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CONFIDENTIALITY IN MEDIATION: A MORAL REASSESSMENT

Kevin Gibson*

To whom you tell your secrets, to him you resign your liberty.

Spanish Proverb

I find the issue of confidentiality fascinating. When the Ethics Committee discussed confidentiality, we each had slightly different meanings. Labor mediators were most insistent on talking of confidentiality in absolute terms, but most flexible when it came to defining it. In the community field, confidentiality has so many facets. We have to break them down in our training sessions. The [Society of Professionals in Dispute Resolution] standards address confidentiality as if we are all talking about the same thing when I think there are overt and subtle variations which need to be explored.¹

Albie Davis

I. INTRODUCTION

In maintaining client confidentiality, mediators may find a conflict between common morality and their role morality. It is sometimes said that mediators should never breach client confidentiality² and yet there will be cases where mediators will want to disclose information given in the mediation session.³ In this article, I will examine confidentiality by looking at the present state of mediation, and some of the legal justifications that are presented. I will then discuss each of important suppositions involved in legal justification. While these suppositions are often taken cumulatively, I believe that it is worthwhile to test the

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1. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, DISPUTE RESOLUTION FORUM 3 (1987) (Albie Davis is the director of the mediation project in the District Court Department of the Trial Court of Massachusetts).


3. Such cases might include the need for public accountability, threats made within the mediation, reports of criminal activity, planned crimes, abuse to children, the elderly or other unempowered groups, and "whistleblowing". See infra text accompanying notes 161-99.
weight each one carries as a component in justification. I will present arguments for the positions taken with respect to confidentiality. Although reasonable people will differ in the importance that they place on various arguments and values, and therefore they may reach different conclusions, I believe that the form of justification will remain fairly constant. I will then present four cases where I contend breaching confidentiality is merited.

I will argue that there should be many more cases where confidentiality may be broken, and there should be greater provision for external review. I contend that for mediation to be effective some degree of confidentiality may be required, but it is wrong to assume that mediation needs *absolute* confidentiality.

II. SCOPE

In discussing mediation confidentiality, it appears that different commentators address different issues. For example, some commentaries discuss only court-ordered mediation\(^4\) while others consider the possibility of *any* intervention by a neutral to be mediation, and hence under scrutiny. There is also disagreement about what should be protected: pre-mediation screening calls, post session discussions among mediators and their supervisors and so on.\(^5\) In order to keep the discussion as broad and inclusive as possible, I will use "mediation" to refer to any organized intervention by an impartial third party and to any part of that process. Although some may consider this term to be too broad, I believe that my conclusions apply extensively.

III. WHAT IS AT ISSUE?

Disclosure of private information can make a negotiator vulnerable, since traditional bargaining gambits require minimum disclosure, bluffing and posturing. In "positional bargaining" exposing a real "bottom line" or the actual rather than perceived leverage over the other party might weaken any subsequent bargaining position.\(^6\) In litigation, a party will attempt to conceal any private facts which may compromise his or her case or which may serve to divulge proprietary information. Moreover, there may be personal reasons for someone to avoid publicity: particular affinities for individuals or groups which influence a supposedly impartial decision, reluctance to make public the details of events

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leading to a divorce, or the presence of a motive such as revenge that is usually subject to moral censure.7

Effective mediation using interest-based bargaining may require the disputants to make candid revelations of their real issues and interests either in private to the mediator, or in front of the other party.8 To encourage openness and to give clients a degree of protection, a mediator will promise to uphold confidentiality.

Although such a promise may expedite any particular negotiation, there are nevertheless two strong reasons why the details of a mediation session should not be kept completely confidential. First, if the process is allowed to go on without any sort of review, then it lacks public accountability. Unfair procedures may lead to unfair outcomes, applicable rights may be infringed, and a client may come away from the mediation far worse off than if he or she had gone to court. Secondly, if there are unrepresented but concerned parties who have a right to know or a duty to be warned about something introduced in mediation, then there is a pull towards breaking confidentiality.

IV. A DEFINITION OF CONFIDENTIALITY

The Oxford English Dictionary tells us that confidentiality refers to imparting "private or secret matters to another" or "the relation of intimacy or trust between persons so confiding."9 Accordingly, confidentiality in mediation contains two aspects, one which deals with information garnered during mediation, and the other which deals with a special relationship of trust between the mediator and disputants. This distinction is not often drawn, but reflects a significant difference in approach by mediators. Not all mediators stress each element. Some feel that there is something so special about the relationship that it should be held paramount, as Lovenheim does when he makes the claim "the absolute requirement of confidentiality places on the mediator the same pressures that a priest has regarding confession and a lawyer has with a client."10 "Others take

7. See Restivo & Mangus, Alternative Dispute Resolution: Confidential Problem-Solving Or Every Man's Evidence? 2 ALTERNATIVES TO THE HIGH COST OF LITIGATION 2, 5 (1984). Restivo and Mangus suggest that ADR is an appropriate forum for disputes where the parties wish to avoid public scrutiny, and that the confidentiality of mediation is a significant factor in attracting clients. Id. at 5. As I shall argue, the efficiency of settlements by confidential dispute resolution procedures is not in itself sufficient reason to warrant immunity from public accountability.

8. See, e.g., Lake Utopia Paper, Ltd., v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979), cert. denied, 444 U.S. 1076 (1979); Freedman & Prigoff, supra note 2, at 38. The Lake Utopia court comments:

If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high stakes game than to adversaries attempting to arrive at a just solution of a civil dispute. 608 F.2d at 930; see also N. ROGERS & C. MCEWEN, supra note 5, at 99.


the relationship to be chiefly one of expedience in achieving settlements." An 'expedient' mediator is less likely to revere the relationship and may thus be more willing to breach confidentiality."

V. PRESENT PERCEPTIONS

There are many options open to the mediator with regard to the confidentiality of the session. At one extreme, the session can be thought of as completely sealed, and at the other it could be open and reportable. Mediation clients are often given the impression that everything that transpires in a mediation session is confidential and immune from any investigation. For instance, Lovenheim boldly announces:

There is no duty of the mediator greater than the duty to preserve the confidentiality of everything revealed to him or her during the hearing. [Mediators] are bound to that duty by the oath of office and by the rules of the particular center where they work.

But despite the impression clients may have, few mediators are "absolutists" in the sense that they believe nothing at all should be revealed at any

12. Id. Kolb quotes a mediator who believed his role involved times when:
one side needs my help more than another. I come on like a gentleman. I use all the logic and argument. Then I convince them by persuasion, and then I take them and bang their heads. Today, if I'm not persuasive enough to get a settlement, there isn't one there.
Id. at 27. The implication, I believe, is that some mediators value making a deal more than preserving the integrity of the process.
13. See, e.g., L. FREEDMAN, C. HAILE & H. BOOKSTAFF, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 205 (1985). In resisting a sub poena Lauren Burton, director of the Neighborhood Justice Center in Los Angeles, explained her action to the court and noted that her program was founded upon an expectation of confidentiality:
The brochure provided to all potential program participants at the outset of their contact with the Center prominently informs each such participant that the program is "CONFIDENTIAL". Before the Center accepts any case for mediation, each potential participant is specifically informed of the Center's policy on confidentiality, and is told that unless he or she will agree that all information communicated to the Center may be held in strict confidence and not used for any purpose other than the settlement discussions conducted by the Center, the Center will refuse to undertake mediation in that particular case.
Id.
14. P. LOVENHEIM, supra note 10, at 34 & 44.
15. Some evidence suggests that mediation confidentiality is rarely challenged because of the mistaken impression that the clients have about the operating codes and applicable law. See, e.g., N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 68 (1987).
time or in any circumstances. There is a broad spectrum of opinion about what should be revealed, and what kind of justifications there are for breaking the seal of confidence established in the mediation conference.

Most practitioners tend to share a commitment to resist court sub poena and the belief that there must be some sort of "escape clause" for exceptional circumstances—usually taken to mean child abuse or imminent harm. For instance, the code of the Society of Professionals in Dispute Resolution (SPIDR) states:

Maintaining confidentiality is critical to the dispute resolution process. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process.

Although it sounds plausible, this qualification is unhelpful. It does not give us a criterion for recognizing "some types of cases," and so we have no principled way of identifying them. It is also unclear when the mediator is under a duty to withdraw from mediation, and when the mediator has an active duty to report information.

16. I am unaware of any mediators who actually believe that settlement conferences are as inviolable as a Roman Catholic confessional. Still, some of the language used by commentators gives this impression. See Rice, Mediation and Arbitration as a Civil Alternative to the Criminal Justice System - An Overview and Legal Analysis, 29 AM. U.L. REV 17, 81 (1979). Rice says:

[T]he need for confidentiality in the negotiation sessions of the mediation/arbitration programs is clear. Unless they can assure confidentiality, the programs will be unable to create the atmosphere of openness that is necessary for successful dispute resolution.

It is obvious that only incomplete protection is given to the confidentiality of the records of these new programs and of the oral communications the programs generate. Complete protection can be assured only through legislation that absolutely forbids the disclosure and use of such information outside the settlement process.

Id. (emphasis added).

17. See, e.g., Freedman & Prigoff, supra note 2, at 38-44. But see Green, A Heretical View of Mediation Privilege, 2 OHIO ST. J. DISP. RESOL. 1, 2 (1986).

18. Freedman & Prigoff, supra note 2, at 44-45; Green, supra note 17, at 34-36.


20. SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY § 3 (1986) [hereinafter SPIDR ETHICAL STANDARDS].

21. SPIDR does have an ethics committee which has the mandate to interpret the standards. It has not yet ruled on cases where there has been an alternative between withdrawing and reporting of cases.
The Colorado Code\textsuperscript{22} is more explicit. It provides the following specific exceptions:

In the event of child abuse by one or more of the disputants or in a case in which a mediator discovers that a probable crime will be committed that may result in serious psychological or physical harm to another person, the mediator is obligated to report these actions to the appropriate agencies.\textsuperscript{23}

Here we are told that there is an active duty to disclose; however, the code suggests that the harm would have to be the result of a crime, and that it would have to be "serious."\textsuperscript{24} Consequently, harm that does occur which is not the result of a crime, or harm from minor crimes would not have to be reported. Thus, it is arguable that a business executive who reveals during a private meeting with the mediator that he has committed tax fraud is under no jeopardy from that mediator.

Similarly, the revelation of past crimes does not appear to be reportable, and so we could imagine the case where an individual in a private session admits that he has committed spousal abuse or even rape. Under the present codes, it would appear that the perpetrator is immune from disclosure by the mediator.

The duty to report cases of child abuse is derived from a legal requirement in force in all states.\textsuperscript{25} However, apart from the legal obligation, it is difficult to see the moral distinction between the abuse of children and other dependent parties, like the elderly, mentally incompetent, or even animals. All these groups are equally capable of suffering at the hands of others without the ability to resist or seek redress. There are even cases where the power imbalance is so significant that a member of a group ordinarily supposed to be autonomous may feel incapable of reporting abuse—for example, a beaten wife who accepts assault as part of her marriage, or an intimidated homosexual man who is discriminated against at work. If at least one of the reasons behind disclosure in child abuse cases goes beyond mere compliance with the law and is instead concerned with preventing unnecessary suffering, then we should consider widening the set of abuse cases.

When mediators face difficult questions about the appropriate course of action in a given situation, they look to the law for guidance. But, as I argue in the next section, the law functions poorly as a basis for codes of ethics. I will first raise questions about the general strategy of using the law as a moral

\textsuperscript{22} The Code of Conduct for the Colorado Council of Mediation Organizations (CCMO) has been a model for many others.

\textsuperscript{23} CCMO Code, \textit{supra} note 19, at 5 (confidentiality).

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{See infra} notes 138-49 and accompanying text (regarding the legal requirements to report child abuse).
yardstick and then indicate some special problems about applying the strategy to the case of mediation.

A common way of underwriting a moral code is to look to the law. By this way of thinking, the law reflects a codified morality. Hence, if we need to know whether "insider trading" is immoral, then one test is to check whether it is illegal.

The writings about mediator confidentiality reflect this law based morality assessment test. In addressing whether or not to break confidentiality, many commentators have confined themselves to an examination and interpretation of the law. Yet, if this move is made, we should be very open in acknowledging that it represents a particular view of morality and one which often takes the law at face value without questioning the values implicit in the policies behind the law.

Before examining the law on mediation confidentiality, I will first question the assumption that we can derive normative standards through an examination of the law.

VI. THE LAW IS NOT EQUIVALENT TO MORALITY

Although there are many important points of agreement between morality and the law, it would be wrong to assume that they are equivalent. Legal acts are sometimes immoral, and moral acts are sometimes illegal. There are many examples of shady dealings in business and public life where, strictly speaking, nothing illegal has taken place, but nevertheless lies have been told, promises broken, and individuals betrayed. Moreover, some moral acts may be against the law; this is perhaps best seen in retrospect. Segregation prior to the Civil Rights Act treated blacks as second-class citizens, and civil disobedience—like blacks sitting in forbidden seats on a bus—which targeted immoral racial discrimination was against the law. We can now see that the racism involved was clearly immoral, but perfectly legal. Thus, there is no simple equivalence between


27. Thomas Aquinas showed that not all law has "moral oughtness" and according to Martin Golding he:

listed the ways in which a purported law may be unjust and hence contrary to the natural law: it may aim at the lawmaker's private good rather than the common good, it may aim at the common good but its burdens may be unfairly imposed, or it may exceed the constitutional or customary authority of the lawmaker to enact it into law.

M. GOLDING, PHILOSOPHY OF LAW 36 (1975). John Austin noted that "the existence of law is one thing; its merit or demerit is another." Id. at 25 (quoting J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832)).

28. I am tempted to call this the "Meese Defense" after the Reagan appointee who declared that he had been cleared of any illegality, and therefore had done nothing wrong or punishable. See, e.g., Salholz, Meese's Long Goodbye, NEWSWEEK, July 18, 1988, at 32-34; Stengel, Veni, Vidi, Vindicated?, TIME, July 18, 1988, at 21.
the law and morality. There may indeed be overlap; but although we may derive law from morality, we cannot derive morality from the law alone.

Although I have argued that the law is not equivalent to morality, I am not suggesting that the law never intersects with morality, or that there are no cases where we may derive what is moral at least in part by examining the law. There are clear cases where we can say that law and morality are in close harmony. For example, murder and other kinds of unwarranted violence upon others breach both law and morality. These might be described as *mala in se*, a legal term meaning "wrongs in themselves."29 We can contrast such acts which are morally wrong to *mala prohibita* or acts which are made offenses and consequently prohibited by positive laws.30

Locke noted that in the seventeenth century the laws of man had developed into a complex artifice, demanding specialists to interpret it, and what we ought to do was no longer self-evident from an examination of the law:

For though it would be beside my present purpose to enter here into the particulars of the law of nature, or its measures of punishment, yet it is certain there is such a law, and that, too, as intelligible and plain to a rational creature and a studier of that law as the positive laws of commonwealths; nay, possibly plainer, as much as reason is easier to be understood than the fancies and intricate contrivances of men, following contrary and hidden interests put into words; for truly so are a great part of the municipal laws of countries, which are only so far right as they are founded on the law of nature, by which they are to be regulated and interpreted.31

Mediators who face difficult or novel questions about whether or not to disclose client confidences are unlikely to find plain guidelines in the law. Usually no conflict exists between the legal obligations of mediators and their individual judgment; man-made law suggests that mediation ought to be a confidential process, and major moral theories converge in thinking that there is a prima facie obligation to keep confidences. Yet situations remain where it might be appropriate for mediators to go against the letter of the law and break confidentiality.32

Employing a patchwork of legal precedent is unlikely to be sufficient grounds to establish policy about what the individual mediator ought to do about confidentiality. Nevertheless the law is worth examining, for in analyzing the law we should be able to determine the policies and considerations that underlie the present regulations.

29. BLACK'S LAW DICTIONARY 861 (5th ed. 1979).
30. Id.
32. Whistleblowing by a mediator is presently considered a prohibited activity under many codes. See infra notes 185-99 and accompanying text.
CONFIDENTIALITY IN MEDIATION

VII. CONFIDENTIALITY AND THE LAW

A. Privilege and Immunity

Some commentators on mediation confidentiality (notably lawyers) have suggested that mediation requires a level of protection comparable to the very strong lawyer-client privilege. In order to understand this, we must look at the legal distinction between privilege and immunity from testifying. A privilege is a blanket protection from testimony, usually based on the special relationship between parties. Thus, except for special exceptions, discourse between a lawyer and client, doctor and patient, priest and penitent are held privileged and undiscoverable. The key premise in this line of reasoning is that a confidential relationship is considered necessary for the function of the office.

The lawyer-client privilege can be waived by the client. Thus, a client may disclose whatever he or she wants to, leaving his or her lawyer no standing to enforce confidentiality. In this sense the lawyer-client privilege is possibly better thought of as a client privilege. Legislation is not always consistent in mediation, but typically mediator-client privileges cannot be waived by the client alone. For example the Colorado Dispute Resolution Act states:

Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization unless . . . all parties to the dispute resolution proceeding and the mediator consent in writing.

33. See, e.g., Freedman & Prigoff, supra note 2 (strongly arguing for a statutory privilege for mediators).

34. BLACK'S LAW DICTIONARY, supra note 29, at 1077; see also DIVORCE MEDIATION: THEORY AND PRACTICE, supra note 26, at 323. Eric Green makes a useful distinction between privileges that are dependent on the relationship between the holder of the privilege and the other communicant (e.g. attorney-client, doctor-patient) and those which "throw a veil of secrecy around specific zones of privacy in order to protect human dignity, individual autonomy, or family. Examples of this kind of privilege include the husband-wife privilege and the constitutional privilege against self-incrimination." Green, supra note 17, at 34-35. I will be dealing with the first type in this paper.


36. See, e.g., N. ROGERS & C. McEWEN, supra note 5, at § 8.16.


38. Id. § 307(2) (emphasis added).
The statutorily protected privilege is worrisome in that if both disputants felt that they had a grievance, they would be unable to pursue it without the permission of the mediator.\textsuperscript{39}

### B. The Wigmore Test

Mediator confidentiality is controlled by statute and by case law. Statutes exist in most states that have court-ordered mediation,\textsuperscript{40} and are usually a derivative from other statutes pertaining to the non-admissability of evidence from settlement conferences.\textsuperscript{41} Absent such absolute statutes, the courts use a balancing test to decide whether the benefits of maintaining confidentiality outweigh the potential harms of disclosure.\textsuperscript{42}

The balancing test that is usually applied is the "Wigmore test" where any evidence that breaches confidentiality has to pass four criteria in order for confidentiality to be protected:

1. Communications must originate in confidence that they will not be disclosed to others.
2. The preservation of secrecy must be essential to the success of the relationship.
3. The relationship is one which the public ought to foster and protect.
4. The injury from disclosure must be greater than the benefit to be gained by the public from non-disclosure.\textsuperscript{43}

The test was applied when President Nixon invoked executive privilege to withhold information in the Watergate Affair, and he was overruled by the Supreme Court which believed that the public right to know was stronger than the

\textsuperscript{39} In fairness, there is a provision in the Colorado statute which allows disclosure in the case of "willful or wanton misconduct," which is designed to allow malpractice suits to be filed against mediators who seriously abuse their position. See id. § 307(2)(d). However, I believe that there is a strong case for review and disclosure should the clients demand it. The present legislation allows mediators to have veto rights over disclosure, and may serve to protect incompetent and ignorant mediators. See generally id. § 307(2).

\textsuperscript{40} See generally N. ROGERS & C. MCEWEN, supra note 5, at 243 (Appendix A, containing a comprehensive listing of statutes).

\textsuperscript{41} See id. at 145. Where the authors state that:

[a]bout half the statutory mediation privileges are qualified ones that balance competing costs, permitting disclosure of mediation information where the need for that information exceeds the value of protecting it. Others afford protection only to the mediator's testimony, because such testimony has the greatest potential to disrupt mediation communications and create a public perception that the mediator is an investigator or is biased in favor of one side or the other. Still others show sensitivity to costs, through exceptions, limited coverage, restrictions on who may raise the privilege, and limits on the forums in which it applies.

\textit{Id}; see also N. ROGERS & R. SALEM, supra note 15, at 61-105.

\textsuperscript{42} See, e.g., NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 54 (9th Cir. 1980).

\textsuperscript{43} J. WIGMORE, WIGMORE ON EVIDENCE § 2285 (1961).
maintenance of presidential secrecy.\textsuperscript{44} The courts may compel evidence \textit{whenever} it is thought to be necessary, and even the confessional is not immune from court scrutiny.\textsuperscript{45}

The Wigmore test is significant in its demonstration that the issue of confidentiality is largely grounded in a sort of "consequentialist calculus." The mechanism of balancing benefits and harms has been used to justify mediator attitudes to confidentiality, and many of the key assumptions implicit in the law have been adopted wholesale.\textsuperscript{46} However, on examination, I contend that the assumptions themselves may not be sound enough to justify present practice.

\textbf{C. Benefits and Harms}

The fourth condition of Wigmore's test involves a balance of benefits and harms.\textsuperscript{47} Therefore, it is worthwhile to assess what are perceived as the possible benefits and harms associated with confidential mediation, since the apparent societal policy is to use mediation to increase benefits and minimize harms.

The benefits of maintaining confidentiality are seen by the legal community as (1) reducing the swollen court dockets, (2) possibly fostering expeditious settlements, (3) lessening the costs of litigation by encouraging informal settlements, and (4) strengthening relationships between potential litigants.\textsuperscript{48} It is often claimed that mediation and its benefits would be ineffective and inefficient without blanket immunity.\textsuperscript{49}

The potential harms of immunity from testifying involve a lack of public accountability in the form of fostering unfair agreements and harming unrepresented parties.\textsuperscript{50} The doctrine of justice as a public affair has become

\begin{itemize}
\item \textsuperscript{44} See United States v. Nixon, 418 U.S. 683, 703-13 (1974)).
\item \textsuperscript{46} See infra text accompanying notes 119-22.
\item \textsuperscript{47} See, e.g., Macaluso, 618 F.2d at 54 (quoting J. Wigmore, \textit{Evidence} § 11 (1940)). The Wigmore quote states that the public interest in revocation must be substantial if it is to cause us to: concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth.
\item \textsuperscript{48} See Restivo & Mangus, supra note 7, at 5-8. This benefit is based on the assumption that stronger relationships will lessen future litigation.
\item \textsuperscript{49} See, e.g., infra text accompanying notes 56-58.
\item \textsuperscript{50} See N. Rogers & R. Salem, supra note 15, at 61-87 (forcibly making this point).
\end{itemize}
known as the right to "every man's evidence," where any person may have access to the evidence that led to a judicial ruling.\footnote{51}

There are several areas where policy has protected mediated negotiations. Included within these policies is Federal Rule of Evidence (FRE) 408, where Congress found that the rule would "encourage settlements which would be discouraged if such evidence were admissible."\footnote{52} It codifies the policy of encouraging candid settlement discussions by specifically excluding evidence of any such talks or conduct. FRE 408 is echoed by many state statutes.\footnote{53} The language in some of these statutes even grant mediators blanket immunities. For example, the Massachusetts confidentiality statute reads in part:

All memoranda, and work product prepared by a mediator and a mediator's case files, shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation. And any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any such judicial or administrative proceeding.\footnote{54}

\footnote{51. See Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (opines that the public has a right to access all presented evidence).}
\footnote{52. S. REP. No. 93-1277, 93d Cong., 2d Sess. 10 (1974).}
\footnote{53. See 4 WIGMORE ON EVIDENCE ¶ 1062 n.1 (Supp. 1987).}
\footnote{54. MASS. ANN. LAWS ch. 233, § 23C (Law Co-op. 1985). Similarly, the Colorado Statute reads: mediation proceedings shall be regarded as settlement negotiations, and no admission, representation, or statement made in mediation not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery. In addition, a mediator shall not be subject to process requiring the disclosure of any matter discussed during mediation proceedings. COLO. REV. STAT. § 13-22-307. Typical other examples include Oregon Statutes: All communications, verbal or written, made in mediation proceedings shall be confidential. A party or any other individual engaged in mediation proceedings shall not be examined in any civil or criminal action as to such communications and such communications shall not be used in any civil or criminal action without the consent of the parties to the mediation. Exceptions to the testimonial privilege otherwise applicable under ORS 40.225 to 40.295 [lawyer-client, physician-patient, and other statutory privileges] do not apply to communications made confidential under this subsection. OR. REV. STAT. § 107.785(2) (1991). The Florida Statute: "All verbal or written communication in mediation or conciliation proceedings shall be confidential and inadmissible as evidence in any subsequent legal proceedings, unless both parties agree otherwise." FLA. STAT. § 61.21(3) (1982). The New York Statute: All memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator or any other person}
Labor cases prove to be a regular testing ground for Federal Rule of Evidence 408, where congressional intent and court *dicta* hold that the potential stability and industrial harmony that labor settlements promise are sufficient to override considerations of public accountability.\(^\text{55}\) *In re Tomlinson of High Point, Inc.*\(^{66}\) and *NLRB v. Joseph Macaluso, Inc.*\(^{57}\) are the key cases in labor mediation. In *Tomlinson* the court defended mediator immunity in policy terms:

> The inevitable result [of compelling mediator testimony] would be that the usefulness of the Conciliation Service in the settlement of future disputes would be seriously impaired, if not destroyed. The resultant injury to the public interest would clearly outweigh the benefit to be derived from making their testimony available in particular cases.\(^{58}\)

A later case, *NLRB v. Joseph Macaluso, Inc.*, employs the same sort of reasoning. The *Macaluso* court asserted:

> Parties participating in mediation efforts must have the assurance and confidence that information disclosed to commissioners and other employees of the service will not subsequently be divulged, voluntarily or because of compulsion . . . . The complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation, and . . . labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence.\(^{59}\)

Several other cases reinforce both the protection granted to settlement conferences and the justification based on grounds of policy. For example, in *Bottarro v. Hatton Associates*,\(^{60}\) several parties were attempting to settle, and only one came to an agreement.\(^{61}\) The court denied a request from the others to discover details about the successful negotiation.\(^{62}\) In defense, the *Bottarro* court said:

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\(^{56}\) 74 NLRB Dec. (CCH) 681 (1947).

\(^{57}\) 618 F.2d 51.

\(^{58}\) *Tomlinson*, 74 NLRB Dec. (CCH) at 688.

\(^{59}\) *Macaluso*, 618 F.2d at 56.

\(^{60}\) 96 F.R.D. 158 (E.D.N.Y. 1982).

\(^{61}\) Id. at 159.

\(^{62}\) Id. at 158.
Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.

Labor mediation is not only protected from judicial discovery but is also immune from revelation under the Freedom of Information Act. The House Report on the Act reads that exemptions would include "disclosures made in procedures such as the mediation of labor-management controversies." The protection of settlement negotiations extends beyond labor disputes. There are protected negotiations for the Equal Employment Opportunity Commission, and settlement conferences sponsored by the Housing and Urban Development Administration. Mediator immunity has also been upheld in environmental mediation. In Adler v. Adams, the court noted that requiring disclosure from mediators who had resolved a dispute would "severely inhibit the proper performance of his or her duties, and thereby undercut the effectiveness of the mediation process . . . There is a substantial public interest in fostering effective mediation techniques in settlement of disputes." Finally, the Dispute

63. Id. at 160; see also Pipefitters, Local 208 v. Mechanical Contractors Ass'n, 90 Lab. Cas. (CCH) ¶ 12,647, 27,072 (D. Colo. 1980) ("Effective mediation hinges upon whether labor and management negotiators feel free to advance tentative proposals and pursue possible solutions that later may prove unsatisfactory to one side or the other. Such uninhibited interaction may be impaired absent the assurance that mediation proceedings will remain confidential").

64. Restivo & Mangus, supra note 7, at 6. Restivo and Mangus also note that there is an exemption for labor from the Freedom of Information Act. Id. Congressional records specifically include "disclosures made in procedures such as the mediation of labor-management controversies." H.R. REP. No. 1497, 89th Cong., 2d Sess. 10, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2427. Moreover, information disclosed to the Federal Mediation and Conciliation Service and the National Mediation Board shall not be divulged: "Labor and management or other interested parties participating in mediation efforts must have the assurance and confidence that information disclosed to commissioners and other employees of the Service will not subsequently be divulged, voluntarily or because of compulsion, unless authorized by the Director of the Service." 29 C.F.R. § 1401.2(a) (1991).

65. H.R. REP. No. 1497, supra note 64, at 2427.

66. See Restivo & Mangus, supra note 7, at 6. "[N]othing said or done during and as part of such informal endeavors may be made public by the Commission . . . or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b) (1981). This is also supported by case law. For example, in Branch v Phillips Petroleum Co., the court barred the defendant's discovery of Equal Employment Opportunity Commission (EEOC) materials relating to charges filed against former employers. 638 F.2d 873, 881 (5th Cir. 1981). The court noted that "disclosure of conciliation materials . . . would discourage negotiated settlement and frustrate the intention of Congress." Id.


69. Id. at 3.
Resolution Act of 1980\textsuperscript{70} called for procedures which would "ensure reasonable privacy protection for individuals involved in the dispute resolution process."\textsuperscript{71} The justifications for Federal Rule of Evidence 408 have also been used in cases where confidentiality has been contracted. In Simrin v. Simrin\textsuperscript{72} a divorcing couple contracted to a confidentiality agreement when they went into marital counseling.\textsuperscript{73} Later, in divorce proceedings, the wife argued that the suppression of evidence from the mediated conference was unwarranted and contrary to public policy.\textsuperscript{74} Drawing on an analogy with Federal Rule of Evidence 408, the Simrin court responded that:

For the unwary spouse who speaks freely, repudiation [of the confidentiality agreement] would prove a trap; for the wily, a vehicle for making self-serving declarations . . . . [S]tatement[s] that are made in offer of compromise and to avoid or settle litigation . . . are not admissible in evidence.\textsuperscript{75}

\textbf{D. Summary of the Legal Basis for Mediation Confidentiality}

At first glance, it appears that there is a strong legal presumption in favor of maintaining confidentiality in mediation. The professional relationship of mediator to client is sometimes held to be similar to that of the lawyer to his or her client with the attendant presumption of a privilege.\textsuperscript{76} It also appears that the courts often presume that in the benefit/harm calculus, maximum benefit will come about by maintaining confidentiality in mediation.\textsuperscript{77}

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\textsuperscript{70.} Dispute Resolution Act of 1980, Pub. L. No 96-190, 94 Stat. 17 (1980) (this Act depended on funding that was not made available and was consequently never enacted).


\textsuperscript{72.} 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (Cal. Dist. Ct. App. 1965). A rabbi undertook marriage counseling "only after an express agreement that their communications to him would be confidential and that neither would call him as a witness in the event of a divorce action" \textit{Id.} at 94, 43 Cal. Rptr. at 378.

\textsuperscript{73.} \textit{Id.} at 92, 43 Cal. Rptr. at 378.

\textsuperscript{74.} \textit{Id.} at 95, 43 Cal. Rptr. at 379.

\textsuperscript{75.} \textit{Id.} For a further discussion of Simrin see J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 271 (1984); N. ROGERS & R. SALEM, supra note 15, at 98.

\textsuperscript{76.} See, e.g., J. FOLBERG & A. TAYLOR, supra note 75, at 267-70.

\textsuperscript{77.} See, e.g., Macaluso, 618 F.2d at 54-55.
VIII. ASSESSING THE LEGAL BASIS FOR MEDIATION CONFIDENTIALITY

Mediators often presume that there is a blanket of judicial immunity that protects them against having to testify about confidential proceedings.\(^78\) The key assumptions for the present set of rulings (and the legal benefit/harm test) are:

(A) Mediation is ineffective unless it is confidential.
(B) Mediation makes the court system more efficient.
(C) Labor mediation promotes a policy of industrial harmony.
(D) Generalizations can be made from one type of mediation to another (e.g. labor to divorce).
(E) In a benefit/harm calculus, disclosure in a particular case could damage the overall mediation process and hence render it ineffective. Since this would be a very unwelcome result, attempts to preserve the process must take precedence over the desire to have access to information in any individual case.
(F) Mediator testimony would compromise their image as impartial.

Taking these individually, we can see that the legal and moral underpinnings for mediators’ assurances of confidentiality are shaky, at best. The basis for a mediator’s decision ought to rest upon legal and moral arguments. The legal assumptions are often based on notions of efficiency;\(^79\) they are not often made explicit\(^80\) and they are vague in the scope of their application.

A. Mediation is Ineffective Unless it is Confidential

There is little evidence to suggest that mediation would be ineffective if it were not confidential. It is argued that people would be reluctant to be candid unless there were some assurance that revealed information would not be disclosed.\(^81\) However, there are counter-arguments which suggest that a degree

78. See N. ROGERS & R. SALEM, supra note 15, at 62.
79. I do not want to deny that there is merit in expediency; clearly there is benefit in efficiency for any system of justice. My concern is that efficiency should be balanced against other elements in a just legal system (or a just system), and not regarded as self-evidently self-justifying.
80. Legal dicta may not be the best place to find the most sophisticated arguments in support of a position; they are more likely to be found in law review articles and professional journals. However, much of the literature takes the key legal dicta (as in Tomlinson or Simrin) uncritically, and, moreover, there is at present relatively little review work on mediation confidentiality - hence the dicta represent important and seminal thinking on the subject.
81. Freedman & Prigoff, supra note 2, at 37-45.
of public accountability fosters good-faith bargaining. Some mediation programs report high settlement rates despite the fact that they do not assure confidentiality.

It is entirely possible that mediation could function well with a limited basis of confidentiality, and expressed fears that breaching the seal of the mediation would bring the whole process into question are probably overstated. "Open" mediation may alter the nature of the mediation process somewhat, since participants might guard what they say. Still, the settlement rate of a more open process shows it to be as successful as mediation that gives traditional assurances about confidentiality. Thus one inference that might be drawn is that a presumption of confidentiality should not be thought of as a decisive factor in the success of mediation, since mediation in some form can operate effectively without it.

B. Mediation Makes the Court System More Efficient

Mediation may well make the courts more efficient. However, the degree of confidentiality in mediation is dependent on the efficacy of the court system and part of the justification for mediation confidentiality is a second-order appeal to the efficiency of the formal legal system. Hence, confidentiality is justified not in its own terms but as an adjunct to the courts. If an administration made clearing court dockets through formal procedures a high priority, or if there were innovations like awarding costs to the winning side (with the consequence of chilling much potential litigation), we might see the backlog of cases vanish. But once formal court systems become more efficient, there would be less reason for mediation to remain confidential.

C. Labor Mediation Promotes a Policy of Industrial Harmony

It is possible that the courts might alter the basic policy that puts a premium on industrial peace and correlatively promotes mediation. Labor courts have often

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82. See, e.g., Note, supra note 26, at 452-54. That author discusses Federal Rule of Evidence 408 and comments that the broad protection that it confers does not protect "participants in negotiation who abuse the negotiation process . . . such as a duty to bargain in good faith; presumably this limitation would apply to mediation as well." Id. at 449.

83. AMERICAN BAR ASS'N, ABA DISPUTE RESOLUTION DIRECTORY 145-50 (L. Ray, B. Davis, M. Shuffletton & A. Clare, eds. 1983). This work refers to three Ohio programs - the Columbus Night Prosecutor Program, the Cleveland Prosecutor Mediation Program and the Cincinnati Night Private Complaint Program - which settle over 75% of mediated cases. N. ROGERS & R.SALEM, supra note 15, at 68 (quoting AMERICAN BAR ASS'N, supra, at 145, 146 & 150); see also Roehl & Cook, Mediation in Interpersonal Dispute: Effectiveness and Limitations, in K. KRESEL & D. PRUITT, MEDIATION RESEARCH 34-36 (1989).

84. AMERICAN BAR ASS'N, supra note 83, at 145-50.
used the analogy of constant confrontation to describe the industrial situation, for example Justice Holmes dissenting in *Vegelahn v. Guntner*\(^8^5\) noted that:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return.\(^8^6\)

Traditionally the policy has been to promote harmony in this struggle.\(^8^7\) However, it is feasible that future administrations might consider that imposed harmony is less desirable than a winner emerging from fair conflict in the free market.\(^8^8\) At one time, the government might have intervened to encourage a settlement, however, the Reagan administration considered the optimal result for the free market would come from open economic contests between labor and capital.\(^8^9\) It is quite possible, then, that court support for mediation confidentiality could quickly evaporate depending on the prevailing economic policy.

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85. 167 Mass. 92, 44 N.E. 1077 (1896) (Holmes, J., dissenting).
86. Id. at 108, 44 N.E. at 1081.
87. See, e.g., *Macaluso*, 618 F.2d at 54 (discussing the congressional intent behind the creation of the Federal Mediation and Conciliation Service). "It is the policy of the United States that (a) sound and stable industrial peace . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the process of conference and collective bargaining." Id. (quoting 29 U.S.C. § 171(a)(b)).

The undermining of labor was then intensified by deregulation, and by decisions of regulatory boards and agencies as diverse as the Federal Maritime Commission and the National Labor Relations Board, although the NLRB has played perhaps the key role. During the Reagan administration the NLRB has issued rulings that allow employers to hire temporary nonunion workers during lockouts, that facilitate the relocation of unionized plants to nonunion facilities while the union contract remains in effect . . . that increase the latitude of employers to refuse to take back workers accused of misconduct during strikes. The effect of these rulings has been to weaken severely the collective-bargaining leverage of unions.

*Id.* at 33-34.

89. See, e.g., Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485 (1990). The author describes some of the tactics used by employers to circumvent the Railway Labor Act. *Id.* at 1494-98. Even provisions for employee protection were neglected, since in the era of deregulation this itself became an item on the table collective bargaining rather than an assumed right. *Id.* at 1491-92. I believe that the historical record shows that the established policy promoting industrial harmony fostered by government intervention has been eroded in the Reagan/Bush administrations.
D. Generalizations Can be Made From One Type of Mediation to Another

There is no compelling reason to believe that all kinds of mediation are similar, or that the same rules need apply universally. Although similar mediation principles may apply to say, small claims cases and environmental cases, there are many practical differences. Small claims deal with relatively small amounts of money, \(^{90}\) rarely involve a relationship that must necessarily continue, \(^{91}\) and are usually limited to two individuals. \(^{92}\) In environmental mediation there may be many parties represented and some affected parties may not be at the table. \(^{93}\) Environmental issues may also be complex. The consequences that result from a poor environmental settlement are more likely to be lasting and affect a greater population. \(^{94}\) Moreover, the public at large may have an interest in the result of a precedent-setting environmental settlement in a way that they would not have in a small claims case.

Thus, there are wide differences in mediation and, unfortunately, the same process may be used to treat cases which differ in the number of disputants, the scope of the dispute and the weight of the consequences. However, it is entirely possible that there is greater public interest at stake in one sort rather than another, and hence the rule on confidentiality which may be appropriate for one case may not be appropriate for another. Mediation is developing as a profession and along with this wide application of ADR it might be the case that broad and inclusive codes are no longer suitable.

E. In a Benefit/Harm Calculus, Disclosure in any Particular Case Could Damage the Overall Mediation Process and Hence Render it Ineffective

Since this would be a very unwelcome result, attempts to preserve the process must take precedence over the desire to have access to information in any individual case. At least one court has determined that the benefit/harm calculus results in a presumption of access rather than confidentiality in settlement

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90. See, e.g., COLO. REV. STAT. § 13-6-403 (Supp. 1991) (the Colorado Small Claims Division handles cases where the amount at issue is less than $3500).

91. Typical small claims cases would be debt, damage, tort or injury, between such parties as a contractor and client, vendor and client, individuals such as neighbors or aggrieved acquaintances, or a member of an organization in conflict with the organization. Occasionally family members may file suit with one another, and there, of course, the relationship will continue; however, most of the parties have no necessary reason to continue the relationship.


93. Some parties, for example future residents, could not possibly be present.

94. Contrast small claims and environmental settlements: In small claims damages are awarded, and the parties are free to go their separate ways. In an environmental case, like the placement of a new freeway or dam, the effects will be more widespread and permanent; even if the residents move, the aesthetics of the area will inevitably be changed.
conferences." In *Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*, the Court of Appeals for the Third Circuit held that the common law right of access to judicial records overcame the policy of encouraging settlements. In some cases, we can expect that the presumption of promoting mediation by supporting mediation confidentiality will be overturned in circumstances where there is thought to be substantial public interest. Thus, mediators can no longer assume that there is an automatic general judicial protection for their enterprise. For example, Federal Rule of Evidence 501 gives the court discretion to interpret privileges in "the light of reason and experience." Although mediators may expect a degree of protection under the law, they should not assume that any benefit/harm calculation will necessarily always favor the confidentiality of the mediation process over the rights to public access.

**F. Mediator Testimony Would Compromise Their Image as Impartial**

Courts preserve confidentiality as a guarantee of impartiality, since any testimony by a neutral may be interpreted as favoring one side or another. Thus, we find a passage in *Tomlinson* which states:

> 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

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96. 800 F.2d 339. *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates* has been cited often, for example in the case of *Littlejohn v BIC Corp.* where *Rittenhouse* is cited with the comment:

> As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury and fraud. Furthermore the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness. *Littlejohn*, 851 F.2d 673, 678 (3d Cir. 1988). Significantly, one court cited *Rittenhouse* with the warning "[c]ounsel in future cases would be well advised to scrutinize carefully those documents that are filed with the court . . . . The parties also may choose to file a voluntary stipulation of dismissal, instead of the settlement agreement, if they seek to prevent public access to their settlement agreement." H.S. Gere & Sons, Inc. v. Frey, 509 N.E.2d 271, 275 n.16, 400 Mass. 326, 332 n.16 (1987); see also Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252-54 (4th Cir. 1988).
98. FED. R. EVID. 501.
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.  

Again, in *Macaluso* the court reasoned that forcing the mediator to testify would impair his or her future effectiveness by destroying "the appearance of impartiality."  

The company argued that revocation of [the mediator's] subpoena was improper because communications made to him during the course of the bargaining sessions were necessarily made in the presence of the opposing party and were not, therefore, confidential. Such a contention misapprehends the purpose of excluding mediator testimony which is to avoid a breach of impartiality, not confidentiality.  

Here again, we need to recognize that confidentiality is considered good because it aids the functioning of the court, not because it is good-in-itself.  

The argument is that if a mediator is no longer perceived as impartial then people will cease using mediation and settlement conferences would be less successful. The argument can be attacked on two grounds: (1) we might not accept the linkage between impartiality and confidentiality that the courts make, and (2) it might be asserted that confidentiality is intrinsically good, and thus that its value cannot be measured by its contribution to legal efficiency.  

It is useful to draw a distinction between two senses of impartiality: One is the very strong notion of having a completely disinterested viewpoint; the other is in favoring neither side in a dispute. No mediator is impartial in the stronger sense—it is impossible. It is inevitable that an individual will retain memories and biases associated with sex, race, upbringing, socio-economic group, however hard he or she tries to avoid them. The court accepts that mediators will not be impartial in this way.

100. *Id.*  
101. *See Macaluso,* 618 F.2d. at 55.  
102. *Id.* at 55-56.  
103. *Id.* *Macaluso* has been taken to apply to mediation in general and not just to court-supervised mediation. *ADR in general* is supported by the courts in part because of the relief of pressure on the docket that it provides. *See id.* Thus even private mediation is supported because it is thought that *but for* mediation those disputes might look for legal resolution. *See generally id.*  
104. This is the sort of impartiality demanded, for example, by John Rawls' "veil of ignorance" put forward in his *A Theory of Justice.* *J. RAWLS, A THEORY OF JUSTICE* (1971). There he demands that in order for us to discover first principles of justice we should systematically put aside knowledge of our place in society, individual talents and inclinations, social status, political ideology and any other accidental features of our lives. *Id.* at 136-42.  
105. This weaker version of impartiality is found in lexical definitions, such as "unbiased, fair, equitable, not favoring one party or side more than another." *OXFORD ENGLISH DICTIONARY,* *supra* note 9, at 1382 (emphasis added).
The second sense of impartial disinterest is that of treating all sides alike, without favoritism. It is possible to treat clients impartially while holding personal opinions which would favor one side, but which are "shelved" or "bracketed" during the process. Court opinion implies that public acknowledgment that a mediator operates with the second type of impartiality will somehow compromise the perception of his or her impartiality during the process. Thus, the claim is that if a mediator testifies about his or her perceptions within the mediation, at least one of the principals will perceive the testimony as demonstrating that the mediator was biased during the negotiations. But such a claim fails to recognize that the mediator may have sufficient professional distance to remove him or herself to an impartial position when at work.

There are two dubious lines of reasoning behind the assumption that mediator testimony will inevitably compromise the perception of impartiality. The first is that a person cannot act impartially while simultaneously holding a private opinion. This seems incorrect in that any counseling profession requires that the therapist not offer personal opinion or judgment about the acts of the patient, although the therapist obviously has a personal point of view. Secondly, it is assumed that mediators could not testify about their own perceptions without losing credibility as impartial. But this assumption could be defeated by asking a standard initial question during testimony about whether the parties thought that the mediator was, in fact, impartial during the negotiations. Subsequently, as long as the mediator's testimony is presented as either about facts (what happened in a given session) or about personal opinion ("in your opinion, was one side stonewalling?") then it is unlikely that the perception of mediator impartiality will be destroyed. Thus a mediator can have privileged opinions, and yet act impartially.

The reasoning in Macaluso relies on the premise that a mediator who is perceived as being partial will be ineffective. If mediation is effective as long

106. See, e.g., Tomlinson, 74 NLRB Dec. (CCH) at 688.
107. There is a genuine concern that whatever the mediator's real position, there may be a public perception of bias which would be hard to overcome. Perhaps the issue requires the test of experience.
108. The issue is whether an "impartial mediator" is defined as one who has no opinion, or one who may have one but does not express it. Admittedly, a mediator may not have developed an opinion about the best solution to an issue at hand, or may have no opinion about the behavior of a party during the negotiations, and presumably that would be an acceptable response to questions in court. Nevertheless a mediator might make inferences based on experience and training about a mediation session, for example, whether or not it was productive, whether or not the participants were genuinely working toward settlement, or whether the negotiations were in good faith. It would appear that whatever definition of "impartial mediator" is employed, it is really the public expression of these inferences that worries the courts.
109. More trivially, a tennis umpire might not like the explosive temper of one of the players, and yet not let this color his or her calls during the match.
110. See, e.g., Tomlinson, 74 NLRB Dec. (CCH) 681. That court states "not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other." Id. at 685.
111. See Macaluso, 618 F.2d at 56 (the court's holding).
as the intervenor is acceptable rather than impartial in some ideal sense, then it is possible that a partial mediator can nevertheless be effective.

It might be argued that demonstrating mediator bias through the fact of testifying for one side rather than the other will discourage potential clients. They feel the process will be steered in a particular way, or alternatively because they feel that they need to be guarded in front of a mediator, since their acts during mediation may be subject to discovery. Clients might also feel at risk if their acts are misinterpreted by the mediator and lead to actual harm when the mediator’s opinion is made public.

The first two objections carry little weight. If a mediator has opinions that steer the process, this will occur as much in closed mediation as it would in open mediation. The claim about modified behavior has an equal and opposite counter in that an open process might well encourage participants to be more productive and accountable.

A stronger objection is that a mediator may cast a disputant’s actions in such a way that may have harmful consequences. Stonewalling is an example of this objection. If an individual was not stonewalling, but in fact was negotiating in good faith, (although he had run out of ideas), mediator testimony to the effect that he was negotiating in bad faith will be unfairly damaging. To safeguard against such unfair treatment, mediators and the parties could look to other situations where attorneys call on expert opinion in testimony. Expert opinions are notoriously diverse, and so precautions might include having more than one mutually acceptable mediator in any session, or ensuring that there are complete records, including audio or video taping of the proceedings.

Since the courts view the impartiality requirement as paramount, and confidentiality secondary, a procedure that ensures impartiality might cause the confidentiality requirement to fall by the wayside or to be taken as far less stringent. Even if confidentiality is secondary, it requires explicit recognition that it is still, nevertheless, important or necessary. The language in Macaluso strongly suggests that confidentiality is legally necessary only in so far as it supports impartiality. Although Macaluso governs attitudes to mediation confidentiality, especially in labor and court-ordered mediation, there are other

112. This problem is not unique to mediation; it occurs in any "caring profession" where expert testimony is called upon. A typical example would be a social worker required to testify about the likelihood of abuse having taken place.

113. I am thinking of analogous governmental processes where one party nominates and the other may veto a person for a given position which guarantee that an individual is acceptable to both sides. A model would be the Advice and Consent powers of the Senate under the Constitution. U.S. CONST. art. II, § 2.

114. Some commentators suggest that neutrals keep the minimum of records and that casenotes be destroyed. See, e.g., Rowe, Simon & Bensinger, Ombudsman Dilemmas: Confidentiality, Neutrality, Testifying, Recordkeeping, in DISPUTE RESOLUTION AND DEMOCRACY IN THE 1990'S 292 (C. Cutrona, D. McCabe & W. Wilkins eds. 1990). If confidentiality is the central issue, this would be appropriate. On the other hand, if demonstrable impartiality is the goal, it seems to me that the more records and public accountability, the better.

115. See Macaluso, 618 F.2d at 56.
cases which give other reasons to support confidentiality,116 and so it is possible that the Macaluso doctrine will be less influential in the future.117 Assuming that cases of confidentiality breach will be unusual and will be accompanied by an explanation by the mediator for his or her actions, I believe the threat to impartiality to be less damaging than often claimed. The key premise in legal reasoning for maintaining confidentiality has been to protect the reputation of impartiality.118 This premise is not as strong as it initially appears, and it alone cannot adequately justify confidentiality in all cases.

G. Summary of the Legal Assumptions Favoring Confidentiality

The law is directed at the permissibility of outsiders to intrude into the mediation process. Statutes often give unconditional protection to mediators from outside interference, and case law usually gives conditional protection.119 The mediator might reasonably extrapolate from these protections that he or she should maintain absolute confidentiality. However, when we look at the assumptions on which the claims for absolute confidentiality are based, we find that they are not as comprehensive or watertight as they may initially appear.

We should also note that the justifications given for mediation confidentiality are often expedient—essentially designed to take pressure off the overburdened court system.120 We can imagine that the courts could be relieved of their load by an allocation of resources to support more judges, overtime in the courts, or using retired judges. This particular justification for confidentiality would then be weakened or even disappear.

Nevertheless, the institution of non-adjudicated settlement is broadly supported, and the policies that are reflected in the law serve to promote mediation.121 Mediators can be confident that their enterprise is in accord with general policy and is considered beneficial on a societal level. All types of settlement may not be seen as equally desirable, though, and there could be much more emphasis and support for one kind of mediation rather than another. For

116. See, e.g., Adler v. Adams, No. 675-73(2), slip op. at 2. That court rejected a subpoena served on a mediator. Id. It used a balancing test, and put the onus of proving that non-disclosure would cause serious injury onto the party seeking discovery. Id. at 2-3. Significantly the central reliance on mediator impartiality will become only one argument that may be presented to defend mediation confidentiality.

117. Id. at 2.

118. See Macaluso, 618 F. 2d at 55-56; also supra note 108.

119. See N. ROGERS & C. MCEWEN, supra note 5, at 145.

120. In encouraging Alternative Dispute Resolution (ADR), Congress has described the courts as "largely unavailable, inaccessible, ineffective, expensive or unfair." Dispute Resolution Act of 1980, § 2(a), 94 Stat. at 17. ADR has appeared to many to be a credible method of providing speedy and flexible justice to people whose disputes are not uniquely suited for the court system. See, e.g., Cratsley, Community Courts: Offering Alternative Dispute Resolution within the Judicial System, 3 VT. L. REV. 1 (1978).

121. See N. ROGERS & C. MCEWEN, supra note 5, at 145.
example, administrations might think that labor mediation should be confidential but environmental mediation deals in significantly different issues and should therefore be subject to public scrutiny. This sort of distinction is implicit in the fact that immunity from disclosure under the Freedom of Information Act has been limited to labor mediation alone. Protections on the basis of public policy as interpreted by the courts are therefore not broad and inclusive but instead are altogether contingent. Thus, there may be differences within mediation practice on a policy level.

The presumption of confidentiality in mediation is often based on a reading of the law. However, when we look at the implicit legal assumptions they do not support a clear-cut rule for mediators to always keep their client’s confidences. Acts by mediators may not always be consistent over time and between different types of mediation. Therefore, the law is unlikely to be an adequate guide for mediator behavior. I will now turn from assumptions which function to preserve confidentiality to cases where it is assumed that there is a duty to disclose.

IX. THE DUTY TO BREAK CONFIDENTIALITY

Usually, the only clear reference to a mediator’s duty to actively break confidentiality is the duty to warn of imminent harm and the duty to report child abuse.

A. The Duty to Warn

The landmark case of Tarasoff v. Regents of the University of California serves as precedent in cases where confidentiality is in conflict with a duty to warn third parties. Tarasoff concerned a patient, Prosenjit Poddar, who told his therapist during psychotherapy that he would kill an unnamed, but clearly identifiable, young woman. The therapist, who worked for the University of California, believed the threats were real and informed the campus police, requesting their assistance in confining Poddar. The police took Poddar into custody, but released him shortly afterwards since they considered him rational. Tatania Tarasoff, the potential victim, was not warned. Poddar ended therapy, and killed Tarasoff roughly two months after making his initial
declaration. Tarasoff's family sued the university, which negotiated an out-of-court settlement on the basis that they had failed to give adequate warning to either the victim or her family.

The 1976 Tarasoff ruling by the California Supreme Court, requires psychotherapists to disclose information needed to protect the public from violent patients, even when doing so breaches confidentiality. Tarasoff is a significant precedent in that it places upon the professional the "duty to warn." It should be noted that Tarasoff is more than a passive removal of immunity from testimony; it imposes an active duty to disclose without prompting. The "duty to warn" has been upheld in similar cases.

Currently, the duty to warn has not been specifically imposed on mediators, although the analogy seems to be strong enough to support a parallel duty to that of therapists and counselors. Like therapists, mediators are in a position where they are likely to become aware of the intentions of a client because of their special relationship to the parties. Thus, a potentially violent husband in a divorce proceeding may only disclose his intentions to hurt his wife's lover because he is in a setting which encourages the sharing of his feelings about the divorce by someone trained in perceptive listening.

The Tarasoff precedent brings with it several problems. For example, Tarasoff is based on a threat and it is left to the professional to gauge the seriousness of that threat. It is not clear whom the mediator would contact: the victim directly, the police, or some superior in the mediation center. Moreover, the mediator is left to decide what exactly constitutes "serious psychological or physical harm."

Asking whether it is likely that a crime will be committed unless mediation confidentiality is broken simplifies this question. However, such a simple rule fails in that there could be reportable cases which are not crimes, and cases which are crimes but may not warrant disclosure. The Tarasoff case itself deals only a very serious sort of crime—premeditated murder—and therefore its application

129. Id.

130. Id. The court concludes "the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins." Id. at 446, 551 P.2d at 351, 131 Cal. Rptr. at 14. A discussion of the case is found in Helms, Mediators' Duties, Informed Consent, and the Hatfields Versus the McCoys, MEDIATION Q., Fall 1988, at 65.

131. Tarasoff, 17 Cal. 3d at 444-45, 551 P.2d at 349, 131 Cal. Rptr. at 29.

132. Id. at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23. In Tarasoff the court states: "Although plaintiffs' pleadings assert no special relation between Tatania and defendant therapists, they establish as between Poddar and defendant therapists the special relation that arises between a patient and his doctor or psychotherapist. Such a relationship may support affirmative duties for the benefit of third persons." Id. at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23.

133. See, e.g., Jablonski v. United States, 712 F.2d 391 (9th Cir. 1983); McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979).

134. CCMO Code, supra note 19, at 5. I presume that most mediators will be more familiar with their codes of conduct than case law.
may be very narrow.\textsuperscript{135} It does not give guidance on other sorts of serious crime, nor does it offer help on acts which may be either illegal but morally justifiable, like the environmental protest, or cases which are legal but immoral, like a cartel agreement.

An example of a threatened crime where it is unclear whether there might be "serious physical harm" sufficient to warrant disclosure is a case where an environmental group suggests during a private caucus with the mediator that one planned "event" will to splash blood over a furrier's stock. The group is seeking publicity and will acknowledge the act and offer to pay for any damage. The damage would be to property which is susceptible to restitution.\textsuperscript{136} In the absence of strict rules, the mediator is again forced to rely on his or her personal judgment.

Nevertheless, it appears incumbent on the mediator to know the appropriate area of law\textsuperscript{137} and judge the severity of any admission. However mere knowledge in advance of a crime seems insufficient to warrant a presumed duty to warn.

\subsection*{B. Child Abuse}

Child abuse is assumed by many mediators to be the sole justified exception to mediation confidentiality, and they tell their clients at the outset that they will halt the process and report any revealed incidents.\textsuperscript{138} The law generally imposes a duty to report by a "caring professional . . . having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect."\textsuperscript{139} The set of professionals who must report abuse includes physicians, nurses, social workers, teachers, psychologists, chiropractors, public

\footnotesize

\begin{itemize}
\item \textsuperscript{135} The language in \textit{Tarasoff} is vague; although it talks of conditions warranting disclosure as those which involve "serious danger to others," 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25, or "public peril," 17 Cal.3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27, the examples that are cited and the language that the court uses imply that the danger is life-threatening. For instance, the court cites two cases, the first where a doctor must warn if the patient has a medical condition which would make activities like driving a car dangerous to others, and the second, where the Veteran's Administration set a patient up with a job on a farm without warning the farmer that he was potentially dangerous. \textit{Id.} at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24 (citing \textit{Merchants Nat'l Bank \\& Trust Co. v. United States}, 272 F. Supp 409 (D.N.D. 1967); Kaiser v. Suburban Transp. Sys., 65 Wash. 2d 461, 398 P.2d 14 (1965)). The Veteran's Administration was found negligent when the patient later killed the farmer's wife. \textit{Merchant's Nat'l}, 272 F. Supp. at 421. The \textit{Tarasoff} court discusses "warning against the peril to the victim's life," "the lives of possible victims," and "the danger that would result from a concealed knowledge of the therapist that his patient was lethal." 17 Cal.3d at 439 & 442, 551 P.2d at 346-47, 131 Cal. Rptr. at 26-27 (emphasis added). The \textit{Tarasoff} precedent appears to deal mainly with mortal danger.
\item \textsuperscript{136} Unlike, say, assault, where the individual can never be fully restored to a prior state.
\item \textsuperscript{137} For example, the mediator might learn the law of assault and battery.
\item \textsuperscript{138} \textit{See}, e.g., CCMO Code, \textit{supra} note 19, at 5.
\end{itemize}
officials, law enforcement personnel, attorneys, clergy and dentists, but not mediators.

Although most mediators assume a duty to report, and would seem to be included in the group by analogy, there is no general legal requirement for them to report. Most reporting laws also state that no one shall be relieved of the duty to report because of the privileged or confidential nature of their communications. There are questions about whether the abuse is actual or potential, and whether mediators need to have heard about the abuse from the child. As Folberg notes, the requirements may vary for each profession. In Oregon, for example, "attorneys, psychiatrists, psychologists, and clergy need not report child abuse if their suspicion is based solely on confidential communications with adults; they must have direct contact with the child or a nonconfidential source of suspicion before reporting is required." Social workers and physicians in Oregon, however, must report a suspicion of child abuse if there is reasonable cause gained from any source. Some commentators have interpreted the Oregon requirements to mean that "[s]ocial workers and physicians . . . must report any suspicion of child abuse." Where the duty of mediators has been addressed, legal opinion has been notoriously noncommittal. For example, the Attorney General of New York was asked to rule on the obligation of mediators to report child abuse. He noted that the statutes mandated reports from health care professionals such as physicians, surgeons, coroners, dentists, osteopaths, and Christian Science practitioners, as well as social workers, school officials, day care workers, peace officers, law enforcement officers, and then concluded:

[T]hat the confidentiality provisions of the Community Dispute Resolution Program do not bar Program mediators from reporting evidence of child abuse which is not contained in the memoranda, work products or case files of a mediator and which is not the subject matter of the resolution process. Nor are Program mediators, when acting as such, required to report such evidence as are other officials or professionals specified in section 413 of the Social Services Law.

141. See supra note 139 (comprehensive review of statutes regarding child abuse). The statutes that I have seen allow mediators to report child abuse, but do not make reporting mandatory. See generally COLO. REV. STAT. § 13-22-301 (2)(b); N.H. REV. STAT. ANN. § 328-C:9 (1990).
142. See generally N. ROGERS & C. MCEWEN, supra note 5.
143. DIVORCE MEDIATION: THEORY AND PRACTICE, supra note 26, at 322.
144. Id. at 322-23.
146. DIVORCE MEDIATION: THEORY AND PRACTICE, supra note 26, at 322-23 (emphasis added).

https://scholarship.law.missouri.edu/jdr/vol1992/iss1/5
Barring judicial ruling, mediators do not appear to be members of the group required to report.

The suffering involved and the inability of the victim to alter his or her situation are significant moral distinctions in reportable abuse cases. I see no moral reason why child abuse should be held as unique, since the degree of suffering that an elderly person may endure may be effectively similar, and both the child and the elderly person may be equally inarticulate or find it difficult to have themselves taken seriously. The policy that underlies reporting child abuse appears to support other types of reports as well, and hence I believe that more forms of abuse should be reportable by mediators.

X. CONFIDENTIALITY AND ETHICS

Mediators who seek to justify breaching confidentiality may be frustrated by looking to the law or codes of conduct. I believe that it is also possible to assert a basis for disclosure or confidentiality founded on the notion of trust. As we saw earlier, confidentiality refers both to an act of imparting information and a special relationship of intimacy or trust between the parties. Trust may be regarded as a fundamental good. In Sissela Bok's words:

[T]rust is a social good to be protected just as much as the air we breath or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.

The relationship of the clients and the mediator should incorporate trust. For example, the clients should trust that the mediator is acting in their best interests and he or she is actively working towards a fair settlement. However, such trust need not always equate to the mediator maintaining confidences. The parties should trust the mediator to the extent that they acknowledge that there will be times when it is appropriate, in the mediator’s judgment, to disclose information. I do not feel that this assumption would have a chilling effect on mediation since

148. The point is that there are two elements at work, one is that suffering is bad and should be minimized where possible, and the second is that the affirmative force that creates a duty to report derives from the fact that the individual is unable to mitigate that suffering himself or herself. In effect the law adopts a stewardship role for those who lack the ability to assert their own rights.

149. Jeremy Bentham defends animal rights in a similar vein. See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1988). He says:
a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month old. But suppose they were otherwise, what would it avail? The question is not, Can they reason? nor Can they talk? but, Can they suffer?

Id. at 311 n.1.

150. See supra note 9 and accompanying text.

clients would choose a mediator with whom they feel comfortable (in the sense that he or she is regarded as competent and credible). A focus on the trusting relationship would also recognize the central role in mediation of the mediator’s ethical judgment.

The thought that legal precedent is more enforceable in the courts than a moral claim is not necessarily correct. The recent Supreme Court case of *Dan Cohen v. Cowles Media Company*\textsuperscript{152} tested arguments based on the notion of promise-keeping against ones based on the first amendment.\textsuperscript{153} Cohen had released information to a newspaper conditional on a promise of anonymity.\textsuperscript{154} The paper published the story and listed Cohen as a source, claiming a first amendment right to do so.\textsuperscript{155} The Court held that there is a duty on those who make promises to keep them and that statutory rights like those endowed by the first amendment do not necessarily take precedence over moral obligations.\textsuperscript{156}

A. Recommendations

Both the law and present codes of conduct seem to be inadequate in giving guidance to the individual mediator faced with a range of problems. While we should not expect codes to be fully adequate, they could probably be more explicit and better formulated than they are at present. My analysis suggests that the issue of whether or not to break confidentiality will largely fall on the judgment of the mediator. I recognize that this may be a great burden to place on any one person, and therefore I would make the following recommendations:

1. Codes of conduct should contain language which allows greater discretion on the part of the individual mediator. At present, the fixed exceptions to confidentiality are too restrictive and cannot accommodate marginal cases.

2. There ought to be some way to collect material about cases (perhaps similar to a court reporter) so that mediators have additional material for discussion and analysis. This would mean that not every issue in mediation regarding confidentiality has to be decided *de novo*.

3. Mediators should have some oversight mechanism which would also provide for a second opinion; mediators should be able to solicit guidance from a supervisor or professional organization.

\textsuperscript{152} 111 S. Ct. 2513 (1991).
\textsuperscript{153} *Id.* at 2516.
\textsuperscript{154} *Id.* at 2414-15.
\textsuperscript{155} *Id.* at 2515.
\textsuperscript{156} *Id.*
4. Review of cases by a third party should be instituted as a safeguard. A case in which disclosure is clearly merited would be less likely to be overlooked by an individual mediator if it were subject to review.

5. Further training in specialized fields should be accessible or even obligatory. At present, many mediators have no formal training or licensure. In some states, one step toward licensure is acceptance by practitioners of a state-sanctioned code of ethics.157

State codes of conduct, such as those in New Hampshire or Arizona158 may contain language giving exceptions to confidentiality in the case of abuse or felonies. Definitions of key ethical terms vary, and they are open to diverse interpretations. Therefore mediators need to be made more aware of what constitutes grounds for disclosure. For instance, a stipulative definition should be given for the term "abuse."

For example, we can imagine a parent who takes the Biblical saying of "Spare the rod and spoil the child" very literally and believes that corporal punishment is not only an appropriate method of child discipline but that it is divinely commanded, and he thus beats his child with the best of intentions. This is a plausible case of child abuse. Typically, child abuse is thought of as the presence of bruises or neglect. However, some would argue that it requires intentional malice, which is not present in this case.159

Hence there can be wide variations in terms which are central to making judgments about whether or not to disclose information. Because of such variations, mediators need to have working definitions of key terms, be aware of the appropriate law in their field of specialization, and know the way that it is applied.160


158. The exceptions in the New Hampshire statute include cases where the mediator has received "material information alleging abuse or sexual abuse or neglect [or] information about a felony or misdemeanor, excepting adultery, that has been or is about to be committed." Id. § 328-C:9 III(c) & (d). The Arizona Coalition on Dispute Resolution (ACDR) draft code has the exceptions of child abuse, imminent physical harm to another person, or where disclosure is required by law. Arizona Code of Ethics, supra note 19, at 5.

159. Black's Law Dictionary defines "child abuse" as "Any form of cruelty to a child’s physical, moral or mental well-being." BLACK'S LAW DICTIONARY 289 (6th ed. 1990). If we then look up "cruelty" we find that for an act to be cruel it has to be both intentional and malicious, conditions which are not met in the example. Id. at 337.

160. Interestingly, in the difficult case of assessing emotional abuse, California law may move to looking at the effects of emotional invective, since it is difficult to say what behavior actually amounts to abuse. Interview with Robert Mnookin, Sweet Professor of Law, Stanford Law School, Falmouth, Mass. (May 16, 1991). In practice it is easier to look to abnormal behavior or development in the victim than to describe emotional abuse. I believe this sort of information is an example of what is necessary for mediators who deal in child custody cases, for instance.
B. Appropriate Cases For Breaching Confidence

There are four cases where I believe that the assessment of moral duty by a mediator will indicate that he or she should break with the present code of conduct and breach confidentiality. A common element in all the cases is that the mediator is acting outside the strictures of the present codes of professional conduct and is required to make a conscious moral deliberation to determine the appropriate role-behavior.

1. Accountability

The most common case is one where there is no good reason to breach confidentiality, except for a claim that it is in the public interest that the process be accountable. Parties will bargain and make disclosures in the course of negotiation. There may be an appeal for openness of the process, so that we can ensure that individual rights are not compromised by parties bargaining in bad faith or that there is incompetence on the part of the mediator.

Consider the hypothetical of the Unscrupulous Mediator: where mediators are not presently licensed in a given state, and an individual solicits landlord/tenant cases based on his expertise as a lawyer.\textsuperscript{161} He allows one side, usually the landlord, to pay for the mediation. Although he is successful in achieving settlements, the quality of those settlements leaves much to be desired—expedient solutions are substituted for legal entitlements, and clients, usually tenants, are often bullied into accepting less than full redress. He makes vague reference to legal terms and rules when advocating certain solutions and sometimes tells the parties what sort of substantive agreement they should agree to. In a typical case, a tenant with a vermin-infested apartment settles for rat-traps and some poison.\textsuperscript{162}

If the Unscrupulous Mediator worked in Massachusetts his decisions would not be subject to review.\textsuperscript{163} Blanket confidentiality of the Massachusetts sort which allows no review would seem to be counter-productive since by its attempt to keep matters secret it can also serve to mask deceit, bad faith bargaining, and coercion at the mediation table.

Completely open public reporting of the mediation session would undoubtedly have a chilling effect on clients. While this is true, it is not necessarily pernicious, in that oversight need not take the form of public review. Instead people may be

\textsuperscript{161} This is a original hypothetical. It shares some features with \textit{Lange v. Marshall} where a lawyer, Marshall, represented both husband and wife in a dissolution proceeding. 622 S.W.2d 237, 238 (Mo. Ct. App. 1981). The wife was sedated in hospital during the divorce "negotiations" and the stipulation and joint petition for dissolution was signed the day she left the hospital. \textit{Id.} She hired another attorney and reached a more favorable settlement. \textit{Id.} She then sued Marshall for his negligent handling of her case. \textit{Id.}

\textsuperscript{162} The vermin infested apartment is a case suggested by W. URY, J. BRETT & S. GOLDBERG, GETTING DISPUTES RESOLVED 51 (1988).

\textsuperscript{163} MASS. GEN. LAWS ANN. ch. 233, § 23C (West 1986); see sources cited \textit{supra} note 54.
mandated to perform such review on behalf of the general public, as is the case in other areas.\textsuperscript{164}

In one of the few discussions about the possibility of mediator accountability,\textsuperscript{165} Goldberg has a character suggest that judicial review is unworkable because "the courts are simply not equipped to provide a useful oversight role."\textsuperscript{166} This response may be a "red herring" in the sense that the duty for oversight may not necessarily fall to the courts, which may lack the structure or funding to handle such a task. Nevertheless, his argument fails on two other counts. Initially, I feel that he misses the point, in that if mediation is to be seen as fair and responsible to the public interest, then some sort of oversight appears necessary. The public policy favoring mediation should be the deciding factor in whether or not to have oversight, not the present ability of the courts to handle more work. The fact that there are currently insufficient resources should not in and of itself dictate a policy decision.

An analogy would be to think of John F. Kennedy saying that the United States could not send a man to the moon because the resources were not available. In such a case, the allocation of resources dictates public policy and it is incorrect to claim that it is public policy allocating resources. Admittedly, in some instances, like health care, policy decisions must pay some heed to available resources. Still, the allocation of resources is policy driven, in that there is some guidance in the way that priorities are set and funds are apportioned.\textsuperscript{167} Thus, in the case of mediation, if some form of review was thought to be necessary in the interests of justice (or, perhaps, providing an adequate alternative to the formal court system), then some form of structure could be fashioned to fulfill that function.

Secondly, I believe Goldberg is wrong in his assumption that review will cause much more work.\textsuperscript{168} As all court-ordered mediation agreements come before the court, I would contend that the burden of reviewing a summary of the process by which the settlement was reached as well as the substantive agreement would be minimal. This kind of review may not be fully adequate; however we should judge the benefits of any review against the risks of unscrutinized

\textsuperscript{164} See generally supra note 54. Many professions have review boards for the purposes of self-regulation. Often these are comprised of members of the professional association. Typical are the American Bar Association for lawyers, the American Medical Association, American Hospital Association, American Nursing Association for Health Care Workers, and the American Institute of Certified Public Accountants.

\textsuperscript{165} S. GOLDBERG, E. GREEN & F. SANDER, The Life of the Mediator: To Be Or Not To Be (Accountable), in DISPUTE RESOLUTION 108-13 (1985).

\textsuperscript{166} Id. at 110.

\textsuperscript{167} Consider the way that an administration has the ability to deliberately channel funds away publicly funded facilities which do not follow the letter of current political thinking: money could be withheld from places that dispense advice that the administration wishes them to withhold. The administration can also use the power of the law to enforce their policies: for example, under Rust v. Sullivan, restrictions are permitted concerning the ability of health clinics funded under Title X to advise patients about abortion services. 111 S. Ct. 1759, 1765 (1991).

\textsuperscript{168} S. GOLDBERG, E. GREEN & F. SANDER, supra note 165, at 108 & 111.
settlements which serve either or both parties badly and where there is no public accountability.

The belief that anything less than blanket confidentiality would discourage the public from using mediation could support a comprehensive and clear rule preventing any disclosure. There are two responses to this claim. First, a clear dictum may still require individual judgment in its implementation; for example, the apparently clear statement "publish the best paper" still requires interpretation by the editorial staff. Second, totally categorical rules are extremely rare in any process, and indeed the Massachusetts example is an anomaly which might allow abuses by actually being so unqualified. In addition, whatever savings that result from lower administrative costs and fewer internal difficulties for a program are likely to be offset by clients who are discouraged from using the program by the very rigidity of the rules. For instance, the Massachusetts program does not even allow for the qualifications found in standard expositions of lawyer-client privileges, and some potential clients might be deterred by the apparent simplicity and unreflective nature of the program rules.

Moreover, there is more to considerations about client welfare than costs alone, since a process which is unfair or not responsible to the public at large does not foster benefit. I contend that extra costs involved by review would be worthwhile in two ways. First, the credibility of the process could be called into question without it, and hence review is effectively an insurance policy for the process. Secondly, the benefits of reviewing the quality of the process are likely to outweigh the costs. Mediation may cost more, but it would be a better process as a result.

2. Threats

Consider the hypothetical case of The Threatening Husband: where during the course of a divorce mediation the ex-husband makes a threat. The marriage broke up because the wife became involved with someone else. During a one-on-one discussion with the mediator about child custody, the ex-husband, a security guard, becomes agitated and yells that if he sees his children with his wife's lover he will shoot him. The mediator asks the husband if the threat is real or an expression of anger. The husband replies that he has a temper and the

169. Anecdotally, I have heard mediators make opening statements which include phrases such as "anything said in this session is entirely confidential." Sometimes the statement is modified to one which uses the qualifier "within the limits of the law." Although clients rarely question what those limits might be, an opening statement which included a list of potential reasons for disclosure might be construed as having a chilling effect on the process. I am not persuaded that a more qualified statement would be a disincentive for parties to mediate. See, e.g., N. ROGERS & R. SALEM, supra note 15, at 67-68; supra text accompanying notes 81-84.

170. See MASS. ANN. LAWS ch. 233, § 23C. The statute reads "[a]ll memoranda, and work product prepared by a mediator . . . shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation." Id.

171. This is an original hypothetical.
thought of seeing his children accompanied by another man makes him "real mad." The mediator is left wondering whether the statement constitutes a real threat, and whether the threat invokes a duty to warn. One difference between this case and *Tarasoff* is the vagueness of the threat and the consequent uncertainty on the part of the mediator about whether it constitutes a case of "imminent harm." 172

There are several possible courses of action open to the mediator: (1) ask the husband to repeat the threat to the wife; (2) ask permission from the husband to restate the threat; (3) tell the wife anyway; (4) break off the mediation; or (5) report the threat to "the authorities"—presumably the police. Present practice, as governed by codes of conduct, might suggest that the mediator should ask permission to repeat in the joint session what was said privately in caucus. 173 If permission is not given, the mediator has the discretion to end the mediation. 174 However, as the threat was neither specific nor imminent there appears to be no duty to warn.

I believe that a reasonable person would acknowledge that mediation ought to be halted when words or acts rise to the level of a threat, and the case is serious and exceptional enough not to damage a policy which supports the mediation process in general. 175 Thus, I contend that just as the present sort of introductory remarks that a mediator makes at the beginning of a joint session contain qualification clauses which announce that child abuse will be reported do not appear to deter clients in general, 176 there would be few negative effects from a clause which tells disputants that threats will also result in the breach of confidentiality. A possible consequence of this kind of introductory remark will be to discourage those who know that they are likely to make threats.

Once a threat has been made, I feel that the mediator has a responsibility to the potential victim to let him or her know about it, and allow the potential victim

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172. See supra note 135 (comments on *Tarasoff*).

173. See, e.g., CCMO Code, supra note 19, at 5. The Colorado Council of Mediation Organizations Code states that "[i]nformation received in caucus is not to be revealed in joint session without receiving prior permission from the party or person from whom the information was received." *Id.*

174. See *Id.* Under several of the codes, the mediator has a duty to stop the mediation process if it does not appear to be advancing to a workable settlement or there is bargaining in bad faith. See, e.g., *id.*

175. A possible exception is the case where the mediator believes that there will be greater benefits through continuing the mediation than by terminating it. Perhaps the husband could agree to some conditions involving self-restraint. In general, though, I am taking a threat to be evidence that the mediation is not productive and unlikely to reach cooperative settlement.

176. The claim that "the only people who may be deterred are those who are deterred" may well be self-verifying, of course. Yet the point is valid - assuming the cases that would be reported are unusual then the number of potential clients who would withdraw prior to mediation would also be small. (This would hold even if there were a perception that the number and type of cases that would be reported were greater than it actually would be.) The only evidence that would be pertinent here is the perceptions of those who choose not to enter mediation and those who do. The vast majority of cases continue even after an introduction by the mediator which says that child abuse cases will be reported. I believe the same would hold true if the introduction included a specific reference to threats.
to then choose what to do with the information. Thus, a threat made in the presence of a mediator will most likely result in a breach of confidentiality, whether the report is made to the victim directly, or to a responsible agency. This conclusion allows the mediator greater discretion than he or she has at present by slavishly following a code—the mediator may report a greater range of cases, but only after conscious moral deliberation.

3. Reports of Crime or Abuse

In discussions between joint owners of a family business, one brother intimates that he suspects that the mother, who is in a private nursing home, is being neglected, perhaps because she is left unattended for long periods of time and has bed sores. Although the allegations are not material to the negotiations, the allegation has been made in the presence of the mediator, and the mediator is presented with the issue of the Neglected Mother.¹⁷⁷

Strictly speaking, the allegations do not concern the mediator, since they refer to a person not represented and not affected by the mediation. The mediator might suggest, without any ethical conflict, that the case be investigated by the parties to the mediation. However, we can imagine that some individuals would not take the allegation seriously, or might not agree to an investigation for other reasons.

Even if the parties themselves wish to ignore the allegation, the mediator may think that a particular case ought to be investigated, and it appears that he or she is foreclosed from pursuing the allegation under the codes of conduct.¹⁷⁸ This is not to say that the mediator should have an obligation to follow through on every rumor that surfaces in mediation. Rather, it suggests that the mediator should be able to make considered judgments about the substance of the allegation and initiate an investigation if he or she believes it to be appropriate.

Such an investigation need not be performed by the mediator personally, rather, the allegations need to be substantiated and then a report made. Ideally, the mediator would give the responsibility of dealing with the allegation back to the party who made it. However, if the party is unwilling or unable to take the responsibility, then the mediator would have to take it upon him or herself to report the allegation, initially to a supervisor, and if necessary to appropriate outside agencies like the social services.

¹⁷⁷. This is an original hypothetical.
¹⁷⁸. See CCMO Code, supra note 19. The closest reference in the Colorado Council of Mediators and Mediation Organizations Code, for example, asserts that:

the mediation process may include a responsibility of the mediator to assert the interest of the public or other unrepresented parties in order that a particular dispute be settled; that costs or damages be alleviated; and that normal life be resumed. Mediators should question agreements that are not in the interest of the public or other unrepresented parties whose interests and needs should be and are not being considered.

Id. at 11 (the focus is on the relevance of the information to any potential settlement, and that the mediator only has the duty to raise issues to the parties at the table, but need do nothing else).
Essentially, what I am advocating here is nothing more or less than treating allegations of serious harm similarly to the way that child abuse is presently treated in mediation. The rationale is that the overall greatest welfare will come about if mediators are willing to break confidentiality, even on behalf of someone not in, or affected by, the mediation itself.

We can contrast the position of the mediator in this incident with that of the attorney or social worker. Under their canons of professional responsibility, attorneys should not break client confidences for the advantage of a third party, unless the client consents after full disclosure. Thus, in the present case the brothers may not give permission for an attorney to follow through on the allegation, perhaps because it would involve embarrassing revelations. If permission is not granted, then the attorney has no right to reveal what was imparted during a confidential session. Even though an attorney may disclose information about an imminent crime, he or she may only reveal sufficient information to prevent a crime that his or her client intends to commit.

Social workers have more discretion in what they may report. In their code of conduct the wording suggests that there may be cases when it is appropriate to break confidentiality. It states:

The social worker should respect the privacy of clients and hold in confidence all information obtained in the course of professional service . . . . The social worker should share with others confidences revealed by clients, without their consent, only for compelling professional reasons.

179. I am taking "serious harm" to mean physical or psychological treatment of a person which causes lasting damage. Although this widens the scope of reportable cases somewhat, I do not think it would result in many more reports; accounts of threats of bodily harm are rare in mediation, as are allegations of child abuse.

180. See M. Pirig & K. Kirwin, Cases and Materials on Professional Responsibility 559 (West 1976) (citing Model Code of Professional Responsibility DR 4-101(c)(3)).

181. Model Rules of Professional Conduct Rule 1.6 (b)(1) (1989). David Luban, for one, has argued for a less strict standard of attorney-client confidences in his book Lawyers and Justice: an Ethical Study. He believes that justifications based on a criminal suit paradigm may not always be appropriate in civil cases. D. Luban, Lawyers and Justice: an Ethical Study (1988). He states: less clear cases raise messy and difficult questions of line-drawing; they are judgment calls. But that is always true in moral deliberation—and my point is simply that moral deliberation, not a rule of confidentiality based on specious analogies with the criminal defense situation, must determine what to do.

Id. at 205. I believe much the same line of argument applies to confidentiality in mediation.


183. Id. (emphasis added).
Thus a social worker may report abuse to a third party given sufficient justification, but is not obliged to.\textsuperscript{184} I believe that a similar standard should operate for mediators, so that they are not foreclosed from reporting crimes or abuse which they may discover in the course of mediation.

The practical implication is that the seal of confidentiality around the negotiating table will be broken in a few additional cases; however, the significant change is that mediators will be allowed to use their professional judgment in difficult cases rather than having to follow the Code to the letter.

4. Whistleblowing

A mediator is involved in negotiations between a supplier and contractor. During the talks, the mediator discovers that there will be some toxic chemicals which need disposal and the clients agree to use a contact of the manufacturer who has a way of dealing with toxics "no questions asked." This hypothetical is the case of \textit{Suspicious Waste Disposal}.\textsuperscript{185} The mediator announces that she cannot be party to anything illegal and complicity in any illegal dumping would be equivalent to betraying the public trust in the mediation process. She is assured that she should not worry, since although the public might not approve, the contact will do nothing illegal. The supplier and contractor further hint that the waste will be "going south."

In this case, the mediator faces the conflict between retaining confidentiality in mediation and letting the public know about a deal that may be legal, but is probably unfair to unrepresented parties. To break confidentiality would effectively be a form of "whistleblowing," or calling a foul upon one's own enterprise for the general good. It is sometimes argued that mediators should be indifferent to the settlements that parties may come to. However, I believe that given careful consideration, there may be cases where whistleblowing is appropriate.

The balance which the mediator must determine is the same that any whistleblower must gauge—the utility of his or her product in local and general terms. Here the mediator is helping to produce an agreement that may be in the interests of his or her employers—the disputants—but against the public interest.

Claims that whistleblowing is inappropriate to mediation have two elements: one that suggests that the merits in any individual case are outweighed by the

\textsuperscript{184} See \textit{American Bar Ass'N, Opinions on Professional Ethics} (1967). In that work we find Informal Rule No. 929 to Canon 37 which reads:

If confidential communications are received by a lawyer in connection with his duties as counsel for a social welfare agency, he may include such information in his report to the agency. However, if such communications were received by the lawyer after he had received an individual client by referral from the agency, then the communications would be privileged and should not be disclosed to anyone without the approval of the individual client.

\textit{Id.} at 172.

\textsuperscript{185} This is an original hypothetical.
potential damage to the process in general, and an associated claim that a mediator has a duty to preserve the mediation process. The belief that revelations from one particular case damages mediation has been popularized by the wording in Tomlinson which suggests that the benefit in particular cases would be outweighed because testimony by a mediator would "seriously impair," or even "destroy" the usefulness of the Conciliation Service. 186

However, it is wrong simply to generalize from Tomlinson. In this one case, the court decided that the balance favored confidentiality, but we have seen that in other cases, such as Rittenhouse, 187 the balance may be decided in favor of disclosure. Furthermore, this dispute, unlike Tomlinson, is not a labor dispute and may not be protected in the same way as labor negotiations. 188

The second argument suggests that a mediator should remain loyal to the mediation process. 189 Yet, using this form of words is nothing more than hypostatization, where an abstract entity is treated as concrete. Thus, although grammatically correct, it makes no sense to speak of "loyalty to a process." What the phrase means, properly interpreted, is that mediators are dedicated to the ends of the mediation process, things like wise, efficient settlements which allow a continuing relationship. Given this interpretation, there is no reason for a mediator to hold confidentiality as sacred, but rather it should be seen as a means to an end. Consequently, if mediation is likely to result in an unfair agreement, there should be no compulsion to hang on to confidentiality as an end-in-itself.

In making a determination about the utility of whistleblowing, it is useful to draw on an analysis by Sissela Bok. 190 Bok’s considerations are important because:

Dissent by whistleblowers . . . is expressly claimed to benefit the public. It carries with it, as a result, an obligation to consider the nature of this benefit and to consider also the possible harm that may come from speaking out: harm to persons or institutions, and, ultimately, to the public interest itself. Whistleblowers must, therefore, begin by making every effort to consider the effects of speaking out versus those of remaining silent. 191

She suggests that there are three elements to whistleblowing: dissent, breach of loyalty, and accusation. 192 In each area, the whistleblower must examine the

186. Tomlinson, 74 NLRB Dec. (CCH) at 688.
187. See Rittenhouse, 800 F.2d at 339.
188. See Macaluso, 618 F.2d at 56 (note especially the context-bound phrase in Macaluso: "labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person’s evidence.").
189. The Colorado Council of Mediation Organizations Code has this connotation when it speaks of "Responsibility of the Mediator to the Mediation Process". CCMO Code, supra note 19, at 2-8.
191. Id. at 5.
192. Id. at 3.
consequences of his or her act and determine whether breaching confidentiality will be worth the personal and professional costs that it is likely to incur. 193

Whistleblowing is motivated by dissent. Unless there is a disagreement on some factual matter or likely outcome, there is no reason to "go public." Therefore, it is incumbent on the whistleblower, Bok suggests, to check the accuracy of the information. 194 A mediator has a duty to be loyal to the clients and thus any breach of that loyalty must be a last resort, meaning exhaustion of all the standard means available to address the problem. 195 Moreover, because the purpose of whistleblowing is to motivate the audience to some reaction or change, the charges have to be credible, specific, pertinent and timely. 196 There must also be a direct causal link between those accused and the problem. Further, the motives for the breach must be open and defensible, so that it is clear that the mediator is not acting from personal malice or for selfish reasons.

Thus, we find that the conditions for whistleblowing are quite restrictive. In most instances the whistleblower will have to make an assessment of the potential benefit and harms that his or her actions may cause and will be acting in the absence of full information.

Codes of conduct do not provide neat algorithms for all cases in any circumstances and so they are necessarily indeterminate. Even within a code, there will be latitude for personal decisions. Obligatory disclosure is a function of the codes of ethics that are established for mediation. 197 Permissible disclosure is a function of the beliefs and values of the individual mediator and it is incumbent on the mediator to inform his or her clients of the approach and standards that will be used in the mediation process. 198

A concern is that clients who live immoral lives may come to mediation to sort out a dispute that is, in itself, innocent. Perhaps the operators of two "crack houses" have a dispute about their property line. By my analysis the clients are at risk of being reported by the mediator, and thus immoral disputants may be driven to other means of resolving their differences, like violence. I see this as a genuine difficulty. One possible solution is that the mediator may whistle-blow but is not obliged to do so. We can imagine some mediators having a professional specialty in resolving disputes between unsavory characters with the understanding that only imminent harm and abuse will be reported.

From the mediator's perspective, we find the number of possible cases where confidentiality may be breached has enlarged. Nevertheless, special considerations apply, and as with whistleblowing cases in general there is an expectation that the cases would be exceptional and the potential harm serious and of immediate

193. Id. at 5.
194. Id.
195. For example, a mediator might allow the parties every opportunity of disclosing information themselves in their own way prior to the information being released by the mediator.
196. Bok, supra note 190, at 3.
198. See generally id.
concern to the public. Moreover, mediators will have differing attitudes about which cases are sufficiently harmful and therefore requiring reporting. Even though we cannot expect mediators to give a before-the-fact listing of such cases, it is nevertheless possible for them to give general statements about their particular approach and attitudes which would indicate their personal values.  

I believe these factors would make whistleblowing cases sufficiently unusual so that ordinary potential mediation clients would not be discouraged from using the process. Still, the whistleblowing provision does give the mediator a set of conditions where breaching confidentiality would be acceptable, whatever the letter of the law might be.

XI. CONCLUSION

I have looked at the nature and limits of mediator confidentiality. The role behavior of the mediator is governed by present codes of conduct, and these in turn are largely based on a patchwork of the present law. In examining the law, we found that there are several suppositions which support confidentiality. However, mediation confidentiality is only as strong as the justifications that can be made on its behalf. There are two elements that are crucial for a mediator deciding whether or not he or she should break confidentiality in apparent disregard of the present codes: one is the policy element which supports the institution of mediation and the related role obligation; the second is the mediator's own ethical judgment. For example some mediators may believe that they not only have duties to the disputants, but also to unrepresented third parties.

There are two implications of my analysis. One is that some form of review of the mediation process is in order so that there is public accountability. Such an oversight mechanism may take the form of review by a supervisor or external party who would be able to make recommendations about the correct course of action in any given case. If mediation is to mature and become a publicly sanctioned alternative dispute resolution mechanism, I believe that the only way earn the public trust is by being accountable to the public and here I suggest expert review of the process as well as the substantive agreements. One way to build in safeguards while maintaining the maximum degree of confidentiality would be to allow an expert to conduct confidential outside review and to allow that person to make an advisory report. Thus mediation would have adequate or accountable confidentiality rather than it being absolute. The reviewer might be a mediator external to the case or a formal or informal supervisor. Adequate confidentiality would be something less than what may be indicated by statute, but it simultaneously satisfies the interests of both sides by providing safeguards without compromising the ability of clients to speak freely. Once again, this would have costs associated with any form of review process, which would probably make the process more expensive and less efficient.

199. Many lawyers still do something similar when they offer an initial free consultation during which they espouse their personal beliefs.
The other implication is that the policy behind mediation, or certain types of mediation, should be made more explicit and the duties of the mediator to retain confidences as a result of that policy need to be examined more closely. One practical result of this would be to broaden the language used in the codes of conduct in order to allow mediators to make their own considered judgments in the light of the underlying policy about what may or must be disclosed.