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Riner v. Newbraugh: The Role of Mediator Testimony in the Enforcement of Mediated Agreements

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RINER v. NEWBRAUGH: THE ROLE OF MEDIATOR TESTIMONY IN THE ENFORCEMENT OF MEDIATED AGREEMENTS

I. INTRODUCTION

Mediation has gained substantial recognition in recent years as an efficient alternative dispute resolution technique. The technique uses a neutral third party to facilitate resolution by encouraging and assisting parties in reaching their own mutually acceptable agreements.[1] The settlement process relies upon an informal, non-adversarial atmosphere that fosters dependable and effective communication, which ensures productive working relationships among all interested participants. Of course, key to the preservation of this crucial atmosphere is the concept of total confidentiality[2] regarding communications made during the mediation.[3]

Despite the informal nature of the mediation process, a successful outcome leads to a formal settlement agreement enforceable against all involved parties. Occasionally, the participants in a mediation disagree on what they settled, or, even if the terms of a settlement are acknowledged, one party may challenge their validity on the grounds of fraud, duress, or lack of authority.[4] Thus, when disputes arise over the enforcement of mediated settlement agreements, courts often apply traditional contract law principles in order to decipher the truth behind each settlement. These traditional contract principles often need the admission of evidence of what transpired during the mediation, leading many scholars to question the wisdom of maintaining total confidentiality when subsequent disputes arise over the enforcement of mediated agreements.[5] In particular, these scholars are calling for an exception to mediation confidentiality that would require the mediator to testify in certain agreement enforcement

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1 *See, e.g.*, Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629, 629 (1997).

2 Confidentiality protects a wide range of communications including those between the participants during the mediation as well as those outside the mediation as to third parties. Due to the complexity of this topic, this Comment will focus on the scope of confidentiality as it applies to outside communications after the mediation session, mainly the right of the mediator to refuse to answer questions in court.

3 *See, e.g.*, Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35 (2001) ("One of the fundamental axioms of mediation is the importance of confidentiality.").

4 *Id.* at 41.

5 *See id.*; *see also* Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9 (2001); Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. DISP. RESOL. 135; Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509 (2004).

proceedings.[6] This criticism has apparently sparked a debate pitting the fundamental goal of enforcing mediated agreements on one side, and the goal of fostering an effective process for reaching those agreements on the other.[7]

Specifically, the debate addresses the difficult balance between preserving the confidentiality of the mediation process and allowing access to the use of mediator testimony when it would aid in the enforcement of mediated agreements. On one side of the argument, confidentiality advocates argue that mediator testimony should play no role at all in agreement enforcement proceedings.[8] This approach is concerned with preserving the informal nature, neutrality, and open communication central to the mediation process.[9] On the other side, advocates of applying traditional contract law to agreement enforcement proceedings argue that courts should have access to all pertinent information when ruling on the validity of mediated agreements.[10] In other words, this argument calls for an exception to mediation confidentiality when the testimony of a mediator might constitute a valuable asset to a court's ability to decipher the truth.[11] In response, the debate forces a balancing of the type and magnitude of harm from compelling the mediator to testify against the harm that would result if the mediator's testimony were not accessible in an enforcement proceeding.[12]

As mediation continues to gain popularity, it becomes increasingly important to define the degree to which rules of privilege protect mediation confidentiality. Due to inconsistency throughout the country, a mediator is currently unable to guarantee that he or she will keep everything said in a mediation session confidential if a dissatisfied participant later subpoenas a mediator to tes-

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6 *See* Deason, *supra* note 3, at 90-96; Hughes, *supra* note 5, at 64-77; Robinson, *supra* note 5, at 171-73.

7 *See* Deason, *supra* note 3, at 35-36.

8 Many scholars view a broad mediator testimonial privilege as a necessary ingredient to the mediation process. *See, e.g.*, Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 40-45 (1986); Eileen P. Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U. L. REV. 181, 196-212 (1981); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 15-20.

9 *See* Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 79-85 (2001) ("[T]he challenge of communicating with an adversary, the presence of a neutral intermediary, and the potential for information informally reaching a judge all make confidentiality especially important for mediation.").

10 *See* Robinson, *supra* note 5, at 149-60.

11 *See id.*

12 *See* Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 469 (Cal. Ct. App. 1998) (introducing a balancing test pitting the public policy of mediation confidentiality against other public policy values).

tify.[13] However, in West Virginia, the West Virginia Supreme Court of Appeals recently offered some much needed guidance in the case *Riner v. Newbraugh*.[14] In *Riner*, the court provides some indirect criticism concerning the use of mediator testimony, which in turn clarifies that in West Virginia state courts mediator confidentiality will continue to take precedence in future agreement enforcement proceedings.[15]

This Comment addresses the continuing development of law regarding the place of mediator testimony in the enforcement of mediated agreements.[16] Part II addresses the importance of confidentiality to the mediation process. Part III discusses the role of traditional contract law principles in the enforcement of mediated agreements and the possible advantages of allowing mediator testimony in this enforcement. Next, Part IV offers some examples of the different approaches used by various jurisdictions throughout the country. Finally, Part V examines West Virginia law and breaks down how the *Riner* opinion may provide some much needed consistency for the future of mediation in this state.

II. THE IMPORTANCE OF MAINTAINING CONFIDENTIALITY IN THE MEDIATION PROCESS

Mediation is generally defined as "an informal, non-adversarial process whereby a neutral third person, the mediator, assists disputing parties to resolve by agreement or examine some or all of the differences between them."[17] In

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[13] *See* Deason, *supra* note 3, at 102 ("Parties are currently hampered in predicting confidentiality by huge variations among jurisdictions in the form and scope of both protections for mediation confidentiality and contract doctrine for settlement enforcement."). It should be noted that in order to provide a little security, some mediators require a signed contract from the participants stating that the participants will not call the mediator as a witness under any circumstances. Interview with Debra Scudiere, Kay Casto & Chaney PLLC, in Morgantown, W. Va. (Dec. 10, 2003). However, these contracts do not necessarily create judicially-recognized protection. *See* Paul Dayton Johnson, Jr., Note and Comment, *Confidentiality in Mediation: What can Florida Glean from the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 490 (2003). Courts have often held similar confidentiality agreements unenforceable as a matter of public policy. *See id.*

[14] 563 S.E.2d 802 (W. Va. 2002).

[15] *Id.* at 808-09.

[16] Four authors whose contributions to the topic of mediation have greatly benefited the author are Ellen E. Deason (*See supra* notes 3 and 9), Scott H. Hughes (*See supra* note 5), Madeleine H. Johnson (Student Work, *What's a Mediator to Do? Adopting Ethical Guidelines for West Virginia Mediators*, 106 W. VA. L. REV. 177 (2003)), and Peter Robinson (*See supra* note 5).

[17] W. VA. TRIAL CT. R. 25.02; *see also* UNIFORM MEDIATION ACT § (2)(1) (2001), *available at* http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm ("Mediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."); BLACK'S LAW DICTIONARY 1003 (8th ed. 2004) (defining "mediation" as "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution").

defining the role of the mediator, the West Virginia rule states, "[t]he role of the mediator is to encourage and assist the parties to reach their own mutually acceptable resolution by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring resolution alternatives, and other similar means."[18] Naturally, the concept of confidentiality is regarded as fundamental to the preservation of the "informal, non-adversarial" nature of the mediation process that enables the mediator to perform these crucial functions. Specifically, confidentiality provides three main safeguards for preserving the crucial mediation atmosphere: (1) it ensures that parties view mediation procedures separately from judicial procedures; (2) it maintains the "neutrality" of the mediator; and (3) it encourages effective communication among the various participants.[19]

A. Distinguishing Mediation Procedures From Judicial Procedures

First, in order for the participants to view mediation as an "informal, non-adversarial" process, it is imperative that mediation be distinguished from normal judicial procedure. In contrast to adjudication, "mediation is essentially a form of negotiation."[20] The parties retain the power to shape the agenda for discussion, and any agreement reached is done so voluntarily through party self-determination.[21] Unlike a judge, a mediator acts primarily as a

> catalyst for this process; he cannot compel the production of information, and he does not render judgment by applying preordained rules to the dispute after hearing reasoned argument. Instead, he helps the parties reach agreement by identifying issues, exploring possible bases for agreement and the consequences of not settling, and encouraging each party to accommodate the interests of other parties.[22]

Indeed, mediation needs to be viewed as a consensual process in which the disputing parties decide the resolution of their dispute themselves, as op-

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18 W. VA. TRIAL CT. R. 25.02.

19 *See* Deason, *supra* note 9, at 79-85.

20 Note, *See Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 443 (December 1984).

21 *See id.* at 444; *see also* Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 80-82.

22 *Protecting Confidentiality in Mediation, supra* note 20, at 444.

posed to having a ruling imposed upon them by a stranger.[23] As various scholars have noted, mediation, unlike litigation, empowers the disputants.[24] Thus, in order to promote successful mediation, the participants must understand that mediation offers a unique problem solving structure that ordinary civil litigation does not.

Confidentiality aids the non-adversarial atmosphere of mediation by "keeping the judging function separate from the mediation function."[25] In other words, without the assurances of confidentiality, parties may fear that their conversations with the mediator could be conveyed informally to the trier of fact.[26] This problem is multiplied if the parties face a bench trial in the event that they fail to settle their suit.[27] For instance, if mediator testimony were allowed in subsequent proceedings, participants might feel as though the judge will rely on the mediator's account of the settlement attempt too heavily. This fear effectively cloaks the mediator with an unfair sense of "settlement coercion," which is contrary to the voluntary nature of the mediation process.[28] Confidentiality ensures participants that a mediator is not performing judge-like analysis, thereby guaranteeing that an unsuccessful mediation attempt will not come back to haunt either side of the dispute.

B. Maintaining Mediator Neutrality

Confidentiality also serves a second very important function by defining the mediator's role as a neutral, non-aligned participant.[29] The appearance and reality of mediator neutrality are "essential to generating the climate of trust necessary for effective mediation."[30] Without mediator neutrality, participants would show reluctance to participate in mediation, mainly because participants will only confide in a mediator who does not appear to be partisan or in a position to serve other interests.[31]

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23 *See* Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 1000 (N.Y. 1993) (recognizing a societal benefit from the parties shaping their own agreement rather than having one judicially imposed).

24 *See, e.g.*, Izumi & La Rue, *supra* note 21, at 81; Thompson, *supra* note 5, at 510.

25 Deason, *supra* note 9, at 83.

26 *See id.*

27 *See id.*

28 *See* Izumi & La Rue, *supra* note 21, at 82.

29 *See, e.g.*, Deason, *supra* note 9, at 82-83.

30 *Protecting Confidentiality in Mediation*, *supra* note 20, at 446.

31 *See* Deason, *supra* note 3, at 36-37.

Requiring mediator testimony in court proceedings poses a danger of undermining the parties' confidence in the mediator's impartiality.[32] If mediators were required to testify about their activities, "not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other."[33] Additionally, a mediator has a financial interest in preserving neutrality because a biased reputation might jeopardize the ability of the mediator to present himself as a neutral party in the future.[34] In turn, members of the local legal community are unlikely to seek the mediator's services in future conflicts. These concerns have led at least one court to refuse mediator testimony solely on the grounds that it would inhibit future "mediator effectiveness."[35]

C. *Encouraging Effective Communication*

A third advantage of providing confidentiality in the mediation process, and perhaps the most important, is the fostering of open communication.[36] Remember that the roles of the mediator often include facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, and exploring settlement alternatives.[37] In order for the mediator to achieve these goals, the participants must approach a mediation session with candor, or a disposition of open-mindedness.[38] As the United States Court of Appeals for the Second Circuit explained:

> If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to

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32 *See id.* at 37.

33 *Id.* (quoting Tomlinson of High Point, Inc., 74 N.L.R.B. 681, 688 (1947)).

34 *See Protecting Confidentiality in Mediation*, *supra* note 20, at 446, 455-56; *see also* Hughes, *supra* note 5, at 37 ("The consequences will usually occur after the completion of the mediation and so any negative impact on the perceived impartiality will not be detrimental to a mediator vis-à-vis one-time disputants, but may adversely affect a mediator who works in a small community or is frequently employed by the same parties.").

35 *See* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980) (holding that an important public policy underlying an independent mediator privilege for labor mediation is the preservation of "mediator effectiveness").

36 *See generally* Deason, *supra* note 9, at 80.

37 *See supra* notes 17-19 and accompanying text.

38 In other words, mediation's dispute-resolving capabilities thrive upon the parties feeling as though they can be frank or open with the mediator. *See, e.g.*, Thompson, *supra* note 5, at 565.

> poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of [the] program . . . .[39]

Confidentiality discourages this "poker player" attitude by ensuring the privacy of conversations between the parties and the mediator.

To illustrate, confidentiality becomes particularly important when mediators try to get parties to discuss the aspects of their case in private caucuses. In order for mediation to be successful, "the parties must feel sure that anything said in private caucus with the mediator is as confidential as they desire."[40] Without confidentiality, participants would refuse to disclose the possible strengths and weaknesses of their respective positions out of fear that they might be communicated to the other side, or, even worse, to a judge or jury at a later court appearance. This cautious behavior would certainly prove detrimental to the settlement of the dispute.

Along these same lines, confidentiality "serves to protect the mediation program from being used as a discovery tool for creative attorneys."[41] "Without adequate legal protection, a party's candor in mediation might well be 'rewarded' by a discovery request or the revelation of mediation information at trial."[42] Confidentiality ensures that parties are free to explore settlement possibilities without worrying about the courtroom advantages that the other side might gain if their exploration does not succeed.[43]

In sum, confidentiality helps to achieve an informal and non-adversarial process by distinguishing the mediation process from the judicial process, maintaining the neutrality of the mediator, and encouraging open communication among the various participants. Accordingly, it is not surprising that confidentiality is regarded as an essential component to the mediation phenomenon. In fact, state legislatures have enacted numerous statutes and rules creating a variety of privileges and protections for communications made during mediation proceedings.[44] In addition, all federal district courts and courts of appeals offer mediation programs protected by confidentiality.[45] However, as discussed be-

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39 Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979).

40 *See Protecting Confidentiality in Mediation*, *supra* note 20, at 454.

41 *In re* Anonymous, 283 F.3d 627, 636 (4th Cir. 2002).

42 *Id.* (quoting Kirtley, *supra* note 8, at 9-10).

43 *See, e.g.*, Deason, *supra* note 9, at 81.

44 *See infra* Part IV.A.; *see also* SARAH R. COLE ET. AL., MEDIATION: LAW, POLICY & PRACTICE apps. A and B (2d ed. Supp. 2003); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715 app.

45 *See infra* notes 81-85 and accompanying text.

low, the various protections offered under these confidentiality provisions differ substantially.[46]

III. THE ARGUMENT FOR AN "AGREEMENT ENFORCEMENT" EXCEPTION TO THE MEDIATOR PRIVILEGE

Despite overwhelming agreement over the importance of confidentiality in the mediation process, some jurisdictions create exceptions that allow mediator testimony during the enforcement of disputed mediated agreements.[47] The rationale is simple: What good does a confidential mediation process do if you cannot effectively enforce the outcome of that process? As a result, some suggest that confidentiality should yield to a "demonstrable need for parol evidence when one of the parties to a mediation agreement sues to enforce or rescind that agreement."[48]

A. The Role of Contract Law in the Mediation Process

Clearly, the underlying goal behind mediation is to resolve disputes and achieve settlements. When a court enforces a mediated agreement, it is affirming the effectiveness of the mediation process and reinforcing the participants' incentives to mediate.[49] Thus, appropriate enforcement "encourage[s] parties in the future to take mediations seriously, to understand that they represent real opportunities to reach closure and avoid trial, and to attend carefully to terms of agreements proposed in mediations."[50] Traditional contract law principles ensure that mediated agreements are treated and enforced as real contracts, thereby protecting them from vulnerability.[51] Moreover, traditional contract law incorporates centuries of experience helpful in determining the true character of these agreements.[52] For example, contract law helps define the conditions necessary for: the formation of a binding agreement; declaring a binding agreement void based on public policy; the meanings of the specific terms of a binding agreement; the effect of performance and nonperformance; impracticability of performance and frustration of purpose; and assignment, delegation, or novation.[53]

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46 *See infra* Part IV.

47 *See infra* Part IV.B.

48 *Protecting Confidentiality in Mediation*, *supra* note 20, at 452.

49 *See* Deason, *supra* note 3, at 37.

50 Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1137 (N.D. Cal. 1999).

51 *See* Robinson, *supra* note 5, at 148 ("The law of contracts consists of the collection of requirements that define when a commitment rises to the level of triggering legal enforceability.").

52 *See id.*

53 *Id.* at 149-59 (providing a thorough analysis of contract law's application in these situa-

Another value to keep in mind is the "fundamental understanding of mediation as a consensual process."[54] Although mediation is an informal procedure, parties are still allowed to assert common-law defenses such as fraud, duress, lack of capacity, or any other claim that may invalidate consent to an agreement.[55] Traditional contract law ensures the validity of the mediation process by providing a forum for disgruntled parties to void contracts entered into without consent. Thus, traditional contract law advances the important interests of mediation by providing a framework for enforcing valid settlement agreements and embodying society's views of appropriate consent.[56]

B. Should Mediator Testimony Play a Role in the Application of Traditional Contract Law?

While traditional contract law obviously has a place in the enforcement of mediated agreements, the role of mediator testimony in these time-honored contract principles is not as clear. Some commentators argue that excluding mediator testimony from enforcement proceedings has the effect of excluding valuable parol evidence essential to a court's ability to decipher the truth.[57] This, it is argued, violates the modern contract approach of using a "totality of the circumstances" when deciphering settlement agreements.[58]

Specifically, it is arguable that the exemption of mediators from subsequent enforcement proceedings has the effect of excluding meaningful information from the only possible "neutral" witness to the agreement. For example, when a party is not permitted to introduce evidence from the "neutral" observer, a party may be hard pressed to prove an alleged defect, such as a missing term or invalid consent, in the mediated agreement.[59] With this in mind, one commentator has suggested that a ban on mediator testimony might interfere with

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tions).

[54] *See* Deason, *supra* note 3, at 38.

[55] *See id.*; *see also* FDIC v. White, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999). For an overview of the issues associated with applying these "appropriate consent" principles to the mediation context, see Thompson, *supra* note 5, at 527-39.

[56] *See* Deason, *supra* note 3, at 37-38 ("Thus traditional contract law, which provides a framework for enforcing properly reached agreements and refusing to enforce invalid agreements, distills important interests that apply in the context of mediation as well as in other contract settings.").

[57] *See supra* notes 10-11 and accompanying text.

[58] In interpreting contracts, "courts have looked well beyond information within the four corners of a settlement document, examining factors regarding the parties and their representatives, the attitude of the parties, and the surrounding circumstances of the negotiations leading up to the settlement." Robinson, *supra* note 5, at 150.

[59] *See* Thompson, *supra* note 5, at 523 (arguing that "there is a type of presumption that assumes the validity and enforceability of settlement agreements ending litigation").

the application of contract law in at least the following circumstances: (1) conflicting factual testimony by the parties; (2) mediations with a prevalence of private meetings; and (3) complex multi-party mediations.[60]

1. Conflicting Factual Testimony Between the Parties

First, hearings about whether a particular issue was discussed at a mediation session or disputes over an alleged clerical error in a written mediation agreement might result in conflicting testimony between the parties. Without mediator testimony, a court will most likely decide the case by finding one witness more credible than the other or that there is no agreement because of a lack of mutual assent.[61] In this situation, allowing mediator testimony might provide a valuable alternative to either of these drastic measures.

2. Mediations with a Prevalence of Private Meetings

Second, since mediators commonly use private caucuses with each party, "the negotiations and discussions often critical to the application of contract law occur between the mediator and a party and/or party's attorney."[62] Simply stated, "[e]ven the most honest party may have a skewed perspective and will be hard pressed to provide an objective characterization of his conversations with the mediator."[63] Moreover, "[l]ess scrupulous parties could offer unrebuttable exaggerated testimony."[64] In turn, the absence of mediator testimony may force a trier of fact to accept false, unrebutted testimony as the truth. Thus, the availability of the mediator's account may provide a safeguard against any skewed testimony by a mediation participant.

3. Complex Multi-Party Mediations

Third, it is arguable that mediator testimony may be indispensable in complex multi-party mediations. To illustrate, some mass tort cases involve hundreds of parties represented by numerous attorneys.[65] Sometimes, these mediations go on for several days and consist of several different meetings with different categories of participants.[66] Thus, one may argue that there are in-

60 *See* Robinson, *supra* note 5, at 172-73.

61 *Id.* at 172. Ironically, this was the exact result in *Riner v. Newbraugh.* 563 S.E.2d 802, 809 (W. Va. 2002).

62 Robinson, *supra* note 5, at 172.

63 *Id.*

64 *Id.*

65 *Id.* at 173.

66 *Id.*

stances where only the mediator knows the information critical to the enforcement analysis.[67] If mediator testimony is not allowed in complex multi-party cases, problems may arise since the mediator is the only person who knows of each individual party's commitment. As a result, only the account of the party attempting to renege on the agreement will be admissible, and these mediated settlement agreements will become vulnerable contracts.[68] In other words, one party may invalidate an otherwise valid and enforceable contract by simply expressing some type of dissatisfaction (i.e., "I never agreed to that!"). Without mediator testimony, it may become difficult to prove the exact terms of these complex agreements.

In sum, critics of a strict mediator privilege argue that it interferes with an unfettered application of contract law. As a result, various jurisdictions are unsure as to whether the possible contributions of mediator testimony outweigh the interests surrounding mediator confidentiality.

IV. A LOOK AT VARIOUS APPROACHES USED THROUGHOUT THE COUNTRY

A. Jurisdictions Refusing to Allow Mediator Testimony About Mediation Communications in Agreement Enforcement Proceedings

Although mediator testimony might provide a valuable contribution to agreement enforcement proceedings, many jurisdictions still maintain a strict mediator privilege in relation to the communications made during the mediation.

1. State Statutory Law

First, most states make no specific exception to their confidentiality protections for the purpose of enforcing a mediated settlement agreement. Some of these protect confidentiality through comprehensive evidentiary exclusions, while others provide protection through specific statutes that govern mediation.[69] For example, the West Virginia Trial Court Rules specifically prohibit a mediator from testifying about confidential communications in any dispute arising out of a mediated agreement.[70] Similar language is found in the statutes and rules of Alabama,[71] Alaska,[72] Indiana,[73] Nevada,[74] New Jersey,[75] North Caro-

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67 "An example is when a mediator amalgamates confidential contributions from a group of defendants for a global settlement." *Id.* In these types of situations, it is imperative that each defendant's contribution remains confidential during the mediation process since the other parties may become irritated if they knew the exact contributions of certain defendants. *Id.*

68 *Id.*

69 *See* Deason, *supra* note 3, at 39-40.

70 *See infra* note 119 and accompanying text.

71 *See* ALA. CIV. CT. MEDIATION R. 11(d) ("A mediator shall not be compelled in any adversary proceeding or judicial forum, including, but not limited to, a hearing on sanctions brought by

lina,[76] South Carolina,[77] and Vermont.[78] Other states create mediator privileges that do provide specific exceptions, but refrain from making any type of exception for agreement enforcement proceedings.[79] As a result, many jurisdictions have found a way to apply common-law contract law principles without the use of mediator testimony.[80]

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one party against another party, to divulge the contents of documents received, viewed, or drafted during mediation or the fact that such documents exist nor shall the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation."); *see also* ALA. APP. CT. MEDIATION R. 8.

[72] *See* ALASKA R. CIV. PROC. 100(g) ("The mediator shall not testify as to any aspect of the mediation proceedings.").

[73] *See* IND. CODE ANN. § 4-21.5-3.5-27(a) (Michie 2003) ("A mediator is not subject to process requiring disclosure of any matter discussed during the mediation.").

[74] *See* NEV. REV. STAT. ANN. 48.109(3) (Michie 2003) ("A mediator is not subject to civil process requiring the disclosure of any matter discussed during the mediation proceedings.").

[75] *See* N.J. CT. R. 1:40-4(c) ("No mediator may participate in any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter.").

[76] *See* N.C. GEN. STAT. § 8-110(b) (2004) (No mediator shall be compelled to testify or produce evidence in any civil proceeding concerning statements made and conduct occurring in a mediation . . . .").

[77] *See* S.C. CIR. CT. ADR R. 8(e) ("The mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum.").

[78] *See* VT. R. EVID. 501(b)(3) (recognizing a statutory privilege for communications made to a "mediator, factfinder or arbitrator during a labor dispute or negotiation.").

[79] *See* CAL. EVID. CODE § 703.5 (West 2003) (creating an exception only in contempt, criminal, or disciplinary proceedings); FLA. STAT. ANN. § 44.102(3)-(4) (West 2003) (creating an exception only for mediator disciplinary proceedings); MO. ANN. STAT. § 435.014(2) (West 2003) (creating an exception only for otherwise discoverable information); OKLA. STAT. ANN. tit. 12, § 1805(F) (West 2003) (creating an exception only for actions against the mediator); R.I. GEN. LAWS § 9-19-44(b) (2003) (creating an exception only for collective bargaining agreements); GA. ADR RULE 7(b) (creating an exception only where there are threats of violence, child abuse, third party danger, and claims brought against a mediator or third party); MD. R. 17-109(c)-(d) (creating an exception only where there is a signed writing providing otherwise, there is a threat of serious bodily harm or death, or there is an allegation of mediator misconduct).

[80] *See, e.g.*, Stempel v. Stempel, 633 So.2d 26, 26-27 (Fla. Dist. Ct. App. 1994) (approving a "bare bones" mediation agreement mainly because there was no proof that the parties agreed to any other terms); Chappell v. Roth, 548 S.E.2d 499, 500 (N.C. 2001) (invalidating a mediated settlement agreement without breaching confidentiality on the basis that there was no "meeting of the minds"); Montanaro v. Montanaro, 946 S.W.2d 428, 431 (Tex. App. 1997) (upholding a mediated settlement agreement without discussing the actual communications made during the mediation session).

2. Confidentiality Protection at the Federal Level

At the federal level, the Alternative Dispute Resolution Act of 1998 requires confidentiality protection in all district court-sponsored ADR programs,[81] although a clear national standard has yet to develop.[82] Similarly, the circuit courts of appeal also offer mediation programs at the appellate level, all of which provide for confidentiality.[83] As for the executive branch, each federal agency is required to provide ADR techniques that promote confidentiality protections.[84] However, the executive branch does have a "manifest injustice" exception to its confidentiality protections for mediators, which is discussed below.[85]

3. The Uniform Mediation Act

In 2001, the National Conference of Commissioners on Uniform State Laws ("NCCUSL")[86] incorporated a strict privilege for mediator testimony into the new Uniform Mediation Act ("UMA").[87] The UMA was passed with an eye toward unifying the law of mediation confidentiality throughout the United States.[88] While the Act calls for a privilege of confidentiality for communications made during a mediation,[89] section 6(b)(2) creates a "substantially out-

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81 *See* 28 U.S.C. § 652(d) (2000).

82 *Compare* Willis v. McGraw, 177 F.R.D. 632, 633 (S.D. W. Va. 1998) (issuing a statement refusing to involve itself in any way "in sorting out disagreements amongst the parties emanating from the mediation process"), *with* FDIC v. White, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999) ("The Court does not read the ADRA or its sparse legislative history as creating an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation.").

83 *See* Deason, *supra* note 3, at 40.

84 The Administrative Dispute Resolution Act, 5 U.S.C. § 574 (2000); *see also* Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dec. 29, 2000).

85 *See infra* note 98 and accompanying text.

86 NCCUSL is now in its 112th year. The organization comprises more than 300 lawyers, judges and law professors, appointed by the states as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands, to draft proposals for uniform and model laws on subjects where uniformity is desirable and practicable, and work toward their enactment in legislatures. For more information, see www.nccusl.org.

87 The UMA, drafted in collaboration with the American Bar Association's Section on Dispute Resolution, establishes a privilege of confidentiality for mediators and participants. UNIFORM MEDIATION ACT § 4 (2001), *available at* http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm. It was approved by the ABA in 2002. *Id.*

88 *See* Michael B. Getty et al., *Preface to Symposium on Drafting a Uniform/Model Mediation Act*, 13 OHIO ST. J. ON DISP. RESOL. 787, 787 (1998).

89 *See* UNIFORM MEDITATION ACT § 4.

weighs" exception for testimony in subsequent agreement enforcement proceedings by the parties to a mediation.[90] In justification of the exception, the comments state, "[t]his exception is designed to preserve traditional contract defenses to the enforcement of the mediated settlement agreement that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications."[91] It is important to note that this exception is much broader than the exceptions currently allowed in most states.[92]

However, section 6(c) declares that this "substantially outweighs" exception is inapplicable to mediator testimony.[93] While the section does allow the mediator to voluntarily testify, he or she may not be compelled to do so.[94] Although the Act's distinction between participant testimony and mediator testimony has been openly criticized,[95] the Act's adoption of a strict privilege for mediator testimony illustrates a substantial trend toward creating a national norm that exempts a mediator from testifying.[96]

B. *Jurisdictions Allowing Mediator Testimony About Mediation Communications in Certain Agreement Enforcement Proceedings*

Despite the substantial authority advocating the use of a strict mediator privilege, the law is far from consistent. For example, the Fourth Circuit re-

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90 *See id.* at § 6(b)(2). Specifically,

> [t]here is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in: . . . (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

Id.

91 *Id.* at § 6(b)(2) cmt. 11.

92 *See* Robinson, *supra* note 5, at 170.

93 "A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection . . . (b)(2)." UNIFORM MEDIATION ACT § 6(c).

94 *See id.*

95 *See* Deason, *supra* note 3, at 90-91; Hughes, *supra* note 5, at 64-66; Robinson, *supra* note 5, at 171-72.

96 Although the UMA is barely two years old, it has already been adopted by Illinois, H.B. 2146, 93rd Gen. Assem., Reg. Sess. (Ill. 2003), and Nebraska, L.B. 255, 98th Leg., 1st Sess. (Neb. 2003), and is currently on the agenda in many other states. For a good discussion of the UMA and some suggestions to state legislatures for integrating the UMA into their laws, see Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99, 127-33.

cently stated in dicta that mediator testimony is required if it is mandated by "manifest injustice" and is indispensable to the resolution of a subsequent dispute.[97] In addition, federal agency law requires mediator testimony if a court determines that such testimony is necessary to prevent a "manifest injustice."[98] Similarly, a few states have created statutory exceptions that take a case-by-case approach in deciding whether a breach of the general confidentiality rules is necessary to resolve a subsequent dispute.[99] Moreover, some state statutes allow very broad exceptions to mediator confidentiality after an agreement is reached.[100] Advocates of these case-by-case approaches point out how they grant courts considerable flexibility while at the same time limiting mediation disclosures "in order to keep them rare."[101] Of course, a possible disadvantage of these approaches is unpredictability and inconsistency.[102]

There is also evidence of courts creating judicially implied exceptions to mediator confidentiality. For example, the current status of California's confidentiality statute is unclear due to a few recent cases creating implied exceptions.[103] In North Carolina, one party's claim that mediation resulted in a set-

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97 *In re* Anonymous, 283 F.3d 627, 640 (4th Cir. 2002).

98 5 U.S.C. § 574(a)(4)(A) (2000).

99 *See* LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (West 2003) (requiring mediator testimony if "[a] judicial determination of the meaning or enforceability of an agreement resulting from a mediation procedure if the court determines that testimony concerning what occurred in the mediation proceeding is necessary to prevent fraud or manifest injustice"); OHIO REV. CODE ANN. § 2317.023(C)(4) (West 2003) (compelling disclosure if the information is necessary to prevent a manifest injustice that outweighs the importance of confidentiality); WIS. STAT. ANN. § 904.085(4)(e) (West 2002) ("In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally."); KY. MEDIATION R. 12(C) (allowing mediator testimony about any matter discussed during the mediation if a party obtains an "order of the Court for good cause shown").

100 *See* CONN. GEN. STAT. ANN. § 52-235d(b) (West 2003) (allowing the disclosure of mediation communications where they are "necessary to enforce a written agreement that came out of the mediation"); IOWA CODE ANN. § 679C.2(7) (West 2004) (creating an exception to confidentiality "[w]hen a mediation communication or mediation document is relevant to determining the existence of an agreement that resulted from the mediation or is relevant to the enforcement of such an agreement"); WYO. STAT. ANN. § 1-43-103(c)(v) (Michie 2003) (recognizing no mediation privilege where "[o]ne of the parties seeks judicial enforcement of the mediated agreement").

101 *See* Deason, *supra* note 3, at 48.

102 *See id.*

103 *See* Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1133-39 (N.D. Cal. 1999) (creating an implied exception when one party asserts the contract defense of undue influence); Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 469 (1998) (creating an implied exception to the statute based upon protecting a "due process right" to cross examine a witness in a juvenile delinquency proceeding). *But see* Foxgate Homeowners' Assn. v. Bramalea Cal. Inc., 25 P.3d 1117, 1125-26 (Cal. 2001) (declaring that implied exceptions to mediation confidentiality are invalid due to the

tlement shown by an unsigned agreement led a state court to hear testimony from a mediator.[104] The court did this in spite of statutory confidentiality protections because, in the court's view, state contract law governing oral contracts trumped the protections.[105]

In a Texas federal case, a mediation participant claimed that fraud had tainted the mediation process.[106] In spite of an ironclad statute protecting mediation confidentiality, the judge decided to weigh the public policy reasons favoring the privilege against the defendant's interest in having the mediator testify.[107] Although the mediator's subpoena was ultimately quashed, the judge's analysis "may have threatened confidentiality more generally by creating new limits to the protection afforded by the statute."[108]

Recently, a Texas state court added to the confusion surrounding its mediation confidentiality protection by creating a judicial exception in a legal malpractice case.[109] In that case, the plaintiff sued his former lawyer alleging that the lawyer failed to adequately warn him of the consequences of accepting a proposed settlement agreement.[110] When the lawyer tried to subpoena the mediator for relevant testimony, the plaintiff objected on confidentiality grounds.[111] The trial court did not allow the mediator testimony on the basis of one of Texas's confidentiality statutes.[112] On appeal, the Texas Court of Appeals reversed on the basis of a common law "offensive use" doctrine.[113] Basically, the Court held that since the plaintiff sought affirmative relief from his former attorney, and since the mediator was the only witness to the disputed conversation, the mediator's testimony was required since it was outcome determinative.[114]

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clear and unambiguous language of the statute).

104 *See* Few v. Hammack Enter., Inc., 511 S.E.2d 665, 670 (N.C. 1999) ("[A] mediator is both competent and compellable to testify or produce evidence on whether the parties reached a settlement agreement, and as to the terms of the agreement, where the judge is making that determination.").

105 *Id.* at 669-70; *see also* Deason, *supra* note 3, at 36.

106 *See* Smith v. Smith, 154 F.R.D. 661, 664 (N.D. Tex. 1994).

107 *Id.* at 670-75.

108 Deason, *supra* note 3, at 71.

109 *See* Alford v. Bryant, 137 S.W.3d 916 (Tex. App. 2004).

110 *Id.* at 918.

111 *Id.* at 919.

112 *Id.*

113 *Id.* at 922.

114 *Id.*

Finally, approximately half the states lack a comprehensive mediation statute, which leads to "a patchwork of protections" made up of one or more of the above approaches.[115] Thus, mediator confidentiality is still faced with a crippling inconsistency across the country.

V. A LOOK AT WEST VIRGINIA

Until recently, West Virginia had yet to become involved in the ensuing debate over the place of mediator testimony in agreement enforcement proceedings. While the West Virginia Trial Court Rules clearly call for a strict mediator privilege,[116] it was still unclear as to whether a judicially implied exception, similar to those used in the Fourth Circuit Court of Appeals, California, North Carolina, and Texas would surface in West Virginia case law.[117] However, in *Riner v. Newbraugh*,[118] the West Virginia Supreme Court of Appeals indirectly addressed the issue and took a stance.

A. Evidence of a Possible Conflict in the West Virginia Trial Court Rules

West Virginia has long used a strict mediator privilege, which states:

> Mediation shall be regarded as confidential settlement negotiations, subject to W. Va. R.Evid. 408. A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. A mediator shall keep confidential from opposing parties information obtained in an individual session unless the party to that session or the party's counsel authorizes disclosure. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.[119]

Thus, the plain language of the rule appears to prohibit mediator testimony in nearly every circumstance.[120] However, West Virginia also uses traditional contract law to enforce mediated agreements through West Virginia Trial

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115 Deason, *supra* note 3, at 50.

116 *See* W.VA. TRIAL CT. R. 25.12.

117 *See supra* notes 97, 103-14 and accompanying text.

118 563 S.E.2d 802 (W. Va. 2002).

119 W. VA. TRIAL CT. R. 25.12.

120 There is evidence that a mediator is permitted to testify as to general questions about whether an agreement was reached at mediation, but the questioning is very limited. *See Riner*, 563 S.E.2d at 808 n.8.

Court Rule 25.14, which states, "[i]f the parties reach a settlement and execute a written agreement, the agreement is enforceable in the same manner as any other written contract."[121] The possibility of an inherent conflict between these rules raises the issue of mediator testimony's proper place in agreement enforcement disputes. On one hand, one rule advocates for maintaining total confidentiality for the mediator. On the other hand, another rule concerns itself with the effective enforcement of mediated agreements, which in turn leads to the difficult question of whether a court should require mediator testimony when it might provide valuable parol evidence.

B. Riner v. Newbraugh

Despite the various arguments endorsing mediator testimony in enforcement proceedings, the West Virginia Supreme Court of Appeals indicates in *Riner v. Newbraugh* that total confidentiality surrounding mediator testimony is still the governing standard in West Virginia.[122]

1. Facts and Procedural History

Riner involved a dispute over the enforcement of a settlement agreement reached as a result of a court-ordered mediation.[123] The dispute arose over the development of a piece of farmland into a subdivision.[124] The Riners, owners of the land subject to dispute, filed a civil action in circuit court alleging fraud and a breach of fiduciary duty against the defendant builders/developers.[125] Although the parties first participated in an unsuccessful court-ordered mediation, the continuing efforts of the mediator and participants eventually led to an agreement.[126] The mediator reduced the agreement to writing, and both he and the Riners signed.[127] The two-page agreement was then transferred to the defendants, who chose not to sign the agreement.[128] Instead, the defendants prepared a lengthier document that restated certain provisions of the original agreement, but also added certain provisions not specifically addressed at the mediation conference.[129]

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121 W.VA. TRIAL CT. R. 25.14.

122 *Riner*, 563 S.E.2d at 808-09.

123 *Id.* at 805.

124 *Id.* at 804.

125 *Id.*

126 *Id.* at 805.

127 *Id.* at 804-05.

128 *Id.* at 805.

129 *Id.*

When the Riners refused to sign the new agreement, the defendants filed a motion to enforce.[130] The defendants argued that the added provisions not discussed at the mediation conference were impliedly included in the settlement agreement.[131] Two hearings were held on the issue at which testimony was offered by the Riners' former counsel, the defendants' counsel, Mr. Riner, and the mediator.[132] The testimony of the mediator consisted of the following:

> THE COURT: There obviously has been a release prepared beyond the date of the settlement agreement in the case. The parties are alleging, primarily the Plaintiffs . . ., that certain terms within the settlement agreement and releases go beyond the pale, go beyond the original agreement that was dated the 5th day of September of 2000, and either embrace new material or work a greater or different settlement than envisioned in your September 5th document, you're aware of that?
>
> THE WITNESS: I am aware of that.
>
> THE COURT: You are unaware of any particulars as to what alleged maybe [sic] larger ambit of the proposed settlement agreement release that was prepared by the Defendants?
>
> THE WITNESS: I am guessing because I know what the nature of the lawsuit was, essentially involved dissolution of a business entity existing between the Newbraughs and the Riners. Because of that I anticipated there was going to be probably a pretty substantial release that both sides were going to want to make sure that neither one of them could throw rocks at them in the future.[133]

The circuit court, relying heavily on the mediator's testimony, found that any agreement between the parties was meant to "insure a clean break."[134] Accordingly, the circuit court ruled that it could "find no substantive area of disagreement or misunderstanding that was not resolved by the [mediation settlement] Agreement, which appears to the Court to be a valid, fair and enforce-

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130 *Id.*

131 *Id.* at 808.

132 *Id.* at 805.

133 *Id.* at 808.

134 *Id.* ("The trial court, in making its ruling, obviously relied upon the mediator's testimony.").

able settlement agreement."[135] Thus, the Riners were subsequently ordered to sign the defendants' version of the agreement.[136]

2. Holding

On appeal, the West Virginia Supreme Court of Appeals reversed and invalidated the agreement on the basis that there was no "meeting of the minds," which is an essential element to all valid contracts.[137] Interestingly, although neither party raised concern over the testimony of the mediator, the court went out of its way to express its disapproval with the use of mediator testimony in these types of proceedings. Specifically, the court stated:

> While the trial court's questioning of the mediator ensued due to his presence having been secured by subpoena, we question the wisdom of permitting the mediator to testify in the fashion allowed in this case. To the mediator's credit, he informed the trial court prior to his testimony that the trial court rules prohibit him from subsequently testifying for trial purposes . . . . While it does not appear that the mediator disclosed any confidential information through his testimony, and neither party has raised such a claim, the trial court's questioning of the mediator went beyond the basic issue of whether in fact an agreement was reached and identifying the terms of that agreement . . . . While we do not approve of the trial court's entire line of questioning of the mediator, we do not find a violation of TCR 25.12 due to the non-disclosure by the mediator of confidential information discussed during the mediation process.[138]

Although the court found no violation of the rule, its comments clearly signal the court's disapproval of breaching mediator confidentiality in subsequent enforcement proceedings.

Interestingly, the court's holding suggests that mediators can testify on the basic issue of whether an agreement was reached and the terms of that agreement. Nonetheless, the court's criticism of the lower court proceedings still indicates that specific questioning about the settlement process is off limits. Thus, after *Riner* it appears that in West Virginia, at least for now, the mediator's confidentiality will take precedence in proceedings initiated to enforce

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135 *Id.* at 805.

136 *Id.*

137 *Id.* at 809.

138 *Id.* at 808-09.

mediated agreements.[139] Moreover, reading the court's comments in this manner provides some much needed consistency for the future of mediation in West Virginia.

3. Possible Consequences

West Virginia's use of a strict mediator privilege results in at least two main consequences to the mediation process. First, it appears that West Virginia mediators may now tell their clients with reasonable confidence that they will not be testifying as to any mediation communication at any subsequent state court proceeding.[140] This promotes the informality and candor that is so crucial to the mediation process.[141]

Second, the unavailability of mediator testimony to a dissatisfied participant illustrates the importance of setting out a clear, definite settlement agreement in writing at the end of each successful mediation. Without the aid of mediator testimony, the drafter of a settlement agreement needs to assure that every term is adequately defined and discussed.[142] Due to these concerns, some states have enacted mandatory writing requirements.[143] In fact, if confidentiality is going to continue to take precedence, a bright-line rule requiring a formal signed writing may be the next step in the continuing development of West Virginia mediation law.[144]

One possible downside to maintaining a strict mediator privilege is the weakening of traditional contract law defenses such as fraud, duress, and mistake, all of which become much more difficult to prove without the aid of neutral testimony.[145] In other words, the lack of mediator testimony may hamper the ability of contract law to decipher whether a valid settlement agreement was formed with the proper consent of the participants. After all, the *Riner* court did

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139 *See* Robinson, *supra* note 5, at 167. *See generally* Johnson, *supra* note 16, at 190-91.

140 Things are still a little murky at the federal level due to the "manifest injustice" exception to confidentiality adopted by the Fourth Circuit Court of Appeals. *See supra* note 98 and accompanying text.

141 *See supra* notes 17-43 and accompanying text.

142 *See* Deason, *supra* note 3, at 75 ("Settling a lawsuit involves releasing rights that would otherwise be pursued in court. This is a decision of significance, and a court's determination that such an agreement was actually reached should be based on more than who wins the credibility contest in a swearing match.").

143 Writing requirements vary in degree and complexity, and are outside the scope of this Comment. However, for a good discussion of writing requirements, see Deason, *supra* note 3, at 51-60.

144 *But see* Thompson, *supra* note 5, at 551 (arguing that "technical, specialized rules in mediations such as a statute of frauds, that conflict with custom, practice, or reasonable expectations, will create confusion, uncertainty, and litigation").

145 *See supra* notes 54-56 and accompanying text.

clarify that "we do recognize that the mediation process will only work while the parties are ensured that the process is fair to both sides and where the attainment of settlement is viewed as non-compulsory."[146] Therefore, the professionalism of both the mediator and the participants during the mediation is of the utmost importance.[147]

VI. CONCLUSION

In conclusion, as the practice of mediation continues to gain support throughout the country, it becomes increasingly important to define the scope of the confidentiality protections surrounding its communications. Currently, jurisdictions are having trouble deciding the proper role of mediator testimony in the enforcement of mediated agreements. Some jurisdictions are continuing to apply a strict mediator privilege, which allows a mediator to refuse from testifying about mediation communications in any agreement enforcement proceeding. On the opposite end of the spectrum, some jurisdictions either offer only slight protection for mediators or have now created broad exceptions that view mediator testimony as an essential element to a court's ability to decipher the truth behind mediated agreements. Not surprisingly, several jurisdictions wind up somewhere in the middle of these two extremes.

The ensuing debate over the proper role of mediator testimony in enforcement proceedings has led to a crippling inconsistency throughout the country. As a result, mediators are often unable to guarantee that they will keep everything said in a mediation session confidential if a dissatisfied participant later becomes unhappy with an agreement and subpoenas mediator testimony. Thankfully, the emergence of the Uniform Mediation Act and various judicially implied exceptions should bring this topic some much-deserved attention.

In West Virginia, at least for now, the standard is set. Through its recent opinion of *Riner v. Newbraugh*, the West Virginia Supreme Court of Appeals has indirectly supplied some much-needed guidance. After *Riner*, West Virginia mediators may now perform their duties of solving problems and encouraging compromise without the threat of a future subpoena complicating the process. However, the absence of neutral testimony will now place a greater importance on the formality of settlement agreements and the professionalism of the participants.

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146 Riner v. Newbraugh, 563 S.E.2d 802, 810 (W. Va. 2002).

147 *See* Hughes, *supra* note 5, at 72-77 (explaining the "downside to confidentiality when it is used to conceal negligent or intentional misconduct by either the parties or the mediator"). It should be noted that confidentiality and privilege rules tend to be much looser when the mediator is accused of actual wrongdoing. *See* Thompson, *supra* note 5, at 528.

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