Asserting a Comprehensive Approach for Defining Mediation Communication

DAVID A. RUIZ

I. INTRODUCTION

Mediation[1] and other forms of alternative dispute resolution (ADR) have experienced immense popularity in recent years.[2] However, if mediation is to continue to grow as a successful alternative to litigation, then the process must remain confidential.[3] Although there have been some voices of criticism,[4] most states have responded to the increased desire for alternatives to litigation by enacting some type of mediation privilege legislation.[5] In part, the various states have enacted these statutes in order to compensate for the shortcomings that were found in the common law, rules of evidence, and pre-existing legislation.[6]

However, the rush to enact legislation to cover this expanding area of the law has resulted in new privileges that vary significantly and do not offer any sort of uniformity.[7] Moreover, many of the statutes do not adequately define the portions of the mediation that are within the privilege. Many states simply assert that "mediation communications" are to remain confidential.[8] Without an accurate definition of mediation communications, the privilege statutes that are implemented will not function as the enactors intended. Similarly, those parties that engage in mediation will not know what actions

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[1] For a definition of mediation, see *infra* Part II.A.

[2] *See, e.g.*, Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 37 (1986); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 717; Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 1.

[3] *See, e.g.*, LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 247 (1987); Kirtley, *supra* note 2, at 1 & n.4.

[4] *See generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 2 (1986) (criticizing the expansion of blanket mediation privilege legislation); Kirtley, *supra* note 2, at 2 & n.5.

[5] *See, e.g.*, Kentra, *supra* note 2, at 719; Kirtley, *supra* note 2, at 2 & n.6.

[6] *See, e.g.*, Kirtley, *supra* note 2, at 2–3 & n.8.

[7] *See, e.g.*, Kentra, *supra* note 2, at 720; Kirtley, *supra* note 2, at 4.

[8] *See, e.g.*, OHIO REV. CODE ANN. § 2317.023 (A)(2) (West Supp. 1999) (stating that "'[m]ediation communication' means a communication made in the course of and relating to the subject matter of a mediation").

or communications are covered by the privilege. As a result, this uncertainty will discourage the parties from fully participating in the mediation.

This Note will analyze current mediation privilege statutes with a focus on the manner in which they define the mediation communications that are confidential under the privilege. Part II will provide an illustration of the various facets of a mediation session. In order to lay out this foundation, Part II will also address the factors that make mediation an increasingly popular alternative to litigation and the concerns that may inhibit a participant's enjoyment. Part III will briefly discuss the importance of maintaining the confidentiality of the mediation session. Since there has been a proliferation of mediation privilege statutes,[9] Part IV will discuss the trends that have emerged with respect to defining mediation communications. In addition, Part IV provides this Note's definition of mediation communication, which draws from the strengths and overcomes the weaknesses of existing legislation. Part V will address the manner in which various states have attempted to provide a mediation privilege. Part VI will provide various examples in order to illustrate how this definition provides a universal standard for maintaining the confidentiality of mediation sessions. Part VII then will conclude with a recap of the reasons that this Note's definition of mediation communication will provide a more appropriate standard from which to judge mediation sessions.

II. THE MEDIATION SESSION

Many commentators have stated that individuals who choose to engage in litigation have several concerns.[10] Such concerns consist of the following: escalating legal fees, burdensome delays stemming from overcrowded dockets, and limited means for resolving a conflict.[11] In hopes of circumventing or at least minimizing these problems, consumers of legal remedies have turned to ADR.[12] Advocates of ADR assert that the advantages of mediation enable the would-be litigant to engage in a more user-friendly method for reaching a satisfying resolution to the conflict.[13]

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[9] *See, e.g.*, Kirtley, *supra* note 2, at 1 & n.6.

[10] *See, e.g.*, Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S5–S7 (1989).

[11] *See id.* (discussing the fact that litigation places a higher burden on a litigant's finances than forms of ADR, and that the legal remedies available to the litigant are more limited than the possible creative solutions that may be reached during a mediation).

[12] *See generally* Kentra, *supra* note 2.

[13] *See generally* Feinberg, *supra* note 10; Kentra, *supra* note 2.

A. *The Advantages of Mediation*

Mediation is the process through which a neutral third party,[14] who does not have an interest in the dispute, assists the disputants in negotiating a voluntary and mutually agreeable settlement of their differences.[15] Although mediation programs may function under a variety of different formats,[16] the essential characteristic of mediation is the fact that it is an informal process.[17] This informal nature allows the mediation to progress in a manner that is conducive to free and open discussion.[18] Mediation allows the parties to discuss their concerns candidly, voice their opinions, and introduce potential avenues for settlement.[19]

However, the participants will not fully appreciate their mediation unless they develop a workable rapport with the mediator.

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[14] *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 103 (2d ed. 1992).

> Mediators' strategies vary widely. Some mediators attempt to focus the negotiations on satisfying the vital interests of each party; others focus on legal rights, sometimes providing a neutral assessment of the outcome in court or arbitration. Some encourage the active participation of both lawyers and clients; others exclude either clients or lawyers from the sessions. Some mediators endeavor to maintain neutrality; others deliberately become advocates of a particular outcome or protectors of nonparties' interests.

Id. at 104.

[15] *See* RISKIN & WESTBROOK, *supra* note 3, at 5; NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW § 1.01 (1987); Kentra, *supra* note 2, at 718.

[16] *See* Kentra, *supra* note 2, at 719.

[17] *See* Kirtley, *supra* note 2, at 6.

[18] *See* RISKIN & WESTBROOK, *supra* note 3, at 247.

[19] *See* Freedman & Prigoff, *supra* note 2, at 38; Philip J. Harter, *Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 324 (1989). According to *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 467 (Cal. Ct. App. 1998),

> Mediation proceedings are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts. Rather, mediators are instructed to "draw out the parties' subjective perceptions of, and feelings about, the events that have brought them into conflict" and to encourage parties "to verbally acknowledge the other's point of view, whether they come to share that point of view or not."

Id. (quoting the testimony of Kristen Rinaker, who is a volunteer mediator affiliated with the Mediation Center of San Joaquin County, California).

> Mediators traditionally enter disputes with little authority, so their ability to help bring about settlement . . . depends, in part, upon the willingness of the parties to accept the mediator. Mediators typically gain this acceptance by earning the parties' trust, a process that begins with the mediator's first interaction with the disputants and continues until mediation is concluded.[20]

Moreover, mediation allows a mediator to move the "parties from focusing on their individual bargaining positions to inventing [creative] options that will meet the primary needs of all parties."[21] Since the mediator has little actual authority to establish a settlement, the process is only as successful as the parties make it. The parties in mediation have control over the resolution of the conflict, a concept known as self-determination.[22] This self-determination in turn fosters a higher degree of respect for the final settlement because the parties develop the agreement themselves, as opposed to having it imposed upon them by the judge or jury.[23] Participation in the mediation enables the parties to realize that mediation offers many advantages compared to the adversarial nature of litigation.[24]

In addition, mediation allows the parties not only the opportunity to discuss past disputes, but it enables them to place the focus on the future by determining the manner in which to resolve their conflict.[25] Mediation allows the parties to look beyond the legal issues and existing legal remedies.[26] The mediator is not required to follow formal rules of evidence, and the parties may introduce anything that they deem relevant.[27] This flexibility enables the parties to focus on their relationship in order to arrive at a true resolution to their conflict.[28] Therefore, mediation affords the mediator an opportunity to engage the parties in a broad-range discussion of the facts, their feelings, and

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[20] GOLDBERG ET AL., *supra* note 14, at 105.

[21] Kentra, *supra* note 2, at 718. *See also Rinaker*, 74 Cal. Rptr. 2d at 472. In *Rinaker*, the court stated, "[t]he thrust of the mediation effort is to get the parties to understand each other's feelings and needs relative to the dispute, and to develop a plan for future behaviors that will avoid conflict between them." *Id.*

[22] *See* Kentra, *supra* note 2, at 718.

[23] *See id.*

[24] *See* Feinberg, *supra* note 10, at S6–S7.

[25] *See* Kentra, *supra* note 2, at 720; *see also Rinaker*, 74 Cal. Rptr. 2d at 469.

[26] *See* Feinberg, *supra* note 10, at S6.

[27] *See* RISKIN & WESTBROOK, *supra* note 3, at 248. However, an experienced mediator will maintain the parties' focus on the relevant issues.

[28] *See* Feinberg, *supra* note 10, at S6.

underlying interests[29] in order to allow the possibility of arriving at a "win-win" resolution[30] that is an optimal settlement for all involved.[31]

Thus, mediation allows for a cooperative environment[32] in which broad-range discussions may take place. However, this advantage is hindered by the fact that many participants wish to conceal their true interests because they fear that they will be exploited or disadvantaged during either the negotiation stage or during subsequent interactions with the other party.[33]

B. *Concerns Swirling Around Mediation*

A mediation privilege that does not define mediation communications that are protected from subsequent disclosure inhibits the parties' ability to participate fully in the mediation. Participants in mediation may want to protect their disclosures from being either admissible in a subsequent proceeding within the same case or subject to revelation via subpoenas or depositions in future cases and hence revealed to outside third parties.[34] Therefore, parties to mediation look for various means to secure the confidentiality of the information disclosed during their negotiations. Absent grounds for protecting their disclosures, parties will not be as receptive to the idea of using mediation, and when they do partake in mediation, they will not be as candid in their negotiations.[35]

Furthermore, many commentators argue for a broad mediation privilege that will prevent one or both of the parties from using mediation as an early and inexpensive form of discovery.[36] "In mediation, unlike the traditional justice system, parties often make communications without the expectation that they will later be bound by them. Subsequent use of information generated at these proceedings could therefore be unfairly prejudicial, particularly if one party is more sophisticated than the other."[37]

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[29] *See id.*; Kirtley, *supra* note 2, at 9 & n.41.

[30] *See* Feinberg, *supra* note 10, at S6.

[31] *See* RISKIN & WESTBROOK, *supra* note 3, at 248.

[32] *See* Feinberg, *supra* note 10, at S7.

[33] *See* RISKIN & WESTBROOK, *supra* note 3, at 248.

[34] *See id.*

[35] *See id.*; Harter, *supra* note 19, at 324 (stating that "if a party has any concern over whether what it tells the mediator in confidence, or what it does in the negotiations, might be revealed to its detriment, any rational party would not be as forthcoming—it would want to protect against revealing too much and hence maintain an adversarial position akin to litigation"); Kirtley, *supra* note 2, at 9–10 & n.49.

[36] *See, e.g.*, Freedman & Prigoff, *supra* note 2, at 38.

[37] *Id.*; see also *Rinaker v. Superior Court*, 74 Rptr. 2d 464, 469 (Cal. Ct. App. 1998), in which the court stated,

Consequently, it is necessary to develop a well-crafted definition of mediation communication that will enable a participant to maintain the confidentiality of a significant portion of the mediation.[38]

Although several mediation privilege statutes have been developed, many have neglected to define properly what communications are governed by the statute.[39] In order to alleviate disparities between these statutes, it is necessary to implement a standard that fully defines mediation communication. Inevitably, such a standard is necessary to provide the foundation upon which a uniform mediation statute will rest.

III. PROVIDING CONFIDENTIALITY FOR MEDIATION

The mediation process encourages the participants to take advantage of the tremendous flexibility it offers in order to develop settlements outside the traditional purview of the court system.[40] Beyond simply being future-oriented and economical,[41] mediation provides the confidentiality that participants perceive as one of its most attractive qualities.[42] This confidentiality is an enticing facet of mediation because it enables the parties to do the following: openly air their concerns; more easily compromise on their positions; and propose nontraditional legal remedies that will bring about a more satisfying resolution of the conflict.

Currently, the law provides several avenues for a mediation participant to protect the confidentiality of his mediation communications. For example, many states have enacted mediation privilege statutes in an attempt to

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> "This program and others like it throughout the [S]tate of California cannot function unless the confidentiality of these mediations is assured. Without confidentiality, mediations would be subject to all kinds of manipulation and abuse. The heart of the mediation exchange typically involves concessions, waivers, confusions, misstatements, confessions, implications, angry words, insults . . . the list could go on. The very atmosphere that serves to promote resolution in mediation would quickly become a trap for the unwary if proceedings were not kept confidential."

Id. (alteration original) (citations omitted from original) (quoting the testimony made by Rinaker, who is a volunteer mediator affiliated with the Mediation Center of San Joaquin County).

[38] *See* Kirtley, *supra* note 2, at 36.

[39] *See infra* Part IV.A.1.

[40] *See* Kentra, *supra* note 2, at 720.

[41] *See id.* at 721 (stating that mediation generally costs less financially than litigation and that it often times provides less stress for the participants).

[42] *See id.* at 722. *But see* Feinberg, *supra* note 10, at S6–S12. Feinberg discusses the advantages that result from mediation being voluntary, informal, flexible, and cost-effective, but also states that "[p]erhaps the most attractive feature of mediation is the fact that participation in the process is completely voluntary and nonbinding." *Id.* at S7.

provide the desired confidentiality.[43] Furthermore, the participants may decide to implement a private agreement not to disclose any information introduced during the mediation.[44] In addition, the Federal Rules of Evidence sometimes have provided an avenue for restricting the admissibility of communications and settlement agreements reached during mediations.[45] In any event, the goal of the participants is either to maintain the confidentiality of a mediation communication or, conversely, to gain the disclosure or admissibility of that mediation communication.

For various reasons, none of these methods for protecting mediation communication is fully capable of maintaining the impartiality and confidentiality that are essential to the mediation session.[46] However, in order to provide a more in-depth analysis of these methods, it is first necessary to define mediation communication.

IV. WHAT IS MEDIATION COMMUNICATION?

This Part will address the various methods that have been implemented in order to provide a standard for protecting the interplay that takes place during a mediation session. First, a general overview of mediation communication will be provided. Second, this Note will address specifically the two most common forms of defining mediation communication. Third, an analysis of the pros and cons of each method will follow. Finally, these two methods will be synthesized in hopes of arriving at a more uniform standard for defining mediation communication.

A. *The Many Ways to Define and Protect Mediation Communication*

Along with the proliferation of mediation privilege statutes, a variety of methods have been implemented in order to prevent a party from disclosing a mediation communication during a subsequent proceeding.[47] If a mediator,

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[43] *See, e.g.*, NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 9:10 (1994); Kentra, *supra* note 2, at 724.

[44] *See* ROGERS & MCEWEN, *supra* note 43, § 9:21, 9:23 to :25; Kentra, *supra*, note 2, at 731–32; Kirtley, *supra* note 2, at 10–11. Although outside the scope of this Note, it is important at least to mention that the judge may determine that the information disclosed during a mediation falls within the scope of a protective order, or the rules of civil procedure may be implemented in order to protect some aspect of the mediation session from disclosure.

[45] *See* FED. R. EVID. 408, 501; ROGERS & MCEWEN, *supra* note 43, § 9:06 to :09; Kentra, *supra* note 2, at 728–30; Kirtley, *supra* note 2, at 11–14.

[46] *See infra* Part V.

[47] *See generally* Feinberg, *supra* note 10; Freedman & Prigoff, *supra* note 2; Green, *supra* note 4; Kentra, *supra* note 2; Kirtley, *supra* note 2.

participant, or other party is to be an educated consumer of the mediation process, then it is essential for each to determine exactly how the applicable statute(s) define mediation communication and the privilege that attaches to the mediation.[48]

Upon an initial observation, it is apparent that many of the existing statutes create confusion and uncertainty because they neglect to define properly the communications that actually fall within the realm of confidentiality.[49] For instance, some statutes fail to state whether the protections govern oral communications, written communications, both, or some other combination.[50] To the contrary, other statutes create uncertainty because they differ widely with respect to whose communications are protected and who may waive that protection.[51]

The confidentiality that a statute offers to mediation communications is directly related to the manner in which the enactors of the statute want the participants to perceive mediation. Moreover, the varying levels of confidentiality are a direct reflection of the many competing interests that are asserted as grounds for promoting mediation as an alternative to litigation.

1. *All Information Introduced During the Mediation is Confidential Mediation Communication*

To begin with, some statutes provide a blanket protection by stating that all information disclosed during a mediation session is confidential.[52] The

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[48] According to Pamela Kentra, one factor that contributes to the confusion over confidentiality is the fact that most jurisdictions have separate statutes and court rules that set different parameters for their mediation privilege. Moreover, many individual states do not have one universal statute that governs mediation. Rather, they have several statutes "enacted on an ad hoc basis as mediation programs develop." Kentra, supra note 2, at 724.

[49] *See id.* at 722.

[50] *See, e.g.*, OHIO REV. CODE ANN. § 2317.023 (West Supp. 1999).

[51] *See* Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157, 158 (1994).

[52] *See, e.g.*, Federal Mediation and Conciliation Service, 29 C.F.R § 1401.2 (1998); CAL. EVID. CODE § 1119 (West Supp. 2000) ("No evidence of anything said or admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation [discussions between the party and mediator to set up or reschedule a mediation] is admissible or subject to discovery . . . ."); FLA. STAT. ANN. § 44.102 (West 1997) (protecting all oral and written communications in a mediation except written settlement agreements as confidential); ME. REV. STAT. ANN. tit. 24, § 2857 (West 1997) (stating that no findings, writing, evidence, or statement made by any party or his representative during the panel mediation hearing are to be used in any way in subsequent court actions). Similarly, Washington State law provides:

very broad, blanket protection that is implemented by these mediation statutes is a direct reflection of the belief that parties who enter into a mediation should not fear that their disclosures will be used against them in a future setting.[53] Therefore, these statutes are designed to encourage parties to use mediation because they provide an extensive privilege that encompasses nearly every aspect of the mediation process.

However, these broad statutes are often criticized for being over-inclusive.[54] In essence, they provide an unyielding cloak of confidentiality that consumes every aspect of the mediation process, whether relevant to the mediation or not.

Although these broad-based statutes establish an extensive mediation privilege, the failure to include a comprehensive definition for mediation communication inhibits their effectiveness. For instance, the vast majority of these statutes fail to address or "specifically cover the 'acts' or 'conduct' of the parties during mediation."[55] These statutes seem to illustrate the rush to implement a broad mediation privilege that will cover everything, thereby

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

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

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

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

(d) When disclosure is mandated by statute;

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

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

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

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

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

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

WASH. REV. CODE ANN. § 5.60.070 (West 1995).

[53] *See* Rosenberg, *supra* note 51, at 157.

[54] *See* Green, *supra* note 4, at 2.

[55] Kirtley, *supra* note 2, at 36.

alleviating the need to provide the details such as a proper definition for mediation communication. Simply because the communication was disclosed during the mediation, it is privileged. However, this is not the best way to establish a mediation privilege because it creates loopholes such that a crucial portion of the mediation would not be covered as confidential mediation communication.[56] A mediation privilege should not be so vague as to miss the details, nor should it be so extensive as to place a shroud of secrecy over the entire process.

2. *A Separate Mediation Privilege Is Mere Surplusage.*

Although it is a minority view, some commentators believe that there is no need to implement a separate mediation privilege. They believe that current methods[57] exist that will effectively maintain the confidentiality of the mediation session.[58] Such proponents argue that there should not be a blanket privilege because this allows participants to conceal their actions merely by entering into mediation.[59] Opponents of the broad mediation statute often argue that "the potential problems of a mediation privilege include unfairness, an aura of suspicion, concealment of criminal acts, and general harm to third parties."[60] However, the belief that a separate mediation statute is not necessary fails to address the shortcomings of current methods of protecting mediation communications adequately.

3. *Information That Relates to the Subject Matter of the Mediation Is Confidential Mediation Communication*

Some jurisdictions have established mediation statutes that cover only communications that relate to the subject matter of the mediation.[61] These

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[56] For example, one of the parties' reaction(s) to the introduction of evidence may not be covered as a communication, and a party's head nod as an affirmative response may not be held confidential because there is not a clear standard by which mediation communication is defined.

[57] *See infra* Part V (discussing some methods other than a mediation privilege statute that may provide grounds for maintaining the confidentiality of mediation communications).

[58] *See* Green, *supra* note 4, at 2.

[59] *See id.* at 11

[60] Freedman & Prigoff, *supra* note 2, at 43.

[61] *See* IOWA CODE § 679.C.2 (Supp. 1999) (providing a general confidentiality for "all verbal or written information relating to the subject matter of a mediation agreement" and then including several guidelines that govern); MASS. GEN. LAWS ANN. ch. 233, § 23C (West 1998). This latter statute provides:

statutes attempt to strike a balance between the rationale for a blanket privilege and the belief that there is no need to implement a separate mediation privilege. Opponents of the "subject matter" statutes may argue that such a statute creates uncertainty because some communications introduced during the informal, free-flowing mediation session will not be protected.[62] However, the subject matter statute[63] provides an extensive privilege that is more than sufficient to maintain the confidentiality of communications introduced during the informal mediation session. Granted, if one of the parties discloses the fact that he committed tax fraud last year (a fact that is completely unrelated to the mediation itself), such a disclosure would not and should not be protected. As stated below in more detail,[64] the purpose of a mediation privilege should be to encourage the parties to settle

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> All memoranda, and other 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 to which such materials apply. 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 judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

Id. Compare TEX. REV. CIV. PRAC. & REM. CODE § 154.053 (West 1997 & Supp. 2000), which provides:

> (b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.
>
> (c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court. (This section only applies to the duties of the mediator, it does not govern the conduct of the participants.)

Id. But see OHIO REV. CODE ANN. § 2317.023 (West Supp. 2000) (providing a qualified privilege for communications that relate to the subject matter of the mediation, but which gives way when it is deemed necessary to prevent manifest injustice and when the necessity of such a disclosure is sufficient to outweigh the general requirement of confidentiality).

[62] *See* Freedman & Prigoff, *supra* note 2, at 38. For example, an opponent of the subject matter mediation privilege statute may argue that a limited privilege may not cover all of the discussions that a mediator may bring out during a free-flowing, open-ended mediation.

[63] *See* Kirtley, *supra* note 2, at 37. Some of these statutes require that the discussion not only relate to the subject matter of the mediation but that they also are in the presence of the mediator. *See id.*

[64] *See infra* Part IV.B.

their dispute, not to provide a forum in which the participants may clear their conscience of every questionable past action.[65]

Moreover, in order to encourage parties to participate in mediation, a subject matter statute must include a well-crafted definition of the following: mediation, the mediator's role, and mediation communications. Subject matter statutes have the ability to extend a privilege of confidentiality over the mediation process, but in a manner that is not so over-inclusive as to create public distrust of the process itself.

B. *A Uniform Definition of Mediation Communication*

The interplay that may take place during the informal, free-flowing mediation session makes it difficult to establish a comprehensive definition that will not place that entire process behind a veil of secrecy. On the other hand, such a definition should not be so inadequate as to leave the entire process susceptible to anyone who wants to explore the legal woes of one of the participants.

1. *Why Is a Uniform Definition Necessary?*

As one commentator stated, "[t]he integrity of mediation as an alternative form of dispute resolution depends largely on the ethics of mediators. To promote the success of the process and protect the rights of the parties, mediators must remain impartial and must preserve the confidentiality of mediation sessions."[66] A uniform definition of mediation communications that draws the boundaries of the mediation privilege as clearly as possible will enable mediators to maintain the integrity and functionality of the process because clarity breeds understanding, and understanding breeds trust in the process.[67]

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[65] Mediation should not become so trivialized as to be compared to the childhood game of "tag" that had a "homebase," a place where nothing could happen to you because you were in the protected zone. To extend a complete protective zone to mediation would be like establishing a home base in which you can do or say whatever you want, but as long as you are on the home base, (i.e., in mediation), no one can touch you.

[66] Michelle Gaines, *A Proposed Conflict of Interest Rule for Attorney-Mediators*, 73 WASH. L. REV. 699, 699 (1998).

[67] If the mediation privilege statute or the mediator is able to articulate a clear rule to the parties before the mediation process begins, then the parties will understand the parameters of the privilege. As these parameters are tested via judicial review, community review, and so forth, they will increase society's familiarity with them, which will result in an increased understanding of the mediation process, and in turn lead to a

The Reporter's Notes to the National Conference of Commissioners on Uniform State Laws', proposed draft of a Uniform Mediation Act states:

> To be effective in promoting effective communications, the contours of the privilege should be clear to the parties at the time that they decide whether to be candid. This need for clarity at the beginning of the mediation should be weighed as drafters determine exceptions to the privilege based on later behavior, such as whether one party claims that the other failed to negotiate in good faith. Also, this fact underscores the need for uniformity across jurisdictions because parties entering a mediation often cannot anticipate what a court or administrative agency will later be asked to receive evidence about the dispute being mediated. In addition, the need for clarity weighs heavily in favor of wording the statute so that people will easily understand its provisions, especially because mediators often are not lawyers and mediation parties are not always represented by counsel.[68]

The informal nature of the mediation process allows the parties to introduce a wide array of information.[69] However, the reason that the parties choose to place their trust in the mediation process is because they are involved in a particular dispute with another party or entity.[70] This particular dispute will be the focus of the mediation, and any relevant communications will relate directly to that conflict. Although the informal nature of the mediation process encourages the parties to speak candidly amongst themselves, prudent individuals usually will taper their comments in order to focus on the particular subject matter of the mediation.

In addition, even though the mediator may encourage the parties to engage in an open discussion of the conflict, mediators typically are trained to determine the main issues during the initial portion of the discussion. If the parties begin to sway from these main issues, then the mediator may use her training to bring the parties back to the main issues. The rationale behind maintaining the parties' focus on the main issues is to promote efficiency within the mediation and to maintain the parties' focus toward a mutually satisfying resolution of the conflict.

The purpose of mediation is to provide the parties with a forum that will

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deeper trust. Knowledge is power, and a clear, common sense definition of mediation communication will engender the parties with the knowledge of what comments, actions, and information will be protected from future disclosure. As a result of this knowledge, participants in the mediation process will be educated consumers that reap the rewards of a user-friendly alternative to litigation.

[68] *See* UNIFORM MEDIATION ACT reporter's note (Proposed Official Draft 1998).

[69] *See supra* Part III.

[70] *See infra* note 112 (stating the essential elements of the common law attorney-client privilege and asserting that this privilege only governs communications that directly relate to the initial reason for obtaining the legal counsel).

allow them to better overcome the barriers that are impeding the settlement of their dispute.[71] In order to encourage parties to pursue this alternative actively, many states have established statutes to provide a level of confidentiality that will protect some, and perhaps even all of the communications made during the mediation.[72] However, even a cursory review of the existing legislation related to mediation reveals that the scenario has not changed much since one commentator asserted:

> [T]here is still considerable uncertainty about the extent to which communications made during the process of mediating a dispute are protected from disclosure in subsequent legal proceedings. This uncertainty about the confidentiality of mediation proceedings is cause for concern and may act as an impediment to the future development of mediation as a widespread method of dispute resolution.[73]

Finally, parties will be encouraged to use mediation if there is a uniform statute that offers a clear and concise privilege upon which the participants can rely.[74] An analysis of the mediation privilege statutes and commentators' reactions to various statutes reveals that a mediation privilege statute must provide an in-depth and well-crafted definition of mediation communication.[75] This will provide a standard that draws from the strengths of existing legislation and overcomes the barriers that have prevented participants from fully appreciating the benefits of mediation.

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[71] *See* GOLDBERG ET AL., *supra* note 14, at 103; Kirtley, *supra* note 2, at 5.

[72] *See supra* Parts I, IV.A.1.

[73] Feinberg, *supra* note 10, at S28 & n.27. Feinberg's concern about the uncertainty provided by mediation privilege statutes is a pervasive theme that continues to place a part in the debate over the implementation of mediation privilege statutes.

[74] *See* Freedman & Prigoff, *supra* note 2, at 37. Freedman and Prigoff state:

> It is incumbent upon those of us advocating the development of alternatives to develop a clear and cogent policy which seeks to balance and accommodate these competing interests, while ultimately allowing salutatory innovations, such as mediation, to flourish. The best way to achieve this policy is through thoughtfully crafted legislation or court rule.

Id.

[75] A statute that simply provides that mediation communications are confidential or privileged from disclosure does not provide mediation participants with the clarity that is necessary for them to appreciate fully this alternative. This uncertainty arrives from the fact that the final interpretation of what communications are protected by the statute is made by judges whose individual interpretation of the extent of the privilege may vary as much as the facts of each case.

2. *Defining Mediation Communication*

To begin with, the answer to this general matter will reveal this Note's support of a privilege that encourages participation in mediation but that does not provide a complete dome over the process. In order to ascertain this outcome, subpart a will first provide a general definition for mediation communication. Subpart b will tailor this definition by providing the boundaries of the mediation, thereby setting the framework for determining what disclosures constitute a mediation communication. In addition, subpart c will add to this definition by addressing those disclosures which constitute a mediation communication.

a. *What Disclosures Are Mediation Communications?*

As an initial facet, mediation communication should be defined in a manner that includes both oral and written communications. The *Oxford English Dictionary* defines communication as "[t]he imparting, conveying, or exchange of ideas, knowledge, information, etc. (whether by speech, writing, or signs)."[76] Since mediations are applicable to everything from the smallest neighborhood dispute to the largest commercial conflict, a proper privilege should cover not only the words transmitted during an informal session but also the written materials that are presented in a more complex mediation.

Moreover, a forum that encourages the participants to be as candid as possible also must provide a privilege for the nonverbal communications that take place during the mediation.[77] However, in order for such a nonverbal communication to be considered a confidential mediation communication, the party must be able to demonstrate objectively that he intended the nonverbal act to be an actual communication to one or more other individuals in the mediation.[78]

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[76] OXFORD ENGLISH DICTIONARY 578 (1989); *see also* MASS. GEN. LAWS ANN. ch. 233, § 20B (West 1998) (defining communication as encompassing conversations, correspondence, actions, and occurrences relating to a mediation in the patient-psychotherapist context).

[77] *See* PETER MARSH, EYE TO EYE: HOW PEOPLE INTERACT 46–55 (1988). "Research identifies words as a minor contributor to the communication of attitudes. Voice qualities reveal much more about what we think and feel. Most important of all is body language, especially facial expression and patterns of eye contact." *Id.* at 46. This suggests that a large portion of the actual communication that takes place during a mediation session will be in the form of nonverbal "body language." Therefore, a mediation privilege statute should afford the same level of protection for nonverbal communications as for oral and written communications.

[78] *See* UNIFORM MEDIATION ACT reporter's note (Proposed Official Draft 1998) (defining mediation communication as an "oral or written assertion or nonverbal

Furthermore, simply basing a privilege on mediation communications that are defined as oral, written, or nonverbal assertions inevitably will establish a blanket privilege that will place the entire process behind an unyielding, over-inclusive cloak of confidentiality. Likewise, the vagueness of such a definition will not breed the clarity and ease of interpretation that is necessary to form a uniform standard. Simply put, a definition is inadequate when it fails to provide standards for determining whose communications will be protected, when such communications will be protected, and so forth. The absence of these and other standards will place an undue burden of interpretation upon the judiciary. Without these additional provisions to define mediation communication, the desire for a uniform mediation privilege statute and uniform interpretation of that statute will not be possible. Without clearly defined guidelines, its judiciary will be forced to make their own individual interpretations of which communications fall within the privilege. Such a scenario most likely will result in a variety of opinions that run the gamut from nothing being held confidential to everything confidential. In hopes of alleviating the high level of discretion that may lead to a disparity in the interpretation of a mediation privilege statute, it is necessary to provide additional framework for the definition of mediation communication.

b. *When Does a Communication Become a Mediation Communication?*

A definition of mediation communication that specifically relies upon the starting and ending of the mediation will provide the necessary boundaries to encapsulate the privileged communications. For example, the proposed draft of the Uniform Mediation Act states:

> "Mediation communication" means an oral or written assertion or nonverbal conduct of an individual who intends it as an assertion and that is made: (A) after a court, public agency, or mediator notifies the parties to appear for the mediation or two or more adverse parties engage the mediator; . . . [and] (D) before the parties execute a settlement agreement, the mediator announces that the mediation has been concluded, or all but one of the parties withdraws from the mediation.[79]

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conduct" of any party that intended it to be an assertion).

[79] *Id*; *see also* CAL. EVID. CODE § 1125 (West Supp. 2000) (having been entitled, *End of Mediation Satisfaction of Conditions*). The California Evidence Code states,

> (a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

The line that indicates when the mediation privilege begins must be drawn in a manner that provides the utmost protection for the participants but does not become over-inclusive and tantamount to a blanket privilege. Consequently, this Note champions the logic of enacting a "trigger point" that signals the start of the mediation privilege.[80] Following this logic, the protection of mediation communications could begin when the court orders mediation or when the parties decide to enlist the services of a neutral third party to mediate their dispute.[81]

In addition, a practical mediation statute will provide a privilege of confidentiality for those communications, oral, written, or nonverbal, that relate to the subject matter of the mediation.[82] Such a privilege will protect the vast majority of the communications that are disclosed during the mediation because most of them will directly relate to the subject matter of the dispute. Tangents and side comments that bear no relevance to the dispute at hand should not be protected because doing so does not encourage

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(1) The parties execute a written settlement agreement that fully resolves the dispute.

(2) An oral agreement that fully resolves the dispute is reached . . .

(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect . . . .

(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect . . . . In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached . . . .

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

Id.

[80] *See* UNIFORM MEDIATION ACT reporter's note (Proposed Official Draft 1998).

[81] *See id.* The proposed draft of the Uniform Mediation Act defines "mediator" to mean an "an impartial person, including an entity, who assists the parties to negotiate an agreed resolution of a dispute after being: (A) appointed by a court or public agency or (B) engaged by two or more adverse parties." UNIFORM MEDIATION ACT (Proposed Official Draft 1998).

[82] *See supra* Part IV.A.3 for a discussion of "subject matter" mediation statutes.

the participants to resolve their conflict.[83] Also, offering a protection for unrelated issues is more likely to crystallize the concerns of commentators like Professor Eric Green,[84] who believes that a broad privilege will create community distrust for the mediation process.[85]

c. *Whose Communications Are Mediation Communications?*

An essential aspect of any definition that attempts to provide a uniform standard for mediation communication is the need to state clearly whose communications are governed by such a definition. If this aspect of mediation communication is not properly included, then a disparity in judicial interpretation and enforcement surely will follow. At least with respect to those who champion a mediation privilege, it seems apparent that the disclosures of the parties should fall within the protections. The more interesting questions arise when determining whether the statements made by a third-party neutral (i.e., a mediator), a witness, or an attorney are also considered mediation communications that lie within the realm of protection that a mediation privilege will provide.

The proposed draft of the Uniform Mediation Act states that mediation communication is "an oral or written assertion or nonverbal conduct . . . .that is made . . . (B) by a party or representative of a party to or in the presence of the mediator; by the mediator or by the parties or their representatives when asked to communicate by the mediator . . . ."[86] If the term "representatives" encompasses both an attorney and a witness, then it will provide sufficient protection to encourage mediation growth. Since the inclusion of such a standard will provide a broad but not over-inclusive description of whose assertions are covered, it provides an effective means for focusing the protection that a mediation privilege will give to mediation communications.

Hence, mediation communication is any oral, written, or nonverbal assertion that directly relates to the subject matter of the mediation. This

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[83] A mediation privilege statute should have as one of its main goals, the establishment of an environment that encourages participants to resolve their disputes. However, once a statute establishes such a parameter, it should not move needlessly beyond that point. *See* Rosenberg, *supra* note 51, at 164 (stating that the goals of mediation are obtaining a settlement in an informal and efficient manner).

[84] Professor Green authored the oft-cited work *A Heretical View of the Mediation Privilege* which espouses the minority view that adequate means currently exist for protecting mediation communications from future disclosures, and as a result it is not necessary to implement a separate mediation privilege statute. *See generally* Green, *supra* note 4.

[85] *See id.*, at 11; *see also* Freedman & Prigoff, *supra* note 2, at 43.

[86] UNIFORM MEDIATION ACT (Proposed Official Draft 1998).

definition applies to communications that the participants of the mediation, the mediator, and any representative of a party intends as an assertion during the mediation.[87] Although the analysis of an appropriate mediation privilege is beyond the scope of this Note, some relevant aspects will be addressed in more detail below.

This definition will serve as the basis for the analysis of existing mediation privilege statutes, general legislation, and this Note's assertion of how mediation communication should be defined. In addition, this definition also will provide the judicial system with the parameters necessary to maintain effectively the privilege of confidentiality that surrounds mediation sessions.

V: ATTEMPTS TO PROTECT MEDIATION COMMUNICATIONS

In recent years, mediation has grown significantly in its popularity.[88] The benefits of mediation are the informal structure, free-flowing discussion, and creativity in problem solving that the mediator encourages.[89] However, along with this increased openness comes the apprehension that statements, documents, or concessions offered during a mediation can be used against the declarant in future proceedings.[90] In order to maintain mediation's status as a viable form of dispute resolution, it is necessary to provide an adequate definition of the mediation communications that are subject to a privilege of confidentiality. The privilege not only will encourage the use of mediation, but it will perpetuate the fundamental notion that the mediator is a neutral third party who will not disclose relevant communications asserted within the mediation boundaries.[91]

Several states have implemented mediation privilege statutes in an effort to compensate for the inadequate nature in which both the common law and the Federal Rules of Evidence apply to mediation communications.[92] Opponents of an extended mediation privilege, which is designed to maintain

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[87] *See id.*

[88] *See* ROGERS & MCEWEN, *supra* note 43, § 5:03; *see also* Kentra, *supra* note 2, at 717; Kirtley, *supra* note 2, at 7.

[89] *See supra* Part II.A.

[90] *See supra* Part II.B.

[91] *See* Kentra, *supra* note 2, at 731–32; Kirtley, *supra* note 2, at 9–10. Kirtley also states that some states have enacted exceptions to the blanket privilege granted to mediation. These exceptions are designed to allow the parties to agree to disclose otherwise confidential communications and to enable the courts to prevent a manifest injustice or harm to the public safety. *See id.*; *see also* OHIO REV. CODE ANN. § 2317.023 (West Supp. 2000); WASH. REV. CODE ANN. § 5.60.070 (West 1997).

[92] *See* Kentra, *supra* note 2, at 733; Kirtley, *supra* note 2, at 2–3.

the confidentiality of mediation communications, have asserted that minor modifications to Federal Rule of Evidence 408[93] are sufficient to calm the concerns of mediation participants.[94] However, for various reasons, the clarity and uniformity that will be established through a separate mediation privilege statute are far superior than that offered by Rule 408 and other evidentiary provisions.

A. *Federal Rule of Evidence 408*

Rule 408 is an existing means for protecting the confidentiality of mediation communications. This subpart will not only address the rationale behind relying on this rule to maintain the confidentiality of a mediation, but it also will discuss the ineffectiveness of this method of protection.

1. *Scope of Rule 408*

Although Rule 408 was intended to protect conduct and statements that take place during settlement negotiations,[95] many have advocated that it be extended to cover mediations.[96] According to Rogers and McEwen, Rule 408 encourages the parties to enter into settlement discussions, and it serves "to exclude evidence generally of low probative weight, since the compromise might have been motivated by a desire to buy peace rather than an

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[93] *See* FED. R. EVID. 408. Rule 408, entitled *Compromise and Offers to Compromise*, provides:

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

Id.

[94] *See* Green, *supra* note 4, at 2; Rosenberg, *supra* note 51, at 164.

[95] *See* Harter, *supra* note 19, at 329; Kentra, *supra* note 2, at 729; Kirtley, *supra* note 2, at 12–13 & n.72; *see also* FED. R. EVID. 408 advisory committee's note (providing that "[a]s a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim").

[96] *See, e.g.*, Rosenberg, *supra* note 51, at 164.

acknowledgement of liability."[97] However, the stronger rationale behind Rule 408 is "promotion of the public policy favoring the compromise and settlement of disputes."[98]

According to the Advisory Committee Notes, the scope of Rule 408 is not limited to offers to compromise, but it also extends to completed compromises if offered as evidence against a party.[99] Rule 408 expands the common law in order "to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself."[100] On its face, Rule 408 "gives broader protection to the negotiation of private settlement than did the common law, which looked to whether the party intended to be bound by the statement in subsequent litigation."[101] In essence, Rule 408 was designed to expand the scope of confidentiality in settlement negotiations, but its language enables various exceptions that prevent it from fully protecting essential portions of many mediation sessions.[102]

2. *Weaknesses*

The exclusion available under Rule 408 only covers statements that occur during negotiations over a disputed claim.[103] Similarly, the rule only covers communications that are "intended . . . to prove the validity of a claim

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[97] ROGERS & MCEWEN, *supra* note 43, § 9.03; *see also* FED. R. EVID. 408 advisory committee's note ("The validity of the position will vary as the amount of the offer varies in relation to the size of the claim . . . .").

[98] FED. R. EVID. 408 advisory committee's note.

[99] *See id.*

[100] *Id.*

[101] *See* ROGERS & MCEWEN, *supra* note 43, § 9.03. The Advisory Committee's Note to Rule 408 states:

> The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule . . . to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself.

FED. R. EVID. 408 advisory committee's note (citations omitted).

[102] *See* Kirtley, *supra* note 2, at 12–14 & nn.72–83; Kentra, *supra* note 2, at 729–30; Harter, *supra* note 19, at 329.

[103] *See* FED. R. EVID. 408 advisory committee's note; Freedman & Prigoff, *supra* note 2, at 40.

or the amount of a civil claim."[104] Such parameters do not cover mediation adequately because it is common to have a mediation in which the participants already have agreed on the issue of liability. The parties simply are negotiating (mediating) over the type of settlement that is mutually satisfying.[105]

Moreover, the informal discussion that is the backbone of mediation sessions[106] often results in the introduction of a wide range of relevant issues aside from the validity of the claim itself. Absent a broader protection, communications that were not intended to prove (or disprove) either liability or the amount of the claim, but which were issues that were related directly to the subject matter of the mediation, would not be privileged.[107]

In addition, Rule 408 does not exclude evidence introduced "for another purpose."[108] The rationale behind this exception stems directly from the purpose of the rule itself. Since the purpose "is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule."[109] This exception to the exclusion of communications in settlement negotiations is a powerful weapon when taken in the hands of a creative counsel.[110] Counsel for either party could paint a scenario in which communications that would have been excluded without this exception could be entered into a subsequent hearing. Simply put, there is no way to draw a line that marks the parameters of this exception. Therefore, Rule 408 does not provide sufficient protection to effectively govern mediation.

B. *Federal Rule of Evidence 501*

Federal Rule of Evidence 501 provides federal courts with the authority to establish a common-law privilege[111]—such as the attorney-client

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[104] Kentra, *supra* note 2, at 730. "The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. Hence, the rule requires that a claim be disputed as to either validity or amount." FED. R. EVID. 408 advisory committee's note (citations omitted).

[105] *See* Harter, *supra* note 19, at 330.

[106] *See* Rosenberg, *supra* note 51, at 163.

[107] *See id.*

[108] FED. R. EVID. 408; *see also* Rosenberg, *supra* note 51, at 163.

[109] FED. R. EVID. 408 advisory committee's note. For example, a party may subsequently introduce settlement communications that otherwise otherwise considered confidential under Rule 408 "for another purpose" such as "proving bias or prejudice of a witness" or negativing a contention of lack of due diligence in presenting a claim." *Id.*

[110] *See* Kentra, *supra* note 2, at 730; Kirtley, *supra* note 2, at 13.

[111] *See* FED. R. EVID. 501. Rule 501 provides:

> Except as otherwise required by the Constitution of the United States or

privilege[112]—that will govern mediation sessions.[113] However, an interpretation of the plain meaning of Rule 501 reveals that it is deferential to any state statute that speaks to the issue before the court.[114] Therefore, on its face Rule 501 allows the judicial branch to establish a mediation privilege,[115] but a broader interpretation of the Rules' deference to state statutes reveals the impetus behind implementing a more comprehensive, universal standard for protecting mediation communications. [116]

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

Id.

[112] According to *Humphreys v. Donovan*, 755 F.2d 1211, 1218 (6th Cir. 1985), the essential elements of attorney-client privilege are characterized by John Henry Wigmore. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2292 (John T. McNaughton ed., rev. ed. 1961). Wigmore provides as follows: "(1) Where legal advice of is sought; (2) from a professional legal adviser in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or the legal adviser; (8) except if the privilege is waived." *Id.* Thus, it is apparent that the common law attorney-client privilege applied to communications that directly related to the original purpose for obtaining legal representation.

[113] *See* Kentra, *supra* note 2, at 727.

[114] *See* FED. R. EVID. 501.

[115] Both Kentra and Kirtley assert that the courts look to Wigmore in order to determine whether or not to establish a separate common law privilege. The four-part balancing test supported by Wigmore is as follows:

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

Kentra, *supra* note 2, at 728 & n.55 (citing 8 WIGMORE, *supra* note 112, § 2285); Kirtley, *supra* note 2, at 13 & n.96 (citing8 WIGMORE, *supra* note 112, § 2285).

[116] According to Kentra:

> Some jurisdictions have chosen to create a mediation privilege via statute. For example, the North Carolina statute allowing for mediation in divorce, alimony, and child support cases has specific language stating that "all verbal or written communications from either or both the mediator or between the parties in the presence of the mediator . . . are absolutely privileged and inadmissible in court."

Of course, one's political beliefs may prejudice the determination of whether the responsibility for developing a comprehensive mediation privilege should fall before the judicial or the legislative branch of government. Disregarding one's personal views, the implication of Rule 501 is that the legislators should take on the task of developing a mediation privilege, not the judiciary.[117] "The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason."[118] In part, the deference of the federal courts may be based on the fact that legislators preparing to enact legislation will form a committee—to conduct hearings, to review the pros and cons of various issues, to examine witness and expert testimony—in order to determine the most appropriate manner in which to structure a state privilege that will, for example, define mediation communications and the mediation privilege as a whole.[119]

Moreover, a mediation privilege must address "the fundamental tension between mediation and adjudication, and the current uncertain legal status of confidentiality, [that] require the clear statement of law and policy which is afforded a statute or rule."[120] Consequently, Rules 408 and 501 do not serve as solid ground for those who wish to maintain the confidentiality of their mediation communications.

C. *Private Contractual Agreements*

In addition, mediation participants have the ability to draft their own written agreements that are designed to maintain the confidentiality of communications introduced during the mediation.[121] However, the parties face a dilemma when it comes to enacting a private agreement. First, they may develop a comprehensive agreement and face the possibility of a court striking it down on the grounds that it runs contrary to public policy.[122]

Kentra, *supra* note 2, at 729 (quoting N.C. GEN. STAT. § 50-13.1 (1996)).

[117] Rule 501 at least suggests that the federal judicial system should defer to the legislative branch when there is no contrary federal law and when the state legislators have passed a statute relevant to the pending issue. *See* FED. R. EVID. 501.

[118] FED. R. EVID. 501 report of the House Committee on the Judiciary.

[119] "The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy." *Id.*

[120] Freedman & Prigoff, *supra* note 2, at 39.

[121] *See* Kentra, *supra* note 2, at 731. The parties may contract to maintain the confidentiality of all communications disclosed during the mediation, those communications that specifically relate to the subject matter of the mediation, or contractually designated some other parameters to govern the mediation.

[122] *See id.*

Second, they may establish a contact that traces the language of the aforementioned Federal Rules of Evidence, which, as stated above, do not provide a guaranteed level of protection.

To begin with, in striking down a private contractual agreement not to disclose, the judge may base her determination on the legal maxim that the court is entitled to "every (person's) evidence."[123] Basically, a private agreement between the participants may not inhibit the court's "access to testimony in its pursuit of justice."[124] If the private agreement has this effect on the court, then the judge may determine that it is null and void.

Moreover, the parties that implement a private confidentiality agreement face the reality that it is only binding upon the signatories.[125] "[A]n agreement not to disclose does nothing to prevent a non-party to the agreement from seeking or disclosing information."[126] In addition, since this would be a contractual agreement, there is the possibility that one of the parties may breach the contract.[127] Even if the court chose to enforce the agreement,[128] the remedies for breaching the contract may be inconsequential, since the nonbreaching party may face a difficult task in proving damages as a result of the breach.[129] Furthermore, if one party breaches the agreement, then the other party is forced to litigate the matter in order to enforce the agreement.[130] This subsequent court action probably would not be confidential, and all the evidence introduced most likely would be admissible in future actions. Therefore, private contractual agreements do not provide the certainty and uniformity that is necessary to encourage individuals to step away from the litigious mindset and engage in an alternative form of dispute resolution.

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[123] Kirtley, *supra* note 2, at 10 (citing 8 WIGMORE, *supra* note 112, § 2192).

[124] *Id.* at 11; *see also* Freedman & Prigoff, *supra* note 2, at 41 & nn.15–16 ("Agreements to suppress evidence are generally void as against public policy. . . . It has been said that 'no pledge of privacy...can avail against demand for the truth in a court of justice.'"); Rosenberg, *supra* note 51, at 165 & nn.61–62 (stating that "courts have not treated contractual agreements as stipulated protective orders").

[125] *See* Kentra, *supra* note 2, at 731.

[126] Freedman & Prigoff, *supra* note 2, at 41.

[127] *See* Kentra, supra note 2, at 731.

[128] At least one commentator has declared that the court may be hesitant to allow one party to repudiate such a contractual agreement because allowing such repudiation may itself be a violation of public policy. *See* Rosenberg, *supra* note 51, at 165 & n.63.

[129] *See id.*

[130] *See* Kentra, *supra* note 2, at 731.

D. *Statutory Provisions*

The above-mentioned avenues for protecting mediation communications are by no means exhaustive. However, they do represent the various methods available to the mediation participant who desires to maintain the confidentiality of his mediation session. On the other hand, this brief description illustrates the various shortcomings of these and other potential protectors of mediation communication. Consequently, it is necessary to implement legislation that will provide a clear, broad-based definition for mediation communication. In addition, such a mediation statute must allow for various exceptions to the privilege when necessary to maintain justice, accountability of the mediator or the mediation program, and public confidence in mediation as a viable alternative to litigation.

As stated above in Part IV, many states have enacted their own statutes in response to the rapid development of mediation programs.[131] However, the vast majority of these fail to provide an adequate confidential protection for the various forms of mediation communications.

VI. ILLUSTRATIONS OF THE MEDIATION COMMUNICATION DEFINITION AND THE EXCEPTIONS

In order to illustrate fully the strengths of the proposed definition for mediation communication, this Part will provide various examples of when and how this definition will cover a mediation sufficiently.

A. *Maintaining the Confidentiality of Mediation Communications*

Because this Note supports the notion that an assertion does not constitute a mediation communication until after a trigger point has been reached, the initial phone call that one of the parties places to the mediation center or the mediator is not covered. However, conversations after the court has ordered the mediation or the parties have engaged the services of the mediator are mediation communications and subject to a mediation privilege. The rationale behind this approach is derived from the concern that some parties may abuse a more extensive privilege by claiming that any call made to a person who also acts as a mediator is a privileged conversation.[132] In addition, the implementation of a starting point will prevent the mediation privilege from encompassing every dispute in which a third party intervenes. Therefore, the schoolyard fight in which a teacher gets involved will not

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[131] *See supra* Part IV.

[132] *See* UNIFORM MEDIATION ACT (Proposed Official Draft 1998).

subject the parties to the privilege of confidentiality, nor will it subject the school teacher to potential liability as a mediator.

B. *Who or What Is Covered by Such a Definition?*

Written documents disclosed by the parties during the course of settlement discussions do fall within this definition of mediation communication, as long as they relate to the subject matter of the mediation. The protection offered by the aforementioned definition is very inclusive, and these assertions would constitute written information transmitted by a party to the mediation. However, a more comprehensive analysis of this inquiry is beyond the scope of this Note.[133]

Likewise, statements and notes made by the mediator during the mediation are also considered mediation communications. The statements constitute the spoken exchange of ideas that take place via conversations during the mediation session. Moreover, the mediator's notes are confidential since they constitute the written conveyance of information.

Similarly, the impressions, opinions, or recommendations of the mediator do fall within the mediation communication definition. The mediator's impressions and opinions are based on the confidential conveyance of information—spoken, written, or nonverbal—that take place during a mediation. For example, if the mediator articulates her impression of the parties' efforts to resolve the conflict, then such an assertion is considered a mediation communication.

However, it may be argued that the impressions themselves do not amount to a mediation communication unless they are conveyed to others during the session. The Ohio Supreme Court addressed this issue in *State ex rel. Schneider v. Kreiner.*[134] In *Kreiner*, the parties mediated a dispute, entered into an oral agreement, and signed a "Statement of Voluntary Settlement" indicating their agreement.[135] After the mediation, Schneider requested the complete mediation file, but he was given access only to the Statement of Voluntary Settlement.[136] Schneider was denied access to a

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[133] In order for such an analysis to be complete, it would be necessary to determine the extent of a mediation privilege, whether the documents were created for or during the mediation, whether they are subject to the work product rule, whether they are otherwise discoverable, and so forth. For the purpose of this Note, it is sufficient to designate written materials introduced or produced during the mediation as mediation communications.

[134] 699 N.E.2d 83 (Ohio 1998).

[135] *See id.* at 84.

[136] *See id.*

"Preliminary Complaint Form" that the mediator completes at the end of the mediation.[137]

> On the form, the mediator describes the allegations made by the plaintiff, denotes the relationship between the parties, and compiles information relating to the parties and the status of the dispute. The mediator also describes the disposition of the dispute under a section entitled "Hearing Disposition." Under another section, the mediator states what future action may be taken if the agreement is broken and, under a "Comments" section, may make personal observations about the mediation and the dispute. This form is not shown to the parties and, unlike the Statement of Voluntary Settlement, is not signed by them.[138]

The Ohio Supreme Court analyzed Ohio Revised Code section 2317.023[139] and determined that it was clear that the requested form was a mediation communication.[140] Likewise, the Court determined that the language of section 2317.023(B) clearly provided for the confidentiality of mediation communications.[141] As a result, the impressions of the mediator, when based on the mediation session, are themselves mediation communications despite the fact that they are not disclosed during the mediation.

Beyond a clear definition for mediation communication, a mediation privilege should run with both the parties and the mediator.[142] The parties should have the ability to waive the privilege amongst themselves, but they should not have the ability to force the mediator to testify unless she agrees to do so.[143] Conversely, a mediator should not be able to disclose

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[137] *See id.*

[138] *Id.*

[139] *See* OHIO REV. CODE ANN. § 2317.023 (West Supp. 2000).

[140] *See Kreiner*, 699 N.E.2d at 85–86.

[141] *See id.* at 85. The Court's opinion supported the argument that a clearly worded statute will ease the judicial task of interpretation. It stated:

> Under the statutory definition, it is clear that this form [the Preliminary Complaint Form] is a mediation communication. It is made in the course of the mediation by the mediator. The mediator compiles information on the form and then describes the outcome. The form is also related to the subject matter of the mediation. The form contains information about the dispute between the parties. It also reflects the thoughts and impressions of the mediator as to the outcome of the mediation, whether and what action shall be taken in the event of breach of the agreement, and the mediator's own observations about the mediation.

Id.

[142] *See* Rosenberg, *supra* note 51, at 159 (discussing the different people that could hold the privilege).

[143] *See* CAL. EVID. CODE § 1122 (West Supp. 2000). Section 1122 states,

communications without the consent of the parties. The rationale behind the extension of the privilege is based on the policy that a mediator is a neutral third party and she should not voluntarily disclose or be forced to disclose her impressions of either the mediation or the communications therein.[144] This safeguard prevents the situation in which a mediator, after unsuccessfully trying to resolve a dispute, discusses her feelings and the potential outcome with the trial judge.[145] Such a disclosure is unnecessary. It not only would prejudice the judge, but it would stain the public's perception of mediation.[146] Moreover, absent the parties' consent, the mediator's statements most likely would be unsubstantiated because she would not be able to disclose any of the background information (i.e., mediation communications) because they would remain confidential.

> (a) A communication or a writing . . that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:
>
> (1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally . . . to disclosure of the communication, document, or writing.
>
> (2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally . . . to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.
>
> (b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

Id.

[144] *See* Freedman & Prigoff, *supra* note 2, at 37–38.

[145] *See* CAL. EVID. CODE § 1121 (West Supp. 2000). Section 1211 provides:

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

Id.

[146] If the parties know that the mediator will discuss her impressions of the parties, their claims, or possible areas of settlement with the trial judge, then they may shy away from fully participating in such a mediation. This shyness may result because of their fear that a disclosure during the mediation may get back to the judge and negatively impact one of their claims.

Furthermore, in order to illustrate the extent of mediation communications, it is necessary to address settlement agreements. Although a settlement agreement that is reached during the mediation session may be considered a privileged communication under a broad statute,[147] the aforementioned definition demonstrates that the scope of mediation communication ends at the moment that the agreement is memorialized on paper.[148] This exception is commonly found in mediation statutes, but it is important to note that the agreement must be in writing before it is no longer considered a mediation communication. If mediation communication is extended to oral agreements, then this inclusion may overrun the entire privilege.[149] Therefore, the exception, like the privilege, must be extended only as far as necessary to implement the desired policy.[150]

Similarly, a well-tailored subject matter mediation privilege statute that rests upon the aforementioned definition of mediation communication will alleviate potential problems that can result from an over- or under-inclusive privilege. The *Randle v. Mid Gulf, Inc.*[151] case provides a vivid illustration of how a narrower and more focused subject matter mediation privilege is more suited for mediation then the broad, blanket privilege. The decision in *Randle* surrounded the enforceability of a mediation settlement agreement. The parties were engaged in the mediation of an oil and gas dispute when appellant Randle began to experience fatigue and chest pains.[152] The symptoms that he experienced and the communications that related to his ailments were not directly related to the subject matter of the mediation. Mr. Randle asked to leave the mediation but was told that he could not leave until the case was settled.[153] He subsequently agreed to a settlement, but

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147 Section 5.60.070 of the Washington Revised Code states that written settlement agreements are confidential unless the parties insert language that makes it enforceable in a court of law. *See* WASH. REV. CODE ANN. § 5.60.070 (West 1995). Such a declaration would then make the agreement subject to disclosure. Therefore, this statute gives the parties a level of discretion in determining the extent of the mediation communications that are to remain confidential. *See id.*

148 *See supra* Part III (defining the parameters of mediation communication); *see also* FLA. STAT. ANN. § 44.102 (West 1997); OHIO REV. CODE ANN. § 2317.023 (West Supp. 2000).

149 *See* UNIFORM MEDIATION ACT (Proposed Official Draft 1998).

150 This policy behind mediation in general, and a statute that seeks to protect mediation communications in particular, was asserted by the court in *Smith v. Smith*, 154 F.R.D. 661, 666 (N.D. Tex. 1994), when it stated, "[t]he [Texas Alternative Dispute Resolution Procedures] Act establishes a definite state policy to encourage the early settlement of pending litigation through the voluntary settlement procedures . . . ." *Id.*

151 No. 14-95-01292-CV, 1996 WL 447954 (Tex. App. Aug. 8, 1996).

152 *See id.* at *1.

153 *See id.*

afterwards he refused to execute the settlement documents because he believed that he was suffering from duress at the time the agreement was reached.[154] The appellee Mid Gulf, Inc. (Mid Gulf) brought a suit for specific performance, and the lower court granted summary judgment in favor of Mid Gulf.

On appeal, Mr. Randle argued that the lower court erred in concluding that he could not contest the validity of the settlement agreement. The lower court determined that the communications, which would have been used as evidence to contest the validity of the agreement, were privileged because they were disclosed during the mediation. Therefore, Mr. Randle had no viable way to contest the validity of the settlement agreement via a showing of duress.

However, the Court of Appeals reversed the case and ruled in favor of the Appellant Mr. Randle. It based its decision on the determination that Mid Gulf could not bring a suit for specific performance of the settlement agreement while at the same time arguing that the communications were confidential.[155] Therefore, it allowed the appellant to contest the validity of the agreement by disclosing comments that were made during the mediation session.

The trial court made its determination based on the rationale that supports the blanket mediation privilege. It did not perform any sort of balancing test but rather concluded that the cloak of confidentiality could not be removed for any reason. This is a perfect example of the abuses that may result from such a broad and unyielding privilege. On the other hand, the Texas Court of Appeals recognized this injustice. It apparently made its decision on the premise that mediation sessions and the agreements that are established as a result must be fair to all the participants. However, after correcting this one wrong, it ordered the opinion to go unpublished perhaps, because it felt that even it did not have the power to contest the blanket privilege.

The blanket privilege would prevent evidence of the chest pains suffered by Mr. Randle and the duress that he was placed under from being disclosed at a later date even though it did not relate to the subject matter of the mediation. However, the more tailored subject matter privilege would have allowed Mr. Randle to introduce evidence of these "unrelated communications" in order to contest the validity of the mediation agreement.

The wisdom behind a more narrowly tailored mediation communication definition that governs communications that relate to the subject matter of the mediation privilege comes from the realization that not everything said during the mediation session relates to the purpose of the mediation.

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[154] *See id.*

[155] *See id.*

Therefore, this approach extends the necessary privilege of confidentiality, but it does not blindly inhibit the role of justice in the mediation session.

Hence, this definition of mediation communication will cover sufficiently the various forms of mediation communication that result from the informal mediation sessions that an active mediator will encourage.[156] However, the interests of the justice system and the needs of society often require exceptions or limitations to the situations in which the aforementioned mediation communications are to remain confidential. Unfortunately, a worthwhile inquiry into the rationale behind and counter arguments against these potential exceptions is simply beyond the realm of this Note.

VII. CONCLUSION

The increased demand for a viable alternative to litigation has resulted in the widespread implementation of mediation programs. With this increased usage comes a strong need to define mediation communication in a clear and just manner. The need for a uniform definition is even more prevalent as the proliferation of mediation privilege statutes continues to spread from state to state. Although there are a variety of potential avenues that could be pursued in order to establish a confidentiality privilege for mediation communications, the various shortcomings depicted above demonstrate that they are not viable methods for adequately protecting mediation communications.

Therefore, the legal community is in need of a broad-based mediation communication definition that will successfully encompass the variety and depth of information that is presented in the informal, free-flowing mediation session. Although this definition should encompass the oral, written, or nonverbal assertions made by the parties, their representatives, or the mediator, it must remain narrowly tailored. This definition may be tailored by requiring the following: (1) the individual must intend the disclosure to be a communication to one or more individuals in the mediation, and (2) the assertion must relate to the subject matter of the mediation itself. If the declarant does not satisfy both prongs, then the assertion does not constitute a mediation communication. This definition will allow for the full coverage of all relevant communications introduced during the mediation, but it will retain the realization that in some situations "the public has a right to every (person's) evidence."[157]

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156 *See* RISKIN & WESTBROOK, *supra* note 3, at 247.

157 Kirtley, *supra* note 2, at 3 (quoting 8 WIGMORE, *supra* note 112, § 2192).