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A Heretical View of the Mediation Privilege

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I. INTRODUCTION

Conventional wisdom among practicing mediators is that the confidentiality of mediation should be protected by a statutory or court-created privilege.[1] The claims for expanded positive law protection of party-party and party-mediator communications is based upon the purported necessity of such confidentiality for the success of mediation,[2]

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1. Dauer, Report of the Committee on Confidentiality in ALTERNATIVE DISPUTE RESOLUTION, Center for Public Resources (October, 1985) 98 HARV. L. REV. 441, 452 (1985) [hereinafter cited as Dauer]; Freedman, *Confidentiality: A Closer Look,* in MEDIATION AND THE LAW: WILL REASON PREVAIL?, ABA Special Committee on Dispute Resolution, 68, 84 (1983) [hereinafter cited as Freedman].

2. Claims for the need for a mediation privilege are characterized both by the forcefulness of their assertion and the dearth of evidence to support such assertions. *See, e.g.,* Dauer, *supra* note 1, at 445: "effective mediation demands that the parties be privileged not to testify about communications they have made to each other in the course of mediation." Dauer, *supra* note 1, at 2: "[a]ssurances of confidentiality are essential. In their absence, unrestricted dialogue is unlikely and the attractiveness of ADR is diminished "; Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes,* 11 CAP. U. L. REV. 181, 196 (1982) in CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 13, 28 (ABA, 1985): "The importance of confidentiality in programs established for the mediation of minor disputes cannot be over-stated. Confidentiality is essential to achieve the full cooperation of participants and, consequently, the integrity and ultimate success of the program." Murphy, *Mediation and the Duty to Disclose,* ABA Special Committee on Dispute Resolution, June 1984 *id.* at 87: "Assuring participants in a mediation program that their statements will be held in strict confidence by the mediator is a crucial ingredient for the successful resolution of disputes through mediation or arbitration. A guarantee of confidentiality promises the honest airing of grievances by the disputants which enables the mediator to discover the true sources of conflict." Restivo and Mangus, *ADR: Confidential Problem-Solving or Every Man's Evidence? id.* at 143: "It is universally recognized that in order for non-judicial settlement discussions and other ADR mechanisms to work, they must be conducted in a spirit of candor and in such fashion that anything said or done during the discussions will not cause jeopardy to any of the parties should there be subsequent litigation."

and on claims that the social utility of such a privilege outweighs its costs.[3]

This Article critically examines the arguments for an expanded statutory or common law mediation privilege. I take the heretical position among mediators in arguing that the current campaign to obtain a blanket mediation privilege rests on faulty logic, inadequate data, and short-sighted professional self-interest. Neither the necessity for such a privilege nor the social utility of a general mediation privilege have been demonstrated. Moreover, an adequate degree of confidentiality in mediation can be obtained with only slight changes in current laws. Extension of confidentiality protections through the enactment of a new privilege statute may well be counterproductive to the goal of increased acceptance of private dispute resolution. Such an extension will also frustrate other important social and legal policies, such as the enforcement of restraints on illegal business conspiracies and combinations, the protection of individual rights, and the enforcement of the criminal law.

The first part of this Article identifies various situations in which claims of mediation confidentiality may arise, and isolates several different factors that must be taken into account when assessing a specific claim of confidentiality. This analysis reveals that the problem of mediation confidentiality is more complex than it may initially seem. Nevertheless, it is possible to identify a paradigm situation, or core case, in which confidentiality is important, necessary, and appropriate. Two hypothetical cases, one from the divorce context and one from the business context, demonstrate the scope of the paradigm situation in which confidentiality should be accorded and, conversely, the limits outside of which confidentiality should not apply.

The next part describes the current state of the law of mediation confidentiality, including statutory, case, and rule-based law. The last part of the paper analyzes current claims for expanded confidentiality protection and concludes that the enactment of general mediation privilege statutes is both unnecessary and unwise. Alternatively, I propose some minor modifications in existing law (specifically, Rule 408 of the Federal Rules of Evidence) to improve the current legal environment.

Throughout this paper I use the term "mediation privilege" to refer generically to any proposal which would require confidentiality in private dispute resolution forums when a third party is involved. In broadest terms, this definition encompasses all forms of mediation, including the mini-trial,[4] "Michigan mediation" (court-ordered arbitration),[5] environ-

3. Dauer, *supra* note 1, at 12.

4. The mini-trial is a dispute resolution hybird in which a "neutral advisor" is generally employed to advise the disputants of the strengths and weaknesses of their respective positions and assist them in reaching a negotiation settlement. The neutral advisor's advice follows summary presentations on the legal merits of the case by each party's attorney, and precedes head-to-head negotiation by each party's nonlegal representative. The mini-

mental mediation,[6] divorce mediation,[7] ombudsmandry,[8] mediation of minor criminal cases as in Neighborhood Justice Centers,[9] neutral expert

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trial has been used successfully in many complex cases involving businesses and/or government agencies. *See generally* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION, at 271-79 (1985) [hereinafter cited as DISPUTE RESOLUTION]; BUTLER, USING THE MINI-TRIAL IN PRODUCT LIABILITY LITIGATION ALTERNATIVES (1983); Davis, *A New Approach to Resolving Costly Litigation,* 62 J. PAT. OFF. SOC'Y 482 (1979); E. GREEN, *CPR Legal Program Mini-Trial Handbook,* in CORPORATE DISPUTE MANAGEMENT (1982) [hereinafter cited as *Mini-Trial Handbook*]; Green, *Growth of the Mini-Trial,* 9 LITIGATION 12 (1982); Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach,* 11 LOY. L.A.L. REV. 493 (1978).

5. Michigan mediation is really a form of non-binding arbitration in which a three-member panel hears half-hour presentations by disputants or their attorneys in cases where the demand for damages falls below a specified jurisdictional amount. The panel attempts to mediate an acceptable value for the case. If it is unsuccessful in obtaining the settlement, the panel renders an award which becomes final if neither party objects within a specified time. An objecting party is entitled to a trial de novo in the regular court system. This blend of mediation and arbitration, with many variations in form which range along a continuum from a mediation-oriented model to an adjudicatory model, is in increasing use across the United States. *See generally* DISPUTE RESOLUTION, *supra* note 4, at 225-43; E. GREEN, *The Complete Courthouse,* in DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY 15 (1985 Chief Justice Earl Warren Conference on Advocacy) [hereinafter cited as *Complete Courthouse*]; E. ROLPH, INTRODUCING COURT-ANNEXED ARBITRATION: A POLICYMAKER'S GUIDE (1984).

6. *See* DISPUTE RESOLUTION, *supra* note 4, at 403: "Environmental disputes, though varied in their form and structure, typically fall into two broad categories — enforcement and permitting cases. Enforcement disputes arise when a public agency or private group raises questions about a party's compliance with a particular federal or state law that establishes specific environmental standards (pertaining, for example, to air or water quality). Permitting cases involve disputes over the planned construction of new facilities (such as a dam or a highway)." Susskind, *Environmental Mediation and the Accountability Problem,* 6 VT. L. REV. 1 (1981).

7. Divorce Mediation: Divorce Mediation often involves a non-lawyer mediator who assists a couple in reaching a divorce agreement with wide-ranging legal effects. An increasing number of lawyers appear to be offering their services as divorce mediators. The "preferred" model of divorce mediation contemplates that each party will be traditionally represented by an attorney at some point in the process, but not all mediations conform to this model. Indeed, some mediators espouse a more therapy-oriented model in which the involvement of lawyers is discouraged. Divorce mediation in any form poses serious problems of fairness and mediator accountability which are the subject of lively debate among practitioners and scholars. *See, e.g.,* DISPUTE RESOLUTION, *supra* note 4, at 313-45; Riskin, *Toward New Standards of the Neutral Lawyer,* 26 ARIZ. L. REV. 329 (1984); FOLBERG, *Divorce Mediation - Promises and Problems,* (paper prepared for Midwinter Meeting of ABA Section on Family Law, 1983) *reprinted in* DISPUTE RESOLUTION, *supra* note 4, at 315-23; HAYNES, DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS (1981); CROUCH, *The Dark Side of Mediation: Still Unexplored,* in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION at 339-57 (ABA, 1982).

8. The classic ombudsman on the Scandanavian model is an independent and nonpartisan official of the legislature who reports on the executive department and deals with specific complaints against public officials. He has the power to investigate and criticize, but no power to decide disputes or reverse administrative action. *See* Verkiul, *The Ombudsman and the Limits of the Adversary System,* 75 COLUM. L. REV. 845, 846-56 (1975). Today in America, the ombudsman is generally found within large corporations or educational institutions and operates as a mediator of employee-institutional disputes. *See* DISPUTE RESOLUTION, *supra* note 4, at 371-87; ROWE, *The Non-Union Complaint System at M.I.T.:*

fact-finding,[10] and so forth. Many of the same confidentiality issues also arise in private dispute resolution situations involving only the parties to the dispute,[11] as well as to dispute resolution situations conducted by public agencies or officials outside of or in addition to their official adjudicatory function.[12] It will be argued, however, in this Article that the specific context of the case is important in deciding the validity of a claim of confidentiality and the scope of legitimate protection. Context includes the type of case, the facts of the case, and the process in which the communication is made.

The term "mediation privilege" is used rather than "mediator's privilege" to emphasize that any privilege that applies to the mediation process should belong to the parties rather than the mediator.[13] It is

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An Upward-Feedback, Mediation Model, 2 ALTERNATIVES TO THE HIGH COST OF LITIGATION 10-13 (1984).

9. An important component of the resurgence of alternative dispute resolution in the United States in the 1970s was the use of mediation within neighborhood justice centers to resolve local problems which otherwise might be processed through the criminal justice system. The classic example is the assault and battery charge arising out of an argument between neighbors over the lack of control of a dog. Proponents of this kind of mediation would extend it to more serious cases of intra-family violence and community disorders. *See generally* DISPUTE RESOLUTION, *supra* note 4, at 347-69; FELSTINER & WILLIAMS, *Community Mediation in Dorchester, Massachusetts,* (1980) *reprinted* in DISPUTE RESOLUTION, *supra* note 4, at 351-63; Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles,* 5 MEDIATION Q. 3, 10-11, 13-16 (1984); NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA (R. Tomasic & M. Feeley, ed. 1982).

10. Neutral expert fact finders, appointed either under Rule 706, Federal Rules of Evidence, or selected privately by parties to a dispute, function as promoters of a negotiated settlement by making a non-partisan finding of a crucial technical issue in a case in which the outcome depends to a large extent on that issue. *See generally* DISPUTE RESOLUTION, *supra* note 4, at 293-98; "Complete Courthouse," *supra* note 5.

11. Mediation in most important respects is merely "negotiation plus." The "plus" is the neutral intervenor who adds elements to the process of negotiation designed to overcome negotiation impasse. *See generally* DISPUTE RESOLUTION, *supra* note 4, at 545-48; H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, 218-34 (1982).

12. *See generally* Galanter, *The Emergence of the Judge as a Mediator in Civil Cases,* 69 JUDICATURE 257 (1986); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference,* 33 U.C.L.A. L. REV. 485 (1985). For an earlier version of this paper, see DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY 83 (1985 Chief Justice Earl Warren Conference on Advocacy).

13. By belonging to the parties, I mean that it is the parties who control the power to waive the privilege and to require others to assert and abide by the privilege. *Cf.* Proposed, but not enacted Rule 503(c), FEDERAL RULES OF EVIDENCE [hereinafter cited as FRE], providing that the lawyer-client privilege belongs to the client rather than the lawyer, but that the lawyer may claim it on behalf of the client. The Advisory Committee's Note to this section states, "It is assumed that the ethics of the profession will require him to do so [assert the privilege] except under most unusual circumstances."

Florida and Arkansas statutes adopt the approach that the privilege is the parties' rather than the mediators'. *See* FLA. STAT. ANN. § 749.01(3) (West Supp. 1983); ARK. STAT. ANN. § 81-129 (Supp. 1983). This approach is consistent with the English common law privilege for domestic conciliation. *But see Protecting Confidentiality, supra* note 2, at 445-46, stating that "the mediator's status as a neutral demands recognition of a distinct privilege on his part. . . ." This Note, however, confuses the requirement that the mediator respect the parties' privilege by asserting it on their behalf (the inverse of the

the parties' interest in private dispute resolution that is the justification for the process in the first place. A persuasive case has yet to be made that an individual mediator's desire to avoid being called as a witness during a trial deserves any greater recognition than the normal desire of any person, whether percipient witness or professional consultant, to avoid being involuntarily drawn into a court battle. On the other hand, the general process of mediation, over the long run, may require that the mediation be separated from and protected against adjudication, so that even if all the parties to mediation are willing to dispense with the confidentiality and inadmissibility of mediation, the law would not permit information from the mediation to be used in court.[14] Recognition of a privilege in this situation is based on an institutional concern for mediation as an important and distinct resolution process, rather than a concern for the mediators' own professional interests. The term "mediation privilege" is broad enough to encompass situations in which the parties seek confidentiality and where the mediation proceeding should be insulated from adjudication or other processes (e.g., investigation, legislation, other mediation).

II. Unpacking the Problem of Confidentiality in Mediation

A major problem with current proposals to expand legal protection for mediation confidentiality is their failure to recognize the complexity of the issue. There are at least five different sub-issues, each of which can be resolved in a variety of ways, that greatly affect the scope, validity, and effects of a claim of privilege. In outline form, these sub-issues and their possible resolutions are:

A. *What does "confidentiality" mean?*

1. Inadmissibility at trial. Confidentiality could mean only that statements or evidence used in mediation and/or the terms of a settlement are inadmissible in a court proceeding (whether between the parties to the mediation or between a mediation party and a third party, or between two third parties). Even though inadmissible as judicial evidence, such statements, documents, or facts may be subject to discovery processes.
2. Insulation from formal discovery processes by third parties. This goes a significant step beyond mere inadmissibility. Most privi-

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power to waive the privilege) with the right of the mediator to assert the privilege on his own behalf. *See id.* at 456-57 ("[T]he mediator should not be allowed to 'waive' his privilege respecting confidential information without the consent of the parties.... Whether the mediator will be permitted to assert a testimonial privilege depends on the context in which he mediates and the consequent nature of the neutrality interest at stake.").

14. *See Mini-Trial Handbook, supra* note 4, at 69.

leges, including attorney-client, doctor-patient, spousal, and self-incrimination, are afforded this degree of protection.

3. Enforcement of legal remedies to prevent or compensate for voluntary disclosure by mediation parties, non-party participants, and the mediator. At the extreme, a legal remedy to prevent disclosure would include the ability to enjoin publication of statements made in mediation, the outcome of the mediation, and the mere acknowledgment that mediation occurred.

B. *What is made confidential?*

1. The mere fact of settlement.
2. The terms of settlement.
3. Statements made by the parties in the course of settlement discussions.
4. Documents and other evidence disclosed by the parties in the course of settlement discussions.
5. Statements made by or notes of the mediator.
6. The mediator's impressions, opinions, or recommendations.

C. *Who can enforce any confidentiality provision?*

1. The parties to the mediation.
2. Witnesses or other participants in the mediation.
3. The mediator (any mediator or only certified mediators?).
4. Interested non-participants.
5. Courts and other public agencies.

D. *Against whom can confidentiality be enforced?*

1. The parties.
2. The mediator.
3. Non-party participants (e.g., witnesses).
4. Private third parties.
5. Public third parties.

E. *How absolute should any grant of confidentiality be (what exceptions should there be)?*

1. Absolute (no exceptions).
2. One broad exception when the interests of justice or public policy requires it.
3. A list of specific exceptions.

It is possible to chart some of these issues to show how they intersect. Although a multifactor analysis displayed in three dimensions would be

a more dramatic medium for such a demonstration, the printed page provides a limit for which the following five charts must compensate.

TABLE I

		Extent of Confidentiality	
		inadmissible	**nondiscoverable**	**non-disclosure**
What			
	Terms of settlement	**	*
	Mere fact of settlement	**	*
	Statements of parties	**	*
	Documents		
	Statements and notes of mediator	**	*
	Mediator's impressions	**	*

TABLE II

		Extent of Confidentiality	
		inadmissible	**nondiscoverable**	**non-disclosure**
Who Can Enforce			
	Parties to the mediation	**	
	Witnesses		
	The Mediator		
	Interested non-participants		
	Courts and other public agencies	*	

TABLE III

Against Whom	Extent of Confidentiality: inadmissible	nondiscoverable	non-disclosure
Parties to the mediation	**		
Mediator	**[16]		
Non-party participants	*		
Priv. 3d parties	*		
Pub. 3d parties	*		

Without considering for the moment any specific exceptions to a confidentiality provision, the above tables give some indication of the complex interrelationship of the five issues outlined above and the extent to which analysis of a claim of mediation privilege depends upon the specific context in which the claim is asserted.

This charting exercise has three purposes. The first purpose is to demonstrate the sheer complexity of the issue and hence the inappropriateness of any blanket mediation privilege. The second purpose, related to the first, is to emphasize the difficulties inherent in drafting a privilege statute or exclusionary rule which is precise enough to apply in all cases where it ought to apply, and not apply where it should not. The third purpose is to demonstrate that even though a blanket privilege may be inappropriate, there is a relatively limited core or paradigm situation in which confidentiality is both needed and appropriate. I have tried to identify this core situation by marking two asterisks ("**") on the charts indicating situations within the core. Cases in which a weaker but possibly valid claim of privilege can be asserted are marked with one asterisk ("*"). Where there is no asterisk, no privilege should apply.

I concede at the outset that this charting exercise and the marking of asterisks in the core situation represent my subjective judgment about various competing values. My analysis and conclusions, however, are based on both the traditional approach and the more modern "zone-of-privacy" approach to privileges.[15] The problem with both of these ap-

15. *See infra* text accompanying note 17.

TABLE IV

Against Whom	Who Can Enforce: Parties to mediation	Witnesses	The mediator	Interested non-participants	Courts & other public agencies
Parties to the mediation	**		*		*
Mediator	**				*
Non-party participants	**		*		*
Priv. 3d parties	*				*
Pub. 3d parties	*				*

TABLE V

Who Can Enforce	What: Terms of settlement	Mere fact of settlement	Statements of parties	Documents	Statements and notes of mediator	Mediator's impression
Parties to the mediation	**		**		**	**
Witnesses					*	*
Mediator					*	*
Interested non-participants						
Courts and other public agencies	*	*	*	*	*	*

proaches, as I have pointed out elsewhere, is their subjectivity, which permits powerful interest groups to rationalize their claims for what is essentially guild legislation or elitist cultural values.[16] In spite of the subjectivity inherent in any analysis of privileges, I have nonetheless approached the problem with a heavy dose of the skepticism with which most judges (and evidence professors) greet the call for creation of any new privilege.[17] Thus the delineation of the core zone reflects both my subjective views of when confidentiality of mediation *should* be afforded recognition and when it is most likely to be afforded recognition through legislation.

The paradigm case in support of the enactment of a confidentiality statute is a situation in which (a) one party to a mediation, (b) to advance its own interests, tries to (c) introduce either the (d) statements of another party or the impressions, notes, or opinions of the mediator (e) in subsequent litigation over the same event (f) between the same parties (g) when the interests of third parties and the public are not involved. However, as I hope to demonstrate, confidentiality in the paradigm case is already adequately provided for under current law in the form of rules of evidence excluding compromises, offers of compromise, and statements made in connection with compromise offers, as well as under rules granting the right of the parties to contract for confidentiality.[18] Moreover, trying to expand a grant of confidentiality beyond this core situation may cause a public backlash against this "secretive" type of dispute resolution. The benefits of a blanket confidentiality privilege are minimal at best, and do not outweigh the tremendous harm that will result from the public perception that a mediation that takes place behind a curtain of confidentiality may produce unfair results.

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16. E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 519-26 (1983).

17. *See, e.g.*, United States v. Arthur Young & Co., 465 U.S. 805 (1984) (accountant's privilege); In re Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

18. *See, e.g.*, Rule 408, FRE. An example of a state adoption of the Rule includes WIS. STAT. ANN. § 904.08 (West Supp. 1979) which states:

> 904.08 Compromise and offers to compromise Evidence of (1) furnishing or promising to accept, a valuable considertion 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 section 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, [proving accord and satisfaction, novation or release,] or proving an effort to compromise or obstruct a criminal investigation or prosecution.
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> [904.08 — taken from the Final Draft Federal Rule 408 which remained identical to the Preliminary Draft — does not contain the third sentence added to Federal Rule 408 by Congress. Wisconsin, however, added the bracketed material].

III. Two Hypothetical Cases

Two hypothetical cases illustrate the complexity of the confidentiality issue.

A. *Jane Smith v. Frank Smith*[19]

Jane and Frank Smith have decided to divorce. They have been married twelve years and have two children, Mary, 7 and Peter, 5.

The Smiths engage Patrick Brave, an experienced divorce mediator, to help them work out a separation agreement covering custody and property issues. During mediation, Jane admits to Patrick during a private session that she does not really want custody of the children, but is only using the custody issue as a device to get a better property settlement. In addition, Jane tells Patrick that the children might be better off with Frank because she doesn't seem to be able to control herself with the children very well; she has lost her temper with them on a number of occasions and found herself hitting them in the face. She gave Mary a black eye last week.

Later, at a joint session, Jane admits that she is using the custody issue as leverage for a larger property settlement. Upon hearing this, Frank gets mad and breaks off the mediation.

Frank's lawyer schedules Patrick's deposition. At Patrick's deposition, the lawyer asks Patrick to repeat what Jane has told him about her interest in custody of the children and about her feelings with regard to the best interest of the children. Frank's lawyer also asks Patrick if he has any information or opinions about what would be in the best interest of the children. At trial, Patrick is called as a witness by Frank's lawyer and asked the same questions.

Jane obtains custody of Mary and Peter. Six months later, at the request of Mary's second grade teacher, the Department of Social Services conducts an investigation into Jane's treatment of the children. The DDS social worker asks Patrick what he knows about Jane's care and treatment of the children.

B. *Pipeco, Inc. v. Northwest Power Co.*[20]

Pipeco, Inc. sued Northwest Power Co. for $10 million in damages arising out of Pipeco's contract to supply and erect the piping at Northwest's new generating facility. Pipeco alleges that changes ordered by Northwest and delays caused by Northwest increased the cost of its work by that amount. Northwest counterclaimed for $22 million in damages it allegedly sustained because of rigged bidding by Pipeco and

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19. Based on problem in DISPUTE RESOLUTION, *supra* note 4, at 343 (question d).
20. *Id.* at 278 (question 1).

other contractors on the new facility. The case has been in litigation for nearly three years and both sides have already spent more than half of the $2 million each expects to pay in legal and expert fees through trial, which is not scheduled for another year and a half.

The presidents of Pipeco and Northwest, although friendly, were unable to resolve the case privately. At in-house counsel's suggestion, they held a mini-trial. After the mini-trial, the neutral advisor informed the executives that, in her opinion, Pipeco is likely to recover close to the $10 million claimed, and recommended settlement in that range. During the subsequent negotiations between the presidents of the two companies, Northwest's president conceded that Northwest was responsible for from $4 to $6 million of Pipeco's damages, but refused to pay any more than that in settlement, and the litigation went forward.

Later, during the discovery phase of the case, Northwest's lawyers attempted to depose executives of Pipeco and two of its major competitors, Constructo, Inc. and Erectors, Ltd., concerning their bidding and pricing practices. In particular, Northwest's lawyers wanted answers to questions concerning an unfair competition lawsuit between Pipeco, Constructo, and Erectors (the "Piping Company Litigation") that was settled through private mediation about a year before bids were submitted on the Northwest project. It is Northwest's contention that the settlement of the Piping Company Litigation involved the establishment of illegal market divisions, group boycotts, and price fixing, which adversely affected the cost of the Northwest facility. Pipeco, Constructo, and Erectors' lawyers consistently refused to allow their executives to answer any questions relating to the settlement of the Piping Company Litigation on the grounds that it involved private mediation. Pipeco's lawyers also moved to quash a subpoena issued to Mark Jonathan, the well-known dispute resolution consultant, who successfully mediated the Piping Company Litigaton.

At the *Pipeco v. Northwest* trial, Pipeco sought to introduce the following evidence:

(i) Certain statements made by Northwest's witnesses during the failed mini-trial;

(ii) Statements made by Northwest's president during the post-mini-trial negotiations conceding $4-$6 million responsibility;

(iii) The testimony of the neutral advisor (whom Pipeco subpoenaed) that, in her opinion, Northwest was liable for approximately $10 million.

Suppose that the Pipeco-Northwest mini-trial had been successful and the parties settled for an $8.5 million payment to Pipeco. Subsequently, Northwest petitioned the Public Service Commission (PSC) for a rate increase. Northwest's petition included the $8.5 million payment to Pipeco as well as the $22 million in additional costs it incurred allegedly

as a result of unfair bidding practices by the piping companies. At a brief hearing before the PSC, at which the neutral advisor's opinion was read into the record by the attorney for Northwest, the requested rate increase was approved. Later, "NWPIRG", a public interest group, challenged the rate increase in court. Lawyers for NWPIRG sought to compel the neutral advisor to testify to the reasons for her opinion and to produce her notes from the mini-trial reflecting her impressions of the parties' presentations.

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The *Smith* and *Pipeco* cases raise difficult questions concerning a mediation privilege. In the *Smith* case, one party seeks to *discover* and *introduce* at trial damaging statements made by the other party during mediation. Some of those statements were made during an ex-parte caucus, others in a joint (but still private) session. In addition, one side seeks to discover and introduce as evidence the impressions and opinions of the mediator. Moreover, the issue at stake involves the separate interests of third parties (the children) as well as the interests of the parties to the mediation. Finally, a public agency charged with protecting the interests of the children, in order to fulfill its statutory obligations, seeks to discover mediator knowledge gained during the mediation.

In the *Pipeco* case, one party to private litigation based on a federal statute implementing important public policy objectives (enforcement of anti-trust laws) seeks to *discover* clearly relevant information about an earlier mediated settlement to which it was not a party. This party seeks to discover such information from both the party participants in the earlier mediation, and the mediator.

Second, one party to the lawsuit seeks to *introduce* statements made by witnesses and by the other party at an earlier, unsuccessful attempt to mediate the current dispute by mini-trial. The same party seeks to *introduce* at trial the opinion of the neutral advisor from the mini-trial.

Finally, in a variation on the case, a non-party purporting to represent the public interest seeks to introduce at a regulatory hearing the impressions and notes of the neutral advisor from a successful mini-trial, after one of the parties has introduced the formal opinion of the neutral advisor in support of its request for favorable regulatory treatment.

Of these hypothetical cases, the only situation that arguably falls within the paradigm case for confidentiality is Pipeco's attempt to introduce at trial evidence of its claim against Northwest from the Pipeco-Northwest mini-trial. Even this situation is not clearly within the paradigm case for confidentiality because the nature of the case and the nature of the parties — an anti-trust action involving a regulated utility — both involve the public interest. All of the other hypothetical situations are clearly outside the core case for confidentiality because they involve (a) *discovery* rather than *admissibility* of evidence, (b)

non-parties to the mediation, or (c) interests clearly public in nature (i.e., abuse of children, utility rates).

How much confidentiality will be accorded in these situations under current case, rule, and statutory law? What *should* be the scope of protection in these cases? Are the limits of the paradigm case set too narrowly? These questions are discussed below.

IV. CONFIDENTIALITY OF MEDIATION TODAY

In the past few years, a flurry of proposals have been made regarding statutory privileges for mediation.[21] Confidentiality statutes in one form or another now exist in at least fourteen states,[22] three of which provide an absolute or blanket privilege.[23] Before considering these recent statutory developments, however, it is helpful to understand the scope of confidentiality afforded mediation in the absence of an explicit privilege statute.[24]

A. *Exclusion of Settlement Offers and Statements Under Evidence Rules*

Basic protection against the admissibility of statements made in the course of mediation is provided by the traditional rule of evidence excluding offers of compromise and statements made in connection with offers. At common law[25] and in virtually every jurisdiction today,[26] compromise offers are inadmissible when offered at a later trial to prove

21. *See generally* Freedman, *supra* note 2, at 68-99; Dauer, *supra* note 1, at 452-57.

22. ARK. STAT. ANN. § 81-128 (Supp. 1985); CAL. CIV. PROC. CODE § 1747 (West 1982); CAL. LABOR CODE § 65 (West 1971); COLO. REV. STAT. § 13-22-307 (Supp. 1985); CONN. GEN. STATE ANN. § 31-100 (West Supp. 1986); IOWA CODE ANN. § 90.14 (West 1984); FLA. STAT. ANN. § 44.201(5) (West Supp. 1986); MICH. COMP. LAWS ANN. § 552.513(3) (West Supp. 1986); MONT. CODE ANN. § 40-3-101 to 116 (1975); N.H. REV. STATE ANN. § 1273:18 (1977); N.Y. STAT., Civil Service Law § 205.2(b) (CLS Supp. 1985); N.Y. (JUD. LAW) STAT. § 489-b(6) (CLS 1983); N.Y. STAT., Labor Law § 754(3) (CLS 1983); N.J. ADMIN. CODE tit. 19 § 12-(3.4), (3.5) (Supp. 1982); N.C. GEN. STAT. § 95-36 (Nov. 1985); OKLA. STAT. tit. 12, § 1805 (Supp. 1985); OR. LAWS c. 892 § 88 (REV. STAT. 107.600, 1981).

23. *E.g.*, CAL. EVID. CODE § 1152.5 (West 1986); M.G.L. c. 233 § 23C (1986).

24. *See Mini-Trial Handbook, supra* note 4, at 63.

25. *See, e.g.*, Laudati v. Liberatore, 51 R.I. 282, 154 A. 120 (1932). *See generally* 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961); Waltz & Hurton, *The Rules of Evidence in Settlement*, 5 LITIGATION 11 (1978) ("Courts at common law consistently ruled that offers to settle a disputed claim by compromise were inadmissible when offered at a later trial to substantiate the plaintiff's claim."); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 274 at 663 (2d ed. 1972).

26. *See generally* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶408[8] (Supp. 1986). States which have adopted Rule 408 verbatim or virtually verbatim include: Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington and West Virginia. Substantially similar rules exist in Alaska, California, Florida, Kansas, Nevada, New Hampshire, New Jersey, New Mexico, Wisconsin, Wyoming, Texas, Vermont and Puerto Rico.

liability for or invalidity of the claim in question or its amount. Although the same protection was not always extended to collateral statements and conduct occurring during settlement talks,[27] the rule of exclusion in most jurisdictions today is broad enough to cover all conduct and statements made during settlement talks.[28] In addition, many of the gaps in the evidence rule of exclusion may be filled by contractual provisions expanding and clarifying the scope of confidentiality.[29]

Rule 408 of the Federal Rules of Evidence is based on the common law rule and is typical of the modern codified approach. It 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. The 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.[30]

The policy behind excluding compromise offers and related statements is twofold: (1) such evidence is of questionable relevance to the substantive issues because offers and settlement talks may imply nothing

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27. *See* Hatfield v. Max Rouse & Sons Northwest, 606 P.2d 944, 950 (Idaho 1980) ("In the past ... if a statement of fact, as opposed to one of opinion, were made in the course of settlement negotiations it would be admissible in evidence unless prefaced by language such as 'for the purposes of argument only,' or 'without prejudice.' "); Gallagher v. Viking Supply Corp., 411 P.2d 814, 819 (Arizona 1966) ("The determining factor is the form of the statement, whether it is explicit and absolute. If its purpose is to declare a fact really to exist, rather than to concede a fact hypothetically in order to effect a settlement, the statement is admissible."); S. Leo Harmoney, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014, 1023 (D.C.N.Y. 1984) ("At common law, use of the prefatory and 'magic' phrase 'without prejudice' clearly indicated that the statement was being made in the course of compromise negotiations. Under FRE 408, employment of this common law phrase is no longer dispositive.").

28. *See* Central Soya Co. v. Epstein Fisheries, 676 F.2d 939, 944 (7th Cir. 1982) ("Rule 408 excludes evidence of compromises and offers to compromise, and of 'statements made in compromise negotiations'."); Cates v. Morgan Portable Building Corp., 780 F.2d 683, 691 (7th Cir. 1985) ("Statements made in settlement negotiations are not admissible to establish a party's liability, or damages, in the dispute that was the subject of the negotiation."); Fidelity & Deposit Co. of MD v. Hudson United Bank, 493 F. Supp. 434, 445 (D.N.J. 1980) ("Rule 408 of the Federal Rules of Evidence clearly prohibits admission of compromises and offers of compromise to prove liability for or invalidity of a claim or its amount.").

29. *See* text accompanying notes 31-41.

30. Rule 408 of the Uniform Rules of Evidence is identical to FRE 408 except that it does not contain the third sentence of FRE 408, which was added by the House of Representatives to the rule proposed by the Supreme Court.

more than a desire for peace, rather than an admission of liability; and (2) the law favors voluntary, informal resolution of private disputes. Thus, the Rule creates a quasi-privilege for specifically defined conduct.

A few observations concerning this Rule are in order. First, the Rule covers successful (i.e., completed) settlement talks as well as unsuccessful negotiations. This means that evidence presented in one case regarding an offer, settlement discussions, or a completed settlement is inadmissible in a later case.[31] Second, it explicitly covers all collateral statements and conduct.[32] Third, there are exceptions to the general rule of exclusion. If settlement offers or statements are offered for a purpose other than proving liability for or invalidity of the claim or amount, they are not excluded by the Rule.[33] The Rule lists three specific exceptions, but these are only exemplary, not exhaustive, of the permissible uses of such evidence. Because of the open-ended nature of the exceptions, it is unclear whether statements made during settlement discussions may be used for impeachment purposes.[34] The tendency seems to be to allow

31. *See* Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 139 (8th Cir. 1968) (It is proper to ask a claims investigator generally about his occupation and interest in the case, but "his intent and activities in this case regarding settlement would be inadmissible as a matter of legal policy to show an offer was made or steps were taken in an attempt to settle the claim.").

32. *See* Ramada Development Co. v. Rauch, 644 F.2d 1097, 1106 (5th Cir. 1981) ("The previous common law rule held that admissions of fact made in negotiations were admissible 'unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it.' ... The present rule fosters free discussion in connection with such negotiations and eliminates the need to determine whether the statement if not expressly qualified 'falls within or without the protected area of compromises' the question under the rule is 'whether the statements or conduct were intended to be part of the negotiations toward compromise.' ") 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶408[3], at 408-21 (1980).

33. *See* Belton v. Fibreboard Corp., 724 F.2d 500, 505 (5th Cir. 1984) (fact of settlement by fifteen co-defendants was admissible for purpose of explaining why those parties were not in court); In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1125 (7th Cir. 1979) (evidence of negotiations admissible on issue of fairness of partial settlement in class action); Central Soya Co., Inc. v. Epstein Fisheries, Inc., 676 F.2d 939, 944 (7th Cir. 1982) (evidence of settlement admissible to show partial forgiveness of primary debt in guaranty case); Brever Electric Manufacturing Co. v. Tornado Systems of America, Inc., 687 F.2d 182, 185 (7th Cir. 1982) (evidence of settlement negotiations admissible in hearing to set aside default to show defendant's awareness of claim); United States v. Wilford, 710 F.2d 439, 451 (8th Cir. 1983) (evidence of settlement stipulation offered to explain circumstances surrounding refunds to certain non-union drivers, not to show that Local 238 violated the National Labor Relations Act); Prudential Ins. Co. v. Curt Bullock Builders, Inc., 616 F. Supp. 159, 165 (N.D. Ill. 1985) ("When evidence that may implicate Rule 408 is offered for a purpose other than inpugning the validity of the claim, a court must balance the weight of the policy considerations behind the rule against the need for the evidence.").

34. *See* Reichenbach v. Smith, 528 F.2d 1072, 1075 (5th Cir. 1976) ("Rule 408 codifies a trend in case law that permits cross-examination concerning a settlement for the purpose of impeachment."); Brocklesby v. United States, 767 F.2d 1288, 1293 (9th Cir. 1985) (indemnity agreement was admissible to attack the credibility of witnesses); John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 635 (3rd Cir. 1977) (evidence of release was admissible to show bias of consultant's testimony as the release of liability was in exchange for the testimony).

the use of statements made during negotiations to impeach the credibility of one who is not involved in the case in which the statement is offered.[35] On the other hand, most courts recognize that allowing the parties to use each other's settlement statements for impeachment purposes would destroy the Rule, and exclude settlement evidence in this context.[36]

Fourth, quite sensibly, the Rule does not permit the bootstrapping of otherwise admissible evidence into the inadmissible category merely because it is presented at a settlement talk.[37] This means that statements with substantive content made orally or in writing during mediation are not admissible to prove the substantive content; however, the same facts can be proved by any other legitimate means. Fifth, the Rule does not distinguish between evidence offered by third parties and evidence offered by the parties to the settlement talks.[38] Thus, it appears that statements or offers otherwise within the Rule are inadmissible even when offered by a third party in a later case. This is the view of the Advisory Committee.[39] Sixth, the Rule only forbids the admission of evidence in court. It does *not* preclude discovery, which may extend beyond the admissible if the discovery is calculated to lead to the discovery of admissible evidence.[40] Seventh, the Rule does not say anything about mere disclosure outside of court of offers or settlement

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35. Esser v. Brophy, 212 Minn. 194, 3 N.W.2d 3 (1942).

36. Estate of Spinosa v. International Harvester Co., 621 F.2d 1154, 1158 (1st Cir. 1980) ("[D]istrict judge properly rules that the agreement could not function to impeach Thomas Spinosa's testimony, since Spinosa was asked at trial and testified, to the fact that he had been sued in state court.").

37. *See* Bottaro v. Hatton Associates, 96 F.R.D. 158, 160 (E.D.N.Y. 1982) ("Rule 408 would not immunize documents or factual admissions merely because they were exchanged in the course of negotiating a settlement . . . if they are independently admissible either as pre-existing documents or 'provable by evidence other than conduct or statements that make up compromise negotiations.' ").

38. *See* Young v. Verson Allsteel Press Co., 539 F. Supp. 193, 195 (D.C. Pa. 1982) (Court did not allow evidence of plaintiff's settlement with a former co-defendant); McHann v. Firestone Tire and Rubber Co., 713 F.2d 161, 166 (5th Cir. 1983) (Plaintiff's settlement with two defendants in contract action not admissible at trial of remaining defendants); United States v. Contra Costa County Water District, 678 F.2d 90, 92 (9th Cir. 1982) (in suit by United States against water district for cost of erecting wall necessitated by actions of landowner, evidence of settlement between United States and landowner not admissible.).

39. The Advisory Committee Notes state, "[w]hile the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto." The latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person. *See* McInnis v. A.M.F., Inc., 765 F.2d 240, 247 (1st Cir. 1985) ("If the policies underlying Rule 408 mandate that settlements may not be admitted against a defendant who has recognized and settled a third party's claim against him, it is axiomatic that those policies likewise prohibit the admission of settlement evidence against a plaintiff who has accepted payment from a third party against whom he has a claim.").

40. FRE 408 speaks only in terms of inadmissibility; FRCP 26(b)(1) states that the scope of permissible discovery is not limited by what is admissible at trial. *See* United

statements. Eighth, although there are few cases on point as yet, Federal Rule 408 and similar state rules should apply to negotiations facilitated by a neutral third party, just as they apply to two-party negotiation.[41] Statements made in the context of mediation are part of compromise negotiations, and nothing in the Rule excludes facilitated negotiations from its coverage.

B. *Exclusion and Nondiscoverability of Settlement Offers and Statements by Contract*

Because of the limited scope of the evidentiary exclusion rule and uncertainty as to its application in problematic cases (e.g., impeachment, subsequent litigation, etc.), many parties to negotiation and mediation attempt to clarify the confidential nature of the process by agreement. This agreement often takes the form of a few words by the lawyers agreeing that the conversation is "without prejudice" or "for settlement only." In more highly structured negotiations, multi-party negotiations, and mini-trials, the agreement usually is reduced to writing and made a part of the mediation or mini-trial agreement.

Generally, contractual provisions incorporating a dispute resolution confidentiality clause have two main purposes. The first is to explicitly call into play Rule 408 or its state counterpart, in order to lay to rest any doubts in a later judicial proceeding that the parties understood and intended the evidence rule to apply. The second purpose is to clarify the uncertainties and fill in the gaps in the evidence rule by directly addressing uncertain areas, such as impeachment, discoverability, non-disclosure, use in later cases, and remedies for a breach of the agreement.

Careful drafting of a confidentiality clause in a mediation or mini-trial agreement is necessary because of the uneven and incomplete coverage of the evidence rule. For example, some courts might not apply the rule to mediation because they mistakenly perceive mediation to be a variant of arbitration rather than a private process of facilitated negotiation. By referring explicitly to Rule 408 in a written mediation agreement, the parties maximize the likelihood of receiving Rule 408 coverage. Also, because the mediator's notes, impressions, and opinion may be among the most tempting items of evidence to try to obtain or

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States v. Reserve Mining Co., 412 F. Supp. 705, 712, *aff'd and remanded on other grounds,* 543 F.2d 1210, *on remand,* 531 F. Supp. 1248 (D.C. Minn. 1976) ("The purpose of the privilege surrounding offers of compromise is to encourage free and frank discussion with a view toward settling the dispute. It is not designed to shield otherwise discoverable documents, merely because these documents represent factual matters that might be or are incorporated in a settlement proposal."); NAACP Legal Defense and Educational Fund, Inc. v. United States DOJ, 612 F. Supp. 1143, 1146 (D.D.C. 1985) (allow discovery of letters from adversaries in past litigation with DOJ to the agency — FOIA; FRE 408 "was never intended to be a broad discovery privilege.").

41. EEOC v. Air Lines Ass'n., 489 F. Supp. 1003, 1008 n.4 (D. Minn. 1980) *rev'd on other grounds,* 661 F.2d 90 (8th Cir. 1981).

introduce in litigation,[42] and because these items are less clearly covered by the Rule, the mediation agreement should explicitly tie the mediator's statements, notes, impressions, and opinion into the settlement process.

A mediation agreement incorporating such language might state:

> This entire process is a compromise negotiation. All offers, promises, conduct and statements, whether oral or written, made in the course of this mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator, who is the parties' joint agent for purposes of these compromise negotiations, are confidential. Such offers, promises, conduct and statements are subject to FRE 408 and are inadmissible for any purpose, including impeachment.

Not only should this clause clearly call the evidence rule into play, it also addresses the ambiguity in the Rule concerning impeachment by making such evidence inadmissible for "any purpose, including impeachment." Whether this attempt would be successful if challenged in a particular context is uncertain; however, it may prove effective, given the general judicial tendency to exclude such evidence when offered for impeachment purposes. To obtain maximum possible application of the agreement and the benefit of Rule 408, all the participants in the mediation, including the mediator and witnesses, should read and acknowledge the confidentiality agreement by signing it.

Neither Rule 408 nor the confidentiality clause set forth above expressly deal with the discoverability or the prevention of unauthorized out-of-court disclosure of statements made in mediation. The issue of discoverability could come up in two contexts. First, a party to an unsuccessful mediation may attempt in the litigation to "discover" something said at, prepared for, or offered during mediation. Since the party will already have all the documents and exhibits in its possession, he or she may request admissions of facts disclosed at mediation under Rule 36 of the Federal Rules of Civil Procedure, or alternatively, may seek to follow-up leads obtained at mediation in depositions or through

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42. In traditional mediation—that is, where the mediator perceives her role as simply helping the disputants to find an agreement acceptable to them without regard for the mediator's judgment of what would be an optimum or fair resolution—the mediator may have no notes, impressions, or opinions to discover. *See* Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind,* 6 VT. L. REV. 85 (1981). Not all mediators practicing traditional mediation share such a minimalist perception of the mediator's role. *See, e.g.,* Susskind, *supra* note 6. A diologue expressing the opposing views on this point can be found in DISPUTE RESOLUTION, *supra* note 4, at 108-13.

Other forms of mediation, such as the mini-trial, involve the mediator deeply in the underlying legal merits of the dispute. Indeed, the mini-trial mediator, called a "neutral advisor", usually is expected to deliver an opinion on the legal merits of the case if either of the parties requests it. *See The Mini-Trial Handbook, supra* note 4, at 15. Such an "evaluative mediator" is likely to have notes, impressions, and opinions of great interest to the litigants.

interrogatories under Rule 33 of the Federal Rules. Nothing in the nature of mediation, the proposed mediation agreement, or Rule 408 would foreclose a party from obtaining useful information or admissible evidence through regular discovery in this way.

The second way in which the issue of the discoverability of statements made in mediation could arise is if a third party, in another lawsuit, seeks to discover what was said and offered at mediation. The *Pipeco* and *Smith* cases present examples of both of these phenomena.

In the *Pipeco* case, Northwest is attempting to discover what happened in the Piping Company Litigation mediation, and NWPIRG (the public interest group) is seeking to discover what transpired in the Pipeco/ Northwest mini-trial. Pipeco is also trying to "discover" facts from its mini-trial with Northwest. In the *Smith* case, both Frank and the DSS are attempting to discover statements made by Jane during the divorce mediation, as well as the knowledge of the mediator.

Under current law, Northwest, NWPIRG, Frank, and the DSS may well get their way. Rule 408, even if applicable to third parties, presents no bar to discovery. Moreover, in most jurisdictions, including federal court, a matter is discoverable even if it is not admissible so long as the information sought is calculated to lead to the discovery of admissible evidence or if the information will facilitate settlement.[43] Those conditions are easily satisfied in our examples, especially when one considers the public policy importance of the third-parties' claims.[44]

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43. FED. R. CIV. P. Rule 26(b)(1) states: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . ." *See* Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 *reh'g denied,* 578 F.2d 871 (5th Cir. 1978) (an engineering document which the automobile manufacturer failed to disclose in violation of a discovery order was not an isolated document but contained referenses to other documents. It was reasonably calculated to lead to discovery of admissible evidence and therefore satisfied the rule); Kerr v. United States Dist. Court for North Dist. of Cal., 511 F.2d 192, 196 (9th Cir. 1975), *aff'd,* 426 U.S. 394 (1975) (Allowed discovery of personnel files of members of an administrative agency in a civil rights action. "[U]nder FED. R. CIV. P. 26(b)(1), it is no ground for objection that information sought in pretrial discovery would not be admissible at trial, 'if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence'. . .").

44. Madden, *Drafting Settlement Agreements in Commercial Litigation,* 5 LITIGATION 40 (1978) [hereinafter cited as Madden] in the context of traditional settlement negotiations, makes the following observations:

> I have discovered the following reported cases that consider this issue. In Uinita Oil Refining Co. v. Continental Oil Co., 226 F. Supp. 495 (D. Utah 1964), the court held that the plaintiff had to answer an interrogatory propounded by a defendant seeking information on the terms of a settlement between the plaintiff and the other defendants; in Rohlfing v. Cat's Paw Rubber Co., 17 F.R.D. 426 (N.D. Ill. 1954), the court held that a defendant was entitled to discover the terms of a settlement between the plaintiff and the other defendants; in Walling v. R.L.

Parties wishing to protect themselves against such discovery could expand the mediation agreement confidentiality clause to preclude discovery as well as admissibility of such evidence. The problem with this approach, however, is that the parties' agreement cannot bind third parties such as Northwest, NWPIRG, and the DSS, who were not parties to the mediation agreement. Moreover, the attempt to preclude discovery may not even be enforceable against the contracting parties. It is by no means clear that private parties have the power to alter judicial discovery rules by agreement. Nonetheless, if a written confidentiality agreement exists, the parties are in a stronger position to argue that the court should exercise its discretion to grant a protective order assuring confidentiality because protecting the confidentiality of mediation statements furthers the expressed intentions of the parties as well as the public policy of encouraging extra-judicial settlements

C. *Public Policy Considerations Favoring Recognition of Mediation Confidentiality*

McGinley Co., 4 F.R.D. 149 (E.D. Tenn. 1943), the court granted the government's motion under the Fair Labor Standards Act for production of certain settlement agreements; in Maule Industries, Inc. v. Roundtree, 264 So.2d 445 (Dist. Ct. App. Fla. 1972), the court held that a defendant was entitled to pretrial discovery of a "Mary Carter" agreement between the plaintiff and other defendants; and in Cseri v. D'Amore, 232 Cal. App. 2d 622, 43 Cal. Rptr. 36 (1965), the court held that where the amount of a settlement would reduce *pro tanto* the amount of another defendant's liability, the fact of the settlement may be properly made known to the jury so the jury may deduct the settlement amount from the total damages sustained by the plaintiff.

Id. at 59. A review of the above cases reveals that the parties have been very imaginative in developing plausible legal theories justifying the discovery of settlement agreements. Consider also the following additional arguments: (1) One of the major purposes of discovery is to facilitate out-of-court settlements. Knowledge of the amount of the settlement with other defendants facilitates such settlements. *See, e.g.,* Holliman v. Redman Development Corp., 61 F.R.D. 488, 491-92 (D.S.C. 1973); 4 MOORE'S FED. PRAC. ¶26.02[2] (1976 Ed.); (2) a party can also argue that it is entitled to discover the amount of a settlement when any person who will testify in the trial will come from one of the settling defendants, citing those cases holding that a jury is entitled to know, as a factor affecting credibility, if a witness has a stake in the settlement, *see* Annot., § 61 A.L.R. 395 (1946); ... (5) a creative defendant could argue that the settlement between the plaintiff and the settling defendants is part of an ongoing antitrust conspiracy, and that the amount and terms of the settlement should be discoverable to ascertain whether an antitrust counterclaim is warranted, *see, e.g.,* Bass v. Gulf Oil Corp., 304 F. Supp. 104 (S.D. Miss. 1969) (action taken by antitrust defendant after the complaint is filed may be proper subject for discovery if relevant); Jack Winter, Inc. v. Koratron Co., Inc., 375 F. Supp. 1, 54 (N.D. Cal. 1974) (the fact that a settlement between competitors is secret does not prove an antitrust violation, but it may be evidence of an intent to violate the antitrust laws); and (6) a defendant can argue that the settlement amount is relevant to the damages question in matters like antitrust cases where the losing defendant is entitled to deduct from the damages assessed the amount that a plaintiff has received from other settling defendants. Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-98 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957).

Public policy favoring encouragement of extra-judicial settlements has been recognized by courts and administrative agencies as grounds for protecting mediation confidentiality, even when no recognized privilege exists.

This public policy is incorporated, for example, in the regulations for the Federal Mediation and Conciliation Service which provide as follows:

> Production of records or testimony by FMCS employees.
>
> (a) Public policy and the successful effectuation of the Federal Mediation and Conciliation Service's mission require that commissioners and employees maintain a reputation for impartiality and integrity. 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.
>
> (b) No officer, employee or other person officially connected in any capacity with the Service, currently or formerly, shall, in response to a subpoena duces tecum, or other judicial or administrative order, produce any material contained in the files of the Service, disclose any information acquired as part of the performance of his official duties or because of his official status, or testify on behalf of any party to any matter pending in any judicial, arbitral or administrative proceeding, without the prior approval of the Director.[45]

In a similar vein, federal regulations for the mediation of age discrimination disputes state:

> The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the agency appointing the mediator.[46]

In the case of *In the Matter of Tomlinson of High Point, Inc. and United Brotherhood of Carpenters and Joiners of America*,[47] the NLRB rejected an attempt to subpoena a conciliation commissioner in a bargaining unit dispute. The Board determined that

> If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required,

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45. 29 C.F.R. § 1401.2 (1986).
46. 45 C.F.R. § 90.43.44 (1986).
47. 74 NLRB 681, 685 (1947).

> not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result 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.[48]

Voluntary, unauthorized violation of the confidentiality clause of a mediation confidentiality agreement would not violate Rule 408, but, assuming nondisclosure was specified in the mediation agreement, this action would constitute a breach of contract. The problem is in identifying useful remedies to prevent or compensate for such a breach. One approach is to try to specify a remedy for a breach in the agreement. For example, the agreement could provide: "Any violation of this agreement by either party will seriously prejudice the other party, and will be *prima facie* grounds for a mistrial or disqualification motion." But reciting in the mediation agreement that a breach of the rules is "*prima facie* grounds for a mistrial or disqualification motion" does not make it binding on the court, although such provisions may be given weight by a judge. In any event, a party should be able to recover actual damages for breach of the agreement.[49] Proving these damages could be difficult, however, especially to the extent that they are based on consequential losses. A liquidated damages clause would avoid this problem if an enforceable clause could be drafted.

A court might specifically enforce a confidentiality clause by granting an injunction against threatened or further disclosures, but prior restraints on speech generally bear a heavy presumption against their constitutional validity. Yet, if disclosure will actually impair legitimate business interests and if the disclosing party agreed not to disclose the information, it has been held that the presumption may be overborne or the first

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48. *See also* International Assoc. of Machinists v. National Mediation Board, 425 F.2d 527 (D.C. Cir. 1970), the court held that EEOC was not required to produce information acquired through conciliation efforts under § 706(b) of Title VII. The court stated that "only by keeping such data strictly confidential can employers be encouraged to discuss openly and frankly the possible grounds for an amicable resolution of the dispute at hand." Disclosure, the court felt, "is bound to dissuade candor and even participation by employers in a negotiated settlement." *Id.* at 948. *See also* Burlington Northern, Inc. v. EEOC, 582 F.2d 1097 (7th Cir.), *cert. denied,* 440 U.S. 930 (1978) (disclosure of EEOC investigative material held to interfere with the agency's ability to obtain voluntary cooperation with its investigative efforts); Bliznik v. International Harvester Co., 87 F.R.D. 490 (1980) (arbitrator was not required to produce all materials used in reaching his decision); NLRB v. Joseph Malcaluso, Inc., 618 F.2d 51 (9th Cir. 1980) (preservation of mediator effectiveness by protection of mediator neutrality held to outweigh the benefits derivable from the mediator's testimony).

49. *See* S. WILLISTON, CONTRACTS § 1338 *et seq.* (Jaeger ed. 1968).

amendment right held to be waived.[50] Despite the constitutional presumption, injunctions are readily available in trade secrets cases to prevent the further dissemination of confidential business information.[51] The party seeking the injunction must satisfy the usual conditions for injunctions, including showing a "substantial threat of impending injury[52] ...." Much of the information disclosed at a business mediation may be characterized as a trade secret. Beyond that, however, it may be argued that disclosure to third-parties of mediation statements, results, and the mediator's impressions poses a greater threat to the participants than does disclosure of ordinary trade secrets. In mediation, the disclosure might not only destroy a business advantage, it could also suddenly put the party at a judicial disadavantage. Nonetheless, in the absence of well-developed precedent in this area, participants in mediation should not assume that injunctive relief will be available to enforce mediation confidentiality agreements.

D. *Public Policy and Protective Orders*

Another way to enhance the protection of mediation statements and proceedings from future discovery is to incorporate the mediation agreement in a court order treating mediation as a hybrid discovery device. Under FRCP 26(c), the court may "for good cause shown ... make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Under Rule 26(c), the court may order "that a trade secret or other confidential research, development or commercial information not be disclosed ...."

Assuming Rule 26(c) would be applicable to a mediation agreement incorporated in a court order, the "good cause" requirement would still have to be satisfied. This requirement has been narrowly construed by some courts to require a showing that disclosure will work a clearly defined and very serious injury.[53] On the other hand, some courts have used a more practical balancing test in determining whether to grant a Rule 26(c) protective order. The factors weighed are (1) the nature of the proceeding, (2) whether the deponent is a party, (3) whether the information sought is available from other sources, and (4) whether the information goes to the heart of the claim.[54]

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50. *See* National Polymer Products, Inc. v. Borg-Warner, 641 F.2d 418, 424-25 (6th Cir. 1981).

51. *See* MILGRIM, TRADE SECRETS, 7.08[1][b].

52. Allis-Chalmers Mfg. Co. v. Continental Aviation & Eng. Corp., 255 F. Supp. 645, 654 (E.D. Mich. 1966).

53. United States v. International Business Machs. Corp., 67 F.R.D. 39, 46 (S.D.N.Y. 1975).

54. Richards of Rockford, Inc. v. Pacific Gas & Electric, 71 F.R.D. 388 (N.D. Cal.

In *Adler v. Adams*,[55] the court relied heavily on a balancing test in granting a motion to quash a subpoena served upon a mediator in an environmental case. Under this balancing approach, the party seeking discovery must show that non-disclosure will lead to serious injury. Relevant factors include (1) the relevancy of the information the discovering party hopes to elicit, (2) whether the information is reasonably available from other sources, and (3) how essential such information is to the preparation of the party's case.

Courts have not been reluctant to allow subsequent litigants access even to previously sealed court records.[56] On the other hand, non-litigant third-parties have been denied access to information submitted to the court under protective orders.[57]

Insulating information and documents from discovery by the government may present even greater problems. Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[58] the Justice Department may issue civil investigation demands ("CID's") to any person that the Attorney General or Antitrust Assistant has reason to believe may be in possession of documentary materials relevant to a civil antitrust investigation, requiring that the materials be turned over to the government for inspection and copying. The government's power under this law to obtain discovery materials covered by a protective order was upheld in *United States v. GAF Corp.*[59] There is no reason to suppose that the issuance of a CID for a mediator's notes would be treated differently.[60]

Some courts have held that Rule 26(c) protective orders are subject to constitutional scrutiny, and may have to give way to first amendment considerations.[61] (Under this analysis, party stipulations fare no better than court orders.)

One response to arguments seeking to unseal information covered by a protective order (or even a mediation agreement between the parties) is that the communications to and from the mediator are akin to work-

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1976) (protecting against disclosure of confidential interviews for research project). *See also* Baker v. E. and F. Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

55. No. 675-73C 2 (W.D. Wash., May 3, 1979).

56. *See* Ex parte Uppercu, 239 U.S. 435 (1915) (Holmes, J.); Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1964). *See also* Owens-Illinois, Inc. v. E.I. Dupont de Nemours & Co., 25 Fed. R. Serv. 2d 54, 57 (N.D. Ohio 1977) (agreements between parties that discovery fruits would be used only for their litigation cannot, in themselves, bar access by subsequent litigants).

57. *See* United States v. United Fruit Co., 410 F.2d 553 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969).

58. Pub. L. No. 94-435, 90 Stat. 1383.

59. 596 F.2d 10, 16 (2d Cir. 1979).

60. On this issue *see generally* Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 HARV. L. REV. 1085 (1981).

61. *See* In re Halkin, 598 F.2d 176 (D.C. Cir. 1979).

product material. In *Hickman v. Taylor*,[62] the Court first noted that broad and liberal discovery became limited where "the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege." While memoranda, notes, and mental impressions of the attorney were held not to fall within the scope of the attorney-client privilege, the Court stated that an attempt to compel their production "falls outside the arena of discovery and contravenes the public policy"[63] underlying the peaceful resolution of disputes through mediation. The mediator, like the attorney, must gather and shift information, consider strategy, and formulate his advice carefully. To do all this effectively, the mediator sometimes must record not only information received, but his own thoughts on how best to use information, and what information will be used. If these records are open to public scrutiny, the mediator would be reluctant to reduce confidential communications to writing. The interest of the disputants in peaceful resolution would be poorly served by disclosure, if served at all. The court in *Adler v. Adams*,[64] recognized the *Hickman* analogy, and deemed the mediator's private communications "protected work product."

In an analagous situation, the Supreme Court of Minnesota recently upheld the confidentiality of previously sealed settlement documents and transcripts from an open hearing in which settlement amounts were disclosed and distributed.[65] At the request of the parties, the civil court records of settlements in five wrongful death actions brought against an airline and other defendants were sealed to protect the parties from harassment and intrusion and to promote the settlement of other actions. The settlement amounts had been disclosed to the court because under applicable state law, in a wrongful death action, the trial court had to approve the distribution of settlement amounts to the heirs of the deceased. Although this had been done at an open hearing, no one other than the parties' representatives had been present at the hearing. Thus, sealing the settlement documents and the transcript of the hearing effectively shielded this information. A newspaper reporter subsequently sought to quash the confidentiality order and obtain access to the files, asserting common law, statutory, and constitutional rights of access to public records.

The trial court denied the motion to quash, applying a common law balancing test to the public's right of access to civil court files and proceedings and the interest of the parties and court, in this case, in confidentiality of the settlement amounts. The intermediate court of appeals granted the reporter's request for a writ of prohibition vacating

62. 329 U.S. 495, 508 (1947).
63. *Id.* at 510.
64. No. 675-73C 2 (W.D. Wash., May 3, 1979).
65. Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986).

the confidentiality order.

The Minnesota Supreme Court reversed the court of appeals, adopting the common law balancing test used by the trial judge and rejecting the petitioner's attempt to advance a first amendment constitutional standard. While the Supreme Court recognized that there is a strong presumption in favor of acccess to civil court files and proceedings, it held that in this case the presumption was overcome by a strong countervailing interest in protecting the settling parties from future intrusion and harassment, promoting further settlement, and benefiting the county and court by settlement, rather than trial, of future cases arising out of the same aircrash.[66] In rejecting a more stringent constitutional standard for the public's right of access to civil settlement documents and transcripts of settlement hearings, the court noted that historically, civil settlements have been private and have not involved courts except for accepting a stipulated agreement dismissing the case. Courts do not approve, or inquire into the terms of settlement. The court also observed that the historic privacy of settlements was borne out by the evidence rule making settlements and offers to settle inadmissible. Coupled with the public policy in favor of private settlement of disputed claims, these considerations refuted any constitutional right of access to civil settlement documents. The court also held that the fact that the settlements were disclosed to the trial court as part of a statutorily required distribution approval proceeding did not change matters because the purpose of the statute was to protect minors, not to expose settlements to the public.[67]

The result in the Minnesota case is questionable and, I suspect, goes further than most advocates for a mediation privilege would argue. Advocates for a mediation privilege emphasize the private and consensual nature of mediation. In the Minnesota case, the actions of a public official — the judge — in a statutorily required proceeding, that had been held in an open courtroom, were veiled with a shroud of secrecy. If the litigants' interest in personal privacy, and the courts' interest in promoting out of court settlements, outweigh the public's right to know what goes on in its courthouses in this case, it is hard to imagine many instances in which the same balancing will not result. Once a judge is involved in an open hearing regarding a dispute resolution process, the claim for confidentiality loses more of its punch.

Notwithstanding one's judgment about the correctness of the result in the Minnesota case, the important point for these purposes is to recognize that while exclusionary evidence rules, contractual agreements, protective orders, and public policy arguments do not provide an airtight

66. *Id.* at 205-06.
67. *Id.* at 204-05.

guarantee of confidentiality in every case, it is evident that courts are receptive to claims for the need for confidentiality of settlement. In appropriate cases, courts will protect confidentiality, even in the face of claims of first amendment rights of access and in the absence of any mediation or settlement privilege.

E. *Mediation Privilege Statutes*

Is a blanket mediation privilege statute an improvement on the existing situation? For the reasons stated above, I believe not. The Massachusetts mediation confidentiality statute, which was enacted in 1985 at the initiative of the mediation community, is an example. The act reads:

> 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; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.
>
> For the purposes of this section a mediator shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.[68]

The primary problem with the Massachusetts statute, as with all statutes of this sort that I have seen, is that it is both over-inclusive and under-inclusive. The act is over-inclusive because, unlike the attorney-client privilege, the husband-wife privilege, and the evidentiary exclusionary rule, it contains no exception for bad faith, illegal conduct, fraud, or any other abuse of the mediation process, nor any exception when other important values are at stake. Thus, all of the mediation and mini-trial related statements in both the *Smith* and *Pipeco* hypotheticals would be secreted under the terms of the Massachusetts statute, notwithstanding the strong countervailing public interests. Exceptions to prevent such results arguably could be inferred by a court, but there is not a textual hook in the statute on which to peg such judicial legislation. Moreover, if exceptions are to be inferred on an ad hoc basis, what is the advantage of a statute that appears absolute but which, in fact, is subject to case-by-case determination? Would it not

68. MASS. ANN. LAWS ch. 233, § 23C (Michie/Law. Co-op. 1985).

be better simply to leave matters to courts to apply a public policy approach to mediation results and fruits?

The statute is under-inclusive in that it applies only to judicial or administrative proceedings involving former parties to the mediation. By implication, an attempt to discover or use mediation results or fruits in other circumstances is not privileged, even though protection may be appropriate. The statute is under-inclusive for the further reason that it applies only to mediation conducted by a "mediator" as the term is defined in the second paragraph of the statute. To qualify, a mediator must have certain training and experience and must act pursuant to a written agreement with the parties. Again, the negative implication is that mediation conducted by anyone else or without a written agreement is to be totally discoverable and admissible. Many mediators, such as internal ombudsmen in corporations, educational institutions, and governmental agencies constantly conduct mediation without any opportunity to enter into a written agreement with the parties.[69] Confidentiality is probably more important and appropriate for such mediation than other mediation covered by the statute, yet the existence of the statute invites judicial interpretation that is not covered, and hence not confidential.

Finally, by tying coverage of the statute to a restrictive definition of a mediator, the act attempts to set standards of practice and define who is qualified to be a mediator and who is not. Many commentators do not believe the field of mediation is ready for restrictive standards and licensure.[70] And if standards of training and experience are going to be set, it should be done as a part of an explicit standard setting process, not through the back door as a definition in a privilege statute. As it is, the definition in the Massachusetts statute smacks of guild legislation. Indeed, many excellent and experienced mediators would not qualify under the statute because they have not had thirty hours of training in mediation. Many of these persons, including myself, have not had such formal training but have spent hundreds of hours training others to be mediators as well as practicing mediation before training mediation was reasonably available.

In sum, attempting to draft an effective mediation statute that protects what should be protected and exempts what ought not to be protected, while well-intentioned, is extremely difficult. It is also dangerous to the practice of mediation because errors of omission can leave parties to mediation more exposed than before and errors of comission can frustrate important public interests and, eventually, lead to a backlash against mediation.

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69. *See* Rowe, *The Non-Union Complaint System at M.I.T.: An Upward-Feedback, Mediation Model,* 2 ALTERNATIVES TO THE HIGH COST OF LITIGATION 10 (1984).

70. *See* DISPUTE RESOLUTION, *supra* note 4, at 517-24.

V. A HARD LOOK AT THE CLAIMS FOR A MEDIATION PRIVILEGE

Can a mediation privilege be justified under traditional privilege analysis? The classic approach is Wigmore's utilitarian calculus. Starting from the premise that "the public is entitled to every man's evidence" and that exemptions from this rule are exceptional and to be discountenanced, Wigmore poses four conditions that must be fulfilled to justify a privilege:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

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

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.[71]

This formula contains a dual focus on the instrumental purpose of the communication and the cost/benefit effect on the trial process.[72]

Courts are extremely reluctant to recognize new privileges. Wigmore's approach to the recognition of a new privilege creates four barriers to successful assertion of a privilege, any one of which may be sufficient to defeat a claim. For example, in the Watergate Tapes Case,[73] the Supreme Court held that an asserted privilege for Presidential communications, at least in the absence of a statute, failed both the second and fourth of Wigmore's conditions. While recognizing that the President's interest in preserving confidentiality of communications between himself and his advisors is "weighty indeed and entitled to great respect," the Court nonetheless decided, "[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions for disclosure because of the possibility that such conversations will be called for in the context of a prosecution."[74] In addition, the Court concluded that "the allowance of the privilege to withold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts."[75]

The Court's conclusion in the Tapes case reflects its generally negative predisposition to privileges:

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71. 8 J. WIGMORE, EVIDENCE §§ 2191-92, 2285 (McNaughton rev. 1961).
72. *See* E. GREEN & C. NESSON, *supra* note 16, at 520-21.
73. United States v. Nixon, 418 U.S. 683 (1974).
74. *Id.* at 712.
75. *Id.*

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.[76]

Similarly, in *Branzburg v. Hayes*,[77] the Supreme Court rejected a constitutionally based common law claim of reporter's privilege, although some members of the Court were of the view that a qualified privilege ought to exist in some cases to protect a reporter's confidential sources. Subsequently, in the *Farber* case,[78] the New Jersey Supreme Court held that an attempt by the New Jersey legislature to create statutorily a reporter's privilege had to give way to the sixth amendment right of confrontation and the New Jersey constitutional equivalent. The Supreme Court denied certiorari.

In light of these courts' demonstrated hostility to privileges with claims to constitutional grounding, how would a mediation privilege fare? A mediation privilege would probably satisfy the first condition of Wigmore's four-part test. The communications between parties to a mediation and between the parties and the mediator generally originate in a confidence that they will not be disclosed, although the circularity of this condition is obvious. Mediation communications originate in confidence that they will not be disclosed because that is what mediators tell parties. If a privilege exists, then this confidence will be justified. If no privilege exists, then the expectation of confidentiality will be false and, eventually, neither mediators nor parties to mediation will engage in communications with the expectation that they will not be disclosed.

It is doubtful whether a blanket mediation privilege would satisfy the remaining three conditions. Although most mediators assert that confidentiality is essential to the process, there is no data of which I am aware that supports this claim, and I am dubious that such data could be collected. Moreover, mediation has flourished without recognition of a privilege, most likely on assurance given by the parties and the mediator that they agree to keep mediation matters confidential, their awareness that attempts to use the fruits of mediation for litigation purposes are rare, and that courts, in appropriate instances, will accord mediation evidence Rule 408 and public policy-based protection. Thus, although the need for confidentiality in most cases is recognized, the need for a blanket privilege is not essential.

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76. *Id.* at 713.

77. 408 U.S. 665 (1972).

78. State v. Jascalevich (In re Farber), 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

In addition, there is no consensus that the relationship between the parties and the mediator ought to be sedulously fostered in all or even most cases. Clearly, when mediation is used as a mechanism to engage in illegal or improper activity, as is alleged in the *Pipeco* hypothetical, the relationship between the mediator and the parties is not one which the community would believe should be fostered. For the purposes of privilege analysis, however, the relationship should not be judged by aberrant examples. The attorney-client and husband-wife relationship are abused also, yet there is a general consensus that these are worthwhile relationships that ought to be fostered. Abuses of the relationship are addressed by carving out an exception to the privilege, not by denying the privilege in total.[79]

Putting aside clear abuses of the relationship, however, there is a substantial and respectable body of opinion that holds that mediation and other informal methods of dispute resolution ought not be encouraged. Some critics of alternative dispute resolution contend that although mediation and similar processes are supposed to be voluntary in theory, in practice at least one participant may be pressured into the process. Once in the process, the parties may not be fully advised of the rights they would have had if their case had gone to court or of their right to walk away from mediation.[80] Other critics of dispute resolution contend that out-of-court settlements are never to be encouraged because settlement, by definition, is always less than justice.[81] Others are concerned that mediation exacerbates disparities of power between the parties,[82] or disadvantages certain groups.[83] Finally, some commentators caution that users of mediation and other forms of alternate dispute resolution are relegated to "second class" justice while the rich and powerful preempt the courts.[84]

While I am not persuaded that any of these criticisms make out a valid case against informal dispute resolution,[85] the fact that such views are held by even a minority of commentators casts sufficient doubt on the proposition that mediation ought to be sedulously fostered to un-

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79. *See, e.g.*, Proposed Rules 503(d)(1) (attorney-client privilege, furtherance of crime or fraud) and 505(c)(1) (husband-wife privilege, interfamily crime), in E. GREENE & C. NESSON, FEDERAL RULES OF EVIDENCE WITH SELECTED LEGISLATIVE HISTORY AND NEW CASES AND PROBLEMS 269-70, 279-80 (Appendix of Deleted and Superseded Materials) (1984).

80. DISPUTE RESOLUTION, *supra* note 4, at 490.

81. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

82. *See, e.g.*, Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569 (1979).

83. *See* Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21 (1984).

84. *See, e.g.*, ABEL, THE POLITICS OF INFORMAL JUSTICE (1982); AUERBACH, JUSTICE WITHOUT LAW? (1983).

85. *See* DISPUTE RESOLUTION, *supra* note 4, at 490-503.

dermine a claim for recognition of privilege.

Finally, given the unwillingness of courts to strike the balance between injury to the relationship and benefit to the justice system in favor of executive privilege and reporter's privilege, it is doubtful that courts will conclude that the balancing of interests called for by the fourth of the Wigmore conditions comes out in favor of a mediation privilege. In the *Smith* and *Pipeco* hypotheticals, it seems unlikely that courts would conclude that the injury to the mediation relationship caused by disclosure of the communication would be greater than the benefit gained for the correct disposal of the litigation, even though these cases, unlike *Nixon* and *Farber,* are noncriminal (and thus confrontation clause concerns are absent). In the *Smith* case, the state's interest in the care and protection of children, and in the *Pipeco* case, the government's interest in enforcement of the anti-trust laws and fair regulation of utilities, outweighs the parties' interests in preserving the confidentiality of the mediation process. In purely private civil disputes, however, where no particular public interests are present (other than the general public interest in the correct disposal of litigation), the balance may come out differently.

Several modern commentators have criticized Wigmore and the Supreme Court's approach to privileges as too narrowly based on an instrumental calculus that values accuracy in the judicial process while not giving enough weight to other important human values such as privacy, dignity, intimacy, autonomy, and individuality.[86] These commentators would base privileges on humanitarian values that depend on protection of zones of privacy in important human relations, such as husband-wife, parent-child, and counselor-client.

The utilitarian approach to privileges still predominates over the humanitarian, but as I have argued elsewhere, neither approach by itself provides a satisfactory explanation for the recognized privileges and for the nonrecognition of seemingly similar but unprotected relationships.[87] This is because there is more than one type of privilege designed to accomplish more than one purpose.

There are at least two different kinds of privileges; the type depending on the relationship between the holder of the privilege and the other communicant. The first kind of privilege includes those in which a professional counseling relationship exists between the holder of the privilege and the other person. Privileges of this kind include the well-recognized ones of attorney-client, doctor-patient, and communications-to-clergy, and the generally unrecognized ones of accountant-client, social

86. WESTIN, PRIVACY AND FREEDOM 31-39 (1967); Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85-94 (1973).

87. E. GREENE & C. NESSON, *supra* note 16, at 525-26.

worker, and stockbroker. The ostensible purpose of these privileges is to foster and promote effective professional services by the counselor.

The second kind of privilege includes those that are designed simply to throw a veil of secrecy around specific zones of privacy in order to protect human dignity, individual autonomy, or family. No professional relationship is involved and no furthering of any service need be demonstrated. Examples of this kind of privilege include the husband-wife privilege and the constitutional privilege against self-incrimination.

These categories obviously overlap. Nonetheless, it is a useful categorization because asserted privileges designed to foster a professional relationship can, and generally are, subject to a utilitarian analysis while those based on a zone of privacy must be justified on other grounds.[88] Into which category does a claimed mediation privilege fit? While some mediators, especially those who work in the family mediation field and employ a more therapeutic-oriented kind of mediation,[89] might assert that mediation promotes individual autonomy, self-development, and emotional release — humanitarian values on which the zone-of-privacy based privileges rest — any general mediation privilege seems to fit more easily into the instrumentalist-based group of privileges because, at bottom, it is defended as furthering the rendition of professional services. And, as argued above, if subjected to the four conditions of the utilitarian test, a general mediation privilege is unlikely to pass muster.

VI. CONCLUSION

A blanket mediation privilege is a bad idea. Attempts by the mediation community to obtain a statutory privilege may backfire. If the attempt is successful, an over-inclusive and under-inclusive statute is likely to be enacted, resulting in the unintended implication that some communications that ought to be confidential were not intended to be protected, and that a backlash of public and judicial opinion against secrecy of events should not be confidential. If the attempt at enactment of a mediation privilege is unsuccessful, it may be understood as a rejection

88. This is not to say that the privacy-based privileges are any more subjective than the professional relationship-based privileges. The instrumentalist approach applied to the latter has more trappings of objectivity than the humanitarian approach applied to the former, but neither approach provides a convincing rationale for the system of privileges that now exists. For the professional privileges, little or no data exists to prove that the utilitarian calculus justifies any particular privilege, and it is difficult to think how such data could be obtained. For the nonprofessional privileges, what reasons justify recognition of a husband-wife privilege but not a parent-child or best friend privilege? A more realistic (if cynical) explanation for the current system is that privileges rest on relative power and influence exercised by certain segments of society, that privileges are, to a large extent, guild legislation. E. GREENE & C. NESSON, *supra* note 16, at 526.

89. *See* J. FOLBERY & A. TAYLOR, MEDIATION 130-35 (1984).

of confidentiality protection for all mediations.

Some confidentiality protection for mediation and other forms of alternative dispute resolution is appropriate. There appears to be sufficient protection under current law to permit alternative dispute resolution to flourish. Working for modest amendment to Evidence Rule 408 to make it clear that the Rule excludes evidence of compromises, offers to compromise, and statements made in connection with such offers for substantive as well as impeachment purposes, would be a better legislative agenda for mediators rather than lobbying for a mediation privilege. An expanded Rule 408, coupled with careful drafting of the confidentiality clause in a mediation agreement where such agreements are used,[90] and attention to the public policy generally favoring out-of-court settlements, adequately protects parties to mediation.

90. In situations in which mediation is usually performed without an agreement by the parties, as by an ombudsman within a university or corporation, a published and disseminated policy of confidentiality might be an effective substitute in most cases for a written confidentiality clause.