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

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

Pamela A. Kentra*

Table of Contents

I. INTRODUCTION .......................................................... 717
II. THE MEDIATION PROCESS ................................................. 718
    A. Mediation Defined .................................................. 718
    B. A Brief History of Mediation .................................... 719
    C. The Mediation Process ............................................. 719
    D. Benefits of the Mediation Process ............................... 720
III. CONFIDENTIALITY IN MEDIATION ..................................... 722
    A. The Importance of Confidentiality in the Mediation System ............ 722
    B. Confusion Over Confidentiality in Mediation ....................... 724
    C. Attempts to Create Uniform Standards Regarding Mediator Confidentiality ....... 725
    D. Sources of Confidentiality Protection ............................. 727
        1. Evidentiary rules and privileges .............................. 728
           a. Federal Rule of Evidence 501: Creating a Mediation Privilege ........... 728
              (1) Common law privilege .................................... 728
              (2) Privilege created by statute ............................ 729

* Visiting Assistant Clinical Professor at Chicago-Kent College of Law, Chicago, Illinois. Teacher of Mediation and Alternative Dispute Resolution courses, supervisor of the Mediation/Alternative Dispute Resolution clinical program, and recipient of the 1996 Arbitrator of the Year Award presented by the Better Business Bureau of Chicago and Northern Illinois.

The author wishes to express her sincere appreciation to September C. Wynne for her research assistance in the preparation of this Article.

715
Settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way, or he may hand you over to the Judge and the Judge may hand you over to the officer, and you may be thrown in prison. I tell you the truth, you will not get out until you have paid your last penny.

— Matthew 5:25-26

I. INTRODUCTION

Mediation and alternative dispute resolution processes have enjoyed epic growth in recent years;¹ however, in the midst of this growth, some serious ethical quandaries have surfaced for the attorney-mediator. If the mediation process is to continue to grow and flourish in a productive manner, obligations of the mediator must be made clear for the protection of the mediator, the parties, and the process. This Article addresses one crucial issue facing attorney-mediators today: the conflict between confidentiality and professional responsibility in the mediation process.

The mediation process must be confidential to work effectively, and most states have enacted legislation granting confidentiality to the mediation process.² However, the vast majority of these confidentiality rules are in direct conflict with attorney rules of professional conduct that require attorneys to report misconduct by fellow attorneys to disciplinary authorities. Attorney-mediators are placed in an intolerable conflict when

---

1. See infra Part II.B. For definitions of commonly used alternative dispute resolution terms, see Patrick Mead & Ed Newcomer, Jr., Alternative Dispute Resolution (ADR) Glossary of Terms, WASH. ST. B. NEWS, April, 1993, at 29.
2. See infra Appendix. The Appendix is a survey of state statutes and local rules across the nation that grant confidentiality to the mediation process. It is delineated by state, topic/citation, parameters of the confidentiality guarantee, and exceptions.
they must choose between two groups of binding obligations: mediation confidentiality rules and attorney misconduct reporting requirements.

This Article proposes that legislatures address the conflict between confidentiality rules and obligations to report attorney misconduct by fashioning an exception to the principle of mediation confidentiality. Part II gives an overview of the mediation process. Part III provides a detailed description of the concept of confidentiality in the mediation session. Part IV explains the attorney rules of professional conduct and, more specifically, the duty to report fellow attorney misconduct. Part V discusses the clash between conflicting obligations to maintain strict confidentiality of the mediation session and to report attorney misconduct. Finally, Part VI suggests alternatives to remedy this conflict.

II. THE MEDIATION PROCESS

A. Mediation Defined

Mediation has been defined in many different ways. In essence, mediation is a process where a "neutral third party who has no authoritative decision-making power" intervenes in a dispute or negotiation "to assist disputing parties in voluntarily reaching their own mutually acceptable" agreement. Mediation involves moving parties from focusing on their individual bargaining positions to inventing options that will meet the primary needs of all parties. The concept of self-determination, which gives parties control over the resolution of their own dispute, is of major importance to the mediation process. It is thought that self-determination enhances commitment to the settlement terms because parties make decisions themselves instead of having a resolution imposed upon them by an authoritative third party.

5. See id.
B. A Brief History of Mediation

Mediation has roots in ancient civilizations. In the United States, mediation can be traced to colonial times; however, it first appeared on a formal scale in 1913 when the U.S. Department of Labor was established to handle conflicts between labor and management. Since then, mediation has grown in the area of labor-management relations. In the mid-1960s, mediation experienced significant growth; for example, community dispute resolution programs were created and funded by the federal government.

Recently, mediation has grown in epic proportions with programs being established in a multitude of areas. Evidence of mediation's growth can be found in the 1996 Martindale-Hubbell Dispute Resolution Directory, which names approximately 60,000 individuals and service organizations that provide alternative dispute resolution services.

C. The Mediation Process

Mediation models vary significantly, but certain aspects are common to almost all models. Typically, the mediator makes an *opening statement* with all parties present in the room. The parties then have an opportunity to speak to each other in a...
joint session. This gives the parties the opportunity to convey their perceptions of the dispute and often involves a period of "venting" emotions while discussing background and dispute-related information. Additionally, the mediator isolates the issues to be discussed, often with the help of the parties.

The mediation process frequently includes private meetings between the mediator and one party, commonly referred to as "caucus" sessions. These sessions are generally considered confidential between the mediator and the party. Some mediators meet with parties in a series of caucuses until they can fashion an agreement between the parties. This style is called "shuttle diplomacy," a negotiation technique made famous by former President Jimmy Carter. Other models of mediation call for an intermingling of private caucus sessions and joint discussion sessions.

**D. Benefits of the Mediation Process**

The mediation process differs from the litigation process in many ways that can be beneficial to the parties. One particularly unique attribute of the mediation process is that it is future-oriented, concentrating on ways to resolve disputes between parties by focusing on what can happen in the future. This is directly opposite to the litigation process, which focuses on the past: What happened? Who broke the rules? Who incurred liability due to their negligence? While judges look to the past and apply sets of rules to resolve disputes in one party's favor, mediators look to the future, searching for ways that parties can come to common ground and find a lasting solution.

The mediation process also offers tremendous flexibility to participants, allowing them to formulate settlement options beyond the traditional purview of the court system. For example, in an employment discrimination lawsuit, a court would typically be concerned with issues of financial liability. However, in medi-

---

13. Issues might include nonlegal matters such as relationships, reputations, respect, communication, and emotions, as well as legal matters. *See generally* ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 95-144 (2d ed. 1991).


15. *See Moore, supra* note 3, at 17.
ation, parties can not only address the issue of money, but can also include any multitude of creative options.16

Further, mediation generally costs less than litigation, a factor frequently cited as a reason for using mediation and other alternative dispute resolution procedures.17 Beginning in 1990, 400 companies participated in a study of corporate alternative dispute resolution programs. The companies reported a savings of $150 million in litigation costs through 1993.18 Another amazing testimonial of cost savings is a report by Chevron Corporation that it saved approximately $2.5 million in litigation expenses by mediating a major case instead of litigating. The total cost to Chevron in bringing the dispute to settlement through mediation was only $25,000.19

In a society that is becoming increasingly litigious, money saved in court costs, litigation expenses, and attorney fees can be extremely significant.20 In the process, lawyers are easy scapegoats for the incredible costs of litigation on society and are blamed for instigating strife and causing a "litigation explosion."21 It is no surprise, then, that individuals are choosing to use mediation and other methods of alternative dispute resolution in an attempt to save money.

Mediation also provides an easier, less stressful form of dispute resolution. Litigation in our current system can involve an incredible amount of time and effort. Frequently, lawsuits are filed that do not go to trial until years later, increasing the risk that witnesses' memories have faded or evidence has been lost. This process can be extremely frustrating, and the emotional toll on parties should not be underestimated. Our litigation system

16. Examples of different options include changing job descriptions, requiring certain parties to enroll in sensitivity training classes, issuing written or verbal apologies, issuing neutral or favorable letters of recommendation, establishing a trust fund for an injured plaintiff, or financing further education for an injured plaintiff.
19. See id.
20. See id. at 586. ("Today, it is estimated that liability lawsuits cost Americans roughly $130 billion annually. The tort system in the United States has grown four times faster than the economy since 1930." (footnote omitted)).
values winning at any price, despite an incredible cost to litigants in terms of stress, money, and frustration.\textsuperscript{22}

In addition to being future-oriented, flexible, economical, and less stressful than litigation, mediation ensures confidentiality, which is one of the most attractive and powerful attributes of the mediation process. Many litigants do not want their disputes aired publicly. Because our litigation system offers little privacy to participants, bad publicity and bad precedent caused by lost cases creates concern for many business litigants.\textsuperscript{23} Exploitation of other peoples' tragedies by making them into a media event is exemplified quite powerfully by the O.J. Simpson murder trial. Even on a smaller scale, many litigants would rather keep their dirty laundry to themselves. Mediation offers an extremely attractive alternative to such individuals.

III. CONFIDENTIALITY IN MEDIATION

A. The Importance of Confidentiality in the Mediation System

Confidentiality lies at the heart of the mediation process. Mediation would not be nearly as effective if the parties were not assured their discussions would remain private. Parties would be hesitant to bare their souls to someone who may be called as a witness against them in subsequent litigation. It is therefore essential to the success of the process that parties freely disclose information relating to the dispute. Confidentiality serves the crucial purpose of allowing the mediator to be seen by the parties as a neutral, unbiased third party. Thus the mediator plays a unique role in the mediation process.

Having no decision-making power, "the mediator . . . acts primarily as a catalyst [and] cannot compel the production of information."\textsuperscript{24} Instead, the mediator must rely on gaining the trust of the parties to encourage forthright communication. In order to gain that trust, mediators must be able to guarantee they will not later testify against any party if the mediation does


\textsuperscript{23} See id. For example, a media defendant would likely place a high value on confidentiality of a bad settlement precedent. See generally LEONARD L. RISKIN, OVERVIEW OF ADR: THE ROARK v. DAILY BUOIE LIBEL CLAIM SIMULATION MATERIALS (1992).

\textsuperscript{24} Note, Protecting Confidentiality in Mediation, 98 HARV. L. REV. 441, 444 (1984) [hereinafter Protecting Confidentiality].
not result in a viable agreement. The parties must understand that the mediator will neither testify on his or her own accord, nor upon compulsion by a party.  

Beyond its trust-facilitating function, the existence of confidentiality in mediation also lures parties to choose mediation over litigation. Parties often prefer to “keep their dispute out of the public eye.” In many cases, the threat of media coverage and bad public relations can be a major concern. Confidentiality, especially of any settlement agreement, can be a powerful mechanism to address the “slippery slope” fears of oft-sued defendants such as the media and large employers. Without confidentiality, these defendants may opt to avoid settling cases for fear that a landslide of additional lawsuits will follow.

Various cases recognize the crucial need for confidentiality in mediation. For example, in *NLRB v. Joseph Macaluso, Inc.*, the court held that the public interest in maintaining the perceived and actual impartiality of federal labor mediators outweighs the benefits derived from the mediator’s testimony. As a consequence, the court completely excluded the mediator’s testimony. The court noted the long-standing policy that mediators must maintain the appearance of neutrality and thus may not be asked to testify about the bargaining sessions they attend. In another opinion, a New York district court noted that “if the process is to work, [parties must] fully disclose to the mediator their needs and tactics—not only those that have been publicly revealed, but also their private views and internal arrangements.” In addition, the court noted the essential nature of “ex parte ‘frank, confidential discussion[s]’ with all parties.”

25. *See id.* at 446.
26. *Assay, supra note 17, at 992-93.*
27. *See generally Riskin, supra note 23.*
28. *618 F.2d 51 (9th Cir. 1980).*
29. *See id.* at 51-54. In this case, a Federal Mediation and Conciliation Service mediator had intervened in failed negotiations between the union and management. After the mediation sessions were completed, the NLRB charged the company with unfair labor practices, partially based on the company’s alleged refusal to commit to a written contract, something it had agreed to during the mediation sessions. The company attempted to subpoena the mediator to obtain his testimony describing the bargaining sessions in question. *See id.*
30. *See id.* at 54-56.
32. *Id.* (quoting Henderson, *Settlement Masters, in CENTER FOR PUBLIC RESOURCES LEGAL PROGRAM, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS 233, 235-36*
B. Confusion Over Confidentiality in Mediation

Despite case law support for confidentiality generally, a great deal of confusion exists, even among experts in the mediation field, as to what falls under the umbrella of "confidentiality in mediation." Due to the many definitions of confidentiality, it is unclear which definition applies in which circumstance. Webster's Dictionary defines confidentiality as "marked by intimacy to confide," or "private, secret information." Attorneys, on the other hand, are likely to view confidentiality from a different perspective, inquiring whether information qualifies as "evidentiary exclusions, discovery limitations, [or] judicial or statutory laws of privilege."

Adding to the confusion over the meaning of confidentiality in mediation is the fact that nearly every jurisdiction in the United States has different statutes or local court rules establishing the parameters of their particular mediation programs. Also, many states do not have a single mediation statute covering all mediation proceedings in the respective state. Rather, jurisdictions often have a multitude of statutes enacted on an ad hoc basis as mediation programs develop. Frequently, confidentiality statutes within the same state will give differing coverage and exceptions to different programs. At this time, there is no national licensing or regulation of mediators. As a result, confi-

(E. Fine ed. 1987).
34. WEBSTER'S NEW 10TH COLLEGIATE DICTIONARY 242 (1994).
35. Assey, supra note 17, at 994.
37. See infra Appendix.
38. Compare COLO. REV. STAT. ANN. § 14-12-105 (West 1989) (stating that all communications and documents in marriage counseling mediation are private and confidential and shall not be disclosed, no exceptions), with COLO. REV. STAT. ANN. § 13-22-307 (West Supp. 1996) (stating that communications and documents are confidential and shall not be admissible as evidence or subject to discovery with various exceptions including written consent to disclosure by all parties, intent to commit a felony, infliction of bodily harm, threatening the safety of a minor child, disclosures required by statute, actions against mediator, otherwise discoverable information, and disclosures for evaluation and research purposes).
dentaility policies differ significantly from one program to another and from one jurisdiction to another. 39

C. Attempts to Create Uniform Standards Regarding Mediator Confidentiality

Because of the widely divergent mediation programs, many have recognized the need for uniform standards of conduct for mediators nationwide. 40 This has been the subject of frequent debate among associations of mediation professionals. 41 Recently, three of the major players in the alternative dispute resolution arena, the American Arbitration Association (AAA), the American Bar Association (ABA), and the Society of Professionals in Dispute Resolution (SPIDR), attempted to remedy the situation by drafting the Model Standards of Conduct for all mediators (Model Standards). 42

The Model Standards attempt to develop a "general framework for the practice of mediation," and are "intended to apply to all types of mediation." 43 The preface to the Model Standards states three major goals: "[1] to serve as a guide for the conduct of mediators; [2] to inform the mediating parties; and [3] to promote public confidence in mediation as a process for resolving disputes." 44

The Model Standards address confidentiality in the following manner:

V. Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

39. Compare Texas ADR statute, TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West Supp. 1997) (providing for confidentiality except when material can be independently discovered), with Illinois Not For Profit Dispute Resolution Center Act, 710 ILL. COMP. STAT. ANN. 20/1-20/6 (West 1993) (stating all memoranda, work product, case files, or communications are not subject to discovery or disclosure). For further discussion of the Texas statute and its implications, see Irene Stanley Said, The Mediator's Dilemmas: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute, 36 S. TEX. L. REV. 579 (1995).

40. See generally KOVACK, supra note 33, at 215-18, 220-22; MURRAY ET AL., supra note 6, at 424 (stating standard "of conduct for ADR has been a much discussed and debated topic over the past decade, both as to source and content" (footnote omitted)).

41. For a discussion of the need for regulation and training of mediators, see Joseph B. Stulberg, Training Interveners for ADR Processes, 81 KY. L.J. 977 (1993).


43. Id. at 78.

44. Id.
The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. A mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.\footnote{Id. at 80. The standards of conduct for mediators includes coverage of various other major issues in mediation, including the principle of self-determination by the parties, mediator impartiality, conflicts of interest, mediator competence, quality controls on the mediation process, advertising and solicitation of the mediation process, and fees for the mediator. See id. at 78-81. A discussion of these components is beyond the scope of this Article.}

The drafters' comments to the confidentiality section state that "[t]he parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations."\footnote{Id.} The comments also suggest that the private nature of caucus sessions be discussed with the parties.\footnote{See id.}

The Model Standards do not suggest a uniform list of exceptions to the confidentiality rule, nor do they include any suggested language to convey confidentiality, except for a reference to the "reasonable expectations of the parties."\footnote{Id.} In addition, the Model Standards do not address the issue of the conflict between the duty to maintain confidentiality in mediation and the attorney-mediator's obligation to report attorney misconduct under professional rules of conduct.

Yet it appears at least some of the drafters were aware of the misconduct reporting requirement problem. In a previously drafted American Bar Association Model Rule covering confidentiality in mediation,\footnote{American Bar Association Standing Committee on Dispute Resolution Report to the House of Delegates, 12 Seton Hall Legis. J. 65 (1988) [hereinafter ABA Report] (containing the MODEL RULE ON CONFIDENTIALITY IN MEDIATION (Proposed Draft 1988)). For a discussion of the American Bar Association's Model Rule on Confidentiality in Mediation, see Mori Irvine, Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation, 26 Rutgers L.J. 155 (1994).} the comment section addressed the conflict created by the rules of professional conduct governing attorneys, and noted that each jurisdiction should draft exceptions as it saw fit.
fit.50 Perhaps the drafters of the Model Standards were convinced the situation would be appropriately addressed by each individual jurisdiction, pursuant to the exception that the “required by law or other public policy” language creates. However, as the Model Standards currently read, it is unclear how the conflict should be resolved.

The lack of guidance is disappointing because the Model Standards were drafted as a response to the call for more uniformity and clearer ethical guidelines for mediators across the country. As it stands, very little guidance can be gleaned from the language of the confidentiality section of the Model Standards.

D. Sources of Confidentiality Protection

Despite the Model Standards’ lack of guidance, various mechanisms exist that extend confidentiality to a mediation session. Parties often find themselves arguing for confidentiality in situations where the mediation session has terminated and one party is seeking disclosure of information discussed during the session. While potential arguments for confidentiality are theoretically limited only by the imagination of potential litigants, this Article discusses the main mechanisms by which confidentiality can be extended to mediation sessions: (1) evidentiary rules and privileges;51 (2) limitations on discovery through private contracts and court orders; (3) common law protection; and (4) state statutes.52


51. When discussing potential bases for confidentiality in mediation, it is important to distinguish between an evidentiary exclusion versus a privilege. Many commentators, mediators, and even court opinions fail to distinguish between exclusion and privilege. See Kovack, supra note 33, at 143-46 (quoting Charles T. McCormick, McCormick on Evidence § 266 (John W. Strong ed., 4th ed. 1992)). An evidentiary exclusion prevents the admission of certain evidence at trial. It is aimed at keeping that information out of the courtroom, regardless of the source. Evidentiary exclusions generally do not prevent disclosure of the information in other settings, such as in the media. On the other hand, a privilege provides a broader scope of confidentiality protection. It prevents disclosure of certain evidence during trial and in discovery, but also may prevent disclosure of information in other settings. A privilege is aimed at a specific individual, typically someone in a relationship that is recognized as a privileged relationship. See id. For a full discussion of this issue, see id.

52. In states where a statute covering mediation confidentiality is in effect, that statute will give guidance to parties. The following discussion covers other potential bases for confidentiality arguments, including reference to the Federal Rules of Evidence and Federal Rules of Criminal Procedure. Many states have enacted state counterparts of the Federal Rules discussed, and those state counterparts would give
1. Evidentiary rules and privileges


   (1) Common law privilege. Federal Rule of Evidence 501 allows courts to create a common law privilege to cover certain relationships. The rule states in relevant part:

   Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.53

   Examples of traditional common law-created privileges include the attorney-client privilege, doctor-patient privilege, and priest-penitent privilege.54 Traditionally, when determining a claim of privilege, the courts have employed the four-part Wigmore balancing test:

   (1) the communications must originate in confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties; (3) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.55

   In the context of a mediation privilege, courts would likely apply this same four-part test. The essence of finding a mediation privilege can be characterized as "the search for truth versus the nurturing of mediation as an attractive and effective alternative to litigation."56

53. FED. R. EVID. 501.
55. 8 JOHN H. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. ed. 1961).
(2) Privilege created by statute. Federal Rule of Evidence 501 goes on to state that where state statutes speak to an issue, the privilege shall be determined in accordance with state law.57 Some jurisdictions have chosen to create a mediation privilege via statute. For example, the North Carolina statute allowing for mediation in divorce, alimony, and child support cases has specific language stating that "all verbal or written communications from either or both parties to the mediator or between the parties in the presence of the mediator made in a proceeding pursuant to this section are absolutely privileged and inadmissible in court."58 Statutorily created privileges vary widely from state to state as to the scope of information to be protected and who in the mediation relationship is protected by the privilege. Legislatively created mediation privileges, such as the North Carolina statute,59 provide comprehensive confidentiality protection to the mediation process. Courts have generally upheld such statutes in litigation.60

b. Federal Rule of Evidence 408. Federal Rule of Evidence 40861 provides an evidentiary exclusion for conduct and statements made during settlement discussions. This rule can apply by analogy to the mediation process since mediation often involves compromise negotiations.

However, Rule 408 is fraught with exceptions, many of which raise serious concerns as to whether essential portions of the mediation process would be deemed confidential. Under Rule

57. See FED. R. EVID. 501.
59. See id.
60. Cf. NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 56 (9th Cir. 1980) (upholding a similar federal statute).
61. Federal Rule of Evidence 408 states in relevant part:

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

FED. R. EVID. 408.
Most states have enacted statutes containing similar evidentiary exclusions. See KOVACK, supra note 33, at 143-45.
408, statements are excluded only if their intended use is to prove the validity of a claim or an amount of a civil claim.\textsuperscript{62} Mediation sessions, by their very nature, often include a discussion of a multitude of issues aside from the validity or amount of a claim.\textsuperscript{63} Furthermore, under Rule 408, statements can be admitted if they are offered "for another purpose" such as proving bias or prejudice of a witness, negating an accusation of undue delay, or proving an attempt to obstruct a criminal investigation.\textsuperscript{64} The "another purpose" exception in Rule 408 "in the hands of creative counsel" would leave much of the mediation session subject to disclosure.\textsuperscript{65} In addition, Rule 408 will not protect the confidentiality of the final mediated agreement.\textsuperscript{66}

Thus, Rule 408 has limited application, and cannot be relied upon to cover all mediation discussions.\textsuperscript{67} However, one should note that a trend has emerged to extend Rule 408's protection to all statements during a compromise negotiation.\textsuperscript{68} In an attempt to remedy these problems, some states have enacted a broader evidentiary exclusion that applies specifically to mediation.\textsuperscript{69}

c. Federal Rule of Criminal Procedure 11(e)(6). Federal Rule of Criminal Procedure 11(e)(6) is the "criminal counterpart to Rule 408."\textsuperscript{70} Rule 11(e)(6) prevents the later admission of offers by a criminal defendant to plead guilty in plea bargaining

---

\textsuperscript{62} See Fed. R. Evid. 408.
\textsuperscript{63} See supra note 13 and accompanying text.
\textsuperscript{64} See Fed. R. Evid. 408.
\textsuperscript{65} Alan Kirtley, The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, 1995 J. Disp. Resol. 1, 13.
\textsuperscript{67} Another potential problem with using Rule 408 to protect mediation communication from disclosure is the fact that most of the options and ideas that are generated during the mediation are not directly contingent upon one another. Under these circumstances, the information would not normally be protected by Rule 408. See Kovack, supra note 33, at 143-45.
\textsuperscript{68} A final concern underlying reliance on Rule 408 to grant confidentiality to the mediation process is that evidentiary rules do not exclude evidence in a subsequent lawsuit over related claims raised after the mediation session. In United States EEOC v. Air Line Pilots Ass'n, International, 489 F. Supp. 1003, 1010 (D. Minn. 1980), rev'd on other grounds, 661 F.2d 90 (8th Cir. 1981), the court allowed evidence from a prior conciliation to prove allocation of damages.
\textsuperscript{69} See Kovack, supra note 33, at 143-45 (quoting 2 Charles T. McCormick, Mccormick on Evidence § 266 (John William Strong ed., 4th ed. 1992)).
\textsuperscript{70} See id. (quoting Me. R. Evid. 408(b) (excluding evidence of mediation discussions for any purpose)).
situations. Because mediation typically involves two or more private parties, whereas Rule 11(e)(6) deals with excluding the government’s use of previous plea offers against a private party, Rule 11(e)(6) would most likely “not exclude the admission of statements made at a mediation.”

2. Limitations on discovery through private contracts and court orders

a. Private confidentiality contracts. In an attempt to keep the subject matter of their mediation discussions privileged, some parties have entered into private, pre-mediation contracts providing for the confidentiality of all communications made during the mediation session. Parties fashion the terms in these agreements to fit their particular circumstances. Typical terms include agreements “not to disclose, subpoena, or offer into evidence information conveyed during a mediation proceeding.”

There are several dangers in entering into a private contract. Private parties may breach the contract, forcing the other party to initiate litigation after the confidentiality has already been compromised. Another problem with private mediation contracts is that such agreements are not binding on third parties. Thus, if a nonparty were to bring subsequent litigation, communications made during the mediation could be allowed as evidence. In addition, some courts strike down private confidentiality con-


Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Id.


74. See id. In Grumman Aerospace Corp. v. Titanium Metals Corp. of America, 91 F.R.D. 84 (E.D.N.Y. 1981), the court ordered a mediation party who was covered by a private agreement to comply with a discovery request filed by a third party. A commentator has noted that parties “should not be permitted to contract privately” in ways which “would prohibit others from obtaining relevant materials in the course of litigation.” Rosenberg, supra note 73, at 165-66.
tracts, finding the agreement is deliberately designed to cover evidence and thus a violation of public policy.\textsuperscript{75}

b. \textit{Protective orders}. Courts have the power to order parties to keep mediation proceedings confidential through a protective order. In cases where the court does not grant a protective order sua sponte, parties may agree that confidentiality is desirable and jointly seek a protective order from the court.\textsuperscript{76} Federal Rule of Civil Procedure 26(c) allows the court to issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."\textsuperscript{77}

3. \textit{Common law protection}

Another potential basis to argue confidentiality in a mediation session is the common law "relevancy rule," which is recognized by most states.\textsuperscript{78} The relevancy rule allows the court to exclude evidence of a proposed compromise under the assumption that this information is not reliable evidence of the truth of the offeror's claim. As such, under the relevancy rule, "only the actual offer of settlement" in a mediation proceeding could be protected from disclosure.\textsuperscript{79} Conduct and independent statements of fact made during the mediation, and even the offer of settlement itself, would be admissible if a party could successfully argue it was being introduced into evidence to prove some-

\begin{itemize}
\item \textsuperscript{75} See, e.g., Garden State Plaza Corp. v. S.S. Kresge Co., 189 A.2d 448, 458 (N.J. Super. Ct. App. Div. 1963). \textit{But see} Simrin v. Simrin, 43 Cal. Rptr. 376 (Ct. App. 1965) (holding that express confidentiality agreement with marriage counselor was valid because the public policy favoring preserving marriage outweighs the public policy against suppressing evidence).
\item \textsuperscript{76} Parties may later seek to have the protective order modified or challenge the validity of a protective order. Courts would ordinarily require the moving party to show that the order was improvidently granted or to demonstrate a compelling need for the information. \textit{See} NANCY H. ROGERS \& CRAIG A. MCEWEN, \textit{MEDIATION: LAW, POLICY \& PRACTICE} 115 (Supp. 1993). In cases where the information sought is relevant to another action and not available elsewhere, the court would normally weigh this need against the interests at stake, including the fact that parties have relied on the protective order in freely engaging in settlement discussions. Parties and their attorneys can increase the chance that orders will be upheld if they are certain to include an acceptable justification for the order in the body of the order and restrict its scope to those materials for which the order is justified. \textit{See id}.
\item \textsuperscript{77} FED. R. CIV. P. 26(c).
\item \textsuperscript{78} \textit{See} Assey, \textit{supra} note 17, at 994.
\item \textsuperscript{79} \textit{Brown, supra} note 66, at 312.
\end{itemize}
thing other than liability, such as for impeachment purposes or to prove an agency relationship.  

4. State statutes

Many states have enacted statutes that provide varying degrees of confidentiality in mediation programs. Some statutes create a full mediation privilege with no exceptions, while others create more limited protection with specific exceptions to the confidentiality guarantee. To lend further confusion to the matter, many states have more than one statute, each granting a different degree of confidentiality protection to different mediation programs within the same state.

A review of case law in all fifty states reveals that each state has one or more statute or local court rule concerning confidentiality in mediation. The morass of statutes can best be theoretically categorized by the degree of confidentiality conferred on the process, coupled with exceptions thereto. Using this paradigm, this Article will consider statutes in the following categories: blanket protection, waiver statutes, statutes safeguarding protected groups, confidentiality statutes that promote the court's and society's need for evidence, public protection confidentiality exception statutes, exceptions related to court administration needs, governmental and subject-matter-specific confidentiality exceptions, and research and record-keeping exceptions.

a. Blanket protection. Various statutes offer blanket protection to the mediation process without listing any exceptions. Many statutes state that all communications and documents obtained during the mediation process are confidential and shall not be disclosed in any subsequent proceeding. Some statutes specify that mediation proceedings are not subject to discovery

80. See id.
81. See, e.g., CAL. FAM. CODE § 3177 (West 1994).
83. See supra note 38; compare N.D. CENT. CODE § 14-09.1-06 (1991) (regarding mediation of contested child custody proceedings providing for full confidentiality with no exceptions), with N.D. CENT. CODE § 6-09.10-10 (Supp. 1995) (regarding mediation of farm and business aid matters, providing that information gathered is confidential subject to the written consent of all parties or pursuant to a court order upon a showing of good cause).
84. See infra Appendix.
85. See, e.g., ARK. CODE ANN. § 11-2-204 (Michie 1996) (relating to mediation of labor relations cases); COLO. REV. STAT. ANN. § 13-22-307(2) (West Supp. 1996); 710 ILL. COMP. STAT. ANN. 20/6 (West 1993).
or compulsory testimony. In other jurisdictions, the statutes go so far as to state that this confidentiality may not be waived by any of the parties.

b. Waiver statutes. Many statutes include an exception to confidentiality provisions when parties agree to waive the confidentiality of the session. These statutes take into account the utility of allowing parties to use information discussed in a mediation session in mutually agreeable situations. However, one court has held that mediation confidentiality statutes are nonwaivable.

c. Statutes safeguarding protected groups. Many statutes contain an exception to confidentiality in situations when disclosure is needed to protect certain groups of people who may be less able to protect themselves, such as children, the elderly, and the disabled. This exception is used frequently in mediation programs dealing with divorce, custody, and visitation issues to allow mediators to report suspicions of child abuse.

d. Confidentiality statutes that promote the court’s and society’s need for evidence. This category includes a multitude of statutes designed to address issues relating to the tension between a private justice system embodied in mediation and other ADR mechanisms, versus the traditional justice system, which promotes the public airing of disputes and the accessibility of all

86. See, e.g., CAL. EVID. CODE § 1152.5 (West 1995) (excepting those otherwise provided).
87. See, e.g., IND. CODE ANN. § 4-21.5-3.5-27 (Michie 1996) (regarding mediation of state and administrative issues).
89. See Brown, supra note 66, at 316 (citing People v. Snyder, 492 N.Y.S.2d 839, 891-92 (Sup. Ct. 1985)).
90. See, e.g., TEX. HUM. RES. CODE ANN. § 48.036 (West Supp. 1995) (containing general requirements to report abuse of the elderly or disabled); UTAH CODE ANN. §§ 30-3-17.1, 30-3-28 (1995) (providing for mediation in divorce cases and requiring mediators to report child abuse).
91. For example, mediators at the Center for Conflict Resolution in Chicago, Illinois, are required by the program’s policy to report a “reasonable suspicion” of child abuse. Interview with Andrew G. Miller, Center for Conflict Resolution, in Chicago, Ill. (Apr. 8, 1997).
relevant evidence to the litigants and to the public in the search for the truth.\textsuperscript{92}

These statutes include: (1) the "otherwise discoverable information" exception;\textsuperscript{93} (2) "independent investigation" exception;\textsuperscript{94} (3) "disclosure required by statute" confidentiality exception;\textsuperscript{95} (4) exceptions covering the necessity to enforce mediation-related agreements;\textsuperscript{96} (5) exceptions relating to the overriding need for

\textsuperscript{92} See NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 54 (9th Cir. 1980) (stating the fundamental principle "that the public is entitled to every person's evidence" (citing Branzburg v. Hayes, 408 U.S. 665, 668 (1976); U.S. v. Bryan, 339 U.S. 323, 331 (1950); 8 JOHN H. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton rev. ed. 1961)); see also United States v. Nixon, 418 U.S. 683, 709 (1974) (recognizing that "the need to develop all relevant facts in the adversary system is both fundamental and comprehensive").

\textsuperscript{93} See, e.g., Fla. Stat. Ann. § 61.183 (West Supp. 1997). A confidentiality exception for otherwise discoverable information is a sound exception to the confidentiality rule. Parties have a right to the discovery of information within the constraints designed in each state's code of civil procedure or other rules governing discovery in that jurisdiction. Some cases that go to mediation do not result in a settlement agreement between the parties. If the case then continues to litigation, the parties should be allowed to use evidence that would otherwise have been discoverable in the litigation setting. To rule otherwise would penalize parties for using the mediation process and allow unethical parties to use the mediation process to bury undesirable evidence.

Such an exception also increases the likelihood that the confidentiality of the mediation session will be preserved upon judicial review if a party challenges the confidentiality rule. Courts are much more likely to be comfortable with confidentiality of the mediation session if it does not prejudice subsequent litigation or parties' access to evidence.

\textsuperscript{94} See, e.g., Minn. Stat. Ann. § 494.02 (West 1990). Some mediation confidentiality statutes provide a specific exception stating that the rule supporting mediation confidentiality does not preclude admission of evidence obtained by independent investigation. See id.

\textsuperscript{95} Many confidentiality statutes recognize the conflict that would be created if there was not an exception to allow disclosures otherwise required by state statutes. Therefore, many statutes include a specific exception to mediation confidentiality for this situation. See, e.g., Ariz. Rev. Stat. Ann. § 12-2238 (West 1994); Colo. Rev. Stat. Ann. § 13-22-207 (West Supp. 1996); Kan. Stat. Ann. § 74-545(f)(4) (Supp. 1996) (relating to agricultural negotiations). Other statutes provide an exception to confidentiality when required by court order. See, e.g., id. Creating an exception for "disclosures required by statute" is a sound practice, balancing the importance of confidentiality in mediation with the need for disclosure of certain issues.


Cases vary from one jurisdiction to another on whether settlement agreements arising from mediation sessions should be admissible in court. In Barnett v. Sea Land Service, Inc., 875 F.2d 741, 744 (9th Cir. 1989), the court held that according to W. Dist. of Wash. Local R. 39.1, discussions during the mediation were not admissible, but if a settlement agreement were reached, reduced to writing, and signed by the
access to the information,97 (6) confidentiality exceptions for subsequent litigation between mediation participants,98 (7) ex-

parties, it would be binding on the parties and admissible in court. Furthermore, the court in In re Marriage of Ames, 860 S.W.2d 590, 591 (Tex. App. 1993), refused to allow a party who had entered into a mediation settlement agreement to unilaterally repudiate that agreement after the fact under TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (Vernon Supp. 1993). The court found that the agreement is enforceable in the same manner as any other written contract reached after “arm’s length negotiations.” Marriage of Ames, 860 S.W.2d at 592. In Bennett v. Bennett, 587 A.2d 463, 464 (Me. 1991), the court refused to compel a party under ME. REV. STAT. ANN. tit. 19, § 665 (West Supp. 1990) to sign and submit to the alleged mediation agreement, which the opposing party claimed it had reached during the mediation session, but had not signed.

One should note that some jurisdictions have decided mediation agreements will not be enforceable and binding unless certain conditions are met. Conditions may include a provision in the mediated agreement stating that it is binding and a recital that the parties have been advised of certain public protection rules in writing. See, e.g., MINN. STAT. ANN. § 572.35 (West 1988).

97. Some mediation confidentiality statutes contain a type of catch-all phrase stating that the confidentiality will be broken in situations where there is an overriding need for access to the information. See, e.g., COLO. REV. STAT. ANN. § 8-1-115 (West Supp. 1996). This amorphous exception is unclear, leaving parties wondering what exactly could be meant by this type of information. This exception opens the door for a panoply of arguments by litigants wishing to challenge the confidentiality of the mediation.

Some related statutes include additional language that confidentiality will be breached to “prevent a manifest injustice . . . [that] outweigh[s] the . . . general requirement of [protecting] confidentiality.” OHIO REV. CODE ANN. § 2317.023(C)(4) (Anderson Supp. 1996); see also WIS. STAT. ANN. § 904.085(e) (West 1996) (seeking “to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality”). Other statutes narrow their exceptions slightly with language that states that confidentiality will be breached as needed for third-party litigation fairness as determined by the judge. See, e.g., TENN. CODE ANN. § 36-4-130(b)(4) (1996) (relating to domestic relations). Nonetheless, this exception is quite vague and likely to open the floodgates to parties who are unhappy with their mediated settlement or desire to challenge the confidentiality of mediation to some other end.

98. Some statutes foresee the need to breach confidentiality if participants to the mediation session are involved in subsequent litigation over conduct occurring during the mediation itself. See, e.g., ARIZ. REV. STAT. ANN. § 12-2238(B)(2) (West 1994) (providing for claims made by the parties against the mediator); COLO. REV. STAT. ANN. § 13-22-307 (West Supp. 1996); KAN. STAT. ANN. § 5-512 (1996); MICH. COMP. LAWS ANN. § 691.1557(7)(b) (West Supp. 1996); OHIO REV. CODE ANN. § 2317.023 (Anderson 1996); OKLA. STAT. ANN. tit. 12, § 1805(f) (West 1993); OR. REV. STAT. § 36.205(2)(b) (1995); TENN. CODE ANN. § 36-4-130(b)(2) (1996); VA. CODE ANN. § 8.01-581.22(ii) (Michie 1992).

Other statutes leave out the requirement that the action be by a party against a mediator and include an exception for any action arising out of the mediation process. See, e.g., IOWA CODE ANN. § 216.15B (West 1996).

Contemplation of lawsuits against mediators is a subject of great debate. Some jurisdictions feel that mediators, particularly pro bono mediators, should enjoy immunity similar to that extended to judges. See Sharon Press, Institutionalization: Savior or Saboteur of Mediation, 24 FLA. ST. U. L. REV. 903, 911-12 (1997). Judges generally have immunity for their actions relating to the fulfillment of their judicial
ceptions dealing with professional misconduct, and exceptions necessary for the conduct of the mediation session.

It should be noted that a survey of state statutes dealing with confidentiality in mediation revealed only one jurisdiction with an exception dealing with attorney professional misconduct, the focus of this Article. Minnesota’s thoughtfully written statute includes an exception for disqualification proceedings against an attorney under the Rules of Professional Conduct and a specific exception for “any statement or conduct that could... constitute professional misconduct.”

e. Public protection confidentiality exception statutes. Many mediation statutes contain exceptions for confidentiality of issues that impact public protection. These include exceptions for: (1) intent to commit a crime or harm a third party, (2) fraud,
duress or illegality, threats of violence, and perjured evidence.

f. Exceptions related to court administration needs. Some mediation confidentiality statutes contain an explicit exception stating that if the parties arrive at a mediated settlement agreement, that settlement agreement will be made public in some manner. Some statutes require that the final settlement agreement be incorporated into a court order. Other statutes allow a settlement agreement to be filed with the clerk of the court. Similarly, other statutes specifically state that the mediator is allowed to report the outcome of the mediation to the court at the conclusion of the mediation session as long as nothing in the

be the one area where courts are most hesitant to extend confidentiality to mediation sessions. This is perhaps due to the obvious concern for obtaining all possible relevant evidence in criminal prosecutions. For example, in State v. Castellano, 460 So. 2d 480, 481-82 (Fla. Dist. Ct. App. 1984), the court held that the public interest and disclosure of information relating to a criminal case are greater than the public interest in maintaining mediation confidentiality. However, in United States v. Gullo, 672 F. Supp. 99 (W.D.N.Y. 1987), the New York federal district court held that, even in criminal cases, all statements made during an alternative dispute resolution process should be held confidential. The court used a four-factor balancing test to decide the confidentiality question, weighing:

"[F]irst, the federal government's need for the information being sought in enforcing its substantive and procedural policies; second, the importance of the relationship or policy sought to be furthered by the state rule of privilege and the probability that the privilege will advance that relationship or policy; third, the special need for the information sought to be protected [in each particular case]; and fourth, the adverse impact on the local policy that would result from non-recognition of the privilege [in each case]."

Id. at 104 (quoting United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976).


105. Some such statutes contain a specific exception for "threats of imminent violence to self or others." See, e.g., GA. R. CT. ADR VII.B (1997).

106. Some statutes contain an exception to mediation confidentiality intended to cover perjured evidence submitted at mediation proceedings. For example, an Iowa statute states: "A mediator who has reason to believe that a [party] has given perjured evidence concerning a confidential communication is not barred by this section from disclosing the basis for this belief to any party to a cause in which the alleged perjury occurs or to the appropriate authorities." IOWA CODE ANN. § 216.15B(3) (West Supp. 1996).

These statutes create a problem for a mediator who wishes to appear and remain truly neutral. When the mediator shifts from an impartial third party with no decision-making authority to a credibility assessor and authority figure who may report suspected perjury, the sanctity of the mediation process is impinged.

107. See, e.g., MICH. COMP. LAWS ANN. § 552.513(2) (West 1988) (relating to domestic relations mediation).

report discloses specific communications arising from the session.\(^\text{109}\)

Some mediation confidentiality statutes also contain a specific exception relating to administration of court-annexed mediation programs. For example, a Connecticut mediation statute contains a specific exemption to confidentiality for reporting the fact of whether the parties attended the mediation session.\(^\text{110}\)

g. Governmental and subject-matter-specific confidentiality exceptions. Some mediation confidentiality statutes contain an exception to confidentiality when government or public authorities are involved in the mediation session.\(^\text{111}\)

In addition, some statutes contain subject-matter-specific exceptions to mediation confidentiality.\(^\text{112}\) Mediation statutes often allow the mediator to deviate from confidentiality constraints to protect the “best interests” of children, by making a recommendation to the court in appropriate circumstances.\(^\text{113}\)

For instance, in Illinois, Cook County’s Marriage and Family Counseling Service provides mandatory mediation in all contested custody and visitation matters filed in the County.\(^\text{114}\) In emergency intervention situations, mediators in the Cook County system meet with the parents or guardians of the chil-

---


\(^{110}\) See CONN. GEN. STAT. ANN. § 46b-53(c) (West 1995) (applying to parties seeking a dissolution of marriage).

\(^{111}\) Some statutes contain a specific exception to confidentiality for mediations conducted by public bodies. See, e.g., OR. REV. STAT. § 36.205 (1995). One Iowa mediation statute contains an exception to confidentiality when a governmental subdivision is a party to the mediation. See IOWA CODE ANN. § 679.12 (West 1987); see also COLO. REV. STAT. § 8-1-115 (Supp. 1996) (providing an exception to confidentiality for cooperative efforts with another subdivision of government).

\(^{112}\) For example, a Montana statute contains an exception to confidentiality as necessary for the worker’s compensation court to rule on certain issues. See MONT. CODE ANN. § 39-71-2410 (1995). A Rhode Island statute states that the confidentiality provisions of its general mediation statute are not applicable to collective bargaining mediation. See R.I. GEN. LAWS § 9-19-44 (Supp. 1996).

\(^{113}\) See CAL. FAM. CODE § 4351.5(f) (West 1994) (allowing the mediator to render a recommendation to the court regarding visitation of a child and the need for further investigation by the court).

In both McLaughlin v. Superior Court, 189 Cal. Rptr. 479, 484 (Ct. App. 1983), and In re Marriage of Rosson, 224 Cal. Rptr. 250, 257 (Ct. App. 1986), overruled on other grounds by In re Marriage of Burgess, 913 P.2d 473 (Cal. 1996), the courts proved willing to compromise the confidentiality of a mediation session where a child’s welfare was at issue. In both of these cases, the mediator was allowed to make a recommendation to the court regarding the “best interests” of a child who was the subject of a custody battle where the parents had attempted to mediate, but had not reached an agreement in the mediation process.

\(^{114}\) See COOK CTY. ILL., CIR. CT. R. 13.4(e)(iii).
dren at issue on an expedited basis and make a recommendation to the court regarding temporary custody or visitation status.¹¹⁵

h. Research and record keeping exceptions. Some mediation confidentiality statutes contain specific exceptions for the purposes of future study and improvement of the mediation programs. Examples include exceptions for data collected for evaluation of the mediation process and research purposes,¹¹⁶ for statistical information about mediation cases in general,¹¹⁷ for records indicating which cases have been referred to mediation,¹¹⁸ and for purposes of evaluating the effectiveness of a particular mediator.¹¹⁹

IV. THE DUTY TO REPORT ATTORNEY MISCONDUCT UNDER THE RULES OF PROFESSIONAL CONDUCT

As discussed previously, confidentiality in mediation differs widely from one jurisdiction to another and from one program to another. However, nearly every mechanism that promises confidentiality in mediation includes a guarantee of some degree of confidentiality to prevent mediator disclosure of the information shared during the mediation session, often with several explicit exceptions. All other communication that takes place during the mediation session is presumably held in confidence.

But, as is so often true in areas of law and ethics, the issue is not that simple. Attorneys have reporting requirements imposed upon them by the Rules of Professional Conduct when they have knowledge of certain misconduct by a fellow attorney.¹²⁰ However, a review of current law indicates the vast majority of state statutes do not contemplate the conflict between the attorney disclosure requirements and mediation confidentiality, nor do they provide any mechanism for dealing with the conflict.¹²¹

¹¹⁵ See Interview with David Royko, Mediation Director, Cook County Marriage and Family Counseling Service, in Cook County, Ill. (Sept. 20, 1996).
¹¹⁸ See id. § 36.205(4)(b)(A).
¹²¹ See infra Appendix.
A. History of the "Duty to Squeal"

A brief history of attorney obligations to report unethical conduct will set the stage for an analysis of the current law. The American Bar Association, the theoretical "Commander-in-Chief" of attorney ethical matters, has long required attorneys to disclose any knowledge of fellow attorney misconduct. Beginning with the ABA Canons of Professional Ethics, first enacted in 1908, attorneys have been subject to rules requiring them to report attorney misconduct. Canon 28 requires a lawyer with any knowledge of another lawyer stirring up litigation to inform the disciplinary authorities of that conduct. Canon 28 was supplemented with Canon 29, which instructs lawyers to "expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession." These same requirements were echoed in the later-codified Model Code of Professional Responsibility. The Model Code consists of three components: canons, which are axiomatic norms for attorney conduct; ethical considerations, which are desired objectives for attorney conduct; and disciplinary rules, which are rules of attorney conduct that are mandatory in nature.

The self-policing reporting requirement of the canons is echoed in the Model Code Disciplinary Rule 1-103, (DR 103), which requires a lawyer who obtains "unprivileged knowledge" of violations of the disciplinary rules by an attorney or a judge to report this knowledge to a "tribunal or other authority empowered to investigate or act upon such violation." Several courts and American Bar Association Ethics Opinions have construed DR 1-103's reference to "unprivileged" information to include both information that falls within the purview of the attorney-client privilege and "client secrets."
The Model Rules of Professional Conduct\textsuperscript{128} carried on the tradition of requiring attorneys to report misconduct by their colleagues. Model Rule 8.3 requires that a "lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."\textsuperscript{129} Like its Model Code predecessor, Rule 8.3 excepts disclosure of information protected by the attorney-client privilege,\textsuperscript{130} but it does not mention "client secrets."

Rule 8.3 does not require lawyers to report every instance of suspected misconduct. Lawyers are obligated to report instances of misconduct about which they have "actual knowledge," that are "substantial" in seriousness, and that raise a substantial question as to the "lawyer's honesty, trustworthiness, or fitness as a lawyer."\textsuperscript{131}

Currently, the majority of states have adopted the Model Rules of Professional Conduct. As such, most attorneys practicing in the United States are bound by the provisions of Rule 8.3. Table 1 shows the forty jurisdictions that have adopted the Model Rules and indicates the ethical rules followed by each of the other jurisdictions.

\textsuperscript{128} The Model Rules of Professional Conduct were first adopted by the American Bar Association in 1983. The most current version is codified as \textit{MODEL RULES OF PROFESSIONAL CONDUCT} (1996).

The term "Model Rules" in this Article refers to both the ABA Model Rules and each enacting state's version thereof.

As of February, 1995, forty jurisdictions have adopted the Model Rules, and two additional jurisdictions are considering adopting the Model Rules, pending review by State Bar and State Court. Interview with Peter Geraghty, American Bar Association Center for Professional Responsibility, in Chicago, Ill. (Feb. 25, 1997).

Because Model Rule 8.3 is the majority rule, the rest of this Article will refer to Model Rule 8.3 with the understanding that in referencing Model Rule 8.3 the author is also encompassing the minority version of the misconduct reporting rule, Model Code DR 1-103.

\textsuperscript{129} \textit{MODEL RULES, supra} note 120, Rule 8.3(a).

\textsuperscript{130} \textit{See id.} Rule 8.3(c); \textit{see also id.} Rule 1.6. For examples of cases interpreting the information taken from Rule 8.3 or its state counterparts, see: Bufford v. Rowan Companies, 994 P.2d 155, 158 (5th Cir. 1999); \textit{In re Ethics Advisory Panel Opinion No. 92-1}, 627 A.2d 317, 322-23 (R.I. 1993); Cesena v. Du Page County, 558 N.E.2d 1378, 1386-88 (Ill. App. Ct. 1991), \textit{rev'd on other grounds}, 592 N.E.2d 177 (Ill. 1991).

Table 1: Map Indicating The Professional Rules Of Attorney Conduct Applicable In Each Jurisdiction.¹³²

B. Hesitancy to Report Fellow Attorneys' Misconduct

Despite these rules, attorneys have historically been loath to report each other to disciplinary tribunals. An American Bar Association Committee on Evaluation of Disciplinary Enforcement Report, which predates the enactment of the Model Code, recognized this problem.133 The report states that every disciplinary agency in the United States has complained that relatively few attorneys have reported misconduct, despite knowledge of such misconduct.134 The committee strongly urged that sanctions be imposed against both “attorneys and judges who fail to report attorney misconduct.”135

A survey of the various rules of professional conduct among the fifty states reveals the vast majority of jurisdictions have some form of a misconduct reporting rule.136 Nevertheless, rules, even those with mandatory wording, have little effect if not uniformly followed by members of the bar. The misconduct reporting rule is particularly difficult to enforce and monitor without widespread attorney participation. It is extremely difficult to monitor the conduct of the vast number of attorneys practicing in the United States, especially considering the autonomy of most lawyers’ day-to-day legal practice. Reporting by fellow attorneys appears to be one of the few effective ways disciplinary authorities can consistently learn about attorney misconduct. Obviously, if disciplinary authorities do not learn of the misconduct, the authorities cannot punish either the guilty attorney or an attorney with knowledge who failed to report.

Comment three to Rule 8.3 limits the attorney reporting requirement “to those offenses that a self-regulating profession must vigorously endeavor to prevent.”137 The language of Rule 8.3 itself includes the term “substantial,” indicating that the misconduct must be more than negligible. Courts interpreting Rule 8.3 and state counterparts to this rule have run the proverbial gamut from stringently requiring misconduct reporting and

134. See id.
135. Id. at 610 (quoting 95 Rep. Am. B. Ass'n. 783, 963 (1970)).
136. See infra Appendix.
137. MODEL RULES, supra note 120, Rule 8.3 cmt. 3.
holding that discipline is mandated for a lawyer who fails to report, to showing surprising leniency in construing disclosure requirements in certain cases.

C. Courts Enforce Reporting Requirements: In re Himmel and its Progeny

After the landmark decision, In re Himmel, attorneys abruptly learned that the reporting requirements embodied in Rule 8.3 and its counterparts will be enforced. In Himmel, the Illinois Supreme Court strictly construed the attorney misconduct reporting requirements embodied in Rule 8.3 and disciplined an attorney solely because he failed to report a fellow attorney's misconduct.

In Himmel, an attorney, Casey, converted a client's settlement funds. The client hired attorney Himmel to recoup the money. Himmel negotiated a settlement with Casey in which the client agreed not to pursue disciplinary action against Casey. Himmel never notified the disciplinary authorities of Casey's misconduct and was later found to have violated Rule 8.3.

The Illinois Supreme Court held that the duty to report misconduct is of utmost importance and that discipline for breach of such duty is mandated. The court rejected Himmel's argument that he had no duty to report Casey's misconduct because he learned about the misconduct pursuant to privileged communications with his client. The court found the information to be unprivileged, noting the client had discussed this information in the presence of third parties.

The Himmel court rejected the broader "client secret" exception to the reporting rule, which would have allowed Himmel to withhold "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detri-

140. 533 N.E.2d 790 (Ill. 1988).
141. See id. at 791.
142. See id. at 794.
143. See id.
144. See id. (noting that where a client voluntarily discloses information in the presence of third parties who are not agents of the clients or the attorney, this information is not privileged); see also People v. Williams, 454 N.E.2d 220, 240-41 (Ill. 1983).
mental to the client." 145 Instead, the Himmel court interpreted the reporting exception narrowly to include only information that falls strictly within the attorney-client evidentiary privilege. 146

The court also rejected Himmel's argument that his client's order not to report the misconduct relieved him of his duty to report the misconduct to the authorities. 147 The court stated that a client's specific request that an attorney not report the misconduct of another attorney does not provide a defense for failure to report misconduct.

The Himmel decision had an astounding effect on attorney misconduct reporting by fellow attorneys. In Illinois in 1988, the year before Himmel, the Attorney Registration and Disciplinary Committee had 154 recorded reports of fellow attorney misconduct. In 1989, immediately after Himmel was published, that number jumped to 922 recorded reports. 148

In cases following Himmel, courts have concurred with Himmel's finding that lawyers who violate the reporting rule are subject to mandatory discipline, although cases have differed in their interpretation of when reporting is mandated and what information is privileged. 149

---

145. MODEL CODE DR, supra note 126, 4-101(A).
146. See In re Himmel, 553 N.E.2d at 794.
147. See id.
148. In 1996, there were approximately 602 reports; in 1995 there were 555 reports; in 1994 there were 578 reports; in 1993 there were 594 reports; in 1992 there were 554 reports; in 1991 there were 539 reports; and in 1990 there were 681 reports. Interview with Mary Andreoni, Attorney Registration and Disciplinary Committee, in Chicago, Ill. (Feb. 27, 1997).
149. See In re Estate of Stanford, 581 N.E.2d 842 (Ill. App. Ct. 1991) (holding that a trial court judge acted properly when he reported evidence of attorney fraud in an estate case which was pending in his courtroom to the Attorney Registration and Disciplinary Committee); Weber v. Cueto, 568 N.E.2d 513, 517 (Ill. App. Ct. 1991) (echoing the Himmel court's proclamation that a lawyer who violates the reporting rule is subject to mandatory discipline, noting that this "absolute duty" to report certain violations is imposed on attorneys to promote the public good; the Weber court went on to find that the communications at issue were privileged); In re Lefkowitz, 483 N.Y.S.2d 261 (App. Div. 1984) (noting that an associate at a New York law firm has an affirmative duty to report the request from his senior partners to make payments of "illegal gratuities" to court personnel to secure favorable or expedient disposition of pending motions).

In a case surprisingly similar to Himmel, the Supreme Court of Rhode Island in In re Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I. 1993), interpreted the reporting requirements of Rule 8.3 in a substantially different way. The court used a much broader interpretation of the information excepted from the reporting requirements of Model Rule 8.3. The court found that any information learned from the client in the course of representation would be protected from disclosure, and cannot
V. THE CLASH BETWEEN THE DUTY TO KEEP MEDIATION CONFIDENTIAL AND THE DUTY TO REPORT ATTORNEY MISCONDUCT

As use of mediation continues to grow in law-related areas, more attorneys are becoming trained as mediators. Attorneys are particularly well suited to mediate certain cases involving complex legal principles and factual matters. Some court-annexed mediation programs require mediators to be licensed attorneys. Commentators have encouraged support for the continued growth of the use of attorney-mediators and of the use of attorneys representing parties in the mediation session (attorney-advocates).

A. Is Mediation the Practice of Law?

There has been some debate over whether mediation can be characterized as the practice of law. Whether an attorney-medi-
diator is actually engaged in the practice of law is of particular importance in the debate over whether an attorney-mediator should break the confidentiality of a mediation to report attorney misconduct. If the attorney-mediator is actually engaged in the practice of law, there is a much greater likelihood that he would be excused from the attorney misconduct reporting requirements of Rule 8.3, if he could establish that the matters fall under the attorney-client privilege.

In *Lange v. Marshall*, an attorney attempted to use the confusion between mediation and the practice of law to relieve himself of liability for alleged malpractice. The attorney in *Lange* claimed he could not be guilty of legal malpractice because he was acting as a mediator in a case between two friends who were divorcing. The court refused to award malpractice damages to the plaintiff, finding she had failed to establish that the damages she suffered were proximately caused to the attorney's negligence. This case illustrates the difficulties courts face when attempting to define mediation and distinguish between mediation and the practice of law. Some states have enacted statutes attempting to remedy the situation.

B. Court Extensions of Attorney Rules of Professional Conduct to Mediators

Some courts have hesitated to interpret confidentiality in mediation issues. Nonetheless, in a recent key decision, *Poly

Traps . . . Pitfalls . . . Hazards, FED. LAW., Jan. 1996, at 10 (citing to an interview with J. Michael Keating, Jr.). There are, however, a few notable exceptions. See, e.g., Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST LITIG. 57 (1996) (arguing that a lawyer who mediates a case is actually engaged in the practice of law).

Another potential argument by an attorney-mediator is that because mediation is not the practice of law, he should not be bound by the Rules of Professional Conduct; thus, he should be excepted from the reporting requirements of Rule 8.3. A review of case law reveals no such argument to date. The preamble to the Model Rules of Professional Responsibility indicates that attorneys should be guided by the law and principles of professional ethics at all times, both in their profession of law and in their business and personal affairs. See MODEL RULES, supra note 120, preamble (1996).

155. See id. at 238.
156. See MO. ANN. STAT. § 435.014 (West 1992) ("[M]ediation proceedings shall be regarded as settlement negotiations.").
157. See, e.g., Snyder-Falkingham v. Stockburger, 457 S.E.2d 36 (Va. 1995) (disposing of the case on a technicality, although it was presented with an issue of interpreting the statute granting confidentiality to court-annexed mediation).
Software International, Inc. v. Su, the court extended the attorney rules of professional conduct to mediators. Poly Software highlighted the confusion surrounding professional rules of conduct governing an attorney-mediator's conduct.

The court was confronted with the issue of when, if ever, an attorney who serves as a mediator in a case between two parties can subsequently represent one of the parties in a litigation matter. The court held mediators to the same standards as attorneys and set forth the following rule: "Where a mediator has received confidential information in the course of mediation, that mediator should not thereafter represent anyone in connection with the same or a substantially factually related matter unless all parties to the mediation proceeding consent after disclosure."159

While the court's decision in Poly Software helped to answer a frequently debated question regarding subsequent representation by an attorney-mediator, the court's holding is in many ways a disservice to attorney-mediators. The Poly Software court may have set a dangerous precedent, and other courts may follow suit by holding attorney-mediators to the attorney rules of professional conduct on an ad hoc basis. Most significantly, the Poly Software decision points out the need for a uniform set of ethical standards for attorney-mediators. Uniform standards would keep attorneys from facing the dilemma of deciding which set of rules to follow when the attorney rules of professional conduct are in direct conflict with mediation rules.

C. Confidentiality Versus the Duty to Report Attorney Misconduct

As has been explained, there are some irreconcilable differences between Rule 8.3's misconduct reporting requirements and most mediation confidentiality statutes, which guarantee confidentiality with certain delineated exceptions. These exceptions deal with a multitude of issues, but very rarely contemplate the predicament in which an attorney-mediator is placed if he witnesses misconduct by an attorney-advocate in a mediation session.

159. Id. at 1494.
160. See supra Part IV.
161. See supra Part III.B.
1. Conflicting obligations to the mediation process and to the legal profession

The case law and policy surrounding both the need for confidentiality in mediation and the misconduct reporting requirements of the Model Rules indicate that both are extremely important issues. Nonetheless, a conflict exists between the two and there is very little guidance to assist attorney-mediators in deciding the proper course of action.

At least one of the drafters of the Model Rules admitted that the Kutak Commission, the body that debated and drafted the Model Rules, never considered the conflict created when a lawyer-mediator gains knowledge of another lawyer’s misconduct during the mediation process.162 As such, no comment on this precarious conflict situation “appears in the comment to [Rule] 8.3 or the legislative history of the Model Rules.”163

There is clearly a need for a comprehensive set of regulations governing attorney-mediators’ conduct.164 Although states have the option of holding attorney-mediators to the attorney professional responsibility rules enforced in their jurisdictions, this practice is theoretically unsound because most codes of professional conduct for attorneys are aimed at the attorney as adversary or counselor and do not adequately consider the activities of a neutral lawyer performing alternative dispute resolution services.165

As discussed in Part III above, the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution have drafted Model Standards for mediator conduct. Unfortunately, this code also does not specifically address the conflict between the duty to maintain confidentiality in the mediation session versus attorney misconduct reporting requirements. Although some organizations have published other suggested codes of ethics for mediators,166 these codes are generally discretionary codes of suggested ethical considerations and are not binding in nature. In addition, the prob-

162. See Hess, supra note 133, at 619 (quoting Telephone Interview by Cletus C. Hess with Geoffrey C. Hazard, Sterling Professor of Law, Yale Law School (Nov. 13, 1989)).
163. Id.
164. See Daigneault, supra note 153, at 10.
165. See id.
166. See, e.g., Moore, supra note 3, at 299-307.
lem is further exacerbated because there is no national licensure of mediators or formal mode of disciplinary proceedings for mediator misconduct.

A survey of all state statutes granting confidentiality to the mediation process reveals only one statute that contemplates the conflict between the duty to maintain confidentiality and the duty to report fellow attorney misconduct. The Minnesota statute creates a privilege for alternative dispute resolution program participants, forbidding them from testifying in any subsequent civil proceeding or administrative hearing as to any statement, conduct, decision, or ruling occurring at or in conjunction with the alternative dispute resolution proceeding. The statute then goes on to list several specific exceptions to the confidentiality, including (1) "any statement or conduct that could give rise to disqualification proceedings under the Rules of Professional Conduct for Attorneys; or (2) any statement or conduct that could constitute professional misconduct." This wisely drafted statute recognizes the conflict created for attorney-mediators in its jurisdiction and gives guidance to attorney-mediators. This is the proper way for jurisdictions to deal with the conflict.

Each jurisdiction should consider the public policies supporting confidentiality in mediation programs versus the need for attorney misconduct reporting and make an informed decision as to which takes precedence. This relieves attorney-mediators from the treacherous position of having to choose between two binding sets of rules.

2. The clash: In re Waller

As can be expected, this lack of direction for attorneys has caused a great deal of concern among attorney-mediators. The situation came to a head recently in In re Waller. In Waller, an attorney-mediator was mediating in a court-ordered mediation of a medical malpractice lawsuit. The court's mediation order in-

169. Id. § 595.02(1a)(2) to (3).
cluded language stating "no statements of any party or counsel shall be disclosed to the court or admissible as evidence."171 During the course of the mediation, the attorney-mediator discovered misconduct on the part of plaintiff's attorney, John A. Waller. Waller had failed to name a crucial defendant in the lawsuit because that person was one of his clients. The attorney-mediator reported Waller's conflict of interest to the trial judge.172

When the trial judge asked Waller about the matter, Waller stated he was attempting to test the confidentiality of the mediation process.173 The trial judge then referred the matter to the disciplinary authorities who suspended Waller for sixty days, citing Waller's false statement to the trial judge as the basis for its decision. The disciplinary board specifically stated it did not feel that the court's confidentiality order was intended to preclude disclosures "such as that made by the mediator to the judge in this case."174 The board noted that it chose to discipline Waller due to the false statement he made to the judge in open court, rather than a statement made during a closed mediation.175 The board made no attempt to reconcile the language of the court's order requiring confidentiality of the mediation and the attorney-mediator's obligation to report misconduct under the disciplinary rules.

The Circuit Court of Appeals for the District of Columbia affirmed the disciplinary board's decision and focused on Waller's lie to the trial court judge and his impermissible conflict of interest.176 The court's intentional failure to address the breach of the confidentiality of the mediation session highlights the lack of guidance given to the attorney-mediators on the issue.

The attorney-mediator in this case was fortunate that the court supported his decision to arguably violate the court's order to keep the mediation proceedings confidential.177 Other attorney-mediators may not find a court as supportive of their

171. Id. at 781 n.4.
172. See id. at 781-82.
173. See id. The attorney-advocate later withdrew his assertion that he was testing the confidentiality of the mediation process.
174. Id. at 785 n.5.
175. See id.
176. Id. at 783-85.
177. See id. at 781 n.4. It should be noted there was no statute covering mediation confidentiality in the jurisdiction at issue in Waller.
VI. ALTERNATIVES TO ADDRESS THE QUAGMIRE OF THE ATTORNEY-MEDIATOR

Clearly, uniform standards are needed to guide the conduct of attorney-mediators and to answer difficult ethical questions which will certainly arise. The following are three suggested options to remedy the situation.

A. Enact Mediation Confidentiality Statutes with a Specific Exception for Reporting Professional Misconduct

Jurisdictions could follow the lead of the Minnesota statute that contains a specific exception for reporting attorney misconduct. This would provide clear guidance for attorney-mediators and would give "fair warning" to attorney-advocates before entering the mediation session. There should be no chilling effect for parties who wish to utilize the mediation process in a fair way. The only potential chilling effect would be for attorneys who are attempting to abuse the mediation process. This approach would allow each jurisdiction to think through its policies and arrive at an informed decision that the need for reporting attorney misconduct trumps the need for confidentiality of the mediation sessions.

Although mediation confidentiality is extremely important, the duty to report attorney misconduct should eclipse mediation confidentiality. Attorney misconduct should not take place in the normal course of a mediation session. When it does, there is a good chance an attorney-advocate is using the mediation session to cloak his or her misconduct in confidentiality or to attempt to settle a matter relating to his misconduct in a confidential manner. Attorneys should not be allowed to abuse the system in this way. As such, mediation confidentiality statutes, local rules, and mediation program rules should contain an exception for reporting attorney misconduct.

The real parties in interest to a mediation session are the people involved in the conflict, not the attorneys. It is those people, the clients, for whom mediation was designed to empower through the concept of self-determination. As such, they should

be the ones we are concerned about protecting when we design an effective confidentiality standard with appropriate exceptions. Most mediation parties would not steer away from the mediation process when they learn confidentiality could be breached if the mediator learns of attorney misconduct. Most clients presumably desire misconduct on the part of their attorney to be reported.

B. Disciplinary Rules Amended to Contain an Exception for Misconduct Discovered in a Mediation Session

One commentator advocates an amendment to Rule 8.3 or state counterparts to insert a specific exception for misconduct discovered in the mediation session. To avoid deliberate abuse, mediation programs could enact mediation rules stating that mediators can decline to mediate a dispute or cease the mediation if it appears to involve a violation of the Rules of Professional Conduct or an attempt to shelter such a violation. This system seems to place an undue burden on mediators and mediation centers to make a very difficult determination regarding an attorney's intent to abuse the system. This could seriously impinge the mediator's neutrality and the trust of the participants in the mediation—all essential elements for an effective mediation. Also, some mediators are not attorneys by training. To ask a nonattorney mediator to determine whether an attorney is attempting to deliberately circumvent the attorney rules of professional conduct is unfair. Further, even for attorney-mediators, certain individuals might understandably feel hesitant, if not unqualified, to make this type of determination. Jurisdictions would have to weigh the benefits of upholding the confidentiality of mediation sessions in their jurisdictions against the risk of allowing unreported attorney misconduct.

180. See id.
181. An exception to misconduct reporting would be justified in cases involving lawyer help programs designed to address attorneys' abuse of drugs or alcohol. In mediations addressing these problems, an exception to the reporting requirement may be instrumental in the success of such programs. For a complete discussion of this issue, see id. at 621-22.
C. Jurisdictions Can Create a Mediation Privilege and Enact Rules of Professional Conduct Which Allow an Exception forPrivileged Information

If jurisdictions decide, after weighing the competing policies, that mediation confidentiality is so imperative as to rise to the level of warranting an absolute mediation privilege, jurisdictions can enact mediation privileges. Jurisdictions that follow Rule 8.3 could then amend the exceptions to the reporting requirement to include privileged information of all kinds, thereby eliminating the conflict. This would allow the attorney-mediator to keep confidential an attorney-advocate’s misconduct during a mediation session without fear of being subject to discipline for failure to report. Such legislative action would eliminate the confusion borne by attorney-mediators.

However, for the same reasons discussed in Section IV.A, this approach seems unsound, in that it would create a mechanism whereby unethical attorneys could exploit the mediation session to veil their unethical conduct in a confidential setting.

VII. Conclusion

The conflict between the duty to maintain confidentiality of mediation sessions and the duty to report attorney misconduct is a serious emerging problem in the face of increased popularity of mediation programs. A review of state law reveals that every state in America has some statute or local court rule dealing with mediation or alternative dispute resolution programs. The statutes contain many varied exceptions to the confidentiality rules. However, only one statute recognizes the conflict created when an attorney-mediator is bound to maintain the confidentiality of the mediation session, while at the same time subject to the Rules of Professional Conduct requiring him or her to report fellow attorney misconduct.

Lack of uniform rules governing mediation conduct is a serious problem for the growth of the mediation profession. The recent attempt by the American Bar Association, American Arbitration Association, and the Society for Professionals in Dispute Resolution to enact Model Standards for mediator conduct lacks in direction on the conflict between confidentiality and the duty

183. See infra Appendix.
to report attorney misconduct. It seems inevitable that more "Waller" type situations will arise and attorney-mediators will be placed in an intolerable conflict situation of having to choose between two sets of binding rules. Guidance is needed to prevent this quagmire. 184

If there is to be no single nationwide code governing mediation conduct, it is of utmost importance that each jurisdiction seriously consider the problem and enact legislation in accordance with its policies and priorities. If legislatures would create exceptions to their confidentiality statutes allowing mediators to report attorney misconduct, the conflict would be resolved. In the alternative, legislatures can opt to require mediator confidentiality even at the expense of allowing attorney misconduct in mediation to go unreported. Either way, the conflict must be addressed in order to give needed guidance to attorney-mediators.

Mediation is a process that is designed to work for people. One of the greatest strengths of mediation is its flexibility. The mediation process is certainly flexible enough to permit a rule allowing for a breach of confidentiality if attorney misconduct is revealed without any impairment to the major goals of the mediation process. By creating clear guidelines for attorney-mediators, the mediation profession will continue to benefit by the addition of experienced attorneys to its ranks. The addition of new mediators with wide-ranging talents can only strengthen and improve an already strong and growing profession.

184. See supra Part V.C.2.
APPENDIX

Survey of Statutes Across the Nation Which Grant Confidentiality To The Mediation Process, as of January, 1997.185

<table>
<thead>
<tr>
<th>STATE</th>
<th>TOPIC/CITATION</th>
<th>CONFIDENTIALITY GUARANTEE</th>
<th>EXCEPTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>ALA. CIV. CT. MEDIATION R. 11.</td>
<td>All records, reports, etc. received by mediator are confidential. Also mediator can’t be compelled to testify.</td>
<td>None.</td>
</tr>
<tr>
<td>Alaska</td>
<td>ALASKA R. CIV. PROC. 100(g) (mediation).</td>
<td>Mediation proceedings shall be held in private and are confidential. Mediator shall not testify as to any aspect of proceedings.</td>
<td>Duties imposed by statute.</td>
</tr>
</tbody>
</table>

185. This table is intended as a survey of selected statutes currently in effect in each state which grant some degree of confidentiality to mediation in their jurisdiction. Exceptions to the confidentiality are listed in column four. In the interest of space, this survey does not include local court rules which discuss confidentiality in mediation, except in jurisdictions which have no mediation statutes. The author wishes to thank M. Kathy Roller for her research assistance in compiling this survey.
<table>
<thead>
<tr>
<th>STATE</th>
<th>TOPIC/ CITATION</th>
<th>CONFIDENTIALITY GUARANTEE</th>
<th>EXCEPTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>ARIZ. REV. STAT. ANN. § 25-381.16 (West 1991). Marital &amp; Domestic Relations (referring to Court of Conciliation proceedings).</td>
<td>Communications and process are private and confidential and shall not be discovered or admitted into evidence.</td>
<td>Consent of the party making the communication.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>ARK. CODE ANN. § 11-2-204 (Michie 1996) (labor relations).</td>
<td>All communications and documents obtained in process are confidential.</td>
<td>Prior written consent of both parties.</td>
</tr>
<tr>
<td>California</td>
<td>CAL. INS. CODE § 10089.80 (West Supp. 1997) (earthquake insurance).</td>
<td>Statements and communications are confidential.</td>
<td>Information for evaluation of mediator or program, consent of all parties in writing, or otherwise discoverable information or information required to evaluate the mediation process or to comply with reporting requirements.</td>
</tr>
<tr>
<td>California</td>
<td>CAL. GOVT CODE § 11420.30 (West Supp. 1997) (ADR).</td>
<td>Communications and documents relating to process are confidential and parties can exercise privilege not to disclose.</td>
<td>All parties consent or otherwise discoverable information.</td>
</tr>
<tr>
<td>California</td>
<td>CAL. FOOD &amp; AGRIC. CODE § 54453 (West Supp. 1997) (cooperative bargaining associations—conciliation).</td>
<td>Statements, records and documents are confidential and shall not be disclosed—conciliation cannot be compelled to divulge in any proceeding or judicial forum.</td>
<td>None.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/ CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>-------</td>
<td>----------------</td>
<td>---------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>California</td>
<td>CAL. FAM. CODE § 3177 (West 1994) (child custody).</td>
<td>Mediations and all communications are private and confidential and shall not be disclosed.</td>
<td>None.</td>
</tr>
<tr>
<td>California</td>
<td>CAL. EVID. CODE § 1152.5 (West 1995) (evidence).</td>
<td>Communications in process are not subject to discovery nor compulsory testimony.</td>
<td>Otherwise discoverable information, consent of all parties, written agreement can be used to show fraud, duress or illegality if relevant to an issue in dispute.</td>
</tr>
<tr>
<td>California</td>
<td>CAL. BUS. &amp; PROF. CODE § 6200 (West 1990) (attorney's fees).</td>
<td>Mediation communications are confidential and may not be disclosed.</td>
<td>None.</td>
</tr>
<tr>
<td>California</td>
<td>CAL. GOV'T CODE §§ 12984, 12985 (West 1992) (housing discrimination).</td>
<td>All information in mediation is privileged and cannot be received into evidence.</td>
<td>None.</td>
</tr>
<tr>
<td>California</td>
<td>CAL. CIV. PRO. CODE § 1297.371 (West Supp. 1997) (arbitration &amp; conciliation).</td>
<td>Communications and documents are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>Consent of all parties to mediation if documentary evidence itself so provides.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEED</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>------------</td>
<td>-------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Colorado</td>
<td>COLO. REV. STAT. ANN. § 14-12-105 (West 1989) (marriage counseling).</td>
<td>Communications and documents are private and confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>None.</td>
</tr>
<tr>
<td>Colorado</td>
<td>COLO. REV. STAT. ANN. § 8-1-1115 (West Supp. 1996) (labor &amp; employment).</td>
<td>Communications and documents are confidential.</td>
<td>Overriding need for access to information in connection with (1) dispute resolution, mediation or administrative or judicial proceeding, or (2) a cooperative effort with another subdivision of government.</td>
</tr>
<tr>
<td>Connecticut</td>
<td>CONN. GEN. STAT. ANN. § 10-153d(c) (West 1996) (education).</td>
<td>Communications are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>Waiver.</td>
</tr>
<tr>
<td>Connecticut</td>
<td>CONN. GEN. STAT. ANN. § 46b-53(c) (West 1995) (family law).</td>
<td>Communications are confidential and shall be inadmissible in any court proceedings.</td>
<td>Must report if parties attended mediation.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Dist. of Columbia</td>
<td>D.C. Ct. R. Appx. B (dispute resolution programs).</td>
<td>All documents and negotiations associated with mediation program are confidential and cannot be introduced in a subsequent trial.</td>
<td>None.</td>
</tr>
<tr>
<td>Florida</td>
<td>FLA. STAT. ANN. § 44.201(5) (West Supp. 1997) (dispute resolution centers).</td>
<td>Communications, documents, and information are confidential and inadmissible in any judicial proceeding.</td>
<td>Written consent of all parties, otherwise discoverable information, programs assessment.</td>
</tr>
<tr>
<td>Florida</td>
<td>FLA. STAT. ANN. § 44.102 (West Supp. 1997) (court-ordered mediation).</td>
<td>Communications are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>All parties agree executed settlement agreement itself is not confidential. Communications in regard to discipline against mediator are not confidential.</td>
</tr>
<tr>
<td>Florida</td>
<td>FLA. STAT. ANN. § 723.038 (West 1997) (Mobile Home Park Tenancy).</td>
<td>Each party may refuse to disclose and to prevent any person present at the proceeding from disclosing communications.</td>
<td>Otherwise discoverable information, communications made in furtherance of a crime or fraud or part of a plan to do so, and cannot permit an individual to obtain immunity from prosecution for criminal conduct.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>---------</td>
<td>--------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Florida</td>
<td>FLA. STAT. ANN. § 61.183 (West Supp. 1997) (divorce and custody).</td>
<td>Communications, documents, and information are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>Otherwise discoverable information and written consent of all parties.</td>
</tr>
<tr>
<td>Florida</td>
<td>FLA. STAT. ANN. § 440.25 (West Supp. 1997) (worker’s compensation).</td>
<td>Communications, documents, and information are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>Written consent of all parties, otherwise discoverable information.</td>
</tr>
<tr>
<td>Georgia</td>
<td>GA. R. CT. ALTERNATIVE DISP. RESOL. VII.B (ADR rules).</td>
<td>Documents and communications are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>Threats of imminent violence, child abuse, third party danger, otherwise discoverable information and claims against mediator or program.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>HAW. APP. CONFERENCE PROG. R. 6.</td>
<td>Mediator is to remind participants of the confidentiality of the process.</td>
<td>None.</td>
</tr>
<tr>
<td>Idaho</td>
<td>IDAHO R. EVID. 507 (mediator’s privilege).</td>
<td>All parties have a privilege to refuse to disclose and prevent disclosure of confidential information.</td>
<td>Child abuse or neglect, client going to commit a crime posing serious risk of bodily injury or death to another, required by law, all parties must consent in writing, otherwise public information mediator-party dispute.</td>
</tr>
<tr>
<td>Illinois</td>
<td>710 ILL. COMP. STAT. ANN. 20/6 (West 1993) (Illinois Not-For-Profit Dispute Resolution Center Act).</td>
<td>All documents and communications are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>None.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>--------</td>
<td>--------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Indiana</td>
<td>IND. CODE ANN. § 20-7.5-1-13 (Michie 1997) (educational employee bargaining).</td>
<td>Mediation process is confidential—not subject to process requiring disclosure of any matter, confidentiality requirement may not be waived by the parties, mediator is not subject to subpoena.</td>
<td>None.</td>
</tr>
<tr>
<td>Indiana</td>
<td>IND. CODE ANN. § 31-1-24-7 (Michie 1987) (family law).</td>
<td>All communications are confidential and should not be disclosed in any subsequent proceeding.</td>
<td>None.</td>
</tr>
<tr>
<td>Indiana</td>
<td>IND. CODE ANN. § 4-21.5-3.5-27 (Michie Supp. 1996) (mediation).</td>
<td>Communications are confidential—not subject to process requiring disclosure. May not be waived by the parties.</td>
<td>None.</td>
</tr>
<tr>
<td>Iowa</td>
<td>IOWA CODE ANN. § 679.12 (West 1987) (informal dispute resolution).</td>
<td>Documents and communications are confidential and shall not be disclosed.</td>
<td>Mediator has reason to believe or has been given perjured evidence, governmental subdivision as a party, mediation arising from a criminal complaint, unless otherwise provided in chapter.</td>
</tr>
<tr>
<td>Iowa</td>
<td>IOWA CODE ANN. § 216.15B (West Supp. 1996) (civil rights commission).</td>
<td>All information, documents, and communications are confidential.</td>
<td>Mediator has reason to believe or has been given perjured evidence, to prove the existence of the mediation agreement and its terms, unless otherwise provided in chapter, in a dispute regarding the existence of a mediation (whether it exists, the terms, and conduct), mediator can testify.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>----------</td>
<td>----------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Iowa</td>
<td>IOWA CODE ANN. § 13.14 (West 1995) (farm assistance program).</td>
<td>All documents and communications relating to the subject matter of an agreement are confidential, mediators shall not be examined in any proceeding, and not subject to process requiring disclosure.</td>
<td>None.</td>
</tr>
<tr>
<td>Iowa</td>
<td>IOWA CODE ANN. § 22.7 (West 1995) (confidential records).</td>
<td>All communications, information, and documents by a mediator are confidential and shall not be disclosed.</td>
<td>Same as provided for in Iowa Code Ann. § 679.12 (West 1987), supra.</td>
</tr>
<tr>
<td>Kansas</td>
<td>KAN. STAT. ANN. § 5-512 (1995) (dispute resolution).</td>
<td>All communications are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>Claims against the mediator, any information required to report either by statute or court order, any information reasonably necessary to stop the commission of an ongoing crime or fraud or to prevent the future commission of such.</td>
</tr>
<tr>
<td>Kansas</td>
<td>KAN. STAT. ANN. §§ 23-603, 605, 606 (1995) (domestic disputes).</td>
<td>All information obtained by mediation shall be treated as if confidential and shall not be disclosed by mediator. Parties may claim a mediator-party privilege.</td>
<td>Necessary for the conduct of the mediation, required by law, commission of a crime during the mediation process.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>----------</td>
<td>--------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Kentucky</td>
<td>KY. R. CT. 3.815 (Rules of Sup. Ct.—resolving disputes by mediation, binding/non-binding arbitration).</td>
<td>By agreeing to participate in the ADR method authorized in this Rule, the parties agree to hold in confidence the award, all records, documents, files, etc. and such records shall not be opened to the public or to any person not involved in the dispute.</td>
<td>None.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>LA. R. NEW ORLEANS 1 CITY CT. R. 30 (pilot mediation program).</td>
<td>Mediators shall preserve and maintain the confidentiality of mediation proceedings. All proceedings of the mediation are privileged in all respects. Mediators shall keep confidential from opposing parties any information obtained in individual caucuses.</td>
<td>Unless the party or parties to a caucus permit disclosure.</td>
</tr>
<tr>
<td>Maine</td>
<td>ME. REV. STAT. ANN. tit. 24, § 2857 (West Supp. 1996) (health security act).</td>
<td>All proceedings and final determinations are confidential.</td>
<td>Party making statement may waive confidentiality. In some cases findings admissible in subsequent court action for professional negligence. Confidentiality provisions of this section do not apply if the findings were influenced by fraud.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Maryland</td>
<td>MD. CODE ANN., LAB. &amp; EMPL. § 4-107(b) (Supp. 1996) (labor disputes).</td>
<td>If information is of a personal nature, relates to the private business of a person, and may disclose profits or methods of doing business, it is confidential.</td>
<td>None.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>MASS. GEN. LAWS ANN. ch. 150, § 10A (West 1996) (labor disputes).</td>
<td>Mediator shall not be required to reveal information gained in mediation.</td>
<td>Criminal proceedings.</td>
</tr>
<tr>
<td>Michigan</td>
<td>MICH. COMP. LAWS ANN. § 552.513 (West 1988) (divorce).</td>
<td>Communications are confidential and privileged and shall not be admitted in evidence in any proceedings.</td>
<td>Final agreement incorporated into court order.</td>
</tr>
<tr>
<td>Michigan</td>
<td>MICH. COMP. LAWS ANN. § 691.1557 (West Supp. 1996) (community dispute resolution act).</td>
<td>All files, documents, and communications are confidential and are not to be disclosed.</td>
<td>All parties consent in writing, actions against the mediator, otherwise subject to discovery, subsequent action between mediator and party.</td>
</tr>
<tr>
<td>Michigan</td>
<td>MICH. COMP. LAWS ANN. § 423.25a (West 1995) (labor disputes).</td>
<td>Communications and documents not intended to be disclosed to a third person are considered confidential and are not to be disclosed.</td>
<td>Necessary to carry out duties in resolving the dispute, information from informant involved in a crime or who is a victim from a violation of this Act.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>MINN. STAT. ANN. § 494.02 (West 1990) (community dispute resolution program).</td>
<td>Any communication relating to subject matter of dispute is confidential and shall not be used in subsequent proceeding.</td>
<td>Does not preclude evidence obtained by independent investigation.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/ CITATION</td>
<td>CONFIDENTIALITY GUARANTEED</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>-------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>Minnesota</td>
<td>MINN. STAT. ANN. § 595.02(K) (West Supp. 1997) (testimony of witnesses).</td>
<td>Shall not be required to testify as to any communications, information, or documents.</td>
<td>Court action to set aside or reform mediation, otherwise discoverable.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>MISS. CODE ANN. § 69-2-47 (1973) (farm debt mediation program).</td>
<td>All information is confidential and mediation sessions are private.</td>
<td>Consent of farmer and creditor.</td>
</tr>
<tr>
<td>Missouri</td>
<td>MO. ANN. STAT. § 435.014 (West 1992) (arbitration).</td>
<td>All communications are confidential and cannot be called to testify or disclose any matter.</td>
<td>Otherwise discoverable information.</td>
</tr>
<tr>
<td>Montana</td>
<td>MON. CODE ANN. § 39-71-2410 (1995) (worker's compensation).</td>
<td>Sessions are private and all communications and records are confidential. Mediator cannot be called to testify.</td>
<td>As necessary for the worker's compensation court to rule on issues.</td>
</tr>
<tr>
<td>Montana</td>
<td>MON. CODE ANN. § 40-4-303 (1995) (family law).</td>
<td>Sessions are private and all records are confidential and cannot be used in evidence. Mediator or party to mediation cannot be compelled to testify.</td>
<td>None.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>---------</td>
<td>--------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Nebraska</td>
<td>NEB. REV. STAT. § 43-2906 (1993)</td>
<td>Sessions are private and all communications are confidential and not to be used as evidence in any subsequent judicial or administrative proceeding.</td>
<td>Child abuse or neglect defined in Neb. Rev. Stat. 28-710 shall be reported to district judge for in camera hearing to determine if an investigation is warranted and final agreement between the parties.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>NEB. REV. STAT. § 48-168 (1993)</td>
<td>Statements and communications are confidential and privileged and shall not be used as evidence or subject to discovery.</td>
<td>Written consent and otherwise discoverable information.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>NEB. REV. STAT. § 2-4812 (1991)</td>
<td>All financial data is confidential.</td>
<td>All parties consent.</td>
</tr>
<tr>
<td>Nevada</td>
<td>NEV. REV. STAT. § 3.500 (1993)</td>
<td>Process should ensure confidentiality and may only report to the court whether the mediation was successful or not.</td>
<td>None.</td>
</tr>
<tr>
<td>Nevada</td>
<td>NEV. REV. STAT. § 48.109 (1993)</td>
<td>Communications or statements made in mediation are not subject to discovery, neither may they be used as evidence.</td>
<td>Otherwise discoverable information.</td>
</tr>
<tr>
<td>Nevada</td>
<td>NEV. ST. DEPT. FAM. CT. R. 53</td>
<td>Sessions are private and all communications are confidential and cannot be disclosed even upon waiver by the parties.</td>
<td>Child abuse.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>---------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>New Mexico</td>
<td>N.M. 8th DIST. LOCAL R. 8-107B (mediation in domestic relations and civil cases).</td>
<td>In its discretion, the court may enter an order addressing the extent of confidentiality of the mediation process.</td>
<td>In the court's discretion.</td>
</tr>
<tr>
<td>New York</td>
<td>N.Y. FAM. CT. ACT § 915 (McKinney 1983) (Family Law—Conciliation).</td>
<td>All statements are confidential and shall not be admissible into evidence in any subsequent proceeding.</td>
<td>None.</td>
</tr>
<tr>
<td>New York</td>
<td>N.Y. JUD. LAW ANN. § 849-b (McKinney 1992) (community dispute resolution centers program).</td>
<td>All files, documents, communications, and information of a mediator are confidential and not subject to disclosure and any communication is confidential.</td>
<td>Written agreement or decision is available to a court which has adjourned a pending action pursuant to 170.55 of the criminal procedure.</td>
</tr>
<tr>
<td>North Carolina</td>
<td>N.C. GEN. STAT. § 50-13.1 (1996) (family law).</td>
<td>Sessions are private and confidential and all communications are absolutely privileged and inadmissible in court.</td>
<td>Communications in furtherance of a crime or fraud, cannot gain immunity from prosecution, reporting requirements (such as child abuse, neglect and protection of disabled), and written mediation agreement.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOC/ CATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------</td>
<td>---------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. CENT. Code § 6-09.10-10 (Supp. 1995) (agricultural mediation).</td>
<td>Information gathered is confidential and not subject to open records requirement.</td>
<td>Written consent of all parties or pursuant to court order upon showing of good cause.</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. CENT. Code § 14-09.1-06 (1991) (domestic relations).</td>
<td>All communications and documents are confidential and are inadmissible as evidence in any proceeding.</td>
<td>None.</td>
</tr>
<tr>
<td>Ohio</td>
<td>OHIO REV. CODE ANN. § 2317.023 (Anderson Supp. 1996) (evidence).</td>
<td>Communications are confidential and shall not be disclosed in any subsequent civil or administrative proceeding.</td>
<td>All parties to the mediation and the mediator consent, reporting requirement, necessary to prevent a manifest injustice that outweighs importance of confidentiality, otherwise discoverable information, a signed written settlement agreement.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>OKLA. STAT. ANN. tit. 12, § 1805 (West 1993) (dispute resolution act).</td>
<td>Any information, files, communications, or documents are privileged and confidential and are not considered public record.</td>
<td>Actions against the mediator.</td>
</tr>
<tr>
<td>Oregon</td>
<td>ORST 3, Ch 36 (1995) (notes to statute 36.210) Mediation of Foreclosure of Agricultural Property.</td>
<td>All documents and communications are confidential</td>
<td>Written agreement, waiver, action against mediator, otherwise discoverable information</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/ CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>---------</td>
<td>----------------</td>
<td>---------------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>Oregon</td>
<td>OR. REV. STAT. § 107.179 (1995) (child custody).</td>
<td>Communications are privileged and confidential and are not admissible as evidence in any civil or criminal proceeding.</td>
<td>None.</td>
</tr>
<tr>
<td>Oregon</td>
<td>OR. REV. STAT. § 107.600 (1995) (domestic relations - conciliation).</td>
<td>All sessions are private and all communications and documents are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>Waiver, petition filed under 107.550, written conciliation agreement or any court order upon written authorization by judge of court.</td>
</tr>
<tr>
<td>Oregon</td>
<td>OR. REV. STAT. § 135.957 (1995) (mediating criminal offenses).</td>
<td>All documents are confidential and written agreements signed by the parties may not be used as evidence of liability or guilt.</td>
<td>Written agreement of parties, mediated agreement itself is not confidential unless agreed to otherwise in writing, actions against the mediator, otherwise discoverable information that was not prepared specifically and actually used in mediation, general statistical information about mediation cases in general, records indicating which cases have been referred to mediation, mediations conducted by public bodies.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>PA. STAT. ANN. tit. 43, § 211.34 (West 1992) (domestic relations).</td>
<td>Information obtained (communications and documents) in a mediation session shall not be disclosed voluntarily or by compulsion.</td>
<td>None.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>R.I. GEN. LAWS § 9-19-44 (Supp. 1996) (evidence).</td>
<td>All documents and communications of mediator are confidential and not subject to disclosure in any subsequent proceeding.</td>
<td>Not applicable to collective bargaining mediation.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>R.I. GEN. LAWS § 15-5-29 (1996) (domestic relations).</td>
<td>Communications are privileged and not admissible as evidence in any civil or criminal proceeding.</td>
<td>None.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>S.C. CODE ANN. § 8-17-360 (Law Co-op. Supp. 1996) (employee grievance).</td>
<td>Mediation conferences are confidential, mediator may not be compelled by subpoena or otherwise to divulge records or communications.</td>
<td>All communications and documents reasonably made are confidential.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>S.D. CODIFIED LAWS ANN. § 25-4-60 (Michie Supp. 1996) (domestic relations).</td>
<td>Any communications and documents are confidential and inadmissible as evidence in any proceeding. Mediator is not subject to subpoena/discovery.</td>
<td>None.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>TENN. CODE ANN. § 16-20-102 (1994) (victim-offender mediation).</td>
<td>Mediation data must maintain the confidentiality and anonymity of all participants. All communications are confidential.</td>
<td>Must provide written agreement or decision to referral source.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>-----------</td>
<td>-----------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Texas</td>
<td>TEX. CIV. PRAC. &amp; REM. CODE ANN. § 154.053 (Supp. 1997) (ADR).</td>
<td>Conduct, demeanor, communications, and information during session may not be disclosed by impartial mediator. Mediator may not disclose confidential communication to adverse party.</td>
<td>All parties consent or disclosing party consents.</td>
</tr>
<tr>
<td>Texas</td>
<td>TEX. CIV. PRAC. &amp; REM. CODE ANN. § 154.073 (Supp. 1997) (ADR).</td>
<td>All proceedings are confidential and privileged from disclosure. Mediator prohibited from disclosing anything which transpires during process.</td>
<td>If there is a conflict regarding other requirements for disclosure, judge can decide in camera if the conflict will be disclosed, otherwise discoverable.</td>
</tr>
<tr>
<td>Utah</td>
<td>UTAH CODE ANN. §§ 30-3-17.1, 30-3-28 (1995) (divorce).</td>
<td>All session are private and all communications and documents are confidential and may not be disclosed in any subsequent proceeding.</td>
<td>Consent of parties to mediation, child abuse, immediate threat of physical violence against a readily identifiable victim.</td>
</tr>
<tr>
<td>Utah</td>
<td>UTAH CODE ANN. § 78-31b-7 (1996) (general).</td>
<td>Sessions are private and all communications and documents are confidential and shall not be disclosed in any subsequent proceeding.</td>
<td>Settlement agreement itself may be filed with court and consent of all parties and mediator.</td>
</tr>
</tbody>
</table>

186. Texas is a state with a number of mediation/ADR statutes for almost every area of the law, including but not limited to, family law, health and safety, labor, worker's compensation, attorney discipline, and deceptive trade practices.
<table>
<thead>
<tr>
<th>STATE</th>
<th>TOPIC/CITATION</th>
<th>CONFIDENTIALITY GUARANTEE</th>
<th>EXCEPTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vermont</td>
<td>VT. ST. REV. R. 408.</td>
<td>Evidence of conduct or statements in mediation is not admissible.</td>
<td>Otherwise discoverable confirmation, for proving bias, negating accusation of undue delay or proving an effort to obstruct a criminal investigation or prosecution.</td>
</tr>
<tr>
<td>Virginia</td>
<td>VA. CODE ANN. § 8.01-581.22 (Michie 1992) (mediation).</td>
<td>All memo, work product, and other material communications are confidential.</td>
<td>All parties agree in writing, action against mediator for damages, otherwise discoverable information not prepared specifically for or used in mediation, mediation agreement is not confidential unless agreed to in writing.</td>
</tr>
<tr>
<td>Washington</td>
<td>WASH. REV. CODE ANN. § 5.60.072 (West 1995) (evidence).</td>
<td>The agency who is conducting the mediation applies its own rules regarding confidentiality.</td>
<td>None.</td>
</tr>
<tr>
<td>Washington</td>
<td>WASH. REV. CODE ANN. § 7.75.050 (West 1992) (dispute resolution centers).</td>
<td>All communication and documents are confidential and privileged and shall not be disclosed at any subsequent proceeding.</td>
<td>Threat of injury or damage to person or property, consent of all parties, evidence in criminal matters, otherwise discoverable, materials submitted to avoid discovery.</td>
</tr>
<tr>
<td>Washington</td>
<td>WASH. REV. CODE ANN. § 26.09.015 (West Supp. 1997) (domestic relations).</td>
<td>Sessions are held in private and are confidential and the mediator shall not be called to testify about the proceedings.</td>
<td>Any agreement reached shall be reported to court.</td>
</tr>
<tr>
<td>STATE</td>
<td>TOPIC/CITATION</td>
<td>CONFIDENTIALITY GUARANTEE</td>
<td>EXCEPTIONS</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>West Virginia</td>
<td>W. VA. LOCAL R. CIV. PROC. 5.01 (alternative dispute resolution). § 3(b)</td>
<td>Mediators shall maintain strict confidentiality with respect to all information from parties and is subject to Rule 408.</td>
<td>None.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>WIS. STAT. ANN. § 904.085 (West Supp. 1996) (evidence—communications in mediation). § 3(a), § 3(b)</td>
<td>Mediation proceedings and communications are confidential and inadmissible as evidence in any subsequent proceeding or discovery. Mediator cannot be subpoenaed to testify.</td>
<td>Child abuse or any evidence necessary to prevent a manifest injustice which outweighs keeping mediation confidential, statistical research and evaluations, child abuse and other discoverable information.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>WYO. STAT. ANN. § 1-43-102 (Michie 1996) (mediation).</td>
<td>A party to the mediation has a privilege to refuse to disclose and to prevent all mediation participants from disclosing confidential communications and mediator may claim privilege on behalf of party. All communications are confidential if not intended to be disclosed to a third party.</td>
<td>Written agreement, future crime or harmful act, child abuse, information otherwise discoverable, judicial enforcement of mediated settlement, stipulation of settlement made between two or more parties, parties can stipulate that mediator may investigate the parties, and evidence necessary to prevent a manifest injustice outweighing importance of confidentiality.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>WYO. STAT. ANN. § 11-41-106 (Michie 1989) (agriculture mediation).</td>
<td>All financial data are confidential and not a matter of public record.</td>
<td>None.</td>
</tr>
</tbody>
</table>