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## Choppy Waters

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# Choppy Waters

## Movement toward a uniform confidentiality privilege faces cross-currents



By Richard C. Reuben and Nancy H. Rogers

**T**he movement toward a uniform standard for confidentiality in mediation among the states is one that from the outset casts off into choppy waters, marked by pitching cross-currents of remarkable force.

One current suggests strong support for additional protections for confidentiality, particularly in mediation. Every year the states add to the more than hundreds of state and federal statutes that protect confidentiality in mediation. Moreover, the American Bar Association, acting through the Section of Dispute Resolution, has joined forces with the National Conference of Commissioners on Uniform State Laws to draft laws to regulate various aspects of mediation, and the first issue they decided to focus on was confidentiality.

The other current seems to oppose additional protections for confidentiality just as strongly. The courts in recent years have increasingly heard pleas to protect confidentiality on a variety of fronts – from presidents to psychotherapists to ombudsmen – and have generally rejected such requests. Rather, they have supported the traditional notion that the law has a right to “every person’s evidence.”

### A vivid display

For most of the nation, this cross-current could be most vividly seen in the national drama that has been Monicagate, just as it was seen two decades ago in Watergate. On one hand, Independent Counsel Kenneth Starr claimed a need for access to evidence in order to determine

whether President Clinton had committed an impeachable offense, and the courts generally backed his requests out of regard for the tradition of the law’s access to evidence that will help establish truth. On the other, privacy is a cherished American value, and Starr’s efforts to find out about intimate conversations Monica Lewinsky had with her mother, Marcia Lewis, about what the president may have told his lawyers or what his bodyguards might have witnessed often seemed offensive to the public at large.

Such is the state of the nation’s debate over confidentiality at the turn of the millennium.

And such is the strait through which the navigators of a uniform confidentiality privilege for mediation must navigate.

The articles in this edition of *Dispute Resolution Magazine* reflect these troubled waters. Some authors strongly support a mediation privilege, arguing that confidentiality is necessary if the full and frank discussion that is the mortar of mediation is to be achieved, and if public confidence in the process is to be inspired. Others, however, oppose such a privilege just as strongly, contending that the costs of the privilege in terms of lost evidence, the condoning of lying and other harms outweigh any benefit that is to be claimed, and that current law is adequate to meet the concerns of privilege supporters. Still others argue that at least in some mediations, particularly those involving public policy, any need for confidentiality must give way to the press’ constitutional right to report public hearings, and that such access is necessary to preserve accountable decision making in a representative democracy.

The drafters expect to issue a draft on confidentiality for comment around the first of January, and to complete drafting by Spring. Surely they will find

themselves balancing the competing views seen in these pages. On one hand, a mediation privilege may encourage the parties to speak candidly during mediation, without concern that their words may be used against them in the dispute they are trying to settle or with the public. On the other hand, a statute drafted more broadly than necessary may result in unnecessary loss of evidence and in shrouding from public scrutiny some matters of significance.

### Weighty questions

The particular questions presented by such a weighty balancing effort are challenging, and existing law varies widely. What is a mediation meriting confidentiality protection? When does it start and end? Should non-disputing parties who participate in the mediation – such as friends of the parties, attorneys, or expert witnesses – fall within a confidentiality privilege? Should they be able to assert the privilege? Should a mediator? Should a mediation privilege preclude admission of mediation evidence in a criminal dispute, and if so, what kinds of criminal disputes? What types of threats made in mediation should be disclosed? Should mediators and parties be free to testify and speak up about child abuse?

The articles in these pages go a long way to informing the public dialogue what the fostering of a mediation privilege ultimately represents – and those interested in speaking up are strongly encouraged to do so. The project has established a web site at [www.stanford.edu/group/scen/mediation](http://www.stanford.edu/group/scen/mediation), which includes comprehensive information about the project, its drafters, public participation opportunities, etc. Formal drafts for comment are expected to be posted by early January. The debate is rich and invigorating. Please join it.

### An Overview

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