is intended by the participants, the mediation is conducted by a qualified mediator and the privilege is justified as a matter of public policy. Most traditional privileges arise when a professional relationship is established: attorney-client, physician-patient or cleric-parishioner.<sup>125</sup> Mediation is an emerging professional activity. Public licensure of mediators is a growing trend, but not the norm.<sup>126</sup> As a result, it is premature in most jurisdictions to base the mediation privilege upon the formation of a professional relationship with a licensed or certified mediator.<sup>127</sup> Other approaches have been necessary.

Narrow approaches extend the privilege only to mediations conducted under the auspices of a particular statute,<sup>128</sup> court,<sup>129</sup> mediation program,<sup>130</sup> alternative dispute resolution procedures<sup>131</sup> or mediators with specified

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124. See ROGERS & MCEWEN, *supra* note 4, at 145-46; Brown, *supra* note 3, at 326-29.

125. WIGMORE ON EVIDENCE, *supra* note 9, Chaps. 82, 86 & 87.

126. The mediation community is struggling with the issue of mediator qualifications. GOLDBERG ET AL., *supra* note 29, at 164-71. Some would open up the field to anyone successfully completing mediation skills training and a practicum. *Id.* at 165. Others would limit entry entirely or in certain types of cases to those with academic degrees. *Id.* For example, marital dissolution case could be mediated only by mediators with degrees in counseling related fields or law. *Id.* at 312-13. Florida has a system of certifying and disciplining mediators. FLA. STAT. ANN. § 44.106 (West Supp. 1994). In Florida only lawyers may mediate non-family law cases that have been filed as lawsuits in its highest trial court. FLA. STAT. § 44.102(2) (West 1991). In New Hampshire the privilege in divorce mediations extends only to mediations conducted by a "certified marital mediator." N.H. REV. STAT. ANN. § 328-C:9.III (1993); see also Edward F. Hartfield, *Qualifications and Training Standards for Mediations of Environmental and Public Policy Disputes*, 12 SETON HALL LEGIS. J. 109 (1988).

127. Hyman, *supra* note 4, at 20-21. Even where mediator licensing exists, basing the privilege on that factor alone would deny confidentiality to parties using an unlicensed mediator. Where the parties believed the mediator was licensed, the courts may uphold the privilege analogizing to the attorney-client relationship. WIGMORE ON EVIDENCE, *supra* note 9, § 2302.

128. ARIZ. REV. STAT. ANN. § 12-2238(A) (1994) ("mediation may occur pursuant to law"); COLO. REV. STAT. ANN. § 8-43-205(2) (West 1994) (workers' compensation); MO. R. CIV. PRO. 88.08 (family law mediations); N.C. GEN. STAT. § 50-13.1 (1993) (family law); WASH. REV. CODE ANN. §§ 5.60.070(1) (West Supp. 1994) (general) and 26.09.015 (West Supp. 1994) (family law); WIS. STAT. § 904.085(2)(a) (West Supp. 1994) (privilege applies to mediations conducted under several cited statutes "or any similar statutory, . . . process").

129. FLA. STAT. ANN. § 44.102(3) (West Supp. 1994) (court ordered mediation of civil cases).

130. FLA. STAT. § 44.201(5) (West Supp. 1994) (citizen dispute settlement centers); MINN. STAT. § 494.02 (West 1990) (community dispute resolution program); N.Y. JUD. LAW § 849-b (McKinney 1992) (community dispute resolution centers); N.D. CENT. CODE § 6-09.10-10 (Supp. 1993) (farm foreclosures); WASH. REV. CODE ANN. § 7.75.050 (West 1992) (community dispute resolution).

131. Texas defines various ADR procedures, then by separate statute extends confidentiality to all. TEX. CIV. PRAC. & REM. CODE ANN. § 154.023-027 (West Supp. 1994) and § 154.053(a) (West Supp. 1994). Utah has a similar approach. UTAH CODE ANN. § 78-31b-7 (1992); see also 5 U.S.C. § 571(3), (6) (Supp. 1994).

qualifications and/or training.<sup>132</sup> The advantage of such privilege statutes is clarity; specifically identifiable classes of mediations are protected.<sup>133</sup> Policy-makers are able to pinpoint specific mediations for protection,<sup>134</sup> and in theory tailor the privilege's content to best serve a particular type of mediation: for example, family mediations<sup>135</sup> or community disputes.<sup>136</sup> The weakness of the narrow approach is that mediations equally warranting protection are not covered. For example, mediations conducted: 1) in a tort case where the parties and mediator desire privilege protection but the jurisdiction only has a privilege for marital dissolution cases, or 2) by a highly skilled mediator who, it is discovered after the mediation, fails to meet the training or experience requirements of the privilege statute.<sup>137</sup> This approach also has the potential for confusion in states with several narrowly drawn mediation privilege statutes, rather than a general statute, if each provision has significantly varying terms.<sup>138</sup>

In contrast to narrow approaches, other statutes have a broad reach.<sup>139</sup> Laudably, these general rules extend the privilege across the entire field of mediation. Unfortunately, such statutes do so often without defining "mediation,"<sup>140</sup> or defining it so broadly<sup>141</sup> so as to include any intervention

132. The Massachusetts privilege applies only to mediations involving a mediator with the following qualifications: "a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body." MASS. GEN. L. ch. 223, § 23C (1986). See also COLO. REV. STAT. §§ 13-22-302(2) & (3) (Supp. 1993) ("Mediation services" defined as settlement discussions with a "mediator" which is defined as "a trained individual."). In New Hampshire the privilege in divorce mediations extends only to mediations conducted by a "certified marital mediator." N.H. REV. STAT. ANN. § 328-C:9.III (Supp. 1993).

133. Brown, *supra* note 3, at 326 ("Such laws pose little definitional problems.").

134. Many states have privilege statutes covering specific case types and not others. Most common are family law conciliation and mediation statutes, community dispute resolution centers, civil rights statutes, labor relations and farm loan mediation programs. California for example, has at least six privilege statutes. See *infra* note 138 listing those statutes. Other states merely have a single general statute.

135. FED. R. EVID. 507.

136. MINN. STAT. § 494.02 (1990); N.Y. JUD. LAW § 849-b (McKinney 1992).

137. See, e.g., MASS. GEN. L. ch. 223, § 23C (1986) (quoted, *supra* note 132).

138. California provides the most vivid example of a state with a multitude of mediation confidentiality provisions. CAL. EVID. CODE § 1152.5 (West Supp. 1994); CAL. FOOD & AGRIC. CODE § 54453 (West Supp. 1994) (labor disputes); CAL. FAM. CODE § 3177 (West Supp. 1994) (child custody); CAL. GOV'T CODE § 12984 (West Supp. 1994) (housing discrimination); CAL. GOV'T CODE § 12985 (West 1992) (housing discrimination); CAL. CIV. PROC. CODE § 1297.371 (West Supp. 1991) (int'l commercial disputes).

139. OR. REV. STAT. § 36.205 (1993); VA. CODE ANN. § 8.01-581.21 (Michie 1992); WASH. REV. CODE § 5.60.070 (Supp. 1994).

140. WYO. STAT. § 1-43-103 (Supp. 1994); HAW. REV. STAT. § 624-45 (1994).

141. ARIZ. REV. STAT. ANN. § 12-2238(F) (1994) (private settlement discussions with a neutral "outside of a formal court proceeding"); VA. CODE ANN. § 8.01-581.21 (Michie 1992) ("[p]rocess by which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually

by a third party.<sup>142</sup> The unintended effect of such statutes may be application to a teacher attempting to settle a playground fight,<sup>143</sup> a neighbor presiding over a family dispute<sup>144</sup> or a bystander intervening in a dispute between drivers after a traffic accident.<sup>145</sup> Recognizing these problems, certain provisions narrow the definition of mediation with qualifying adjectives: "'[m]ediation' is the deliberate and knowing<sup>146</sup> use of a neutral<sup>147</sup> third person."<sup>148</sup> This effort to reduce over-inclusiveness with "self-referential"<sup>149</sup> and vague modifying terms only opens up the privilege to *post hoc* challenges. The privilege would not apply if a party could later prove she did not realize or understand the nature of the process she had engaged in or could show that the mediator lacked impartiality or neutrality.<sup>150</sup> Though well intentioned, the broad approach yields uncertainty and the potential for significant over-inclusiveness.

A third approach, found in a few statutes, is to activate the privilege when the mediation occurs pursuant to an order of court<sup>151</sup> or agreement between the mediation parties.<sup>152</sup> For example, the Washington statute triggers the privilege

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acceptable resolution. . . ."); ABA Model, *supra* note 6, at 65 § 1(a) ("Mediation' is the use of a neutral third person by disputing parties to help them reach a resolution of their dispute.").

142. *Id.*

143. Hyman, *supra* note 4, at 19.

144. Statements made by divorcing parents regarding their children while a neighbor is attempting to help them resolve their differences could become privileged. Investigating social agencies and the court would be denied access to the information. *Id.* at 19-20.

145. If a bystander intervenes to bring reason to the discussions between arguing drivers, one driver's admissions about the color of the light before the accident during the negotiations may be privileged.

146. With similar effect, the Wyoming statute defines confidential communications as those "not intended to be disclosed." WYO. STAT. § 1-43-102 (Supp. 1994).

147. ARIZ. REV. STAT. ANN. § 12-2238(F) (1993) (neutral third party); TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (West Supp. 1994) (impartial person); VA. CODE ANN. § 8.01-581.21 (Michie 1992) (impartial third party).

148. Hyman, *supra* note 4, at 71, § 1(2) (emphasis added).

149. *Id.* at 22.

150. The use of modifiers such as "impartial" or "neutral" could result in the loss of the privilege when it was later discovered the mediator has some connection to the dispute or a party, even though the mediation was conducted with absolute neutrality. Also, parties agreeing to use a mediator with knowledge of the dispute, viewing that knowledge as an asset to their mediation, face the loss of the privilege. *Id.* at 22-23.

151. ARIZ. REV. STAT. ANN. § 12-2238(A) (1994); COLO. REV. STAT. § 13-22-311 (Supp. 1993) (providing for court referrals for "mediation services" which are privileged under COLO. REV. STAT. § 13-22-307 (West Supp. 1993)); FLA. STAT. ANN. § 44.102(3) (West Supp. 1994); OR. REV. STAT. § 36.200(4) (1993); WIS. STAT. ANN. § 904.085(2)(a) (West Supp. 1994) ("court-referred process"); WASH. REV. CODE § 5.60.070(1) (Supp. 1994).

152. ARIZ. REV. STAT. ANN. § 12-2238(A) (1994) (voluntary decision of the parties); CAL. EVID. CODE § 1152.5 (West Supp. 1994); COLO. REV. STAT. § 13-22-307 (Supp. 1993) (makes confidential "mediation services" defined in COLO. REV. STAT. § 13-22-302(3) (1991) to be ". . . a process . . . parties . . . agree to enter"); MO. REV. STAT. § 435.014(1) (Vernons 1992); MINN. STAT. § 595.02(k) (1988 & Supp. 1994) (" . . . pursuant to an agreement to mediate."); MO. REV. STAT. § 435.014 (1989); N.D. CENT. CODE § 31-04-11 (Supp. 1993) ("When persons agree to conduct and participate in a mediation."); OKLA. STAT. tit. 12, § 1804 (1993) (requires parties to complete a

"[i]f there is a court order to mediate, a written agreement between the parties to mediate, . . . ."<sup>153</sup> These statutes generally require written agreements to mediate to avoid the obvious proof problems of oral agreements.<sup>154</sup> To activate the privilege, some of the statutes insist that the parties' agreement include a recitation of statutory language or other language evidencing their intent that communications will be confidential.<sup>155</sup> Such "magic language" requirements are unjustified traps for careless parties who nevertheless intended to invoke the privilege.<sup>156</sup>

Requiring written agreements to mediate is not without its problems. For example, conciliation programs attempt to resolve disputes exclusively via telephone contacts with the parties and do not utilize written agreements to

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proscribed form, agreeing on the type of dispute procedure they wish to use, which specifies that proceeding will be confidential); OR. REV. STAT. § 36.205(1) (1993) ("If there is a written agreement between any parties to a dispute that mediation communications will be confidential, . . . ."); WASH. REV. CODE § 5.60.070(1) (Supp. 1994) ("If there is . . . a written agreement between the parties to mediate . . . ."); WIS. STAT. § 904.085(2)(a) (Supp. 1994) (mediation, to which confidentiality applies, includes "contractual . . . process").

The Symposium Model provision requires both the parties and the mediator to agree to confidentiality to trigger the privilege. Hyman, *supra* n.6 at 71, § 2 ("where the parties and the mediator have agreed that they shall be confidential.").

153. WASH. REV. CODE § 5.60.070(1) (Supp 1994).

154. MO. REV. STAT. § 435.014(1) (1992) ("parties to a dispute agree in writing"); OR. REV. STAT. § 36.205(1) (1993) ("written agreement between any parties to a dispute"); WASH. REV. CODE § 5.60.070(1) (Supp. 1994) ("written agreement between the parties to mediate"). Statutes not requiring a writing include: COLO. REV. STAT. § 13-22-302(3) (Supp. 1993) (" . . . parties involved in a dispute, . . . agree to enter into one or more settlement discussions . . . ."); MINN. STAT. § 595.02(k) (1988 & Supp. 1994) ("pursuant to an agreement to mediate"); N.D. CENT. CODE § 31-04-11 (Supp. 1993) (" . . . when parties agree to conduct and participate in a mediation"); Hyman, *supra* note 6 at 71, § 2.

None of the cited statutes require a signed written agreement to mediate, which allows for flexible interpretation as to the meaning of "agreement." For example, in a recent Washington case, a "written agreement to mediate" was found from one party's letter to the mediator, reflecting the other party's assent to mediate, and the mediator's letter to the parties confirming the mediation. In re Dennis R. Ryan, Case No. 92 4974, Wash. Board of Industrial Appeals. The mediator in that case now requires parties to sign an agreement to mediate in his presence. *Id.* Affidavit of Mediator on file with the author.

155. The original language of CAL. EVID. CODE § 1152.5(c) provided: "This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) [text of the privilege] and states that the persons agree that this section shall apply to the mediation." CAL. EVID. CODE § 1152.5 (West Supp. 1994). The current Oregon statute requires party agreement that the ". . . mediation communications be confidential." OR. REV. STAT. § 36.205(1) (1993). Such language creates a risk that the privilege will not be activated without the presence of the "magic language" in the parties' agreement. Hyman, *supra* note 6, at 71, § 2.

156. If the requirements for the application of the privilege go beyond the minimum proof necessary to evidence the parties' desire to settle their differences, then they become unnecessary procedural obstacles. Brown, *supra* note 3, at 329; Green, *supra* note 5, at 2, 30. Any agreement of the parties to mediate should effectuate the privilege. Parties who did not intend or later do not wish their mediation communications to be confidential may, under most privilege statutes, waive the privilege.



mediate.<sup>157</sup> Also, in mediations where emotions are high, the trust level low and great reluctance to sign anything exists, such as in certain marital, labor or environmental disputes, requiring parties to sign an agreement at the beginning of the process may dampen or scuttle the mediation.<sup>158</sup>

Of the three approaches examined, the Washington statute best minimizes both over-inclusiveness and under-inclusiveness. The Washington statute's broad availability is tempered by the court order/agreement to mediate requirement. Privilege protection is extended to disputes where most needed: parties in litigation and parties who unequivocally intended to mediate, both situations where the presence of a "professional" mediator is likely. By triggering its operation on the existence of a writing, the statute's application is unambiguous.

The Washington-type statute does have the potential for being under-inclusive. For example, those who mediate without a court order or written agreement do not access the privilege. Legally uninformed or careless parties<sup>159</sup> and mediators are placed in peril. However, most mediators are cognizant of the importance of confidentially issues, and most regularly use written agreements to mediate.<sup>160</sup> Moreover, policy-makers have options available to reduce the risks caused by the court order/mediation agreement requirement to particular mediation programs (dispute resolution centers) or subject matter areas (family law). They may eliminate the requirement for mediations conducted by specified programs<sup>161</sup> or under particular statutes.<sup>162</sup>

Once a mediation falls within the privilege, care must be taken to ensure that the entire process receives the privilege's protection (from the first intake call to the exit interview). Protection is especially needed for the sensitive information that is often disclosed by prospective mediation clients to program staff during

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157. The conciliation process is most frequently used by community dispute resolution programs. Confidentiality can extend to a center's telephone conciliation by creating a specific privilege that applies to all the center's dispute resolution activities. WASH. REV. CODE § 7.75.050 (1992). Another possibility is to state in a general statute that all dispute resolution conducted by specified community centers will be privilege under the general statute. A third alternative would be a statutory delegation of authority to judges or an administrative agency to certify dispute resolution programs and/or providers, with one of the effects being that mediations conducted by certified providers would be privileged.

158. On the other hand, negotiating the terms of confidentiality, in mediations where trust levels are low, can be the means for improving trust before the substantive discussions begin. If successful, the parties have learned they can agree about something at least.

159. Counsel for represented mediation parties can be expected to take the necessary steps to protect their client's interests in confidential communication.

160. See *supra* notes 54-60 and accompanying text. This is not always the case however. Recently in Seattle a professional mediator associated with a national mediation group was subpoenaed to testify because of the failure to secure a written agreement to mediate from the parties. The subpoena was ultimately quashed because an agreement was found by the administrative law judge in the participants' exchange of correspondence. See *supra* note 154.

161. WASH. REV. CODE § 7.75.050 (1992) (dispute resolution centers).

162. WASH. REV. CODE § 5.60.070(1) (Supp. 1994); ("if mediation is mandated under RCW 7.7.100"-- health care claims).

intake interviews.<sup>163</sup> Many statutes are vulnerable to narrow interpretation because they do not define the mediation process,<sup>164</sup> define it vaguely with terms like "mediation,"<sup>165</sup> "resolution process,"<sup>166</sup> or limit the protection to information disclosed "during" or "in the course of" mediation<sup>167</sup> or only when the mediator is present.<sup>168</sup> Such statutes put into question the confidentiality of intake, inter-session and exit interview communications.

The Washington statute contains the phrase "any communication made or materials submitted in, or in connection with,"<sup>169</sup> the mediation proceeding.<sup>170</sup> The word "proceeding" encompasses the whole of the mediation process, similar to the word "case" in the litigation context.<sup>171</sup> To add clarity some statutes specifically state that the mediation process commences with initial intake

163. A principal objective of the mediation privilege is to free mediation programs and their staff from the burden of responding to subpoenas. Hyman, *supra* note 4, at 25-26. Case law exists with respect to other privileges extending confidentiality to interactions with those assisting the professional. See, e.g., *Sibley v. Wopple*, 16 N.Y. 180 (1857) (lawyer/clerk); *Taylor v. Taylor*, 177 S.E. 582 (Ga. 1934) (lawyer/secretary); *Ostrowski v. Mockridge*, 65 N.W.2d 185 (Minn. 1954) (doctor/nurse). Courts may interpret mediation privilege statutes similarly to include the staff members of mediation organizations.

164. WYO. STAT. § 1-43-103 (Supp. 1994).

165. ARIZ. REV. STAT. ANN. § 12-2238(A) (1994).

166. MO. REV. STAT. § 435.014(1) (1992) ("during the resolution process," but later in the statute communication made "in setting up" the mediation afforded confidentiality); TEX. CIV. PRAC. & REM. CODE §§ 154.023 & .073(a) (Supp. 1994) ("communication . . . in an alternative dispute resolution procedure. . .").

167. Alabama Civil Court Mediation Rule 11; MASS. GEN. L. ANN. ch. 233, § 23C (West 1986) (but must also be in the presence of the mediator); MINN. STAT. §§ 494.02 (1990) ("during dispute resolution") & 595.02(k) (1988 & Supp. 1994) ("in the course of"); N.D. CENT. CODE § 31-04-11 (Supp. 1993) ("in the course of").

168. MASS. GEN. L. ANN. ch. 233, § 23C (West 1986).

169. With this phrasing any information surfacing in the mediation is covered regardless of the degree to which it is relied on. The intent is to avoid a result like that reached in *Newark Bd. of Educ. v. Newark Teachers Union*, 377 A.2d 765 (N.J. Super. Ct. App. Div. 1977), where a document given to the mediator to pass on to the other party, but not read by the mediator, was held to be discoverable.

170. WASH. REV. CODE § 5.60.070(1) (Supp. 1994).

171. COLO. REV. STAT. § 13-22-307 (Supp. 1993) ("mediation service proceeding"); FLA. STAT. §§ 44.102(3), 44.201(5) (Supp. 1994) ("mediation proceeding" and "proceeding"). The Colorado statute defines "mediation services" to include "one or more settlement discussions with a mediator . . ." COLO. REV. STAT. § 13-22-302(3) (Supp. 1993).

In those states where an agreement to mediate triggers the privilege, an issue exists as to the confidentiality of intake statements if the mediation does not go forward and an agreement is never signed. The Florida privilege relating to citizen dispute settlement centers addresses this issue as "[a]ny information relating to a dispute obtained by any person while performing any duties for the center. . . , is confidential." FLA. STAT. ANN. § 44.201(5) (West 1991). Colorado's statute specifically covers "any communication provided in confidence to . . . a mediation organization . . ." COLO. REV. STAT. § 13-22-307(2) (Supp. 1993). See *Krueger v. Washington Fed. Sav. Bank*, 406 N.W.2d 543, 545 (Minn. App. 1987) (holding that communications concerning whether to mediate were not confidential). For federal administrative dispute resolution proceedings, the privilege is extended to information that is provided with the express intent that it be confidential or under circumstances that create a reasonable expectation that disclosure would not occur. 5 U.S.C. § 571(7) (1994).

discussions,<sup>172</sup> spans multiple sessions<sup>173</sup> and ends only with resolution or termination.<sup>174</sup>

### B. Persons Covered by the Privilege

Mediators, mediation parties, the parties' lawyers and the staff of mediation organizations are involved in mediation. Others may be present during a mediation session: a party's family members or "support persons,"<sup>175</sup> staff members and outside consultants of an organizational party, "witnesses," mediator trainees and other observers. Once a mediation falls within the privilege there is no policy justification for allowing disclosure of information acquired during mediation by anyone. Everyone with access to mediation information should be "burdened" by the privilege.

Statutes vary in their effectiveness on this issue. Those that name no one<sup>176</sup> risk an interpretation that the mediation privilege is limited to those in the "professional relationship," the parties and the mediator, leaving others present free to disclose or subject to subpoena. Other statutes which name only the parties,<sup>177</sup> the mediator<sup>178</sup> or both<sup>179</sup> may limit the reach of the privilege to

172. The Missouri statute extends confidentiality to communications "made in setting up" the mediation. MO. REV. STAT. § 435.014(2) (1992). The Symposium Model's definition of "mediation" states: "For purposes of this statute/rule, a mediation commences at the time of initial contact with a mediator or mediation program." Hyman, *supra* note 6, at 71, § 1(a).

173. Oregon and Virginia provisions define the privileged interval to include ". . . all contacts between the mediator and any party or parties, until such time as a resolution is agreed to by the parties or the parties discharge the mediator." OR. REV. STAT. § 36.110(6) (1993); VA. CODE ANN. § 8.01-581.21 (Michie 1992). Both provisions unfortunately appear to fail to specifically include contacts with mediation organization staff other than the mediator.

174. The Oregon provision states that the ending point of the process does not occur "until such time as a resolution is agreed to by the parties or the mediation process is terminated." OR. REV. STAT. § 36.110(6). Va. Code Ann. § 8.01-581.21 (Michie 1992) (resolution "or the parties discharge the mediator").

175. The physician/patient privilege includes communications by the patient's family members to the medical staff. *Grosslight v. Superior Court*, 140 Cal. Rptr. 278 (Cal. Ct. App. 1977). The same rationale ought to apply to a person present at the mediation providing support to a party as a surrogate family member. *Cf. United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (holding attorney-client privilege encompassed client discussions with accountant in the attorney's employ).

176. ARIZ. REV. STAT. ANN. § 12-2238(B) (1994); N.D. CENT. CODE § 31-04-11 (Supp. 1993).

177. FLA. STAT. § 44.201(5) (Supp. 1994) ("[e]ach party . . . has a privilege . . . to refuse to disclose and to prevent another from disclosing . . ."). The intended meaning of "another" in the Florida statute is unclear. If "another" means another party, does that exclude the mediator or is "another" intended to include all present? Confusion may arise because the waiver provision of the Florida statute applies to parties. *Id.* Expansively interpreting "party" and "another" to determine who is burdened by the privilege may have the unwanted effect of increasing the class of persons whose consent is required to waive the privilege. The Symposium Model presents this problem as well. Hyman, *supra* note 6 at 71, §§ 1(a), 2. One may want to burden a party's relative, "witness" or lawyer, or a mediation trainee who is present during the mediation, but not give them a voice in whether mediation information is disclosed.

those named.<sup>180</sup> The same result could occur with statutes that use the word "participants."<sup>181</sup> Several statutes extend to all persons present.<sup>182</sup> For example, the Washington statute places the burden of the privilege on "the mediator, a mediation organization, a party or any person present."<sup>183</sup> By specifically listing all who may have access to information arising out of a mediation proceeding, the Washington statute ensures comprehensive protection against disclosure. It also eliminates the argument that confidentiality is waived by the presence of persons other than the mediator and the parties.<sup>184</sup>

### C. *Later Proceedings in Which the Privilege Will Be Effective*

Crafting a mediation privilege statute also involves considering the subsequent proceedings in which the privilege will apply. Traditionally, confidential information protected by a privilege is exempt from discovery<sup>185</sup> and barred from evidence in civil and criminal actions.<sup>186</sup> Mediation privilege provisions have taken differing approaches. Many are silent<sup>187</sup> or list only

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178. WASH. REV. CODE § 26.09.015(3) (Supp. 1994). The Wisconsin mediation privilege is a bit awkward. While it only specifically forbids subpoenaing the mediator, other language provides that no mediation "communication . . . is admissible in evidence or subject to discovery or compulsory process." Presumably the intent is that mediation parties and other participants, as well as the mediator, will not be subject to process. WIS. STAT. § 904.085 (Supp. 1994).

179. Alabama Civil Court Mediation Rule 11; COLO. REV. STAT. § 13-22-307(2) (Supp. 1993); 5 U.S.C. § 574(a), (b) (1994).

180. *Expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). BLACK'S LAW DICTIONARY 692 (Rev. 4th ed. 1968).

181. WYO. STAT. § 1-43-103(a) (Supp. 1994); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (West Supp. 1994).

182. FLA. STAT. ANN. § 44.102(3) (West Supp. 1994); OR. REV. STAT. § 36.205(1) (1993); VA. CODE ANN. § 8.01-581.22 (Michie 1992); MASS. GEN. L. ANN. ch. 233, § 23C (West 1986); MO. REV. STAT. ANN. § 435.014(2) (Vernons 1992); WASH. REV. CODE § 7.75.050 (1992). The Utah statute could cause confusion. First "all communications . . . made by the participant" are made confidential, then "participants" and "the third party facilitator" may not be subpoenaed, and finally "all parties" may waive the privilege in writing. UTAH CODE ANN. §§ 78-31b-7(1)(a), (2) & (3)(a) (1992). Only a few statutes specifically mention mediation organization personnel. COLO. REV. STAT. § 13-22-307(2) (Supp. 1993); WASH. REV. CODE § 5.60.070(1) (Supp. 1994).

183. WASH. REV. CODE § 5.60.070 (Supp. 1994); N.Y. JUD. LAW § 849-b(6) (McKinney 1992); MINN. STAT. § 595.02(k) (1988 & Supp. 1994) ("A person cannot be examined . . .").

184. Under traditional privilege law, the privilege is waived if communications occur while a third party is present. WIGMORE ON EVIDENCE, *supra* note 9, § 2311 (attorney-client), § 2339 (wife-husband) and § 2381 (physician-patient).

185. FED. R. CIV. P. 26(b)(1).

186. FED. R. EVID. 1101(c).

187. ALASKA STAT. § 18.80.115 (1994); ARIZ. REV. STAT. ANN. § 12.2238(B) (1994); CONN. GEN. STAT. ANN. § 46b-53(c) (West 1986); MO. REV. STAT. ANN. § 435.014 (Vernons 1992); PUERTO RICO, tit. 4, Sec. 532(d); WASH. REV. CODE § 26.09.015(3) (Supp. 1994); WYO. STAT. § 1-43-103(a) (Supp. 1994); 5 U.S.C. § 574 (1994).

"civil" cases.<sup>188</sup> Other statutes extend the privilege to "civil and criminal,"<sup>189</sup> "any proceeding,"<sup>190</sup> "any subsequent legal proceeding,"<sup>191</sup> "judicial or administrative proceeding"<sup>192</sup> or other<sup>193</sup> proceedings.

Statutes referencing "civil and criminal" are consistent with existing privilege law and will undoubtedly be interpreted to extend to such actions. Judicial treatment is less certain for silent statutes and those using vague phrases: "any proceeding" and "any subsequent proceeding." However, if the state involved has a counterpart to Federal Evidence Rule 1101(c), then the rule of privilege will apply to "all stages of all actions, cases, and proceedings."<sup>194</sup> Statutes limiting the privilege to civil cases may reflect a policy judgment that the criminal justice system's need for access to mediation information outweighs the benefit of preserving mediation confidentiality.<sup>195</sup> A narrower policy consideration may be to protect the safety of those involved in mediation or threatened third parties. The latter concern is better addressed through specific exceptions to the mediation

188. CAL. EVID. CODE § 1152.5 (West 1994); MONT. CODE ANN. § 26-1-811 (1993); N.D. CENT. CODE § 31-04-11 (Supp. 1993); PA. STAT. ANN. tit. 43, § 211.34 (Purdon 1992). The Maryland and New Hampshire privilege for domestic relations cases is limited to subsequent family law cases. MD. ST. R. SP. P. RULE S73A(e); N.H. REV. STAT. ANN. § 328-C:9.II (Supp. 1993). Ohio's family mediation privilege covers any action or proceeding "other than a criminal, delinquency, child abuse, child neglect, or dependent child action. . . ." OHIO REV. CODE ANN. § 3109.052(C) (Anderson 1993).

189. Idaho Rule of Evidence 507(2) (relating to child custody and visitation mediations); R.I. GEN. LAWS § 15-5-29(3) (1988).

190. LA. REV. STAT. ANN. § 9:355 (West 1991); MICH. COMP. LAWS ANN. § 552.513(3) (West 1988). Note that North Dakota's family law privilege, N.D. CENT. CODE § 14-09.1-06 (1991), covering "any proceeding" is broader than the state's general mediation privilege, which does not apply if the "evidence relates to a crime, civil fraud, or [juvenile violation]."

191. FLA. STAT. § 44.102(3) (1994).

192. COLO. REV. STAT. § 13-22-307(3) (1993); FLA. STAT. ANN. § 44.201(5) (1994); ILL. ANN. STAT. ch. 710, para. 20/6 (Smith-Hurd 1992); IOWA CODE ANN. § 13.12(2) (West 1994); MASS. GEN. L. ANN. ch.233, § 23C (West 1986); MINN. STAT. § 595.02(1) (1994) (privilege applies to testimony in civil or criminal cases and "before any person who has authority to receive evidence"); N.Y. JUD. LAW § 849-b(6) (McKinney 1992); OKLA. STAT. ANN. tit. 12, § 1805C (West 1992); OR. REV. STAT. § 36.205(1) (1993); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (West Supp. 1994); UTAH CODE ANN. § 78-31b-7(1)(b) (1992); VA. CODE ANN. § 8.01-581.22 (Michie 1992); WASH. REV. CODE §§ 5.60.070(1), 7.75.050 (1994 & 1992).

193. The force of the mediation privileges in other alternative dispute resolution settings is unclear. A few states include arbitration in the list of fora affected by the mediation privilege. Alabama Civil Court Mediation Rule 11 ("arbitral, judicial or other proceeding"); KY. REV. STAT. ANN. § 336.153 ("administrative, civil, or arbitration proceeding"); MASS. GEN. LAWS ANN. ch. 150, § 10A (West 1994) (same). The mediation privilege should apply in any later arbitration since that procedure is adjudicatory in nature. Hyman, *supra* note 4, at 33. This would be particularly true of court-annexed arbitrations. In Maine's medical malpractice mediation panel system, the privilege applies to "any subsequent court action and any other public disclosure." ME. REV. STAT. tit. 24, § 2857(1) (1990 & Supp. 1993).

194. FED. R. EVID. 1101(c).

195. See *People v. Snyder*, 492 N.Y.S.2d 890 (N.Y. Sup. Ct. 1985) (in which New York's mediation privilege statute was interpreted to bar the district attorney from obtaining mediation records of a local dispute resolution center in a homicide case).

privilege.<sup>196</sup> Mediation privileges which do not apply to criminal cases are inconsistent with traditional privileges and produce a chilling effect upon mediation discussions.<sup>197</sup> Such statutes are particularly onerous in jurisdictions with programs for mediating criminal complaints.<sup>198</sup> Such programs cannot operate unless the accused is assured mediation communications will be barred from the criminal trial.<sup>199</sup> This reality was recognized by the Georgia Court of Appeals in *Byrd v. State*,<sup>200</sup> which, in the absence of a privilege statute, held that a mediation settlement agreement from a criminal diversion program was not admissible in the accused's subsequent criminal prosecution as an admission of guilt. In reaching this result, the Georgia Court of Appeals stated:

By allowing this alternative dispute resolution effort to be evidenced in the subsequent criminal trial, the trial court's ruling eliminates its usefulness. For no criminal defendant will agree to 'work things out' and compromise his position if he knows that any inference of responsibility arising from what he says and does in the mediation process will be admissible as an admission of guilt in the criminal proceeding which will eventualize if mediation fails.<sup>201</sup>

Even in mediations not directly involving a criminal complaint -- family matters, neighborhood disputes and business situations -- mediation discussions will be restricted if the parties learn that what they say or submit may be used later in a criminal courtroom.

Statutes, such as Washington's, which extend the privilege to "any judicial or administrative proceeding"<sup>202</sup> properly protect mediation communications from use in criminal cases. They also recognize the prevalence of administrative justice in our contemporary legal system and the need to exclude privileged mediation communications from administrative hearings.<sup>203</sup>

196. See *infra* notes 323-33 and accompanying text.

197. Cf. *Williams v. State*, 342 S.E.2d 703, 704 (Ga. App. Ct. 1986) (settlement agreement signed by employee admitting to have taken and agreeing to repay employer \$6,000 was admitted in employee's criminal trial).

198. Friedman, *supra* note 4, at 189-96 (describing the Night Prosecutor Program in Columbus, Ohio).

199. *Id.* at 198-200; see also *Byrd v. State*, 367 S.E.2d 300, 303 (Ga. App. Ct. 1988).

200. *Byrd*, 367 S.E.2d at 300; *Accord Williams v. State*, 770 S.W.2d 948, 949 (Tex. Ct. App. 1989) ("Contrary to the State's assertions, we cannot consider any evidence from the dispute resolution procedure that appellant and complainant participated in prior to his [appellant's] arrest, as disclosures made in an ADR procedure are confidential, and not subject to disclosure."). The Texas court relied on its state's ADR privilege statute. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West Supp. 1994). *Contra Williams v. State*, 342 S.E.2d 703, 704 (Ga. App. Ct. 1986) (involving a mediation conducted by a private mediator).

201. *Byrd*, 367 S.E.2d at 302.

202. WASH. REV. CODE § 5.60.070(1) (Supp. 1994); see also statutes cited *supra* note 192.

203. For example, mediations are regularly conducted in industrial injury cases in Washington in advance of an administrative hearing. See generally Harter, *supra* note 15, at 348-56.

### D. Holders of the Privilege

A critical task of any mediation privilege law is establishing who holds the right to assert or waive the privilege (i.e., a "holder" of the privilege). Holder status varies in the traditional privileges. With the attorney-client and physician-patient privileges the protection of the client/patient disclosure is paramount. Therefore, only the client/patient holds the privilege.<sup>204</sup> In contrast, under the traditional rule husbands and wives are joint holders of the spousal privilege.<sup>205</sup> Each spouse retains control over disclosures by the other.<sup>206</sup>

With respect to the cleric-penitent privilege, statutes vary as to whether the penitent, the cleric, or both are holders of the privilege.<sup>207</sup> In some jurisdictions the cleric may refuse to testify even if the penitent has waived the privilege in deference to the cleric's religious obligation not to discuss confidential communications.<sup>208</sup>

The mediation process presents a unique context for the operation of an evidentiary privilege. Rather than the usual bilateral relationship in traditional privileges, mediation always involves at least three persons: the mediator and two parties. Additionally, two distinct relationships are at work simultaneously in a mediation: a professional relationship between the mediator and each of the parties, and a confidential relationship between the parties. Both relationships generate distinct interests in preserving confidentiality.

Generally, the parties and the mediator share a common interest in maintaining the confidentiality of mediation communications. However, after a failed mediation, interests may diverge as to whether mediation communications ought to be disclosed. Each of the participants -- the mediator or either of the parties -- in different circumstances may wish to maintain confidentiality, or discover or introduce mediation information in a later proceeding. A mediation

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204. As to the attorney-client privilege "the waiver, like the privilege, belongs solely to the client, and not to the attorney." WIGMORE ON EVIDENCE, *supra* note 9 § 2327 at 635. As a general rule only, the patient, if competent, may waive the physician-patient privilege. SCOTT N. STONE & ROBERT K. TAYLOR, 1 TESTIMONIAL PRIVILEGES § 7.20 (2d ed. 1993).

205. Under the traditional rule a spouse has a privilege to refuse to disclose, and to prevent the other spouse from disclosing confidential communications, with exceptions for civil actions between the spouses and criminal assaults perpetrated by one spouse against the other. ROBERT ARONSON, THE LAW OF EVIDENCE IN WASHINGTON, 501-19 (2d ed. 1993); STONE & TAYLOR, *supra* note 204, § 5.09. However, it has been suggested by some that only the communicating spouse should hold the right to assert or waive the spousal privilege. WIGMORE ON EVIDENCE, *supra* note 9, § 2340 at 670-71. Under such a rule the hearing spouse cannot assert the privilege to stop the speaking spouse from disclosing.

Some states have an expanded spousal privilege, allowing a spouse-party to prevent a spouse-witness from testifying, regardless of whether the testimony related to confidential communications between the spouses. WASH. REV. CODE § 5.60.060(1) (Supp. 1994). Such rules in actuality are spousal competency rules.

206. *Id.*

207. See generally STONE & TAYLOR, *supra* note 204, § 6.08.

208. See, e.g., OHIO REV. CODE ANN. § 2317.02(c) (Anderson 1991) (cleric to testify if penitent has waived privilege, unless the disclosure "is in violation of [the cleric's] sacred trust."); Church of Jesus Christ of Latter-Day Saints v. Superior Court, 764 P.2d 759 (Ariz. Ct. App. 1988).

privilege must rationally reconcile these potentially competing interests in an unambiguous fashion.

Special care must be taken to protect the role of the mediator. Preserving confidences in order to maintain neutrality is elemental for mediators.<sup>209</sup> As a result, mediators regularly refuse to be the "tie-breaking" witness in a subsequent proceeding, even when the parties so desire.<sup>210</sup> Mediator testimony inevitably leads to one of the parties viewing the mediator as biased.<sup>211</sup> Moreover, if mediator testimony becomes commonplace, the public is likely to form the undesirable perception that the particular mediator or the mediation process does not protect confidences.<sup>212</sup> These important policy considerations were recognized by the Ninth Circuit Court of Appeals in *NLRB v. Macaluso, Inc.*<sup>213</sup> The court stated:

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209. "Maintaining confidentiality is critical to the dispute resolution process." ROGERS & SALEM, *supra* note 5, at 263 (quoting Society of Professionals in Dispute Resolution, Ethical Standards of Professional Responsibility, Standard 3 [hereinafter SPIDR Ethical Standards]).

210. See, e.g., *N.L.R.B. v. Joseph Macaluso, Inc.*, 618 F.2d 51, 53-56 (9th Cir. 1980); see also *Port Arthur v. United States*, 517 F. Supp. 978 (D.D.C. 1980), *aff'd*, 459 U.S. 159 (1982); *People v. Reyes*, 816 F. Supp. 619 (E.D. Cal. 1992); *Cohen v. Cohen*, 290 N.Y. Supp.2d 524 (N.Y. Sup. Ct. 1968); *Royal Caribbean Corp. v. Modesto*, 614 So.2d 517 (Fla. Dist. Ct. App. 1992); *Simrin v. Simrin*, 43 Cal. Rptr. 376 (Cal. Ct. App. 1965); *People v. Snyder*, 492 N.Y.S.2d 890 (N.Y. Sup. Ct. 1985); *Kruger v. Washington Federal Savings Bank*, 406 N.W.2d 543 (Minn. Ct. App. 1987) (providing an example of a mediator being forced testify). An example of a mediator who apparently was willing to testify is found in *Sonenstahl v. L.E.L.S., Inc.*, 372 N.W.2d 1, 6 (Minn. Ct. App. 1985).

211. *Sonenstahl v. L.E.L.S., Inc.*, 372 N.W.2d 1, 6 (Minn. Ct. App. 1985) ("... the proffered reasons for [the mediator's] testimony are insufficient to overcome the compelling need for a mediator to maintain the confidences of the parties and the appearance of impartiality."). A mediator's testimony, no matter how truthful and unbiased, is likely to be perceived as harmful by one or more of the parties. Since mediators generally make no formal record of the mediation, they will have difficulty testifying as to the specific statements made. Under such circumstances, mediator testimony is likely to be interpretive or evaluative, rather than descriptive, heightening the risk the parties will view the mediator as biased after the fact. A party who viewed the mediator as neutral during the mediation is likely to alter her view if the testifying mediator reveals "damaging" mediation information. *Prigoff, supra* note 4, at 2; *Brown, supra* note 3, at 309-10 ("To remain effective the mediator must be perceived as impartial by the parties.").

212. In two cases, courts have upheld the quashing of a subpoena issued to a mediator of the Community Relations Service of the U.S. Department of Justice. *Port Arthur v. United States*, 517 F. Supp. 987 (D.D.C. 1980) ("The effectiveness of the CRS is . . . dependent upon the actual and perceived impartiality of its mediators. The public interest in maintaining this impartiality greatly outweighs plaintiff's need for Mr. Greenwald's [the mediator's] testimony."); *People v. Reyes*, 816 F. Supp. 619 (E.D. Cal. 1992); see also *Sonenstahl v. L.E.L.S., Inc.*, 372 N.W.2d 1, 6 (Minn. Ct. App. 1985) ("... the policy of promoting successful mediation of public employment disputes outweighed the need for disclosing what the mediator believed was happening in this instance.").

The federal administrative dispute resolution provision recognizes the importance of party and public perceptions of the neutral's willingness to maintain confidences. 5 U.S.C. § 574(a)(4) (1994). Under that law, a court may order disclosure by the neutral (or a party) only if the need for disclosure outweighs "the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential." *Id.*

213. *N.L.R.B. v. Macaluso, Inc.*, 618 F.2d 51, 55 (9th Cir. 1980).



However useful the testimony of a conciliator might be . . . in any given case, . . . the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.<sup>214</sup>

Subjecting mediators and mediation organization records to subpoena disrupts the delivery of mediation services.<sup>215</sup> This is particularly true for community dispute resolution centers which rely heavily on volunteers.<sup>216</sup> Fighting off subpoenas, the usual response in these cases, is time consuming, costly and anxiety provoking. The limited situations in which a mediator may feel compelled to breach confidentiality irrespective of party preferences, such as to protect a vulnerable person or to prevent an injustice, can be accommodated through exceptions to the privilege.<sup>217</sup> For these reasons, a mediation privilege statute should give the mediator holder status which is independent from that of the parties.<sup>218</sup>

As with other aspects of the mediation privilege, statutes vary vastly as to their treatment of this important issue. Some statutes are silent<sup>219</sup> as to who holds the privilege. Others assign the rights to assert and/or waive the privilege

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214. *Macaluso*, 618 F.2d at 55 (quoting Tomlinson of High Point Inc., 74 N.L.R.B. 681, 688 (1947)).

215. Hyman, *supra* note 4, at 21, 50.

216. Prigoff, *supra* note 4, at 2-3.

217. *See infra* part VI.E.2.c. Mediation is an emerging profession with practitioners from many disciplines. Most jurisdictions do not yet have certification/licensing processes for mediators and professional codes with disciplinary sanctions. Professional mediation organizations have promulgated codes of ethics, but their effect is heuristic. Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution (1986); Joint Committee Standards, *supra* note 13. Mediators bring to the process ethical traditions of their various fields. *See, e.g.*, ABA Standards of Practice for Lawyer Mediators in Family Disputes, American Bar Association, Summary of the Actions of the House of Delegates, Report of Sections 22-23 (1984). During this period of developing ethical standards for mediation, mediation privilege statutes serve an instructive function regarding the appropriateness of disclosing classes of mediation information.

218. Hoxie, *supra* note 4, at 445-46 ("[P]rotection of the mediator's status as a neutral demands recognition of a distinct privilege on his part not to testify."); Hyman, *supra* note 4 at 33-34, 50-53.

219. Alabama Civil Court Mediation Rule 11; CAL. FAM. CODE § 4607, *repealed* CAL. FAM. CODE § 3177 (West Supp. 1994); ILL. REV. STAT. ch. 37, para. 856(6) (1991); IOWA CODE ANN. § 13.14(2) (West Supp. 1994); MASS. GEN. L. ANN. ch. 233, § 23C (West 1986); MICH. COMP. LAWS ANN. §§ 552.513, 691.1557 (West 1988 & 1994); MINN. STAT. ANN. § 595.02(1)(k) (West 1994); MO. REV. STAT. § 435.014 (1992); N.Y. JUD. LAW § 849-b(6) (McKinney 1991); OKLA. STAT. tit. 12, § 1805(C) (1993); R.I. GEN. LAWS § 15-5-29(3) (1988); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West Supp. 1994).

to the parties only,<sup>220</sup> the mediator only,<sup>221</sup> or the parties and the mediator as joint holders.<sup>222</sup> A small group of statutes bifurcates the "holder" status by assigning separate rights to the parties and the mediator.<sup>223</sup>

**Silent Statutes:** A silent statute can be expected to generate confusion in the tripartite setting of mediation.<sup>224</sup> In one case, a silent statute has been interpreted to be non-waivable by the mediation parties.<sup>225</sup>

**Party-Holder Statutes:** Statutes<sup>226</sup> making parties exclusive holders of the mediation privilege are in accordance with traditional privilege law. Mediation parties as clients of the mediation professional exercise the privilege rights, as do clients and patients of attorneys and physicians under those privileges.<sup>227</sup> Also, mediation parties exercise holder rights jointly because their special confidential relationship is analogous to the marital privilege. Party-holder statutes are also consistent with mediation ideology that lodges decision-making power with the parties.<sup>228</sup> While the joint party-holder approach is appropriate with respect to party disclosures, the mediator is afforded no means to resist compelled testimony. Such statutes undervalue the critical interest of preserving perceptions of mediator neutrality for all parties in individual cases and the public at large.<sup>229</sup>

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220. ARIZ. REV. STAT. ANN. § 12-2238(B)(1) (1994); FLA. STAT. §§ 44.102(3), 44.201(5) (Supp. 1994); KAN. STAT. ANN. § 23-606(a) (1988) (party or "anyone the party authorizes" may assert the privilege; statute is silent on waiver rights); MONT. CODE ANN. § 26-1-811 (1993); N.Y. JUD. LAW § 849-b(6) (McKinney 1992); UTAH CODE ANN. § 78-31b-7(3)(a) (1992); WASH. REV. CODE § 7.75.050 (1992) (allows waiver if "all the parties to the communication waive"); VA. CODE ANN. § 8.01-581.22(i) (Michie 1992).

Under the Idaho, Utah, Wisconsin and Wyoming provisions, the parties hold the privilege, but the mediator (and others) may assert the privilege on a party's behalf. IDAHO R. OF EVID. 507-3, UTAH CODE ANN. § 78-31b-7(2) & (3)(a) (1992); WIS. STAT. § 904.085 (Supp. 1994); WYO. STAT. § 1-43-103(a) (Supp. 1994). For example, Idaho Rule of Evidence 507-3 provides that the privilege may be asserted "for the client through his mediator, lawyer, guardian or conservator, or the personal representative of a deceased client."

221. MASS. GEN. LAWS ANN. ch. 150, § 10A (West Supp. 1994) (privilege for labor mediators); OHIO REV. CODE § 3109.06(C) (Anderson Supp. 1993) (creates mediator only privilege which cannot be waived by the parties).

222. COLO. REV. STAT. § 13-22-307(2)(a) (Supp. 1993); N.D. CENT. CODE § 31-04-11(4) (Supp. 1993).

223. OR. REV. STAT. §§ 36.205(2)(a) & (3) (1993); WASH. REV. CODE §§ 5.60.070(1)(a) & (2)(a) (Supp. 1994); 5 U.S.C. §§ 574(a) & (b) (1994); Hyman, *supra* note 6, at 72, § (4)(b)(1).

224. ROGERS & MCEWEN, *supra* note 4, at 116.

225. In re Rosson, 224 Cal. Rptr. 250 (Cal. Ct. App. 1986) (holding that a silent statute was interpreted to give the trial court, and not the parties, the right to waive the privilege). People v. Snyder, 492 N.Y.S.2d 890 (N.Y. Sup. Ct. 1985) (silent statute evidenced legislative intent that privilege cannot be waived).

226. See statutes cited *supra* at note 220.

227. See *supra* note 204 and accompanying text.

228. MOORE, *supra*, note 18, at 6 ("As with negotiations, mediation leaves decision-making power in the hands of the people in conflict.")

229. See *supra* notes 209-214 and accompanying text.

**Mediator-Only Holder Statutes:** Statutes<sup>230</sup> vesting "holder" rights exclusively in the mediator are consistent with the cleric-penitent privilege in a few jurisdictions, but an inversion of traditional privilege rights as to other privileges based on a professional relationship.<sup>231</sup> The mediator is given sole authority to assert or waive the privilege. Mediation clients lose all control over disclosure decisions, even when all are agreeable to disclosure.<sup>232</sup> Party preferences become legally irrelevant as to communications involving their privacy interests.<sup>233</sup> Also, this type of statute invites undesirable lobbying of the mediator by a party wanting to disclose mediation communications.<sup>234</sup> The mediator will make an enemy of one of the parties no matter what she does. The limited benefit of such statutes is that the parties cannot force mediator disclosures.<sup>235</sup> Less restrictive alternatives exist to accomplish that result.<sup>236</sup>

**Joint-Holder Statutes:** Statutes<sup>237</sup> making the mediator and the parties joint holders of the privilege ostensibly balance the power to assert or waive the privilege. Mediators have the means to avoid compelled testimony; parties may assert the privilege against a mediator who has decided to disclose mediation information. However, joint-holder provisions have the potential for causing stalemate. While the mediator no longer holds absolute power under a joint-holder statute, she effectively has veto power over parties' disclosures. A mediator is unlikely to join in a waiver of the privilege to permit party disclosures if the result is that she may be called to testify.<sup>238</sup> This statutory scheme also encourages parties to lobby the mediator. One party may seek a mediator's vote for disclosure as a means of convincing the other party to agree to waive confidentiality. Joint-holder provisions represent little improvement over other statutes examined to this point.

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230. See statutes cited *supra* at note 221.

231. See *supra* notes 204-208 and accompanying text.

232. For example, an Ohio statute applying to family law cases does not permit mediator testimony even if the parties agree to the mediator testifying. OHIO REV. CODE ANN. § 3109.06(C) (Anderson 1993).

233. Cf. Formerly under California law counties could opt by local rule to allow the mediators to make custody/visitation recommendations to the court, and testify, if the parties fail to reach settlement in mediation. Such a rule removed any power of the parties to oppose disclosure. For a criticism of this system, see Lizbeth M. Morris, *Mandatory Custody Mediation: A Threat to Confidentiality*, 26 SANTA CLARA L. REV. 759 (1986).

234. Cf. *Sonenstahl v. L.E.L.S.*, 372 N.W.2d 1, 6 (Minn. Ct. App. 1985) (a group of employees sought to overcome the mediation privilege on the grounds that the mediator had expressed willingness to testify on the group's behalf).

235. See *supra* notes 209-214 and accompanying text.

236. See *infra* notes 239-244 and accompanying text.

237. See statutes cited *supra* at note 222.

238. A mediator may attempt to conditionally waive the privilege to allow for party disclosures if the parties agreed not to subpoena the mediator. It is questionable whether a court would uphold the condition once the waiver is made given the strong policy of obtaining all relevant evidence for trial.

**Bifurcated-Holder Statutes:** Another approach to addressing the differing interests of the mediator and mediation parties with respect to disclosure of mediation information has been to bifurcate holder rights. Such statutes recognize that party disclosures should be solely within party control, free of mediator interference. Equally important, mediators are given the means to avoid compelled testimony. A few states have enacted statutes with bifurcated holder rights.<sup>239</sup>

The Washington statute is an example of the bifurcated model.<sup>240</sup> The privilege is waived as to party disclosures if all the parties agree in writing.<sup>241</sup> The mediator has no control over party disclosures. Mediator disclosures, however, require the joint consent of the parties and the mediator.<sup>242</sup> The effect of the statute is that a mediator may not disclose confidential mediation information without party approval, nor may the parties compel mediator testimony.<sup>243</sup>

Bifurcated statutes fulfill the critically important function of protecting the mediator from being the forced "tie-breaker" witness.<sup>244</sup> While parties may not compel mediator testimony under a bifurcated statute, their loss is limited. Parties who agree to disclosure may themselves testify freely as to what was said and done at the mediation. At the same time, each party as an independent holder of the privilege may block both party and mediator testimony. Bifurcated provisions properly balance the interests of preserving mediator neutrality and providing parties with significant control over the disclosure of mediation information.

### *E. Information Covered by the Privilege*

As pointed out earlier,<sup>245</sup> the mediation process is exemplified by wide ranging, candid negotiation discussions unrestricted by formal rules of procedure or evidence. Parties to mediation discuss known and new information, present pre-existing writings and tangible evidence, and prepare written materials for and during the mediation. Communication often ranges far beyond the core of the specified dispute. Private personal or business information may be disclosed. A party may admit or threaten criminal behavior or harm to those present or to others. One party may perpetrate a fraud on another or the mediator may engage

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239. See statutes cited *supra* at note 223.

240. WASH. REV. CODE §§ 5.60.070(1)(a) & (2)(a) (1994).

241. WASH. REV. CODE § 5.60.070(1)(a) (1994).

242. WASH. REV. CODE § 5.60.070(2)(a) (1994).

243. All of the bifurcated statutes allow the mediator to testify only with party approval. OR. REV. STAT. §36.205(3) (1993); WASH. REV. CODE § 5.60.070(2)(a) (1993); 5 U.S.C. §§ 574(a) & (b) (1994); Hyman, *supra* note 6, at 72, § (4)(b)(1). The federal administrative dispute resolution provision allows parties to alter the neutral's rights regarding disclosure, if the neutral is advised of the parties' wishes before the commencement of the proceeding. 5 U.S.C. § 574(d) (1994).

244. For a discussion of this issue, see *supra* notes 209-214 and accompanying text.

245. See *supra* notes 34-48 and accompanying text.

in wrongdoing. A policy issue emerges as to what mediation information ought to be privileged. A mediation privilege statute must strike a reasoned balance between general confidentiality for mediation discussions and access to specific information deemed by public interest to require disclosure.

### 1. General Definition of Mediation Information to be Privileged

The usual statutory scheme is a broad general definition<sup>246</sup> of information to be covered by the mediation privilege, followed by a list of specific exclusions.<sup>247</sup> With few exceptions mediation privilege statutes cover oral and written communications<sup>248</sup> and information generated by both the mediator and the parties. Although entirely appropriate, only a couple of statutes specifically cover the "acts"<sup>249</sup> or "conduct"<sup>250</sup> of the parties during mediation. A few

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246. ARIZ. REV. STAT. ANN. § 12-2238 (1994) ("[c]ommunications made, material created for or used and acts occurring during mediation. . . "); CAL. EVID. CODE §§ 1152.5(a)(1) & (2) (West 1994) (" . . . evidence anything said or of any admission made" and documents " . . . prepared for the purpose of, or in the course of, or pursuant to, the mediation"); COLO. REV. STAT. § 13-22-307(2) (Supp. 1993) (" . . . any mediation communication or any communication provided to in confidence to the mediator or a mediator organization. . . "); FLA. STAT. § 44.102(3) (1994) (" . . . all oral or written communications"); ILL. REV. STAT. ch. 37, § 856 (1994) ("[a]ny communication made during the resolution process . . . "); KAN. STAT. ANN. § 23-606 (1988) (" . . . any communication made in the course of the mediation"); N.H. REV. STAT. ANN. §328-C:9 (Supp. 1993) ("[a]ll communication, oral or written"); MO. REV. STAT. § 435.014 (1992) ("any matter disclosed"); OHIO REV. CODE ANN. § 2317.02 (1994) (" . . . any information discussed or presented in the mediation process. . . "); WASH. REV. CODE § 5.60.070(1) (1994); 5 U.S.C. §§ 574(a) & (b) (1994).

247. See *infra* part VI.E.2.c. FLA. STAT. §§ 44.102(3) & 44.201(5) (Supp. 1994); OR. REV. STAT. § 36.205 (1993); WASH. REV. CODE §§ 5.60.070 (Supp. 1994). The Alabama rule takes the unusual approach of extending confidentiality broadly, but then enumerates only four types of information that may not be introduced as evidence. The rule could be interpreted to limit the privilege to those four (admittedly rather inclusive) subject matters: 1) party's views on settlement proposal; 2) admissions by a party; 3) mediator proposals and views; and 4) statements regarding willingness to settle. Alabama Civil Court Mediation Rule 11. Of course judicial interpretations of the application of the mediation privilege in particular cases will shape the privilege.

The Texas statute is also unusual. It has no exclusions other than for otherwise discoverable material. If the privilege conflicts with "other legal requirements for disclosure" the court is to decide *in camera* whether the information is subject to disclosure. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(d) (West Supp. 1994).

248. WASH. REV. CODE § 5.60.070(1) (Supp. 1994); MINN. STAT. § 595.02(1)(k) (1994) (" . . . any communication or document, including worknotes, . . . "). The federal administrative dispute resolution provision also protects information expressly intended to be confidential and information shared under circumstances that create a reasonable expectation of non-disclosure). 5 U.S.C. § 571(7) (1994). *But see*, N.D. CENT. CODE § 31-04-11 (1993) (which appears to limit that state's privilege to oral communications ("anything said" or "admissions made")); Maine Administrative Orders of the Supreme Judicial Court, Rule B.5. (ADR pilot project covers only " . . . conduct, discussions, and statements.").

249. ARIZ. REV. STAT. ANN. § 12-2238(B) (1994).

250. FLA. STAT. § 44.201(5) (1994).

statutes state no exceptions to the privilege.<sup>251</sup> These absolute privilege statutes override obvious needs for access to certain mediation information.<sup>252</sup>

The general definition of information to be privileged is narrowed in some statutes by limiting phrases, such as communications which are the "subject matter of the mediation,"<sup>253</sup> communication which "relates to the controversy being mediated"<sup>254</sup> or "confidential communications" as defined,<sup>255</sup> or by requiring communications to be in the presence of the mediator.<sup>256</sup> To their credit, such statutes focus the mediation privilege on communications most in need of protection (those at the core of the dispute), yet allow "extraneous" information to remain available to the adversarial process. The weakness of these statutes is the lack of predictable application.

Determining the "subject matter" of a given mediation is problematic.<sup>257</sup>

251. Alabama Civil Court Mediation Rule 11; MASS. GEN. L. ANN. ch. 233, § 23 (West 1986) (absolute as to information "within the subject matter of the mediation"); MO. REV. STAT. § 435.014 (1992) (absolute except for otherwise discoverable evidence); N.Y. JUD. LAW § 849-b(6) (McKinney 1992); R.I. GEN. LAWS § 9-19-44 (Supp. 1993); WASH. REV. CODE § 26.09.01(3) (Supp. 1994) (family disputes).

252. See *infra* Part VI.E.2.

253. MASS. GEN. LAWS ANN. ch. 233, § 23C (West 1986) ("relating to the subject matter of any mediation."); MINN. STAT. ANN. § 494.02 (West 1990) ("subject matter of the dispute."); MO. ANN. STAT. § 435.014(2) (1992) ("subject matter of such disputes"); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West Supp. 1994) ("subject matter of any civil or criminal dispute"); UTAH CODE ANN. § 78-31b-7 (1992) (same as Texas); WASH. REV. CODE § 7.75.050 (1992) ("subject matter of the resolution made").

Statutes limiting the privilege to the subject matter of the "agreement" or "resolution" raise the unfortunate and unnecessary question of whether communications in mediations that do not result in agreement or resolution are privileged. IOWA CODE § 679.12 (1987) ("subject matter of an agreement"); MICH. COMP. LAWS § 691.1557 (7) ("subject matter of the resolution"); N.Y. JUD. LAW § 849-b(6) (McKinney 1992) ("subject matter of resolution").

254. OR. REV. STAT. § 36.205(1) (1993); VA. CODE ANN. § 8.01-581.22 (Michie 1992); WIS. STAT. § 904.085(3) (Supp. 1994) ("communication relating to a dispute in mediation").

255. The Wyoming statute defines confidential communications to be those ". . . not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the mediation process or those reasonably necessary for the transmission of the communication." WYO. STAT. § 1-43-102 (Supp. 1994).

256. LA. STAT. ANN. § 9:355 (1991) (extends the privilege to "communications between a mediator and a party . . ."); MASS. GEN. LAWS ANN. ch. 233, §23C (West 1986) (communication "made in the presence of the mediator."). Although the mediator is generally present when parties communicate, these statutes appear not to offer confidentiality to communications between parties when the mediator steps out of the room. Similarly, Idaho's mediation privilege similarly limits confidentiality to communication "among the client, the client's mediator, and persons who are participating in the mediation, . . . including members of the client's family." IDAHO RULE OF EVIDENCE 507(C)(2). These provisions raise the question as to whether having a non-party or non-specified person present during mediation communications destroys the privilege. The theoretical basis for such a position lies in the traditional privileges which are waived if communications are not made in confidential circumstances. MCCORMICK ON EVIDENCE, *supra* note 62, at § 74.

257. This language is problematic for it is often difficult to determine the precise scope of mediation discussions. For example, in the mediation of a divorce, is a party's disclosure of tax fraud part of mediating a property settlement or disclosure of substance abuse part of developing the parenting plan? Statutes with this narrowing language unnecessarily create the potential for litigation

There are no pleadings in mediation and considerations of legal relevancy do not apply.<sup>258</sup> Moreover, "extraneous" information is likely since mediators urge parties to move beyond their legal rights and consider interest-based, often non-legal, solutions to the conflict.<sup>259</sup> Take, for example, a dispute over draws by business partners. Will the privilege include admissions by one partner of making unauthorized draws, marital infidelity and drug use, or disclosures by the other partner of diverting partnership assets to another business and personal income tax evasion? Because answers to these examples are not apparent, the "subject matter" definition does not serve the mediation process well.<sup>260</sup> As with Evidence Rule 408 in the negotiations context, the "subject matter" definition results in uncertainty and invites post hoc determinations of confidentiality.<sup>261</sup>

The Washington statute initially throws a blanket of privilege over all mediation information, ". . . any communication made or materials submitted in, or in connection with, the mediation proceeding . . .,"<sup>262</sup> and then sets out specific exclusions. Under such statutes with a broad definition of privileged information, parties begin mediation knowing all their mediation communications will be confidential, except for specific types of information that can be identified

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within litigation when a party seeks to introduce such mediation communications in a subsequent proceeding.

The same issue arises regarding the scope of the attorney-client privilege. See WIGMORE ON EVIDENCE, *supra* note 9, at § 2310. A legal client cannot be expected to know in advance what information is necessary and material to his legal question, and he should not be hampered in seeking advice. However, when the client knowingly departs from the purpose of seeking legal advice and interjects irrelevancies, he is no longer communicating under the protected purpose. *Colman v. Heidenreich*, 381 N.E.2d 866 (Ind. 1978) (client telling lawyer that client's friend had committed crime for which someone else was being prosecuted and sued civilly "did not concern the rights, liabilities, or other legal problems of the . . . client . . ."); *accord*, *Rubin v. State*, 602 A.2d 677 (Md. 1992); *Registered Home Builders, Inc. v. Lanchantin*, 198 N.Y.S.2d 767 (N.Y. App. Div. 1960).

258. Query: How does a mediator explain the bounds of confidentiality under such statutes in the mediator's opening statement?

259. See *supra* notes 39-47 and accompanying text.

260. *Brown*, *supra* note 3, at 318. A somewhat analogous issue arises with regard to information relating to the attorney-client relationship. Under the ABA Model Code of professional responsibility, differing standards of confidentiality applied depending on whether the information was a "confidence" shared by the client in direct communication with the attorney or a "secret" of the client the attorney became aware of during the course of the representation from a source other than the client. ABA MODEL CODE OF PROF. RESP. DR 4-101. Because of the confusion caused by that dual standard, the newer Model Rules impose a single, global duty of confidentiality on lawyers as to "all information relating to the representation, regardless of its source." ABA MODEL RULES OF PROF. CONDUCT, Comment [5] to Rule 1.6.

261. See *supra* notes 66-76 and accompanying text.

262. WASH. REV. CODE § 5.60.070(1) (Supp. 1994). Use of the terms "communications" and "materials," rather than "statements" or "writings" is aimed at ensuring the privilege extends to nonverbal communication and any tangible items other than writings. Any ambiguity as to conduct could be eliminated by the phrase used in the Arizona statute: "acts during mediation." ARIZ. REV. STAT. ANN. § 12-2238(A) (1994). If the definition of privileged information is specifically enlarged to include acts, then it is important that an exemption be added for "threatened or actual violence that occurs during mediation." *Id.*

in advance. A broad definition provides needed improvement over the limitations of Evidence Rule 408.<sup>263</sup> Mediation participants benefit from the certainty such statutes provide. As will be seen immediately below, a "laundry list" of exceptions to the mediation privilege has been enacted or suggested. With confidentiality so critical to mediation's success,<sup>264</sup> exceptions must be judiciously employed.

## 2. Exceptions to the Privilege

### *a. Preexisting Information*

Mediation occurs after the events precipitating a dispute. During mediation preexisting facts, statements,<sup>265</sup> documents and tangible objects are often presented. The availability of such information to the mediation process is critically important. A privilege rule covering such preexisting information encourages party candor. However, other policy considerations weigh in favor of not extending the privilege to otherwise discoverable facts and documents.<sup>266</sup>

While the mediation process needs privilege protection to function effectively, the privilege should not permit mediation to become a blackhole into which parties can purposefully bury unhelpful evidence.<sup>267</sup> For example, a party's admission during mediation that he falsified accounting records would be privileged, but his placing the records on the mediation table should not make the records privileged. Allowing discovery of preexisting facts and documents that are presented in

263. See *supra* notes 66-76 and accompanying text.

264. See *supra* Part III.

265. During mediation oral statements made before the mediation are recounted. For example, a mediation party might state that at the time the automobile accident occurred his passenger said: "Watch out, the light's red!" The passenger's original statement would never be privileged, for unlike writings and tangible objects, oral statements once made (absent recording) do not have a continuing existence. Since the original statement cannot be presented during mediation, in the manner a pre-existing writing or tangible document can, the original statement of the passenger does not have the protection of the mediation privilege and can be sought in discovery. The driver's recounting the passenger's statement during mediation is a separate, independent and privileged statement.

266. FED. R. CIV. P. 26(b)(1).

267. Hyman, *supra* note 4, at 32. That would be the expected result with statutes that do not have an exception from the mediation privilege for otherwise discoverable evidence. Washington's privilege for dispute resolution centers specifically expresses that concern in stating protection will not be given to materials "... submitted by a participant to the center for the purpose of avoiding discovery of the material in a subsequent proceeding." WASH. REV. CODE § 7.75.050 (1992). That language unfortunately links discoverability of materials to proof of the submitting party's state of mind.

Conversely, a party submitting helpful preexisting information during mediation should not be barred from introducing that information as evidence in a future court action. That result would occur if the other party refused to consent to its disclosure because the fact or document was part of the mediation.



mediation is consistent with traditional privilege<sup>268</sup> and evidence<sup>269</sup> law. The Washington statute<sup>270</sup> contains a representative example of an exception for "otherwise discoverable" evidence found in several state privileges.<sup>271</sup> These statutes follow the correct course by leaving the litigation discovery process undisturbed.

This approach however causes concern for unwary parties<sup>272</sup> who tell or show "it all" during mediation. Such persons are unlikely to understand the distinction between privileged communications and the later discoverability of disclosed facts and preexisting documents.<sup>273</sup> The concern is that unscrupulous parties will use mediation, where candor is urged and confidentiality promised, as an informal discovery device. But barring discovery based on clues obtained during mediation would entwine former mediation parties in litigation to determine whether the source of the discovery lead came from or was independent of the

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268. The attorney-client privilege protects only confidential communication made as a part of the professional relationship. The privilege does not bar independent inquiry into the same facts that were communicated to the attorney. *STONE & TAYLOR, supra* note 204, § 1.24 (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

269. *FED. R. EVID.* 408 does not require the exclusion of otherwise discoverable evidence merely because it is presented in the course of compromise negotiations. See *ROGERS & MCEWEN, supra* note 4, at 107.

270. The Washington privilege does not apply "[w]hen the written materials or tangible evidence are otherwise subject to discovery. . . ." *WASH. REV. CODE* § 5.60.070(1)(b) (Supp. 1994).

271. *ARIZ. REV. STAT. ANN.* § 12-2238(C) (1994); *COLO. REV. STAT.* § 13-22-307(4) (Supp. 1993); *FLA. STAT.* § 44.201(5) (Supp. 1994); *MINN. STAT.* § 595.02(1)(k) (1994); *MO. REV. STAT.* § 435.014(2) (1992); *OR. REV. STAT.* § 36.205(2)(c) (1993); *TEX. CIV. PRAC. & REM. CODE ANN.* § 154.073(c) (West Supp. 1994); *UTAH CODE ANN.* § 78-31b-7(1)(a) (1992); *VA. CODE ANN.* § 8.01-581.22(iii) (Michie 1992); *WASH. REV. CODE* § 5.60.070(1)(b) (Supp. 1994); *WYO. STAT.* § 1-43-103(c)(iv) (Supp. 1994).

The Symposium Model accomplishes the same result by limiting the privilege to documents that were "prepared for the purpose of or in the course of, or pursuant to, a mediation. . ." Hyman, *supra* note 6, at 71, § 1(f). The federal administrative dispute resolution provisions contain both the definitional and "otherwise discoverable exclusions." 5 U.S.C. §§ 571(5), 574(f) (1994).

The Wisconsin statute exception reads: "[the privilege] does not prohibit the admission of evidence otherwise discovered, although the evidence was presented in the course of mediation." *WIS. STAT.* § 904.085(4)(c) (Supp. 1994) (emphasis added). This provision could be read to suggest evidence discovered before and submitted in the mediation is admissible, but post-mediation discovery is not permitted.

272. Many mediation parties are unrepresented or do not have counsel present during mediation sessions. They may not understand, particularly after a mediator has said the session will be confidential, that mediation disclosures of preexisting facts and documents can result in their use by the other party in later litigation if otherwise discoverable.

273. "While the overall objective of the mediation is to allow the clients to reach an agreement that is mutually acceptable, clients have to understand that mediation is occurring in an adversary context, and things said in mediation may lead to discovery of admissible evidence if the case does go to trial." *DISPUTE RESOLUTION MAGAZINE*, Vol. 1, No. 1, Spring 1994, 5 (Interview with Attorney John R. Van Winkle, chair-elect ABA Section of Dispute Resolution [hereinafter Interview]).

mediation.<sup>274</sup> The benefit is not worth the cost. Moreover, such a policy would be inconsistent with other privileges that do not protect facts, but only confidential communications.<sup>275</sup> By carefully explaining the nuances of confidentiality, mediators can reduce the chances that mediation will become an informal discovery device for unscrupulous parties. Nonetheless, mediation disputants and their counsel need to be aware of the consequences before divulging discovery tips during mediation discussions.<sup>276</sup>

One form of otherwise discoverable mediation information merits privilege protection. In anticipation of mediation, parties may solicit preliminary appraisals, financial statements or expert opinions. This material is obtained to provide "ballpark" information for mediation negotiations.<sup>277</sup> Washington and a few states<sup>278</sup> maintain the privileged status for materials "prepared specifically for use in mediation and actually used<sup>279</sup> in the mediation proceeding."<sup>280</sup> Such statutes are consistent with the attorney-client privilege and the work-product doctrine.<sup>281</sup> Only on very narrow grounds does the work-product doctrine allow discovery of the facts and opinions of consulting experts.<sup>282</sup> Mediation's goals of encouraging informal, prompt and cost effective settlement are served if parties are not yoked with these preliminary estimates in later litigation.

274. Minnesota's privilege statute for community dispute resolution programs may cause such litigation by stating that the privilege ". . . shall not preclude the use of evidence obtained by other independent investigation." MINN. STAT. § 494.02 (1990).

275. The attorney-client privilege protects only confidential communication made as a part of the professional relationship. The privilege does not bar independent inquiry into the same facts that were communicated to the attorney. STONE & TAYLOR, *supra* note 204, § 1.24 (citing Upjohn Co. v. United States, 449 U.S. 383 (1981)).

276. Interview, *supra* note 273, at 5.

277. Since mediation and litigation proceed simultaneously it may be difficult to determine the precise motive in obtaining such information. Hyman, *supra* note 4, at 28. For practical suggestions on dealing with this issue see *infra* note 278.

278. ARIZ. REV. STAT. ANN. § 12-2238(A) (1994) ("materials created for . . . a mediation"); OR. REV. STAT. § 36.205(2)(c) (1993); UTAH CODE ANN. § 78-31b-7(3)(c) (1992); VA. CODE ANN. § 8.01-581.22(iii) (Michie 1992). To avoid proof problems and preserve the privilege as to such materials, a clear paper trail should be created. Correspondence requesting such information should specifically state that the request is for "mediation purposes" and all documents/reports obtained should be headed: "Prepared For Use in Mediation Proceedings Only." Note neither statute covers oral expert opinions obtained and shared in mediation: "I called an engineer and he said it would cost us \$200,000 to retool to make the changes you want." The engineer could be deposed.

279. Presenting the material during mediation to the other party or the mediator ought to satisfy the "actually used in" requirement. The result is not so clear if the material is only shown to the mediator in caucus or relied on by a party but not presented. Since the purpose of this provision is the encourage mediation parties to negotiate on the basis of preliminary reports, any use of the material related to the mediation should satisfy the requirement. Further a literal reading of the "actually used in requirement will cause needless later proof problems, since there will be no formal record of the mediation session. The Arizona privilege does not appear to require actual use during mediation. ARIZ. REV. STAT. ANN. § 12-2238(A) (1994) ("created for or used . . . during a mediation").

280. WASH. REV. CODE § 5.60.070(1)(b) (Supp. 1994).

281. Hickman v. Taylor, 329 U.S. 495 (1947); FED. R. CIV. P. 26(b)(5).

282. FED. R. CIV. P. 26(b)(5)(B).

*b. Party Agreements and the Privilege*

Parties usually begin a mediation by entering into a written agreement to mediate.<sup>283</sup> Among other things, an agreement to mediate outlines the process, describes the mediator's role and sets forth the participants' understanding regarding confidentiality.<sup>284</sup> Without an exemption to the privilege, such agreements remain confidential communications. This is despite the fact that mediation participants may need access to the agreement to mediate in order to demonstrate that the privilege was triggered,<sup>285</sup> to evidence participation in a mandated mediation,<sup>286</sup> to establish the terms of the mediator's undertaking or to prove a prior agreement to disclose otherwise privileged material. The Washington statute<sup>287</sup> and a few other statutes<sup>288</sup> have an exception for the agreement to mediate.

Settlement agreements present special considerations. Some parties are attracted to mediation out of the desire to preserve the privacy of their settlements. Yet, in certain cases, such as product liability and environmental cases, secret settlement agreements may do harm to third parties<sup>289</sup> or the public at large.<sup>290</sup>

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283. See *supra* notes 55-59 and accompanying text.

284. At the onset of the mediation process, the vast majority of participants will want the maximum confidentiality allowed by the applicable mediation privilege (if any). However, parties may agree in advance, perhaps at the suggestion of the mediator, to waive the privilege as to specific subject matters. This occurs when the parties, the mediator or the mediation organization believes certain subject matters ought to be disclosed, but the privilege statute does not have an exception for that type of information. The Washington statute promotes such decision making by the participants by removing the privilege "[w]hen a written agreement to mediate permits disclosure; . . ." WASH. REV. CODE § 5.60.070(1)(c) (Supp. 1994). The public interest is not harmed by allowing parties knowingly to forego the privilege. See *supra* part VI.E.2.C. for a list of subject matters which could, but are not always, excepted from the mediation privilege.

285. See *supra* note 152, for statutes which trigger the operation of the mediation privilege on the existence of an agreement to mediate. While the Oregon and Missouri statutes are triggered by a written confidentiality agreement between the parties, there is no exemption for its disclosure. OR. REV. STAT. § 36.205 (1993); MO. REV. STAT. § 435.014 (1992).

286. Access to the agreement to mediate may not be critical for this purpose. Mediators, while reluctant to discuss the progress of a mediation, will inform outsiders that a party is participating in mediation. *Cf.*, The identity of a lawyer's client is generally not privileged. WIGMORE ON EVIDENCE, *supra* note 9, at § 2311. An exception, known as the last link rule, is when disclosure "may well be the link that could form a chain of testimony necessary to convict an individual of a federal crime." *Baird v. Koerner*, 279 F.2d 623, 633 (9th Cir. 1960).

287. WASH. REV. CODE § 5.60.070(c) (Supp. 1994).

288. COLO. REV. STAT. § 13-22-302(2.5) (Supp. 1993); 5 U.S.C. § 571(5) (1994).

289. Such a risk is recognized in the Wisconsin mediation privilege which provides: "In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally." WIS. STAT. § 904.085(e) (Supp. 1994).

290. Access to settlements may be necessary to assure public safety. See, WASH. REV. CODE § 4.24.600(2) (Supp. 1994) (forbidding a court from entering a sealed order or judgment that conceals a "public hazard.").

Also, parties may need access to their settlement agreement for enforcement purposes.

Few statutes contain exceptions for settlement agreements.<sup>291</sup> Certain states except settlement agreements from the privilege unless the parties otherwise agree in writing.<sup>292</sup> The Washington statute states that the privilege does not apply "[w]hen the written materials consist of a written settlement agreement or other agreement signed by the parties resulting from a mediation proceeding."<sup>293</sup> The Washington statute facilitates enforcement of mediation accords. However, parties lose control over the secrecy of their written settlements. Those that desire privacy must limit themselves to oral agreements with their attendant proof problems. Despite undercutting party privacy, the Washington rule strikes the correct balance. Maintaining confidentiality of settlement agreements is not essential to the workings of mediation. Moreover, the public's oversight interest in citizen disputes is served by allowing access to mediation settlement agreements.

### *c. Subject Matter Exceptions*

Among the most difficult policy choices in crafting the mediation privilege is deciding what particular classes of information should be excepted from the privilege in all instances.<sup>294</sup> The process mirrors the analysis involved as to whether a mediation privilege is warranted.<sup>295</sup> As to each type of information, the cost of the loss of evidence to the justice system must be weighted against the benefit of a broad-based mediation privilege.<sup>296</sup>

A "laundry list" of subject matter exceptions has been enacted in various states or suggested. Examples include: (1) admission of threats to commit child

291. COLO. REV. STAT. § 13-22-302(2.5) (Supp. 1993); OR. REV. STAT. § 36.205(1) (1993); VA. CODE ANN. § 8.01-581.22 (Michie 1992); WASH. REV. CODE § 5.60.070(e) (Supp. 1994); WIS. STAT. § 904.085(4)(a) (Supp. 1994); 5 U.S.C. § 571(5) (1994). With the exception of the Oregon statute, these provisions except only written settlement agreements.

292. COLO. REV. STAT. § 13-22-302(2.5) (Supp. 1994); OR. REV. STAT. § 36.205(1) (1993); VA. CODE ANN. § 8.01-581.22 (Michie 1992).

293. WASH. REV. CODE § 5.60.070(1)(e) (Supp. 1994). The "or other agreement" language in the Washington statute is intended to account for partial, interim settlement agreements. *Id.* See also, WIS. STAT. § 904.085(4)(a) (Supp. 1994).

294. This was clear from the reporting of the discussions of the panel members who created the Symposium Model. Hyman, *supra* note 4, at 33-34. Disagreement existed as to what exceptions are appropriate. *Id.* While panel members believed the conflict to be between the interests of parties and providers of mediation services, I would add the interests of the public and the courts to that mix. *Id.*

295. See discussion *supra* at Part V. Quantifying the costs and benefits with regard to a specific type of information is not less difficult than with the mediation privilege as a whole. Faced with balancing immeasurables, reference to exceptions associated with traditional privileges is instructive. They represent expressions of shared social values and give guidance to policy for the mediation privilege.

296. *Id.* Innumerable real and hypothetical circumstances can be imagined where the lack of access to certain mediation information in that particular case may cause an injustice. But as with the law, one bad mediation result can make for bad mediation privilege exceptions.

abuse,<sup>297</sup> a crime,<sup>298</sup> a felony,<sup>299</sup> physical/bodily harm,<sup>300</sup> and damage to property;<sup>301</sup> (2) information pertinent to a crime,<sup>302</sup> an action claiming fraud or suits against the mediator,<sup>303</sup> (3) information relating to the commission of a crime during mediation, and (4) use of mediation information for research purposes or non-identifiable reporting.<sup>304</sup> In addition, some privilege statutes permit disclosure when mandated by another statute<sup>305</sup> or a court.<sup>306</sup> For

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297. COLO. REV. STAT. § 13-22-307(2)(b) (Supp. 1993); IDAHO R. EVID. § 507; UTAH CODE ANN. § 78-31b-7(4)(a) (1992); WIS. STAT. § 904.085(4)(d) (Supp. 1994); WYO. STAT. § 1-43-103(c)(iii) (Supp. 1994).

298. FLA. STAT. § 723.038(9) (Supp. 1994) (mobile home park lot tenancy mediations); WYO. STAT. § 1-43-103(c)(ii) (Supp. 1994) ("communication involves the contemplation of a future crime or harmful act").

299. COLO. REV. § 13-22-307(2)(b) (Supp. 1993).

300. COLO. REV. STAT. § 13-22-307(2)(b) (Supp. 1993) ("intent to . . . inflict bodily harm"); IDAHO R. EVID. 507(4)(D); UTAH CODE ANN. § 78-31b-7(4)(b) (1994) ("If the ADR provider determines a participant in the procedure has made an immediate threat of physical violence against a readily identifiable victim or against the provider, communications involving the threat are not confidential.").

301. The Washington privilege for community dispute resolution centers excepts threats to "the property of a party to the dispute, to the extent the communication may be relevant evidence in a criminal matter." WASH. REV. CODE § 7.75.050 (1992). The "relevant evidence in a criminal matter" language raises the question of whether the intent is to allow disclosure if the threat meets the elements of a crime or only in the event the property destruction actually occurs and criminal charges are brought.

302. N.D. CENT. CODE § 31-04-11(1) (Supp. 1993) (includes juvenile violations).

303. COLO. REV. STAT. § 13-22-307(2)(d) (Supp. 1993) ("action alleging willful or wanton misconduct of the mediator or meditation organization"); FLA. STAT. § 723.038(9) (1991) (fraud); FLA. STAT. § 44.102(4) (Supp. 1994) (mediator disciplinary proceedings); IDAHO R. EVID. 507(4)(E); N.D. CENT. CODE §§ 31-04-11(1), 31-04-11(2) (Supp. 1993); OR. REV. STAT. § 36.205(2)(b) (1989); UTAH CODE ANN. § 78-31b-7(4)(a) (1991) (" . . . subsequent action between ADR provider and a party . . . for damages arising out of the mediation"); VA. CODE ANN. § 8.01-581.22(ii) (Michie 1992); WASH. REV. CODE § 5.60.070(1)(g) (Supp. 1994); 5 U.S.C. § 574(i) (1994).

304. COLO. REV. STAT. § 13-22-307(5) (Supp. 1993); FLA. STAT. § 44.201(5) (Supp. 1994); UTAH CODE ANN. § 78-31b-7(4)(d) (1992); 5 U.S.C. § 574(h) (1994).

305. COLO. REV. STAT. § 13-22-307(2)(c) (Supp. 1993); IDAHO R. EVID. 507(4)(D); WASH. REV. CODE § 5.60.070(1)(d) (Supp. 1994); 5 U.S.C. §§ 574(a)(3), (b)(4) (1994) (mediator only to disclose if no other person is reasonably available). The "other statute" exception can serve as a brake on listing numerous specific exceptions within the mediation privilege. In the case of the Washington statute, the "other statute" exception became the means of accommodating those whose clear preference for a statute maximizing the scope of mediation confidentiality and not weighed down with numerous exceptions, and those who wanted to add various specific exceptions, particularly dealing with abusive situations. The fact that Washington provided by statute for disclosure of child abuse, for example, satisfied those wanting a specific exception for child abuse in the privilege statute.

If the other statute is a general reporting requirement for all individuals, then the mediator's obligation is clear. However, if the other statute requires only specified persons to report information (e.g. physicians/child abuse), the obligations of the mediator are unclear if "mediators" are not among those listed. See, e.g., WASH. REV. CODE § 26.44.030 (Supp. 1994).

306. The Texas statute establishes a procedure for courts to consider, *in camera*, conflicts between privileged ADR information and "other legal requirements for disclosure." TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(d) (West Supp. 1994). See *infra* notes 355-358 for discussion (such a rule has the potential for generating frequent litigation, and subjects the mediation privilege to a

purposes of the analysis that follows, the various exceptions have been organized in the categories of past criminal activity, ongoing or future crimes and threats of harm, and breakdowns in the mediation process and enforcement of mediated agreements.

### i. Past Criminal Activity

Above it was argued that the mediation privilege ought to apply in all criminal cases.<sup>307</sup> For the same reasons, admissions of past criminal activity made during mediation should not be excepted from the privilege.<sup>308</sup> As pointed out above, excepting admissions of past criminal activity would eliminate programs mediating criminal cases and stifle mediation communications in other types of disputes.<sup>309</sup>

Admissions of past criminal activity do not necessarily present current or future risks of harm.<sup>310</sup> Such an approach is consistent with the treatment of confidential disclosure of past criminal activity under traditional privileges.<sup>311</sup> Undoubtedly, because of that body of law, most mediation privilege statutes do not exclude disclosures regarding past criminal activity.<sup>312</sup> Mediation disclosures involving ongoing or future plans to do crime and threats of harm require separate analysis.

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balancing test unwarranted in most instances).

307. See *supra* notes 197-202 for discussion.

308. A different result, fueled by constitutional considerations, is likely if a criminal defendant seeks mediation information to offer in her defense. Cf. *State v. Castellano*, 460 So. 2d 480 (Fla. Dist. Ct. App. 1984) (requiring a mediator to testify, in the absence of a privilege, where the defendant claimed self-defense based on the victim's threats during mediation).

309. *Brown*, *supra* note 3, at 317. A criminally accused person's constitutional rights may be implicated if he or she is directed to mediation by a court, not given any warning about the rights against self-incrimination, and thereafter the court receives evidence of the accused person's admissions made during mediation. U.S. CONST. AMENDS. V & XIV.

310. Cf. *Hyman*, *supra* note 4, at 38-39 (discussing limiting Symposium Model to future and ongoing crime). An alternative that has been suggested is to preserve the privilege for disclosures of criminal activity subject to the right of a court to override the privilege in special cases where the need for the information is great. *ROGERS & MCEWEN*, *supra* note 4, at 116.

311. *CHARLES W. WOLFRAM, MODERN LEGAL ETHICS* § 6.4.10 (West 1986) (as to lawyer-client privilege); *STONE & TAYLOR*, *supra* note 204, § 6.09 (as to clergyman-penitent). Cf. *United States v. Marashi*, 913 F.2d 724 (9th Cir. 1990) (holding that the marital communications privilege did not apply to a bedroom conversation between husband and wife in which a criminal conspiracy was planned).

312. However, North Dakota excepts from its privilege evidence related to a crime or a juvenile violation. N.D. CENT. CODE § 31-04-11(1) (Supp. 1993).

ii. Ongoing and Future Crime; Threats of Harm<sup>313</sup>

The few mediation statutes providing for disclosure of criminal activity generally limit the exception to ongoing or future crime.<sup>314</sup> Such exclusions are consistent with some views of the attorney-client privilege; society does not wish to allow individuals to seek out the assistance of a lawyer in planning or carrying out a crime.<sup>315</sup> However, the other privileges generally do not have an exception for ongoing or future crimes.<sup>316</sup> In mediation, where the context is a meeting of persons in conflict, there is substantial risk of retaliatory reporting of mediation information. For example, an exception that allows a party to report, and the mediator to be compelled to testify to, the other party's use of drugs, illegal gambling, welfare misreporting or not paying income taxes is not warranted. The risks such offenses present to individuals or society do not justify penalizing mediation candor.<sup>317</sup> On the other hand, an exclusion aimed at "serious physical harm" is a justified policy choice.

Public policy favoring disclosure of otherwise privileged information is nowhere stronger than in the area of abuse of vulnerable persons such as children, the aged and persons with a disability. In most states statutes exist requiring the reporting of knowledge of abuse or neglect of vulnerable persons to a designated

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313. Traditional privileges do not provide an exception for threats of damage to property. Yet a few mediation statutes allow disclosure of such information. WASH. REV. CODE § 7.75.050 (1992). While not to be minimized, threats to property do not merit disclosure at the cost of sacrificing mediation confidentiality. The absence of exemptions for threats of injury to property in the clear majority of statutes reflects concurrence with that judgment.

314. . COLO. REV. STAT. § 13-22-307(2)(b) (Supp. 1993) ("intent to commit a felony, inflict bodily harm, or threaten the safety of a child"); WASH. REV. CODE § 7.75.050 (1992); WYO. STAT. § 1-43-103(c)(ii) (Supp. 1994) ("communication involves the contemplation of a future crime or harmful act"); Hyman, *supra* note 6, at 72, §§ 4(a)(3), (b)(3). The exception is the North Dakota statutes which does not limit its exclusion to future or ongoing crime. N.D. CENT. CODE § 31-04-11(1) (Supp. 1993).

315. WIGMORE ON EVIDENCE, *supra* note 9, § 2298; WOLFRAM, *supra* note 311, § 6.4.10. See also Washington State Rules of Professional Conduct, Rule 1.6(b)(1) which allows attorneys to disclose client confidences or secrets the attorney reasonably believes necessary to prevent the client from committing "a crime." But see, ABA Model Rule of Professional Conduct Rule 1.6(b)(1) which allows disclosure only for future crime "likely to result in imminent death or substantial bodily harm."

316. Disclosures relating to crime are not excepted from the marital privilege unless the activity involves a crime to the other spouse or a child of the couple, or criminal activities engaged in jointly by the spouses. STONE & TAYLOR, *supra* note 204, § 5.13; see also *Marashi*, 913 F.2d at 724 (holding that the marital communications privilege did not apply to a bedroom conversation between husband and wife in which a criminal conspiracy was planned). As to the clergyman-penitent privilege, see STONE & TAYLOR, *supra* note 204, § 6.09. Disclosures of crimes to a physician remain privileged unless the physician is a "partaker" in the crime or acted on behalf of the criminal. WIGMORE ON EVIDENCE, *supra* note 9, § 2385. But see STONE & TAYLOR, *supra* note 204, § 7.24 (indicating that a number of states have limited the physician-patient privilege to civil cases or provide for an exception for serious crimes).

317. Cases interpreting FED. R. EVID. 408 suggest that evidence from negotiations of a civil matter will not be admissible in a later criminal proceeding. ROGERS & MCEWEN, *supra* note 4, at 110-11. See also *U.S. v. Gonzalez*, 748 F.2d 74, 78 (2d Cir. 1984).

governmental agency, even if learned during a confidential interview.<sup>318</sup> That position is consistent with the law governing traditional privileges where the risk of injury is serious.<sup>319</sup> The interests of mediation confidentiality are not so unique as to justify a different result.<sup>320</sup> It is not surprising that the most common exclusion in mediation privilege statutes is for information relating to child abuse.<sup>321</sup> The same result is reached in states, including Washington, with an exception allowing for disclosure of information "when mandated by statute."<sup>322</sup>

Few mediation privilege statutes allow for disclosure of threats of physical harm made during mediation.<sup>323</sup> Most of these statutes limit the exception to credible threats of serious bodily harm or violence.<sup>324</sup> Such exceptions allow a mediation participant who is so threatened to take protective measures.<sup>325</sup> A more troublesome question arises when the threat is directed toward a non-participant of the mediation. Does the mediator have a duty to warn the third party or notify the police of the threat?

318. See e.g., WASH. REV. CODE § 26.44.030 (1994).

319. See *supra* notes 315-316 and accompanying text.

320. *But see*, C.R. v. E., 573 So. 2d 1088 (Fla. Dist. Ct. App. 1991) (in which a priest accused of child molestation was granted an injunction barring the parents of the child from disclosing information from the med/arb proceeding).

321. See *supra* note 297 for a listing of statutes. An abuse exception that requires reporting of past behaviors, where there is no perceived risk of future harm, for some represents a roadblock to experimental mediation with abusers. Some say there is need for a setting where people, whose relationships includes a history of abuse, can talk to a mediator with privilege concerning abuse and neglect issues. For example, experimental mediation programs exist for parties in court cases involving alleged abuse or neglect of children. For such programs to function the exception would need to be limited to present or future risk to a vulnerable person.

322. ARIZ. REV. STAT. ANN. § 12-2238(B)(3) (1994); WASH. REV. CODE § 5.60.070(d) (Supp. 1994).

323. ARIZ. REV. STAT. ANN. § 12-2238(D) (1991) ("threatened . . . violence"); COLO. REV. STAT. § 13-22-307(2)(b) (1991) ("intent to . . . inflict bodily harm, or threaten the safety of a child"); UTAH CODE ANN. § 78-31b-7(4)(b) (1991) ("If the ADR provider determines a participant in the procedure has made an immediate threat of physical violence against a readily identifiable victim or against the provider, communications involving the threat are not confidential."); WYO. STAT. § 1-43-103(c)(ii) (1991) ("communication involves the contemplation of a future crime or harmful act").

324. The purpose of the exception is to advise persons of a serious risk of harm who without warning would be unaware of the risk. Threats directed at a person attending the mediation but not present when the threat is made, for example during a caucus, present a similar case. If the threat is made with the person threatened present the exception allows him or her and others present to report the information to the authorities. *Cf.* *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985) where the court ruled a mediator's written report privileged in a civil case claiming constitutional violations brought by a mediation party involved in a physical altercation during the mediation.

Most statutes do not except threats to property no matter how credible or serious. However, an argument exists for an exception allowing disclosure of credible threats to do serious damage to a substantial property interest. For example, "I will blow up your house . . . car." See WASH. REV. CODE § 7.75.050 (1991).

325. The mediation privilege would in theory block evidence of a threat made in mediation as a basis for a court protective order in the absence of an exception of the type under discussion.



Applying the reasoning of *Tarasoff v. Regents of the University of California*<sup>326</sup> to the mediation process, mediators may have an independent duty to report threats against third persons.<sup>327</sup> In that case, a psychologist and others were sued for failing to inform a third person of death threats made by the psychologist's client during confidential treatment sessions.<sup>328</sup> The client killed the threatened person. The court held the risk of serious physical injury or death to an identifiable person created a duty for the professional to warn the intended victim.<sup>329</sup> Important to the case was the fact that both the applicable psychotherapist-patient privilege and professional ethics standards permitted disclosure by the psychologist under the circumstances presented.<sup>330</sup>

In response to *Tarasoff*-like risks in mediation, several mediation privilege statutes have an exception eliminating confidentiality for threats of serious physical harm.<sup>331</sup> The absence of such an exception is a weakness of most mediation privilege statutes, including Washington's.<sup>332</sup> A *Tarasoff* exception for mediation would eliminate the privilege "when the mediator or a party reasonably believes that disclosing the mediation communications or materials is necessary to prevent a mediation party from committing a crime likely to result in imminent death or substantial bodily injury to an identifiable person."<sup>333</sup> Adding a *Tarasoff* exception would implicate few mediations, resolve the *Tarasoff* dilemma for mediators and potentially save lives.

### iii. Breakdowns in the Mediation Process; Enforcement of Mediation Agreements

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326. *Tarasoff*, 551 P.2d at 334.

327. Murphy, *supra* note 4, at 213. Cf. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6(b)(1) (1983) (lawyers may reveal confidential client information the lawyer reasonably believes necessary to prevent the client from committing a crime likely to cause "imminent death or substantial bodily harm.").

328. *Tarasoff*, 551 P.2d at 334.

329. *Id.*

330. *Id.* at 347.

331. ARIZ. REV. STAT. ANN. § 12-2238(D) (1994) ("threatened . . . violence"); COLO. REV. STAT. § 13-22-307(2)(b) (Supp. 1993) ("intent to . . . inflict bodily harm, or threaten the safety of a child"); IDAHO R. EVID. 507(4)(D); UTAH CODE ANN. § 78-31b-7(4)(b) (1992) ("If the ADR provider determines a participant in the procedure has made an immediate threat of physical violence against a readily identifiable victim or against the provider, communications involving the threat are not confidential.").

332. WASH. REV. CODE § 5.60.070 (1994).

333. Cf. IDAHO R. EVID. 507(4)(D); ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6(b)(1) (1983). Such a provision allows either the mediator or a party to breach confidentiality when significant injury is probable. Including "party" in the suggested exception allows mediation parties to report threats to themselves (and identifiable others) to the police and use such threats as a basis for a protective order. If the mediating parties are familiar with one another, they may have a better sense than the mediator as to how credible a threat is. Since the threat may occur in caucus and relate to another mediation party, the proposed exception is not limited to threats against outside third parties. The provision also covers situations when the threat may have been made during the mediator's absence.

As with any dispute resolution mechanism, there will be breakdowns in the mediation process. Mediators may commit malpractice. Parties may fail to bargain in good faith. Mediation agreements may be tainted with fraud, or may be ambiguous or unfair. The mediation privilege should not provide a safe haven for participant wrongdoing or injustice. However, in allowing for disclosure of mediation information to deal with serious process breakdowns, care must be taken not to eviscerate the mediation privilege with exceptions that are too easily called upon.

A party claiming mediator misconduct must have access to mediation information and the mediator's testimony.<sup>334</sup> A privilege that bars access to such information results in de facto immunity for malpracticing mediators. For that reason, and because the few claims of malpractice likely to arise will not greatly impact the operation of the privilege, a clear-cut exception to the privilege for mediator malpractice is appropriate.<sup>335</sup> The Washington statute<sup>336</sup> and a few other statutes<sup>337</sup> address this obvious need. The Washington statute provides an exception to the privilege "[i]n a subsequent action between the mediator and a party to the mediation arising out of the mediation."<sup>338</sup> Exceptions for malpractice by mediators would be improved by explicit language permitting disclosure to mediator licensing authorities as well.<sup>339</sup> Mediators also need access to mediation information to defend themselves against claims and charges, and to bring suit against parties, usually to collect agreed upon fees. Several exceptions accommodate such mediator needs for disclosure.<sup>340</sup>

Good faith bargaining is the pathway to mediated settlements.<sup>341</sup> However,

334. Hyman, *supra* note 4, at 37-38.

335. Eliminating or limiting mediator liability through immunity provisions is a separate question that ought to be dealt with directly in the privilege statute or elsewhere. Several state statutes provide for mediator immunity. COLO. REV. STAT. § 13-22-306 (1993); FLA. STAT. § 44.201(6) (Supp. 1994); ME. REV. STAT. ANN., tit. 4, § 18 (West 1994); MINN. STAT. § 583.26 (1994); OKLA. STAT. ANN. tit. 12, § 1805 (West 1993); UTAH CODE ANN. § 78-14-15; WASH. REV. CODE § 7.75.100 (West); WIS. STAT. ANN. § 93.50 (West 1994); WYO. STAT. § 1-43-104 (Supp. 1994).

For a discussion of mediator immunity statutes, see generally, Stulberg, 2 Ohio St. J. Disp. Resol. 85 (1986) (favoring statutory immunity for mediators) and Chaytink, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 Ohio St. J. Disp. Resol. 47 (1986) (opposed to mediator immunity).

336. WASH. REV. CODE §§ 5.60.070(1)(g), (2)(b) (Supp. 1994).

337. ARIZ. REV. STAT. ANN. § 12-2238(B)(2) (1994); COLO. REV. STAT. § 13-22-307(2)(b) (Supp. 1993) (disclosure permitted for an "action alleging willful or wanton misconduct of the mediator or mediation organization."); N.D. CENT. CODE § 31-04-11(2) (Supp. 1993); OR. REV. STAT. § 36.205(2)(b) (1993); UTAH CODE ANN. § 78-31b-7(3) (1992); VA. CODE ANN. §§ 8.01-581.22(ii) (Michie 1992); 5 U.S.C. § 574(i) (1994).

338. WASH. REV. CODE § 5.60.070(1)(g) (Supp. 1994).

339. See, e.g., FLA. STAT. § 44.102(4) (Supp. 1994).

340. UTAH CODE ANN. § 78-31b-7(3)(b) (1992); WASH. REV. CODE § 5.60.070(1)(g) (Supp. 1994).

341. Mediators will often obtain a spoken commitment from each party to negotiate in good faith at the beginning of the mediation. Moore, *supra* note 18, at 162. This commitment, while of no legal force, is available to the mediator as a prod to encourage movement and, in extreme cases, as a basis

providing an exception to the mediation privilege based on a claim of bad faith bargaining, short of fraud, is problematic. Most parties undertake mediation voluntarily. While such parties often negotiate under a mediator's entreaty to bargain in good faith, they may discontinue negotiations at will. When parties mediate voluntarily, mediation discussions should not be revealed based on a claim of bad faith negotiations. Negotiating in bad faith is often in the eyes of the beholder. Stonewalling or moving in small increments may be justified in particular mediations.<sup>342</sup> Parties who become frustrated by their opponents' bargaining tactics have the option of withdrawing from the mediation and pursuing other means of resolving the dispute.<sup>343</sup>

A different approach is justified when mediation parties come to the table involuntarily and under a statutory obligation to bargain in good faith, such as in labor mediation,<sup>344</sup> farmer/creditor mediation<sup>345</sup> and mandatory child custody mediation.<sup>346</sup> In such cases, mediation communications are essential evidence to prove or defend against a claim of bad faith bargaining. Mediation communications should be available in contexts when parties have a statutory obligation to bargain in good faith, established standards of good faith bargaining exist and bargaining in bad faith is actionable. For example, in a school district/teachers' union mediation, if one side bargains in bad faith, mediation communications must be revealable to an administrative judge or court in order to obtain or oppose the requested relief. For that reason, some mediation privilege statutes eliminate confidentiality for claims of bad faith bargaining in mandatory mediations<sup>347</sup> or simply exclude mediations in which negotiating in good faith is a legal obligation.<sup>348</sup> While in this context parties should be free to introduce mediation communications to enforce good faith bargaining laws, the mediator should not be compelled to testify. It was on precisely that issue that the

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for terminating the mediation.

342. Stonewalling in mediation negotiations may be perfectly appropriate when the party has a clear-cut legal right supporting her position.

343. Parties dissatisfied with the course of mediation negotiations should not be forced to continue to bargain in order to avoid a claim of failing to negotiate in good faith. Hyman, *supra* note 4, at 48. Claims of bad faith negotiations in mediation could become standard counts in legal pleadings as a means of opening up the entire mediation to discovery and admission at trial.

344. WASH. REV. CODE § 41.56.440 (1991); WASH. REV. CODE § 41.59.120 (1991).

345. MINN. STAT. § 583.26 (1994).

346. WASH. REV. CODE § 26.09.184(2) (1991) (requires divorcing parties with children to designate in the final decree the resolution process to be followed for any future disputes). If mediation is selected, a party who "frustrate[s] the dispute resolution process without good reason," that is fails to mediate in good faith, is subject to attorneys' fees and costs imposed by the court. WASH. REV. CODE § 26.09.184(3)(d) (1991).

347. For example, Minnesota's mandatory farmer-lender mediations in which the parties have an obligation to meditate in good faith. MINN. STAT. § 583.26 (1994).

348. The Massachusetts and Washington general privileges specifically exclude labor disputes. See MASS. GEN. L. ch. 233, § 23C (West 1986); WASH. REV. CODE § 5.60.072 (Supp. 1994). In the case of the Washington statute, the exclusion was sought by interests that wanted to insure continued access to mediation information to prove claims of "bad faith" bargaining in labor/management mediations.

*Macaluso*<sup>349</sup> and other court decisions provided the genesis of the mediation privilege.<sup>350</sup>

Most would agree that mediation settlements tainted by fraud, obtained through duress or deemed unconscionable<sup>351</sup> should not be enforceable. Yet relatively few mediation privilege statutes address these issues, and those that do mostly contain only fraud exceptions.<sup>352</sup> This deviation from what might be expected may reflect the conclusion that fraud, duress and unconscionability are present in few mediations, and may reflect the concern that exceptions dealing with those ills will open the mediation privilege to widespread misuse by parties suffering from "bargainer's remorse." For example, a stated fraud exception to the privilege could be cited by those unwilling to abide by their mediation agreements, whether justified or not. Undoubtedly, states without fraud, duress or unconscionability exemptions, such as Washington,<sup>353</sup> recognize that courts are likely to be willing to set aside the privilege when presented with viable contract defenses to the enforcement of a mediation settlement agreement.<sup>354</sup> Once in court, mediation participants who wish to make out a case of fraud, for example, could seek *a priori* approval from the judge to present mediation information.<sup>355</sup> By hearing the competing claims *in camera*, the court could

349. *Macaluso*, 618 F.2d at 51.

350. See *supra* notes 209-214 and accompanying text.

351. The Symposium Model contains an exception permitting any party and the mediator, with court approval, to disclose mediation communications to "prevent manifest injustice." Hyman, *supra* note 6, at 72, § 4(a)(4) & 4(b)(4). The federal administrative dispute resolution provision requires court approval for "manifest injustice" disclosures by both the neutral and the parties. 5 U.S.C. §§ 574(a)(4), (b)(5) (1994). The parameters of the "manifest injustice" exception, if intended to go beyond disclosure in cases of abuse of vulnerable persons, threats of serious physical injury, fraud, duress and unconscionability, are vague. The manifest injustice exception has the potential of swallowing the privilege. As with claims of bad faith negotiations and fraud, a manifest injustice exception offers an opportunity to upset the privilege by mediation parties experiencing "settlement remorse." The better approach is to leave the privilege silent on this subject, and allow for judicial intervention where an enforcement action has been commenced.

352. FLA. STAT. § 723.038(9) (Supp. 1994) (mobile home park lot tenancy mediations); IOWA CODE ANN. § 679.12 (West 1987) (perjured testimony has been given); ME REV. STAT. ANN. tit. 24, § 2857 (West 1993); NEB. REV. STAT. § 25-2914 (West Supp. 1994); N.D. CENT. CODE § 31-04-11(1) (Supp. 1993) ("civil fraud"). From their language, these statutes appear more often to be intended to apply to disclosures of past or intended fraudulent schemes during mediation, rather than being aimed at fraud committed during the course of the mediation itself.

353. WASH. REV. CODE § 5.60.070 (Supp. 1994).

354. Cf. *Harriman v. Maddocks*, 518 A.2d 1027 (Me. 1986) (where the court held that ME' R. EVID. 408 did not bar testimony of fraud in the inducement of settlement).

355. Texas has such a procedure to resolve conflicts between the privileged ADR information and other legal requirements for disclosure. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(d) (West Supp. 1994); 5 U.S.C. §§ 574(a)(4), (b)(5) (1994) (court determines if disclosure necessary to prevent a manifest injustice, help establish a violation of law or prevent harm to the public health or safety).

preserve confidentiality unless disclosure was held to be necessary and appropriate.<sup>356</sup> Since the parties will be able to present evidence related to fraud, duress or unconscionability, mediators should not be compelled to testify as the "tie-breaking" witness.<sup>357</sup> A similar approach is appropriate when interpretive issues arise regarding the meaning of a settlement agreement.<sup>358</sup>

## VII. CONCLUSION

Mediation has proved to be a highly successful process of resolving disputes. Recognizing that confidentiality is at the heart of mediation's success and that existing law inadequately protected the process, many jurisdictions have created mediation privilege statutes and rules. These provisions vary in their effectiveness.

Certainty of application is a critically important characteristic for mediation privilege provisions. Certainty is enhanced by statutes and rules that are triggered by affirmative acts (written agreements to mediate or court orders) or directed toward readily identifiable classes of mediations (those under a specific statute or mediated by specified organizations).

Broad-based protection for mediation communications is preferable. A jurisdiction-wide, single mediation privilege statute or rule serves that purpose. Localities with a series of narrow privilege provisions leave areas of mediation practice without privilege protection. Moreover, multiple privileges of varying substance create confusion and the potential for litigation when a given mediation arguably falls under more than one provision. Diversity in mediation practice settings can be accounted for in a single, all-encompassing privilege by allowing parties, the mediator and mediation organizations to alter the terms of confidentiality by written agreement.

Once a mediation is covered by a privilege provision, all persons with access to mediation information must be "burdened" by the statute. Also, the protection of the privilege ought to extend from the first intake interview through file closing. Privileged mediation information should include all oral and written communications and conduct that occurs within the mediation proceeding. Narrowing the protection to information relating to the subject matter of the

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356. The preferred procedure would be for an *in camera* review of any mediation communications relied on to prove fraud or "manifest injustice." If a threshold showing was made by the proponent of the evidence, only then would the court override the privilege and permit discovery or admissibility of mediation communications.

357. That is the approach of the Minnesota statute. MINN. STAT. § 595.02(k) (Supp. 1994). The privilege does not apply to the parties in the dispute where there has been an application to the court to set aside or reform a mediation settlement agreement. *Id.* See *supra* notes 209-212 and accompanying text for a discussion of mediator testimony.

358. Special problems face mediation parties attempting to use mediation information to establish the meaning of the settlement agreement. For even if confidentiality is waived by the court, the litigant faces the limitations of the parole evidence rule. RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

mediation merely replicates the uncertainty of evidence law preceding Rule 408's promulgation.

The protection of the privilege should extend to civil, criminal and administrative proceedings. Mediation discussions will be chilled if the participants have to be concerned that their communications will be admissible or subject to discovery in a later legal proceeding. Extending the privilege to later criminal cases is especially critical for mediation programs that handle cases diverted from the criminal justice system.

Exceptions to the privilege also have the potential for significantly chilling mediation discussions. For that reason, exceptions ought to be established judiciously so as not to hobble the practice of mediation. In balancing competing policy considerations, the case for disclosure is most compelling where vulnerable individuals -- children, the aged or disabled -- are at risk or when a credible threat of serious physical injury or imminent death has been made against an identifiable person. Other appropriate exceptions are for "otherwise discoverable" evidence, the written agreement to mediate and any settlement agreement. An "otherwise discoverable" exception prevents mediation from becoming a "blackhole" in which to bury unfavorable evidence. The agreement to mediate and settlement agreements are needed to prove understandings reached by the participants. An exception is also appropriate to allow disclosure of mediation information if a dispute arises between the mediator and any of the parties, or a mediator's professional conduct comes under review by a licensing authority. Non-identifiable mediation data should be excepted from the mediation privilege for research or educational purposes.

Jurisdictions may choose to vary their approach to deal with other concerns arising out of mediation, including fraud, unconscionability, "manifest injustice," public health and safety issues, or violations of law. Privilege statutes without exceptions for these issues implicitly create a role for the courts of setting aside the privilege in appropriate cases. Other localities may wish to address these matters with specific exceptions to the privilege. Regardless of the approach taken, if a court becomes involved in resolving such questions the appropriate procedure to preserve confidentiality is an *in camera* hearing. Disclosure should not be ordered unless the court finds a need of sufficient magnitude which outweighs maintaining the integrity of the mediation for the participants and the confidence of the public that mediation communications are held confidential.

A final important task for a mediation privilege provision is to establish clear rules for asserting and waiving the privilege. Differing rules are justified for party and mediator disclosures. So long as all agree, parties ought to be free to disclose mediation information. Mediator disclosures are another matter entirely. A separate privilege and holder status is required for mediator disclosures in order to preserve party and public perceptions of mediator neutrality. The attractiveness of mediation will be short lived if the public learns mediators can be forced to divulge confidential information. A mediation privilege provision with these characteristics serves mediation participants, the mediation process and the public interest.

