THE MODEL MEDIATOR CONFIDENTIALITY RULE: A COMMENTARY

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I. Introduction

The panel which discussed mediation confidentiality was composed of persons with a wide range of experience in mediation and in similar methods of alternate dispute resolution. Its members shared a deep commitment to making mediation work. All of them were acutely aware of the importance of confidentiality, and had devoted much effort and thinking to the issue.

The panel took as its starting point the model rule on mediator confidentiality which has been proposed to the American Bar Association's House of Delegates (hereinafter ABA proposal or proposal).[1] After several hours of vigorous debate, the panel developed its own rule on confidentiality (hereinafter symposium rule or rule)[2] by building from and altering the ABA proposal. In discussing the symposium rule, this article notes the changes that the panel made to the proposal and articulates the reasoning behind the changes. The symposium rule might well be considered as a suggestion and recommendation—a guide post to be used by the various states and their judicial systems in adopting a statute or rule on the issue of mediation confidentiality. I urge the reader to study the text of both the symposium rule and the ABA proposal before continuing with the article so as to provide a background for the comments that follow.

II. Analysis of Sections of the Symposium Rule

A. *Definitions*

The panel only considered one of the definitions contained in the ABA proposal—the definition of the term "mediation." The panel modified the definition to read: "mediation is the *delib-*

[1] The text of the ABA proposal is set forth in full beginning on page 65.

[2] The text of the rule that the panel members composed is set forth in full beginning on page 71.

erate and knowing use of a neutral third person by disputing parties to help them [reach] *negotiate* a resolution of their dispute. For purposes of this statute/rule, a mediation commences at the time of initial contact with a mediator or mediation program."[3]

The panel added the phrase "deliberate and knowing" to help mark a boundary between mediation covered by the symposium rule and other, similar interactions between people with disputes. Modifying the term "mediation" by the phrase "deliberate and knowing" gives mediation the confidentiality that seems appropriate for its continued growth, while at the same time does not sweep too broadly into a wide range of informal social practices. It excludes from the confidentiality rule, for instance, informal three-way conversations over the back fence or at family get-togethers, at the factory lunchroom or in the office of the vice president who is trying to resolve a dispute. It separates confidential mediation from such informal processes by requiring some recognition by the parties that they are undertaking a special process to try to resolve their dispute. It asks them to understand that what they are doing is different from the normal flow of gripe and advice that often accompanies disputes.

Without such a boundary, confidentiality may intrude into such a wide variety of social transactions that it would create severe and unwarranted hardships. For instance, a divorcing couple may seek the informal assistance of a relative or neighbor in trying to resolve their dispute over who will have custody of their children. If their conversation becomes confidential because of a rule, a parent may be prevented from disclosing what the other parent said, even if it is directly relevant to deciding which custody serves the best interests of the child. A social worker investigating the matter for the court may be prevented from finding out from the relative or neighbor what the parents said. Similarly, broad confidentiality could bar prosecutors or defense counsel from obtaining information that would be relevant to the guilt or innocence of someone charged with a crime where a third party had stepped in to try to mediate the dispute. Such a rule can fall harshly on the mediator as well. In the child custody situation, the relative or neighbor who acts as an infor-

[3] For clarity, the terms that the panel removed from the proposal are enclosed in brackets while additions are indicated by italics.

mal mediator may think that it is important for the welfare of the children that certain information be disclosed, but may be unwittingly barred from such disclosure by a broad rule of confidentiality. A student mediating a dispute in school may discover that the disputants plan some unpleasantness for another student, and may wish to protect that student by disclosing the plan.[4]

As these examples indicate, people considering mediation confidentiality often feel a sense of unease about how far confidentiality should extend into ordinary social transactions involving disputes. Time and again during the panel's day-long discussion, proposals for a particular way of treating confidentiality were met with counter-examples which showed how the proposal would be unwise or harmful for the particular situation described. The examples were drawn from an extremely wide range: from court-annexed matrimonial mediation programs, to formal mediations carried out by the Federal Mediation and Conciliation Service, to organized criminals resolving territorial disputes, and to schoolyard peacemakers.

It is easy to understand why the members of the panel could draw on such a wide range of troublesome examples. When mediation is broadly defined, it describes a pervasive social practice, or rather, a set of varied practices that have as a common feature the use of a third party to help resolve a dispute by agreement. In this regard, mediation is quite unlike other practices to which confidentiality applies. Most of the confidentiality rules that now exist, such as the lawyer-client and doctor-patient privileges, are tied to specific social institutions. Society decides when confidentiality applies, in part, by determining whether the information was transmitted as part of the social institution. A lawyer-client privilege will only apply within a lawyer-client relationship. A spousal privilege requires that the parties be united in the bonds of matrimony. These institutions are both socially recognizable and have elaborate sets of rules and standards that govern whether the privileged relationship exists. The same cannot be said of "mediation."

If mediation confidentiality is to be modeled strictly on these other rules, society could postpone the creation of a confidentiality rule for mediation until the practice of mediation is more

[4] Panelist Professor Rogers suggested this example.

firmly established. Then mediation confidentiality could be tied to particular functioning social institutions. This approach is suggested by Professor Green who argues that existing privileges are sufficient at this time to cover mediation.[5]

But such an approach ignores one of the important reasons favoring a general rule of confidentiality: confidentiality is important to foster the growth of mediation.[6] Several panelists stressed the need to preserve the confidentiality of mediation proceedings to attract and retain mediators. Whether they mediate as volunteers or for a fee, people would be reluctant to mediate if they envisioned going through the gruelling and time-consuming experience of being questioned later about what happened during the mediation. Other panelists stressed the importance of fairness to the parties. If they believed that their statements made during mediation were being held in confidence, but subsequently discovered that the statements were to be used against them, they would feel betrayed. This would promote distrust of the mediation process, which in turn would be extremely detrimental to its effectiveness; the participants must have confidence in the process if the mediation is to be successful. The panel members agreed that mediation is a highly desirable practice, and could be used much more than it is now. Yet the practice of mediation seems fragile. Over the next decade it may

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[5] Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. L. J. 1 (1986).

[6] There is no systematic empirical evidence to support this proposition, but it is widely believed among mediators and mediation programs. We do have evidence that the practice of mediation has grown, but whether this growth would be enhanced by greater confidentiality remains quite unclear. The opponents of increased confidentiality can argue with some force that we do not need broader confidentiality to encourage mediation; the growth to date shows that it will grow without broad confidentiality. People have used and will continue to use mediation for powerful reasons that have nothing to do with confidentiality. The proponents of increased confidentiality, however, can argue with equal force that people have assumed, perhaps erroneously, that confidentiality applies. The existing standards of confidentiality, whether created by specific, limited statutes or rules, by agreement of the parties, or by the promise of a mediation service that it will keep the mediation confidential, may have created an expectation that there is more confidentiality than these provisions can actually deliver. People have felt free to engage in mediation based on an assumption of broad confidentiality. A rule guaranteeing such broad confidentiality is necessary to assure that the assumption is not destroyed. According to this argument for the proponents of broader confidentiality, it might only take one publicized case in which supposedly confidential mediation information is revealed to destroy public confidence.

be overwhelmed by adversarial processes. Devising rules of confidentiality now, even though the institutions through which mediation is conducted are in the midst of great growth and change, will help protect the growth.

In this context, "deliberate and knowing" modifies the term "use" in a special sense. It means something more than a simple awareness that the parties are using a third party. The phrase here denotes that the parties are consciously aware that they are using a specific and distinct process for dispute resolution. Their deliberateness goes to the fact that they have purposely chosen to use a process that they understand to be identifiable and distinct. It is their purpose to use a special process that creates "mediation" under the symposium rule.

To be sure, using "deliberate and knowing" in this way imparts a certain self-referential quality to the definition of mediation. One could argue that the panel defined "mediation" as no more than the purposeful and knowing use of a process that the parties recognize as "mediation." Despite its limitation as a matter of verbal logic, the definition captures an essential element of the transactional nature of mediation. Mediation requires the disputants to do something they might not otherwise do—negotiate the resolution of their dispute and do so by invoking the assistance of a neutral third party. The parties' understanding that they are undertaking a special process to deal with their dispute provides a basis for distinguishing "mediation," which will bring down the cloak of confidentiality, from other verbal interchanges, which will not.

The panel did not discuss the use of the word "neutral" to modify "third person." In subsequent commentary, Professor Green has urged that the term "neutral" be dropped.[7] He notes that mediation may well be successful even though the mediator lacks the appearance of neutrality, such as when an ombudsman employed by a company mediates a dispute between the company and one of its customers. Although not argued by Professor Green, it is possible that a person directly interested in the mediated dispute may be an effective mediator, at least if the interest is known to all the parties, and the mediator is accepted by them with full knowledge of the interest. If a court were to read

[7] Letter from Professor Eric Green to Jonathan M. Hyman (Apr. 13, 1988).

the term "neutral" as requiring the appearance of neutrality, rather than neutrality in fact, or acceptance by the parties, then many mediations might be deprived of the benefits of confidentiality that are provided by the symposium rule.

On the other hand, it may be appropriate to deny confidentiality if the mediator secretly has an interest in the particular dispute that is subject to mediation. However, situations may arise where a mediator's interest in the outcome of the particular dispute could not be cured by disclosure to the parties. If so, the symposium rule might well include some term modifying "third party," even if the term "neutral" is not used.

The panel decided to substitute "negotiate" for the term "reach" used in the ABA proposal to distinguish mediation from a variety of other dispute resolution processes. Arbitration, for instance, whether it is mandatory or voluntary, and whether its results are binding or not, is commonly used to resolve disputes; yet it was not our intent to include that practice within the symposium rule.[8] The term "reach," as used in the ABA proposal, can be construed to apply to arbitration, since that procedure literally uses a third party to help the parties reach a resolution of their dispute. Since arbitration is a distinct process, and may have its own confidentiality rules, we sought to exclude it from the symposium rule.

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[8] Arbitration can be required by the contractual agreement of the parties, in which case the arbitrator's decision is binding. Recently, a number of courts have adopted a system of court-annexed arbitration that is mandatory for certain classes of cases, but which does not result in necessarily binding decisions. *See* D.N.J. CT. R. 47 (cases for money damages not exceeding $75,000 subject to nonbinding pretrial arbitration); N.J. CT. R. 4:21A (nonbinding pretrial arbitration for automobile accident cases not exceeding $15,000). Under this procedure, parties to a lawsuit are typically required to present an abbreviated version of their claims and defenses to an arbitrator, usually a member of the bar, before they are permitted to proceed to trial. The proceeding is often quicker and less expensive than a trial because many of the rules of evidence, such as the hearsay rule, do not apply. After hearing the evidence, the arbitrator renders a decision. The parties are free to accept the arbitrator's decision as the judgment in the case, or they can seek a trial *de novo* in the court. Typically, if they seek a trial *de novo* they are at risk of incurring a financial penalty if they do not achieve a verdict at trial that is more favorable to them than the arbitrator's verdict. While such programs are still being evaluated, previously completed evaluations indicate that a large percentage of cases are resolved through this process and the parties are satisfied with the process and the result. *See generally* Hensler, *What We Know and Don't Know about Court-Annexed Arbitration*, 69 JUDICATURE 270 (1986).

The definition does not make clear whether the rule of confidentiality applies to mini-trials, summary jury trials, fact-finding hearings held by a special master, or similar processes aimed at helping the parties to resolve a legal dispute. Mini-trials and summary jury trials are non-binding proceedings in which the parties present an abbreviated version of their claims and defenses to a neutral party or parties. The neutrals could be persons chosen by the court from the regular jury pool, ordinary citizens, lawyers, experts, or anyone else.[9] After hearing the evidence, the neutral party indicates what the verdict in the case would be if it were to proceed to a real trial. The parties are then free to use that information to help them reach a reasonable decision about what an appropriate settlement would be.

Mini-trials and summary jury trials have a strong functional similarity to mediation. As with mediation, they provide the parties with much information about the relative legal and factual strengths of their claims. This in turn makes it easier for the parties to determine what a reasonable settlement would be. Indeed, a summary jury trial or a mini-trial differ more in degree than in kind from mediation in which the mediator actively explores the facts and gives an advisory opinion about the possible result if the matter went to trial. Unlike non-binding court-annexed arbitration, these methods do not establish what the judgment in the case will be, unless the parties take further action to have a trial *de novo*.

This similarity suggests the confidentiality that attaches to mediation under the rule should also attach to the mini-trial and the summary jury trial. One of the advantages that attracts corporate litigants to mini-trials is that the method permits them to air their dispute without any public disclosure. Summary jury trials, on the other hand, are annexed to regular court procedures and use citizens on public jury duty to make up the summary jury. It might well conflict with the public nature of our court system to cloak summary jury trials in secrecy. Similarly, hear-

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[9] Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States on the Operation of the Jury System*, 103 F.R.D. 461 (1984); S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 271-78 (1985). As to whether summary jury trials should be open to the public, see Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900 (6th Cir. 1988).

ings before a court-appointed master are a regular part of the court system and thus are subject to the policies that require most adjudicatory events to remain public.

Perhaps mini-trials could be included within the confidentiality rule, while summary jury trials and references to masters should be excluded.[10] The panel, however, did not discuss this distinction. Alternatively, all of these processes could be excluded from the symposium rule. If parties wish to keep mini-trial proceedings confidential, they could do so as part of their agreement to submit the matter to a mini-trial. Similarly, if the mini-trial takes place during the settlement of a suit, the evidentiary rules that already provide some confidentiality for settlement discussions may apply.[11]

Professor Green suggested a further addition to the definition of mediation as follows: "For purposes of this statute/rule, a mediation commences at the time of initial contact with a mediator or mediation program *with a view to obtaining mediation services from the mediator or mediation program.*" The additions clarify that confidentiality applies to initial communications, before either the parties or the mediator or mediation program have decided to undertake formal mediation. Full disclosure can be very important even before mediation has actually begun, as it will help the parties and the mediator or mediation program to decide whether mediation is appropriate, and will enable them to choose a mediator or structure a mediation program in ways that are most fitting for the dispute to be mediated. The suggested lan-

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10 Professor Green is persuaded that mini-trials are a form of mediation and should be covered by the symposium rule. He would drop "perhaps." *See supra* note 7.

11 FED. R. EVID. 408 bars the admission of evidence of conduct or statements made in compromise negotiations. If a mini-trial is characterized as a compromise negotiation, then statements made by the parties during the mini-trial would not generally be admissible. Not all evidence rules are this broad. For example, N.J. R. EVID. 52 only prevents a party from using another's offer of compromise as evidence to prove the offeror's liability. An admission of liability is different from an offer of compromise, and New Jersey law has not resolved the question of whether an admission of liability made during settlement negotiations is admissible. *See* N.J. R. EVID. 52(1) comment 2. In New Jersey, counsel are still well-advised to introduce factual statements made during settlement negotiations with a disclaimer that the statement is only hypothetical, made for the purposes of exploring settlement. In addition, they would be similarly well-advised to be reluctant to let their clients make uncontrolled factual assertions during settlement negotiations.

guage makes the mediation privilege similar to the lawyer-client privilege. The lawyer-client privilege applies to statements made to a lawyer in an initial consultation by a person seeking representation, even if the lawyer does not subsequently accept the person as a client.[12]

The panel did not discuss whether confidentiality should apply to initial consultations as well as to more formal mediation sessions or even whether this language guaranteed protection to initial consultation. The panel kept intact the language of the ABA proposal, which applies confidentiality to the "initial contact" between the parties and the mediator or mediation program. That language may be sufficient to include initial inquiries made with a view to obtaining mediation services.

It could be argued that confidentiality should not begin as early in the mediation context as it does in the lawyer-client relationship. Lawyers need full disclosure from prospective clients from the very start of their relationship. The lawyer must quickly obtain enough information to decide whether the client has viable legal issues that can effectively be handled by a lawyer, and to decide whether it is worthwhile to accept the representation. This also includes an estimation of the cost and extent of legal work that will be required. The need for confidentiality in the mediation setting is somewhat different. For mediation, full disclosure is most critical to the mediation itself, for it is there that the exchange of information will lead the parties on the path to the best possible agreement. Full disclosure may not be so critical before the give-and-take of mediation begins. Because the costs of imposing confidentiality can be so high, confidentiality should not be imposed unless it is vitally important.

Professor Green also suggested changing the definition of "party" to read: "A party is a mediation participant other than the mediator *with an interest in the subject matter of the mediation.*" Adding this phrase to the symposium rule makes clear that the term "party" is limited to those who have a dispute that they are seeking to resolve through mediation. The mediation process may include additional people or organizations because they are witnesses or because they may help in creating or implementing an arrangement that resolves the dispute. If all of these people

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[12] C. WOLFRAM, MODERN LEGAL ETHICS 251 (1986).

and organizations are understood to be parties under the symposium rule, the application and enforcement of the rule becomes very unwieldy. It is the parties that have the power to impose the confidentiality required by the rule, and it is the parties that have the power to agree to exceptions. If the number of "parties" is too large, or if the term is cast so wide that it includes people only marginally interested in the disputing parties or in the mediation, then it becomes extremely difficult to obtain the agreement required for these provisions of the rule.

Many people associated with mediating disputants may have an "interest" in the subject matter, without being the ones with the power to resolve the dispute. In a divorce mediation involving the custody of a child, for instance, the child, grandparents and prospective spouses of the divorcing couple all have an interest in resolving the custody dispute. Should they all have the power to bar disclosure? In a business dispute over how a seller handles claims involving breach of warranty, all customers may be interested in how the dispute is resolved, even though they do not currently have a dispute with the seller. Should they be included?

This issue is conceptually made more difficult by the fact that mediation may involve many people or organizations who have an interest in the dispute, but who are not themselves the disputants. Unlike litigation, with its formal rules for deciding who may be an appropriate "party," flexible mediation casts its net broadly and includes anyone who, as a practical matter, contributes to a good dispute settlement. This very strength, however, creates some confusion as to whom should be considered a "party."

The panel did not change the definition of "mediation document." This definition gives greater protection to work-product than that provided by the Federal Rules of Civil Procedure,[13] under which an opponent may, in some instances, use pre-trial discovery to obtain things prepared in anticipation of trial and

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[13] FED. R. CIV. P. 26. New Jersey provides the same exceptions to the work-product privilege. *See* N.J. CT. R. 4:10-2(c).

I am indebted to my colleague at Rutgers Law School, Professor John Leubsdorf for pointing out to me the importance of the exceptions to the work-product rule.

statements previously made by a party. The proposal provides no such exceptions.

The symposium rule should not be construed to change the rules of civil discovery. It does not create a privilege for statements or documents occurring outside the mediation and are otherwise subject to pretrial discovery or introduction at trial. The definition of "mediation document," however, creates questions as to how this general standard should be applied to work-product that happens also to be a mediation document. In a suit, an opponent may seek the discovery of work-product under Federal Rule of Civil Procedure 26(b)(3), and the party may resist disclosure by claiming that the material sought is "mediation work-product" and thus completely privileged. The problem is made more difficult by the fact that "work-product" for litigation and "work-product" for mediation may often proceed hand-in-hand and may be impossible to distinguish from one another. A party with a dispute may well engage in litigation and mediation at the same time. Preparation for one form of dispute resolution can be preparation for the other. Indeed, a contemporaneous resort to mediation as an alternative way to resolve the dispute is to be encouraged. The panel did not have time to address this issue.

B. *General Rule*

1. Agreement of the Parties and Mediator to Impose Confidentiality

The panel significantly modified the ABA proposal by requiring that parties and mediators agree that confidentiality will attach to their communications and documents. Without such an agreement, the symposium rule's confidentiality provisions will not apply. The panel changed the proposal to read:

> Except as otherwise provided by this statute/rule, all mediation documents and mediation communications are privileged and confidential and shall not be disclosed[.] *where the parties and mediator have agreed that they shall be confidential pursuant to this statute/rule. If confidential pursuant to this statute/rule,* they are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding.

Many different approaches were suggested to the issue of triggering the application of the symposium rule. Some participants wanted the symposium rule to apply automatically to communications and documents that fell within the definition of "mediation communications" and "mediation documents." Others did not want it to apply unless the parties and the mediator had first agreed in writing. Also considered was whether the symposium rule applies only to established mediation programs.

Consensus was reached that the symposium rule applies to privately organized, one-time mediations, as well as to established programs that carry out many mediations. The panel also agreed that the symposium rule applies only if the parties and the mediator agree that it should. It is not necessary that such an agreement be in writing; an oral agreement is sufficient. A mediation program can also notify participants about confidentiality in the descriptive written material that it provides. Deciding to go ahead with the mediation process after receiving such notification would constitute an "agreement" to be bound by the symposium rule. It is impractical to require a written agreement in every instance. For example, some large organizations have ombudsmen who work quickly and informally over the telephone to resolve disputes. In these situations, written agreements are generally not necessary. The program can describe the rule in its brochures, and the ombudsman can make reference to it at the beginning of mediation telephone conversations.

Nevertheless, the symposium rule should require an explicit agreement to impose confidentiality. An explicit agreement prevents inexperienced parties from blindly subjecting themselves to a complicated set of privileges and exceptions. The parties have two important interests in preserving confidentiality: to facilitate disclosure by all the parties in order to find the best resolution, and to avoid the sense of betrayal and unfairness that would follow the disclosure of information that a party thought was given in confidence. Requiring an explicit agreement to keep communications and documents confidential does not disrupt these interests.

Mediators have interests of their own in maintaining confidentiality. They seek the best possible agreed resolution of the dispute by encouraging full disclosure. In addition, they may wish to avoid having to spend time appearing before a court or administrative agency. Disclosure can also undermine the appearance of impartial-

ity that is a critical part of mediator effectiveness. These interests of the mediator are not weakened by requiring the mediator to agree to confidentiality before relying on the benefits that confidentiality provide.

The symposium rule provides a shorthand method for specifying the elements of confidentiality to which the parties and the mediator have "agreed." Without this method, it would be important for the participants to articulate each aspect of confidentiality to which they are agreeing. That could be a time-consuming task that would distract the parties and the mediator from mediating the dispute. Under the symposium rule, a simple agreement to abide by the terms of the rule is sufficient. If a party or mediator wishes to inquire further into the scope of the confidentiality obligation, they can refer to the symposium rule and its exceptions.

2. Agreements to Modify the Terms of Confidentiality

As redrafted by the panel, and in marked contrast to the ABA proposal, the symposium rule permits the parties and the mediator to agree to their own terms of confidentiality. In doing so, however, they risk the enforceability of their agreement. While such agreements might be binding as enforceable contracts between the parties, they would probably not be binding on third parties, unless some independent legal rule created confidentiality.[14] The risk of ignoring the symposium rule in favor of a private confidentiality agreement may be increased by limitations on the remedies that a party might have for the breach of a private agreement. Even if such private agreements are binding as contracts, when one party breaches and threatens to disclose matters that were communicated in confidence, the other party might be limited to recovering money damages, rather than an injunction against the disclosure.[15]

3. The Scope of the General Rule

The symposium rule uses language more appropriate for an absolute privilege of confidentiality than for a qualified one. The

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[14] *See supra* note 11.

[15] Damages have been the traditional remedy for a breach of contract, but the courts have become more willing to grant equitable relief, such as injunctions, as a remedy. *See* A. FARNSWORTH, CONTRACTS 826 (1982).

panel spent much time discussing whether the general rule of confidentiality should be drafted as a qualified privilege or as a broad privilege with specific exceptions. A qualified approach would use language that provides the courts great discretionary power to qualify the privilege on a case-by-case basis. An expansive approach was chosen, even though this requires explicitly stated exceptions.

The symposium rule creates broader confidentiality than the evidentiary rules that currently apply to settlement discussions. While current evidentiary rules make some aspects of settlement discussions confidential, they do permit limited disclosure of statements made during settlement negotiations. Federal Rule of Evidence 408, for instance, bars the admission into evidence of "conduct or statements made in compromise negotiations." However, Rule 408 does not preclude that evidence if it is offered "for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Similarly, Rules 52 and 53 of the New Jersey Rules of Evidence prohibit only the introduction of evidence that a party offered or accepted something of value in settlement of a claim, and even that evidence will be admitted if it is used to prove something other than whether a party was liable or not.

In contrast, under the symposium rule, mediation communications will be confidential regardless of the purpose for which a party seeks to use the evidence. A party will not be able to use evidence of mediation communications even to show that a party or witness is biased or prejudiced, or to show that a party was prompt in the prosecution of litigation, or tried to obstruct a criminal investigation. As a practical matter, however, the differences in degrees of confidentiality may not be as great as the formal language the various rules suggest. Careful lawyers protect confidentiality during settlement meetings by couching the discussions with disclaimers, such as, "Everything we say here is hypothetical and only for purposes of exploring the possibility of settlement."

The symposium rule prohibits the use of statements made during mediation to impeach a witness who later contradicts himself. Confronting witnesses with prior inconsistent statements is a powerful technique to undermine credibility. Yet under the

symposium rule a witness is free at trial to contradict what was said during mediation without fear of being challenged. As harsh as this result seems, however, the panel thought that it was vitally important for the success of mediation. Otherwise, persons participating in mediation—and the lawyers advising them—will be put on their guard when they consider what they will say during mediation. That kind of guarded approach is very destructive to the full disclosure that is necessary for good mediation. In case there are any doubts about the scope of the symposium rule and impeachment, the rule could be rewritten to state that mediation communications may not be used for impeachment. A governmental entity adopting a confidentiality rule should give consideration to whether such explicit language would help assure that impeachment evidence does not get lost in subsequent judicial application of the rule.

As with the ABA proposal, the symposium rule does not interfere with fact gathering processes to prepare for trial or other adjudicatory matters. Parties are free to use the discovery methods provided by court rules to obtain relevant information for their cases. If a pre-existing or other document is subject to disclosure under discovery rules, a party may not immunize it from discovery simply by disclosing it during the mediation and calling it a privileged "mediation document," nor may a party protect it from disclosure by incorporating it into a privileged "mediation document." If a party or a witness discloses information during mediation that is relevant to an adjudicatory proceeding, the party or witness can be compelled to disclose that information by interrogatory, deposition, trial testimony or other authorized method. Mediation confidentiality still applies, however, because it may not be disclosed that the information was given during mediation nor may disclosure during mediation be used either to impeach or support any version of the information given under normal court processes.

4. Proceedings to Which the Rule Applies

By its terms, the symposium rule prohibits the disclosure of confidential information in judicial or administrative hearings. This specification is not intended to permit disclosure in other circumstances. This sentence merely emphasizes that the general rule against disclosure applies to formal adjudicatory hearings, as

well as to attempts to make disclosures in less formal settings. The panel did not discuss whether the prohibition would apply as well to arbitration, mediation, or other dispute resolution procedures. The strong functional similarity between arbitration and other adjudicatory procedures suggests that mediation communications and documents should be excluded from arbitrations to the same extent they are excluded from trials or administrative hearings. Adding the term "arbitration" to the list of proceedings in which use of mediation communications and documents will be barred would make this result explicit. There is already authority for applying a rule of mediator confidentiality to contractual arbitrations, as well as to court proceedings.[16]

In contrast to arbitration, however, an argument can be made to permit a party to disclose confidential information in a subsequent mediation. The subsequent mediation may involve the same dispute that brought the parties to mediation in the first place. To bar disclosures in the subsequent mediation simply because the statements sought to be disclosed were made in the prior mediation would limit the effectiveness of the subsequent mediation. So long as the second mediation is carried out under the rule of confidentiality, the communications and documents will remain confidential so far as the outside world is concerned, even if disclosed in the second mediation.

It should be noted that this is a different question from the one addressed above in the discussion of whether statements made during arbitration are confidential to the same extent as statements made during mediation.[17] The previous issue was to define which communications will be confidential. The immediate issue is to define the settings in which confidentiality will bar the disclosure of information.

C. *Exceptions*

The panel's discussion of confidentiality disclosed sharp differences between the interests of the disputing parties and the interests of the mediators and mediation programs. Proposals that protect the confidentiality of the parties often seem inappro-

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16 *See, e.g.*, Air Reduction Chem. & Carbide Co., 41 Lab. Arb. 24 (1963) (Warns, Arb.); Day Care Council, 55 Lab. Arb. 1130, 1135 (1970) (Glushien, Arb.).

17 *See supra* note 8.

priate for the mediator or mediation programs. To accommodate these varied interests, the panel developed two different sets of exceptions to the general confidentiality rule, one for the parties and one for the mediator or mediation programs. Consequently, the list of exceptions in the symposium rule is substantially longer than that contained in the ABA proposal.

1. Disclosure by the Parties

a. *Agreement*

There is no confidentiality if all parties to the mediation agree to disclosure. Note that this exception, as written, does not authorize or permit disclosure by the *mediator or mediation program*, even if all the parties agree to disclosure. Thus, the mediator and mediation program may refuse to disclose what transpired during the mediation even if the parties agree that the mediator or mediation program should disclose.

The panel did not agree to limit this exception to disclosure by the parties. Some participants argued that mediators and mediation programs lose their privilege if the parties agree to disclose. They stressed that mediation belongs primarily to the parties. The privilege of confidentiality serves their interests by enhancing the mediation that is theirs. The privilege is like the lawyer-client privilege. As with that privilege, it is for the benefit of the parties, not for the benefit of the professional, who assists the parties. Thus, it should be waivable by the parties in the same way that a client can waive the privilege of lawyer-client confidentiality which requires the lawyer to disclose otherwise confidential information.

Other participants stressed that the mediators and mediation programs have an institutional interest in confidentiality separate and distinct from the parties' interest. Mediators need to avoid the time and stress associated with being compelled to testify about the mediation. They need to preserve the appearance of neutrality, which is jeopardized by testimony.[18] To protect these

[18] The leading case supporting the mediator's interest is NLRB v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980). In that case, the court of appeals upheld the revocation of a subpoena that had been issued to a mediator appointed by the Federal Mediation and Conciliation Service. The parties were in dispute about whether they had reached an oral agreement during mediation, and the mediator's testimony would have been relevant to resolve the issue. Nevertheless, "the complete

interests, it would be necessary to maintain mediator confidentiality, even when the parties have agreed to disclose.

Note also that the symposium rule does not invariably bar mediator disclosure. It provides for disclosure by the mediator or mediation program when the parties agree, but only when the mediator or mediation program agree as well, or when some other exception applies.

The symposium rule does not specify what constitutes "agreement" of the parties sufficient to permit disclosure. An explicit form of agreement either oral or written should usually be required. There may be additional situations in which agreement comes about by tacit understanding or even by waiver. One panelist suggested to permit disclosure if one of the parties has by his actions waived the privilege and the other party then seeks to disclose. In a trial, for instance, one party might remain silent while the other proceeds to disclose what occurred during a mediation. The silent party may then try to introduce contrary evidence of what was said during the mediation. Such evidence should be admissible, despite the fact that the parties never explicitly agreed to disclosure. The first party waived the right to claim the privilege by introducing evidence of what occurred in mediation. This is similar to the general proposition in evidence law that privileges can be waived by "opening the door" to the introduction of evidence or by failing to object at an appropriate time.[19]

In addition, waiver may be appropriate when a party's actions have created a need for other parties or a mediator to disclose. For example, a party may refuse to pay a fee incurred for mediation services, or may refuse to contribute to the other party's payment of a mediation fee. Similarly, a party may make allegedly defamatory statements against a mediator, mediation program or another party regarding what occurred during the mediation. A party also may bring charges against a mediator, mediation program or another party before a disciplinary author-

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exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation, and . . . labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence." *Id.* at 56.

[19] Telephone conversation with panelist Professor Rogers (Apr. 19, 1988). *See* C. MCCORMICK, EVIDENCE 223-24 (E. Cleary 3d ed. 1984).

ity, claiming that the mediator or mediation program, or even another party, did things that violated the professional standards of that person's discipline.[20] If the mediator is a lawyer, a party may claim that the lawyer gave legal advice without properly representing the parties.[21] If the mediator is *not* a lawyer, a party may claim that the mediator gave legal advice and thereby practiced law without a license. If the mediator is an accountant, a party may claim that the mediator knowingly permitted the parties to violate accepted accounting principles in working out the financial details of a complicated dispute. In each of these situations, it seems appropriate for the victim of the claims or charges to ignore the privilege to the extent necessary to collect the fee, to defend against the claim or to seek a remedy for the charges or defamatory statements.

The concept of waiver shifts focus from the basic situation where the parties to the mediation agree to the disclosure, to a periphery situation, where a single party's actions waive the privilege. This raises the more general question of whether, or under what circumstances, a party may waive the privilege without first obtaining the agreement of the other parties. The panel did not discuss this issue.[22]

A party's confidentiality interest is not harmed by permitting the party to disclose voluntarily what was done or said during mediation, so long as the party does not at the same time disclose what the other parties to the mediation, or the mediator, said or did. The most important purpose of the mediation privilege is to encourage unconstrained disclosure during mediation and to protect parties from being harmed by their own words. Thus, as a general matter, a party should not use against *another* party what the other party said during mediation. This justification, however, does not directly prohibit a party from voluntarily disclosing what was said during mediation. The interests underlying confidentiality are only threatened if that disclosure led to disclosure of what the other parties to the mediation said or did.

While voluntary self-disclosure seems to be consistent with the spirit of this exception, there are also sound reasons for bar-

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20 These examples were brought to my attention by Professor Leubsdorf.

21 *See* Comment, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986 (1985).

22 I am indebted to Professor Leubsdorf for this point as well.

ring disclosure unless all the parties to the mediation agree. Voluntary self-disclosure will usually be self-serving because its intent is to bolster some claim that the disclosing party is seeking to make. If the claim is against other parties to the mediation, or against the mediator or mediation program, those targets will wish to respond. If the voluntary self-disclosure is used against others who did not participate in the mediation, those against whom it is used will wish to test the statement's accuracy and meaning. This will lead them directly to the other participants in the mediation, because the other participants will be the best witnesses to verify or contradict the disclosing party's testimony. For instance, a party may wish to testify about what was said during mediation to prove that the party has not recently fabricated similar testimony.[23] The opponent will want to question the other participants of the mediation to disprove the party's assertion regarding the consistency of the prior statement. Under the mediation privilege, however, the opponents may not gain access to mediation evidence known by the other parties to the mediation. They will thus be placed at an unfair disadvantage, and the trier of fact will be cut off from a complete version of relevant evidence. Permitting one-sided voluntary disclosure could thus lead to great pressure to abandon the entire confidentiality rule.

b. *Legal Claims Against the Mediator*

The parties may choose to disclose what occurred during the mediation—and may be required to do so against their will—if they bring a legal action against the mediator or mediation program. It would be unfair to sue for matters arising out of the mediation and then hide relevant information by claiming privilege. This type of claim would usually be an action for damages against the mediator or mediation program. The provisions of the symposium rule were drafted broadly, however, to cover an action for other relief as well. These provisions include an injunction against certain disclosures by the mediator or mediation program.

The symposium rule does not establish or limit mediator liability; that is a matter for separate common law or statutory de-

[23] FED. R. EVID. 801(d)(1)(B) permits the introduction of evidence of prior consistent statements.

velopment.[24] Similarly, the symposium rule does not establish what the remedy should be for a violation of its terms. Whether damages, injunctive relief, or some lesser sanction, such as disqualification of a mediator from future mediation are available, remains open to interpretation.

This exception describes the situation in which a party seeks legal relief against a mediator or mediation program. It might be appropriate to permit disclosure in other situations where a party's actions or refusals to act caused harm, or threatened to cause harm, to the mediator or mediation program. This exception could be redrafted to provide: "the mediation communication or mediation document is relevant to claims arising out of the conduct of the parties, the mediator or the mediation program during the mediation, including claims for fees for conducting the mediation." However, this alternative version was not drafted or discussed by the panel.

c. *Ongoing or Future Criminal Activity*

This exception permits one party to the mediation to disclose information about the other party's ongoing or future criminal activity. The right to disclose may have some inhibiting effect upon candor during the mediation. In a divorce mediation, for instance, a husband may admit that he has income that he does not plan to report for income tax purposes. His wife would be free to disclose this information, and she could use her threat to disclose to extract concessions from him. Under this exception, the husband might be more guarded about what he says during the mediation.

Nevertheless, there was a consensus on the panel that disclosure of ongoing or future criminal activity had to be permitted. Society has a vital interest in the disclosure of potential crime. Often, the ongoing or future criminal activity will threaten the well-being of innocent third parties, and the party to the mediation will justifiably feel a strong moral compulsion to protect such parties by disclosure. Preventing disclosure could easily bring mediation into disrepute.

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[24] *See generally* N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 171-86 (1987); Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876 (1986).

Some panelists suggested that this exception be broadened to include ongoing or future "illegal" activity, as well as crimes. The panel did not do so because it is quite difficult to define the term "illegal." Limiting disclosure to crimes does not seem to create a serious risk of unfairness. If the symposium rule is adopted in jurisdictions that do not have comprehensive criminal codes, however, it would be appropriate to determine whether certain identifiable kinds of conduct that constitute a civil wrong, or that violate a government regulation without being a crime, also should be subject to disclosure. In addition, this exception permits law enforcement agencies to question the parties about any disclosures of ongoing or future crimes. Parties who did not wish to speak could be compelled to do so by subpoena to a grand jury or trial. Note that this exception does not apply to disclosures about past criminal activity, unless such past criminal activity is part of an ongoing conspiracy or similar ongoing criminal arrangement.

This exception is similar to the crimes exception to the lawyer-client privilege. The rules of evidence and the bar's ethical standards generally prevent a lawyer from disclosing what a client says in confidence. However, both make exception for information that the client intends to engage in future criminal activity. The precise boundaries of the exception vary from jurisdiction to jurisdiction.[25] The lawyer-client privilege at common law generally does not protect statements made in furtherance of crime or fraud.[26] While the crime exception to the Model Rules of Professional Conduct seems somewhat narrower than the

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[25] For example, N.J. R. EVID. 26(2)(a) does not protect "a communication in the course of legal service sought or obtained in aid of the commission of a crime or fraud." The MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1988) permit a lawyer to voluntarily disclose confidential communications in only a very narrow circumstance: if "necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." When it adopted N.J. RULE OF PROFESSIONAL CONDUCT 1.6(b)(1), the New Jersey Supreme Court expanded its scope to include a larger class of harm and to require, rather than merely permit, lawyer disclosure in certain circumstances: "a lawyer shall reveal . . . information . . . to prevent the client (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another."

[26] *See generally* 8 J. WIGMORE, EVIDENCE §§ 2298, 2299 (1961); C. MCCORMICK, EVIDENCE § 95 (E. Cleary 3d ed. 1984).

common law exception to the lawyer-client privilege, because it does not permit disclosure of intent to commit fraud, the difference is less significant than might appear. For example, New Jersey has extensive fraud provisions which permit the disclosure of the most serious planned fraud because such fraud is also a crime.[27] Some panelists still prefer that the exception cover anticipated fraud, as well as anticipated crimes.[28] If the exception were to be extended in this way, it would be useful to specify whether all fraudulent acts are subject to disclosure, or whether the exception should be limited to some narrower category of more serious frauds. These could include fraudulent acts that cause only "substantial" injury, or only injury to "financial" as opposed to "personal" interests, for instance.[29]

This crimes exception to the symposium rule does not draw a clear distinction between past crimes, for which confidentiality applies, and ongoing or future crimes, for which it does not. In this lack of clarity, it is no different from the similar lack of clarity that exists in the realm of lawyer-client privilege. "[T]he boundary between past and present wrongdoing is not always clear and . . . troublesome problems can arise. . . These are questions for which no satisfactory answers can be found in present case law or canons of ethics."[30]

The panel did not discuss whether the threat of perjury is the kind of future criminal activity that will authorize disclosure. If read very broadly, this exception could authorize disclosure whenever it appeared that a party to the mediation was about to testify under oath in a manner that contradicted what was said during mediation. For instance, during mediation a party might say "I'm telling you this now, but I will deny it if you or anyone else asks me about it later, even if they ask me under oath." This is not a threat to commit the crime of perjury; therefore, no disclosure is authorized. To permit disclosure in such situations would allow the exception to swallow the rule. The mediation

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27 *See* N.J. STAT. ANN. §§ 2C:20-1 to -22 (West 1982 & Supp. 1988); N.J. STAT. ANN. §§ 2C:21-1 to -19 (West 1982 & Supp. 1988).

28 *See supra* note 7.

29 N.J. RULE OF PROFESSIONAL CONDUCT 1.6(b)(1) requires a lawyer to disclose information regarding a future fraudulent act if the lawyer reasonably believes the act "is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another."

30 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 503-69 (1986).

session would become an open book to anyone seeking to impeach the subsequent testimony given under oath of a party to the mediation. Prior inconsistent statements made during a mediation should not be subject to disclosure under this exception, even if they may be evidence of a plan to commit subsequent perjury.[31]

There is one very limited circumstance in which the "future crimes" exception and perjury would come together to authorize disclosure. If, during mediation, someone said, "I'm going to lie about this at trial," he or she would have revealed a plan to commit a future crime. This statement would be subject to disclosure because it is a plan to lie under oath, and not merely a threat to testify in an inconsistent manner. The balance of the statements made during the mediation, however, would not be subject to disclosure.

d. *Prevention of Manifest Injustice*

This is a general exception used to permit disclosure in extreme situations not covered by any of the other exceptions.

The Scope of the Exception

This exception would swallow the rule if it were construed too broadly. A confidentiality rule draws on different and competing concepts of justice, and it is no easy task to find what justice requires in a particular situation. Justice to the disputants, justice to affected third parties, and the need to maintain a just system of dispute resolution for the sake of other disputants in the future may all lead to different answers involving disclosure. If one focuses attention solely on the disputants, it may seem unjust to one of them to keep secret information that is revealed during mediation. If a party has been greatly embarrassed, socially shunned or has lost business customers because of the dispute, the mediation may reveal facts to repair the social and economic damage, but a party would not be able to disclose those facts without the agreement of the other party. If confidentiality prevents a court from arriving at a just result, the court will be tempted to invoke this exception. On the other hand, if a party has given the other party an explicit promise that the medi-

31 *See* C. MCCORMICK, EVIDENCE 230 (E. Cleary 3d ed. 1984).

ation will remain confidential, justice to the promisee—who relied on the promise in choosing to engage in the mediation—will speak quite strongly in favor of maintaining confidentiality.

Beyond protecting the parties to the mediation, it may seem quite unjust to identifiable third parties to withhold information that they could use to protect themselves from harm or economic disadvantage. If business competitors use mediation as an opportunity to restrain trade, for instance, justice may require that their customers know of the restraint.[32] A woman employee may seek to show that she was excluded from certain job assignments because of her sex. If the job assignments were made as a result of a mediated dispute about job assignments involving only male employees, the woman would need access to the mediation discussions to show discriminatory intent. Confidentiality may prevent a party from disclosing information that could help a child receive proper placement in school. It could also prevent a third party from learning about evidence that would be important to pursue or defend pending litigation.[33]

Despite the strength of these claims favoring disclosure, broad disclosure under this exception would weaken mediation. If confidentiality is not assured, people will not display the candor required to make mediation successful. Diminishing the availability and effectiveness of the practice of mediation would itself result in a form of injustice. Mediation serves justice. It is a system by which parties can reach a fair and just result to their dispute with less cost and aggravation than litigation. "Manifest injustice" must include consideration of just institutions, even when that may conflict with justice between the disputing parties or affected third persons. This problem illustrates the inevitable tension between fairness for particularly situated people and the

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[32] *See supra* note 5, at 12-13.

[33] The confidentiality rule would not prevent the third party from using ordinary methods of discovery to obtain the pertinent information, so long as the information was not limited to what transpired during the mediation. As a practical matter, however, formal discovery is expensive and time-consuming. Litigants must rely on tips and informal investigation to learn much pertinent information, and even to learn when formal discovery may be worth the cost. A criminal defendant does not have the same formal discovery methods available, and must rely on informal investigation to build a defense. Informal investigation would be foreclosed by mediation confidentiality.

need to serve justice by maintaining a system of uniform and objective rules.

This conflict leads to a series of questions that should be asked before deciding whether this exception applies. How serious is the harm that may befall third parties if the information is kept confidential? How likely is it to occur? Has the party seeking disclosure sought to obtain the other party's permission to disclose? What are the reasons that the non-disclosing party wishes to keep the information confidential, and how justifiable are they? What is the likelihood that the harm will be prevented, or that it can be recompensed by damages, punishment or otherwise, if it occurs? For instance, the harm may be a civil wrong subject to civil remedies. Is the information available through other methods? Would non-disclosure result in perjury or only in a contradiction between what was said in mediation and what is later said under oath? How critical is the information to another proceeding for which disclosure is sought? Is this the only information on the topic? Is it central to the resolution of the other issue? Did the disclosing party require an explicit and specific promise of confidentiality to induce him or her to speak? Is the information of a type often disclosed during mediation, and usually kept confidential? If the mediation is carried out by a mediation program, do the administrators of the program think that disclosure will jeopardize the effectiveness of the program? What are the reasons for their opinion? These questions are only illustrative. Disclosure will more likely be proper under this exception if the person who discloses has considered these or similar questions and has reached a reasoned judgment about them.

Under this section, a party is free to disclose if failure to disclose would permit a manifest injustice to occur. The party is left with the power to decide what would constitute manifest injustice, although the party may be subject to damages or other legal sanctions if he or she guesses wrongly about the existence of manifest injustice.

This provision could be rewritten to require a party to obtain judicial approval before disclosing a "manifest injustice." This would make it parallel to the manifest injustice exception for mediators and mediation programs. Without prior judicial approval, there is a danger that parties will use this exception for all sorts of disclosures. A party that improperly wishes to disclose

may mask the true reasons for disclosure claiming that manifest injustice requires disclosure. Such a claim would be hard to disprove. But this is not simply a problem of preventing fraudulent disclosures. Even a party that acts entirely in good faith may exercise flawed judgment in deciding whether manifest injustice requires disclosure. Unlike judges, the parties may have a financial, emotional, moral or other personal stake in the consequences of remaining silent that would make them less trustworthy to determine what constitutes manifest injustice. Requiring parties to seek permission from a court before they make disclosure under this section would act as a check on hasty and partially considered action.

On the other hand, the expense and delay of court proceedings provide reasons for permitting parties to exercise their own judgment about what constitutes manifest injustice. Why should we require a nonwealthy, morally sensitive party to spend substantial funds to hire a lawyer, on short notice, who will find a judge to do what is plainly morally correct? The answer to this dilemma seems to lie in one's expectations about how often parties will "abuse" this exception to confidentiality. If there exists a substantial risk, then it would be appropriate to filter the party's decision through a court. If no substantial risk exists, and if one sees a substantial risk that third parties will be harmed, *unless* there is quick disclosure by caring parties, then it would be appropriate to let parties act on their own.

These risks can be modified somewhat by related rules and practices. For instance, if parties are made liable in damages for disclosure when manifest injustice did not *in fact* require disclosure, the damage remedy may prevent excessive disclosure. Just as the threat of tort damages may lead people to act more reasonably, parties would think twice before disclosing if they knew that a wrong guess would subject them to liability. This could lessen the necessity of requiring court approval prior to disclosure.

But the argument in favor of requiring prior court approval can be similarly strengthened by paying attention to context. If parties lack the resources to hire a lawyer, they are still free to raise the issue with the mediator or the mediation program. Indeed, if a party thinks that disclosure is critically important, he can be expected to raise it in this way. The mediator or mediation program will probably have access to legal help, and will be

in a better position to invoke court assistance for disclosure. Disclosure will only be made if the party can convince the mediator or mediation program that disclosure is necessary, or if the party feels strongly enough about disclosure to hire a lawyer. In this way, the mediator or mediation program will act as the filter for the party's concern. This corrects the danger of skewed judgment that arises if disclosure is left entirely in the hands of the party, while at the same time, permits disclosure in cases where the injustice of remaining silent is truly "manifest."

This discussion may have refined the nature of the dilemma in choosing between party control over disclosure and prior judicial approval, but it has not resolved it. One's expectations about the relative risk concerning too much disclosure, or too little, will still determine the rule of choice.

e. *Disputes About the Agreements that Result from Mediation*

Successful mediation usually results in an agreement by the parties that resolves their dispute. If the parties subsequently become embroiled in a dispute over the implementation of the agreement, however, it may be necessary to disclose what occurred during the mediation to decide whether there has been compliance. The parties may disagree over whether they actually reached agreement, over what was included in the agreement, over what the agreement means, or whether their subsequent conduct complies with the agreement.

If the agreement was oral, determining what was said during the mediation may well be the only way to evaluate what the agreement means. The parties may have different recollections relating to statements and promises made during the mediation. Even if the agreement is reduced to writing, the parties may disagree over whether the written agreement includes everything agreed upon or over the meaning of the written words. Disclosure of what was said during the mediation may well be the best way to resolve such disputes.

A distinction should be made here between disclosure in the context of an adjudicative forum, such as a court, and disclosure elsewhere. In court, the parol evidence rule and rules of evidence may limit the extent to which evidence of oral communications can be used to describe the agreement of the parties or to

give meaning to written agreements.[34] This exception is not meant to authorize disclosure when such rules prohibit it. But if disclosure is made outside of an adjudicative proceeding, this exception authorizes disclosure regardless of the parol evidence rule. For instance, the parties may mediate their subsequent dispute about the meaning of the agreement that resulted from their first mediation. If disclosure of the first mediation is relevant to determine meaning, the parties could disclose during the second mediation, regardless of the limitations imposed by the parol evidence rule. This is similar to the practice of using evidence of negotiation history to determine the meaning of collective bargaining agreements, even if the agreement resulted from mediation.[35]

Note, however, that this exception only applies to disclosure by the parties to the negotiation. It does not authorize or require the mediator or the mediation program to disclose what the parties or others said or did during mediation. If one were to adopt the argument that the mediation belongs to the parties and the mediator should be required to disclose so long as the parties agree to disclosure, then this limitation would not apply. Disputes between the parties about the agreement resulting from mediation automatically make the mediator subject to disclosures about what occurred during the mediation. Even if this limitation applies, however, the mediator or mediation program are still free to agree to disclosure.

f. *Disclosure Required by Statute*

This exception permits the legislature to create specific exceptions to the confidentiality rule as it sees fit. An example is the New Jersey statute[36] which requires that evidence of child

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[34] Generally, the parol evidence rule bars the use of prior or contemporaneous oral statements to modify the meaning of a written agreement, particularly when the parties intend the written agreement to be a complete statement of their agreement. Such statements may be admitted into evidence, however, to resolve an ambiguity in the written agreement or, in some jurisdictions, to aid in understanding language in the written agreement that is reasonably susceptible to differing interpretations. *See* RESTATEMENT (SECOND) OF CONTRACTS § 214(c) comment b (1981).

[35] *See* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 357 (1985).

[36] N.J. STAT. ANN. § 9:6-8.10 (West 1976 & Supp. 1988) requires prompt reporting by any person having reasonable cause to believe that a child has been subjected to child abuse. That statute does not explicitly apply to mediators, and it

abuse be reported to the appropriate governmental authorities. This statute applies to a mediation party and requires disclosure of evidence of child abuse that is revealed during a mediation. The so-called "sunshine laws,"[37] requiring that certain government proceedings be conducted in public, may also limit the circumstances under which a public entity may mediate a dispute and hold the mediation confidential under the symposium rule.

The rules of procedure and rules of evidence are not the kind of statutes that authorize disclosure under this exception. Both the rules of procedure controlling discovery and the rules of evidence specify large categories of evidence that may be disclosed. The symposium rule has protections from disclosure of mediation documents and communications.

g. *Enforcement of Agreement to Mediate*

If the parties have an agreement requiring them to mediate their disputes in good faith, it may become necessary to examine whether they have complied with the good faith requirement. In most instances, we would expect that the breach of an agreement to mediate would take the form of a refusal even to appear at a mediation session. Proving such a breach should not generally require disclosure of what transpires during the mediation. A more clever opponent, however, could sabotage the agreement to mediate by appearing, but then refusing to participate by remaining silent during the mediation or by making only outrageous demands. The other party must disclose these facts to show that the opponent has breached the agreement.

The panel did not discuss what constitutes a breach of an agreement to mediate, or the extent of disclosure that would be

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might be argued that the statute does not override a contrary privilege of confidentiality. While there are no cases on point, it is not clear that the statute takes precedence over the attorney-client privilege. It probably does not require a lawyer to breach attorney-client privilege to disclose a client's admission of past child abuse. If it did, no lawyer could effectively defend a guilty party accused of child abuse. During its discussion, the panel assumed that parties to a mediation would have to disclose admissions of child abuse by virtue of the state disclosure statute.

[37] N.J. STAT. ANN. §§ 10:4-1 to -21 (West 1976 & Supp. 1988), requires that much public business be conducted in public, but permits private meetings in a number of circumstances, including collective bargaining negotiations, discussions of pending or anticipated litigation and employment matters. These are situations in which mediation might be particularly useful. This statute does not pre-empt the confidentiality imposed by the symposium rule in these kinds of disputes.

relevant to the enforcement of such agreement. This exception should not apply to a breach of a simple agreement to mediate, but only to an agreement that explicitly requires the parties to mediate in good faith. A simple agreement to mediate should not be interpreted to include by implication an unstated agreement to continue mediation in good faith even if one of the parties arbitrarily decides that mediation is a bad idea and should be avoided.

There are practical reasons not to interpret a simple agreement to mediate to include a commitment to continue mediation in good faith. Parties cannot be usefully forced to continue mediation against their will once they have decided to stop because successful mediation requires willing parties. If simple agreements to mediate are construed to include an implied requirement to continue mediation in good faith, the party wishing to stop will be subjected to a real danger of being the victim of disclosure and harassing litigation by the opposing party. Whenever a party resists further mediation, the opposing party can threaten to sue for breach of the implied requirement of good faith continuation, claiming that the first party's effort to stop is made in bad faith and is unreasonable. If the first party revealed confidential matters during the truncated mediation, he will be faced with a difficult choice. He could continue the mediation against his will, no matter how good were his reasons for stopping, or he could find his confidential mediation statements spread over the court record as the other party seeks to prove that his desire to stop mediation is in bad faith. Faced with this risk, the party seeking to end mediation may try to avoid the disclosure altogether by giving in to the other party and ending the underlying dispute.

Professor Green argues, to the contrary, that it is more appropriate to impose on the parties an implied requirement that they act reasonably and in good faith in continuing to mediate.[38] While there may be a danger that parties will use such claims of breach in a strategic manner, to bolster their bargaining power in the underlying dispute, this danger appears insufficient to him to justify giving up the benefits of forcing parties to continue their mediation in good faith. Professor Green's experience as a medi-

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[38] *See supra* note 7.

ator and as a scholar of mediation makes this a powerful point. Even if it is true that an adversarial lawyer, not interested in fostering mediation, could distort the rule by using it for a client's strategic advantage, this danger faces any rule that is meant to support mediation. If the danger seems more substantial in this context than it does to Professor Green, then care should be taken in describing the scope of a legally enforceable duty to continue mediation.

h. *Disclosure of Agreement Required by Law*

Sometimes the law will require that the agreement resulting from the mediation be disclosed, even if the mediation discussions leading to the agreement remain confidential. This exception permits such legal requirements. It only requires the disclosure of the agreement that resulted from mediation, not any information from the mediation itself.

The exception is primarily directed towards the disclosure of so-called "Mary Carter Agreements."[39] These are agreements made between adversaries in a multi-party litigation by which the adversaries agree to settle with a contingency. The contingency is that the amount of the settlement will vary with the size of the judgment obtained from the nonsettling party. The potential unfairness of such agreements arises from the fact that they are kept secret from the nonsettling parties even though the settling parties remain in the case. The settling parties have a strong reason to distort their presentation of evidence, thus placing the major financial burden on the nonsettling parties. Therefore, if the agreement remains secret, the nonsettling parties will not be able to counteract the distortion and the judgment of the trier of fact may be skewed. The plaintiff may pull punches against the secretly settling defendant in order to place greater liability on the nonsettling defendant. Some courts have required disclosure of such secret agreements.[40] This exception preserves such hold-

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[39] "Mary Carter Agreements" are named after Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. Dist. Ct. App. 1967), which required plaintiff's settlement agreement with one co-defendant to be disclosed because the agreement specified that the amount of the settlement would vary depending on how much plaintiff recovered from the other defendant. The settling defendant remained in the case in a position to help the plaintiff increase the size of the jury award against the nonsettling defendant.

[40] *See* Ratterree v. Bartlett, 238 Kan. 11, 707 P.2d 1063, 1074-75 (1985). New Jersey does not have a firm rule on the issue. In Wyatt by Caldwell v. Wyatt, 217

ings, and permits other courts to adopt such a rule if they see fit.

2. Disclosure by the Mediator or Mediation Program

a. *Agreement of the Parties and the Mediator or Mediation Program*

The parties may disclose if they agree to do so, but their agreement cannot bind the mediator or the mediation program to disclose. However, if the mediator or mediation program also wishes to agree to disclosure, there is no reason why the rule should prohibit it. This protects mediators and mediation programs from spending time and energy to participate in proceedings in which disclosure is made, such as trials and pre-trial discovery. It also prevents the loss of the image of impartiality that may accompany testimony by the mediator regarding what occurred during the mediation.

This exception gives mediators and mediation programs two options if they wish to disclose more than what is automatically permitted by the symposium rule. First, they can specify that the mediation is *not* being conducted pursuant to the symposium rule. Second, they can elect to proceed pursuant to the symposium rule, but explicitly agree with all the parties that certain things will be subject to disclosure by the mediator or mediation program.

The latter method provides more assurance of confidentiality. Under it, the confidentiality provisions of the symposium rule, and the exceptions, would continue to apply except for those issues which the parties and the mediator and mediation program agree are subject to disclosure. If they choose the former option of avoiding the symposium rule altogether, the parties and the mediator and mediation program would be left to

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N.J. Super. 580, 526 A.2d 719 (App. Div. 1987), the court held that the fact that plaintiff had settled with a third party that was peripherally involved in the incident, but was not a party to the lawsuit, could be introduced at trial, but under the facts of that particular case admission of the evidence was improper because prejudice to the plaintiff outweighed the probative value of the evidence. In Tramutola v. Bortone, 118 N.J. Super. 503, 288 A.2d 863 (App. Div. 1972), *modified on other grounds*, 63 N.J. 9 (1973), the court held it was not error to keep confidential the fact that the plaintiff had settled with one of the defendants near the end of the trial. Strictly speaking, this was not a "Mary Carter Agreement," because the amount of the settlement did not depend on the recovery to be obtained from the nonsettling defendant, thus reducing the risk of prejudice.

common law or other rules for a determination of what aspects of the mediation proceedings were to remain confidential. Furthermore, if the parties and the mediator and mediation program agree to be covered by the general rule of confidentiality, but to use this exception for disclosures, they would be free to agree to reach an agreement about disclosure at a later time. Subsequent events can make disclosure desirable, even if the parties preferred confidentiality when they began the mediation.

This exception could be particularly helpful for programs in which mediation efforts are mixed with evaluation and recommendation procedures. For instance, there are "mediation" projects in which intake workers screen disputants when they enter the court system. They recommend further steps to the court based on the screening. The screening sessions provide a good opportunity for some mediation, to see if the parties can reach agreement without further proceedings. Under this exception, the program could agree with the parties that the mediation would be confidential, except that the mediator who does the screening would be free to report pertinent information learned from the mediation sessions to other court personnel for appropriate further action.

b. *Legal Claims Against the Mediator or Mediation Program*

This exception requires the mediator or mediation program to disclose if a party has sued them. In a suit against the mediator or mediation program, the mediator or mediation program would be subject to the generally applicable rules of evidence and pre-trial discovery. They could not avoid disclosure by invocation of the symposium rule.

It may be more appropriate to broaden this exception to include claims made *by* the mediator or mediation program, as well as claims made against them. This would permit them to disclose what transpired in mediation if it is relevant for collecting a fee, for obtaining damages for defamatory statements by parties who had used the mediator or mediation services, or for an action to bar a party from making a wrongful disclosure. The language of such a variation could be: "the mediation communication or mediation document is relevant to claims arising out of the conduct of the parties, the mediator or the mediation program during the

mediation, including claims for fees for conducting the mediation."

c. *Prevention of Manifest Injustice*

Under this exception, unlike exception 4(a)(4) of the symposium rule applying to parties, the mediator may not rely on his own judgment to disclose but must seek a prior determination from a court.

The panel did not discuss whether the mediator or mediation program is free to keep matters confidential by deciding not even to seek a judicial determination on this question. While a mediator or mediation program cannot disclose without a court order, they might be required to seek a court ruling whenever a reasonable mediator or mediation program would have sought a ruling under the similar circumstances. Alternatively, the mediator or mediation program might be free not to seek a ruling, even if the facts seem to cry out for disclosure. The question of whether a mediator or a mediation program has an obligation to seek a ruling is an issue relevant to the scope of liability of mediators and mediation programs. The symposium rule does not address the question of liability in general, and thus does not speak to this part of the issue.

d. *Disclosure Regarding the Existence or Meaning of the Agreement Resulting from the Mediation*

This exception differs from symposium rule section 4(a)(5) in that this exception requires *all* parties to agree that the mediator or mediation program should disclose before they will be required or permitted to do so. Under exception 4(a)(5), when a party is seeking disclosure from another party only, not from a mediator or mediation program, his unilateral disclosure demand is sufficient. Unlike exception 4(b)(1) which authorizes mediator disclosure, the agreement of the mediator or mediation program is *not* necessary where the parties unanimously agree to disclose. In this instance, the joint interest of the parties in obtaining the best evidence about the existence or meaning of their agreement is preferred over the mediator's or mediation program's interest in avoiding the costs of disclosure. Because the parties to the mediation must agree to disclosure by the mediator

or mediation program before this exception applies, the interest of the mediator or mediation program in preserving the appearance of neutrality is not badly jeopardized by disclosure.

In the case of *NLRB v. Joseph Macaluso*,[41] the NLRB refused to enforce a subpoena issued to the mediator to have him testify as to whether the parties had orally agreed to the terms of a collective bargaining agreement. The court affirmed the NLRB's action, holding that the interest of the Federal Mediation and Conciliation Service, which had supplied the mediator, in preserving the mediator's appearance of neutrality prevailed over the desire of the company to have the mediator's evidence. The *Macaluso* opinion does not state whether all the parties agreed to disclosure by the mediator, or whether the company sought disclosure on its own, without agreement from the union. If the latter, then this exception would not apply and the mediator would be free to resist disclosure. If both of the parties agreed to have disclosure from the mediator, however, this exception would apply and the mediator could be required to disclose.

III. Other Issues and Concerns

A. *Research*

Sound and extensive research is critical for the continued growth and effectiveness of mediation. A general rule of confidentiality could hinder research. A comprehensive research effort requires a close look at what actually occurs in mediation sessions, both to determine the characteristics of parties, mediators and methods that may lead to successful resolutions, and to answer difficult questions about the fairness of the process and the reasonableness of its outcomes. Broad confidentiality could prevent researchers from gaining access to mediation sessions, or even from questioning participants about what occurred.

However, the symposium rule provides an opportunity for such research. Disclosure to the researcher is permissible under exceptions 4(a)(1) and 4(b)(1) if the parties and the mediator or mediation program so agree. The parties and the mediator or mediation program can stipulate the limits of disclosure, thus

[41] 618 F.2d 51 (9th Cir. 1980).

preserving confidentiality to the extent disclosure is not necessary for the research plan. This method of permitting research seems preferable to trying to draft an additional general exception for researchers because it provides more flexibility, both to the participants in the mediation and to the researchers.

B. *Liabilities and Immunities of Mediators and Mediation Programs*

The symposium rule does not explicitly create any legal liability or immunity for mediators or mediation programs, but it does have an indirect impact on liabilities or immunities that may have their source elsewhere in the law. There are three different facets to the connection between liability and the symposium rule: when the mediator or mediation program follows the commands of the rule, when the mediator or mediation program disobeys the commands of the rule, and when the mediator or mediation program acts or fails to act within the scope of the rule.

If mediators or mediation programs keep matters confidential in accordance with the symposium rule, they should not be liable for any harm caused by their obedience. The symposium rule does not explicitly grant them freedom from liability, but the rule would be gutted if they could be subjected to damages or other relief for obedience to its commands. Although the symposium rule's exceptions provide for disclosure in many of the situations in which disclosure could prevent harm, confidentiality not covered by any of the exceptions might also result in harm. Such injury could give rise to suits against mediators or mediation programs for failure to disclose. During the mediation a party may admit information that is relevant to a suit involving that party and a third party. If none of the exceptions to the symposium rule apply, the mediator and mediation program would be barred from disclosing the information, even if confidentiality causes the third party to lose the lawsuit for lack of information. The mediator or mediation program should not be liable to the third party for loss of the lawsuit if the symposium rule is to have any effect.

If the mediator or mediation program *discloses* information that should have been kept confidential, a party harmed by the disclosure can sue. The symposium rule does not establish

whether the mediator or mediation program would be liable for the harm caused in that situation. The injured party might be able to characterize the disclosure either as a tort or as a breach of contract, however, and thus obtain relief. To establish a tort, the harmed party would argue that the rule creates in the mediator or mediation program a duty of care to keep matters confidential. The breach of that duty should then, as a matter of common law, give rise to a tort action for damages. Alternatively, the injured party could argue that the mediator or mediation program agreed to keep matters confidential in accordance with the rule when the agreement to mediate was made. Disclosure would be a breach of that agreement. The symposium rule neither authorizes nor bars such legal actions. Whether they should be permitted is a matter for each state to decide as a matter of its common or statutory law.

The more troublesome area is the exceptions to the symposium rule. For the most part, the exceptions merely permit disclosure; they do not require it. Whether the mediator or mediation program chooses to disclose or not, if the choice causes harm, the mediator or mediation program might be subject to suit for the harm caused by the choice. One could construct a separate rule of liability for such situations, making the mediator or mediation program liable if the harm was foreseeable, for instance, or if a reasonable mediator or mediation program would have disclosed or not, as the case may be. As an alternative, special immunity rules can be created for mediators and mediation programs, granting absolute immunity for any harm caused by their decision about disclosure, or granting them qualified immunity unless their decision about disclosure was motivated by malice or was flagrantly unreasonable. The symposium rule, however, does not create any liability or immunity in this situation.

CONFIDENTIALITY IN MEDIATION: AN ANNOTATED BIBLIOGRAPHY

Allison, *Mediation and Legal Problems*, 60 FLA. B.J. 15 (1986).

The absence or minimal nature of case law is a common theme throughout articles on confidentiality which discuss state confidentiality statutes and rules of evidence related to mediation. Centering about three considerations related to the establishment of a mediation program—confidentiality, the enforceability of agreements and quality control (the selection and training of mediators)—the author discusses the Florida Confidentiality Statute of 1985 and remarks that there has been no significant case law interpreting the measure.

Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comment*, 17 FAM. L. Q. 461 (1984).

The author reviews the Standards of Practice, Family Law Section of the American Bar Association, including Standard II—Confidentiality ("the mediator shall not voluntarily disclose any information obtained through the mediation process without the prior consent of both parties"). Particular emphasis is given to Specific Consideration A, mandating that the parties to a mediation agree in writing to require the mediator to withhold from third parties all statements made in the course of mediation. The author concludes that, above all, mediators must ensure that the parties have no false expectations about what statements made in mediation can and cannot be used in a court in the event that the parties fail to achieve a settlement.

Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731 (1984).

The author discusses the fiduciary duties of mediators and effectively distinguishes them from the obligation of mediators to maintain confidentiality.

Comment, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733 (1984).

An analysis of a statute enacted in California during 1980 which requires mediation in disputes concerning child custody or visitation, this comment covers many issues related to the scope, terms and underlying rationale of the legislation. The writer points out that while the statute contains language intended to ensure that mediated sessions and communications between parties and mediator are to be kept pri-

vate and confidential, the privilege of confidentiality extended under the law may be conditional rather than absolute. That is, a mediator's recommendation regarding custody made to a court, if held to be conditionally privileged, will yield to a due process right of cross examination. Confidentiality would, as a result, be seriously compromised. Insisting that this situation can be obviated if the mediator refrains from making recommendations in custodial matters, the author maintains that the mediator's purpose is to facilitate a solution rather than to formulate a recommendation. She recommends, therefore, that the law be amended to prohibit a mediator from making a custodial recommendation to a court. Confidentiality would thereby be protected by eliminating the possibility of cross examination.

Coombs, *NonCourt-Connected Mediation and Counseling in Child Custody Disputes*, 17 FAM. L. Q. 469 (1984).

Because of the recent emergence of mediation concerning divorce and child custody, the writer believes that the privilege of confidentiality extended to attorneys representing clients may not be as readily granted by the courts to attorneys acting as mediators. To protect confidentiality, the author notes that it is the practice of some attorneys to have their clients sign agreements stating that mediation sessions are confidential.

Egle, *Divorce Mediation: An Innovative Approach to Family Dispute Resolution*, 18 LAND & WATER L. REV. 693 (1983).

Focusing on factors involved in the decision to mediate as well as potential problems and conflicts likely to be faced by the attorney-mediator, the author emphasizes that the assurance of confidentiality is crucial to family dispute resolution. He takes an expansive view of Federal Rule of Evidence 408 and argues that it "guarantees the confidentiality of the mediation process."

J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984).

This is the most thorough treatment of mediation examined in the course of preparing this bibliography. Confidentiality in mediation is but one of many subjects in the field of mediation, yet the authors give it proper weight and thoughtful analysis. A particularly fine discussion of statutory, common law and testimonial privileges precedes a review of key cases and the role of statutes and court rules in defining the extent to which communications are protected from disclosure in court. The authors focus not on the need for confidentiality, but rather on the

different ways in which and extents to which confidentiality can, should and should not be secured. This section on confidentiality, taken together with articles by Hoxie, Freedman and Rice, form a core set of readings which greatly facilitate an understanding of the philosophical and legal issues characterizing confidentiality in mediation.

LEGISLATION ON DISPUTE RESOLUTION (L. Freedman ed. 1985).

A compilation of proposed and enacted federal and state legislation concerning mediation, this volume reproduces legislative efforts in such areas as the establishment of mediation programs, rules of evidence relating to compromise offers and to certification of mediators. The work is particularly helpful for examining evidentiary rules throughout the nation and the manner in which individual states have sought to broaden or narrow Federal Rule of Evidence 408, a central concern of literature on the confidentiality of mediation.

CONFIDENTIALITY IN MEDIATION (L. Freedman, C. Haile & H. Bookstaff eds. 1985).

This is the best single source for materials concerning confidentiality in mediation. Containing the most thoughtful and important articles written to date regarding the subject (some of which are discussed elsewhere in this bibliography), this volume also includes copies of legal briefs and motions filed in the few leading cases which have been decided in the area of confidentiality. The articles deal extensively with criminal, family and environmental mediation and explore Federal Rule of Evidence 408 as well as state rules of evidence pertaining to compromise offers. Articles of particular interest to those embarking on a study of confidentiality in mediation are *Confidentiality: A Closer Look* by Lawrence Freedman and *Mediation Confidentiality: The Need for Protection and its Limits* by Timothy Hoxie. The Freedman entry presents an especially helpful discussion about current case law and statutory schemes concerning confidentiality throughout the United States.

Gold, *Mediation in the Dissolution of Marriage*, 36 ARB. J. 9 (1981).

This article presents a useful, albeit brief, overview of the role of mediators in divorce proceedings. The author discusses seven fundamental principles of divorce mediation, the last of which is the guarantee that mediation sessions be confidential. The author maintains that a mediator must not be called upon to testify in a court proceeding and that a party to mediation should be prohibited from using information gained in a mediated proceeding against the other party in court.

S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION (1985).

This comprehensive work has within a short time become one of the central overviews of alternative dispute resolution. It does not contain an extensive discussion of confidentiality.

Halperin, *The Mediation Alternative is Gaining Support in Colorado*, 13 COLO. LAW. 589 (1984).

A discussion of the Colorado Dispute Resolution Act, which became effective on July 1, 1983, this article reinforces the prevailing notion that, where a state's confidentiality statute has not been specifically upheld in the courts, confidentiality should be required in a contract executed before mediation sessions take place. The author maintains that the confidentiality shield is not absolute in Colorado and that uncertainty as to the extent of protection reinforces the need for attorney-mediators to take appropriate steps to promote the confidential nature of mediation sessions.

Kilpatrick, *Should Mediators Have a Confidentiality Privilege?*, 9 MEDIATION Q. 85 (1985).

The article presents a thoughtful treatment of arguments supporting and opposing the establishment of a confidentiality privilege for mediators, that is, a privilege against testifying in court regarding a mediation which fails to produce a settlement. The author concludes that a privilege is appropriate but that it must be limited to protect the public from mediators who in their professional capacity may have committed criminal acts, conspired with others to use information obtained during mediation for personal gain or acted in other ways contrary to public policy. The need for a privilege of confidentiality is then analyzed and supported in terms of four criteria advanced by Professor Wigmore to justify privileged communications.

Liepmann, *Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?*, 14 B.C. ENVTL. AFF. L. REV. 93 (1986).

The article concerns the arguments for and against granting environmental mediators a testimonial privilege. The author concludes that a common law privilege should be available for environmental mediators, the practitioners of which are distinguished from those of other areas of mediation in part because the opposing parties (such as governmental agencies and utilities) have ongoing relationships which will presuma-

bly survive a particular mediated dispute. The author gives special attention to the leading cases affecting environmental mediation, and concludes that, despite the judicial result therein favoring mediation, the holding is too narrow to serve as the basis for a common law privilege for environmental mediators.

McCrory, *Environmental Mediation—Another Piece for the Puzzle*, 6 VT. L. REV. 49 (1981).

The author surveys the field of environmental mediation and finds that confidentiality is as fundamental to this area as it is to other fields in which mediated settlements are achieved.

Mc Guinness & Cinquegrana, *Legal Issues Arising in Mediation: The Boston Municipal Court Mediation Program*, 67 MASS. L. REV. 123 (1982).

The article primarily addresses the manner in which the mediation process affects constitutional rights. Confidentiality is among the non-constitutional legal issues considered and the authors discuss the limitations of Federal Rule of Evidence 408 (and the then proposed identical Massachusetts Rule of Evidence 408) with regard to the issues in criminal mediation arising under the Boston Municipal Court Program. Rule 408 affords no protection against the use of statements made in unsuccessful mediation sessions against disputant-defendants in later criminal proceedings. The authors conclude that the mediator and disputants should sign an agreement to mediate containing promises not to reveal statements made during mediation. A further consideration discussed is whether a mediator's promise to ensure confidentiality embraces information learned in connection with the commission of a crime.

McIsaac, *Confidentiality: An Exploration of Issues*, 8 MEDIATION Q. 57 (1985).

The article begins with a discussion of the concepts of limited and absolute privileges and proceeds to a review of the absolute privilege established in California for reconciliation and mandatory mediation of custody disputes. McIsaac demonstrates, however, that the absolute privilege contemplated in California is considerably less than that. Examining the Confidentiality and Local Rules of the Los Angeles Superior Court, the author argues that both protect the integrity of the mediation process. McIsaac then makes explicit that which can be inferred from the writings of virtually everyone contemplating the link

between mediation and confidentiality—"Respect for the confidentiality of the mediation process is ultimately respect for mediation itself."

Note, *Family Law—Attorney Mediation of Marital Disputes and Conflict of Interest Considerations*, 60 N.C.L. REV. 171 (1981).

Focusing on whether lawyers are suitable mediators in marital disputes, the author considers the reasons associated with the traditional reluctance of attorneys to involve themselves in mediation. Among the factors is that of concern for ethical considerations such as possible conflicts of interest posed by Disciplinary Rule 5-105 in relation to the representation of multiple clients. The author contends that the presence of an opposing party during a communication raises a presumption that the communication was not intended to be confidential. This presumption can be rebutted by demonstrating that the other client intended that his or her statement be confidential. Ethical canons and disciplinary rules directly concerning confidentiality are also discussed.

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

This entry offers one of the best and most succinct treatments of confidentiality available and can serve as the basis for further study of the major issues related to mediation and confidentiality. A thoughtful, balanced appraisal of the nature of mediation and its relation to confidentiality, the discussion embraces protections available under common law and those afforded under the Federal Rules of Evidence. The author also considers contractual means of excluding the use of confidential information in judicial proceedings, and he is one of the few to observe that written agreements prohibiting testimony regarding a mediation might prove to be void as against public policy in the absence of a statute making such arrangements legal. Proceeding to a general evaluation of recently enacted legislation to enhance confidentiality, the author finds that even the most comprehensive statutes exclude the admission of parol evidence. The article concludes with a discussion of the need for a mediator's privilege and it is asserted that confidentiality is of such overriding importance to mediation that any such privilege should be as broad as possible.

Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System—An Overview and Legal Analysis*, 29 AM. U.L. REV. 17 (1979).

Confidentiality consists really of two issues—whether information derived from mediation sessions may be used thereafter in court and

whether records of those sessions may be examined by the public. The author makes this distinction clear and argues that legislation is the only effective means of ensuring that confidentiality in both guises is absolutely protected. He also maintains, however, that such protection is nowhere absolute and is in fact dependent upon the facts of each case. Section E of the Rice article is reprinted in Freedman, Haile & Bookstaff, *Confidentiality in Mediation: A Practitioner's Guide.*

Rigby, *Alternative Dispute Resolution*, 44 LA. L. REV. 1725 (1984).

An overview of alternative dispute resolution processes, this article is of particular interest because of its emphasis on the advantages and disadvantages of mediation over adjudication. The fifth listed disadvantage of mediation (of five listed) centers about the potential use of admissions. Concern that failure to achieve a mediated settlement may result in litigation is a central issue in discussions of confidentiality, for commentators regard the admission of mediated discussions into evidence as a development which could greatly impair the trust and candor on which mediation depends.

N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW (1987).

This comprehensive book contains an extensive chapter on confidentiality, discussing both theoretical issues and cases.

Zumeta, *Mediation as an Alternative to Litigation in Divorce*, 67 MICH. B. J. 434 (1983).

After discussing procedures involved in mediating divorce cases, the author considers problems and limitations associated with divorce mediation. These include ethical constraints on dual representation and whether ethical considerations effectively regulate non-lawyer mediators. With reference specifically to confidentiality, the author maintains that "[m]ediators recognize that the chances for success of mediation are much greater if the parties know that what they say in the sessions will not prejudice them later."

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON DISPUTE RESOLUTION REPORT TO THE HOUSE OF DELEGATES*

Recommendation

BE IT RESOLVED, that the American Bar Association supports in principle the enactment of legislation or court rules which safeguard, with appropriate exceptions, confidentiality in mediation.

BE IT FURTHER RESOLVED, that the American Bar Association endorses the following model provision on confidentiality in mediation and urges its adoption as a statute or court rule by state and local jurisdictions:

1. Definitions. As used in this statute/rule:

(a) "Mediation" is the use of a neutral third person by disputing parties to help them reach a resolution of their dispute. For purposes of this statute/rule, a mediation commences at the time of initial contact with a mediator or mediation program.

(b) A "mediator" is a person who performs mediation.

(c) A "party" is a mediation participant other than the mediator and may be a person, public officer, corporation, association, or other organization or entity, either public or private.

(d) A "mediation program" is a plan or an organization through which mediators and/or mediation may be provided.

(e) A "mediation communication" is any communication or behavior in connection with a mediation by or between any party, mediator, mediation program or any other person present during a mediation session other than a party or mediator.

(f) A "mediation document" is any written material, including copies thereof, prepared for the purpose of, or in the course of, or pursuant to, a mediation, including but not limited to, memoranda, notes, files, records and work product of a mediator, mediation program or party, except that it shall

* This model statute is still being considered by the ABA, has not been approved by the House of Delegates or the Board of Governors, and, until so approved, does not constitute the policy of the ABA.

not include (1) agreements by the parties which specify that they may be disclosed or enforced, or (2) summary records of a mediation program necessary to evaluate or monitor the performance of the program.

2. General Rule. Except as otherwise provided by this statute/rule, all mediation documents and mediation communications are privileged and confidential and shall not be disclosed. They are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding.

3. Public Record. No part of the proceedings of a mediation shall be considered a public record.

4. Exceptions. There is no privilege and no restriction on disclosure under this statute/rule if:

(a) All parties consent in writing to disclosure;

(b) The mediation communication or mediation document is sought to be used in an action for damages against the mediator or mediation program arising out of the particular mediation, but only to the extent the communication or document is used for the purposes of said claim; or

(c) The mediation communication or mediation document is required to be disclosed by any of the following statutes or regulations, but only to the extent, and for the specific purpose, the communication or document is required to be disclosed: [child abuse, attorney conduct, etc.]

Commentary

This model provision is designed to be adopted by jurisdictions either as a statute or, where appropriate, as a court rule. A description of the individual paragraphs of the provision follows:

1(a). The definition of "mediation" is a broad one, and is designed to include all negotiations involving the assistance of neutrals where the third-party functions to assist the disputants in resolving their dispute. This definition would include the broad range of mediation programs presently in operation including community mediation programs, settlement panels, etc. The definition is not designed to encompass adjudicatory processes such as arbitration, where the third-party imposes a solution upon the disputing parties. In order to extend protection to initial contacts made with a mediation program (where, in many contexts, extensive information is communicated), the defi-

nition makes clear that a mediation commences for purposes of the statute/rule at the time of initial contact by the disputant.

1(c). The definition of "party" is similarly designed to be as broad as possible and can include individual persons as well as corporations or other entities in both the public and private sectors.

1(e). The definition of "mediation communication" is designed to include not just communications, but also behaviors. Since mediation is an informal process which encourages candor by the disputants, protection of behaviors as communication is essential to allow the process to operate at its maximum potential. For example, the nonverbal conduct of a disputant in reacting to a statement made in the mediation session is protected to the same degree it would if made in the form of a verbal communication.

In order to be included within the definition, the communication (or behavior) must be made "in connection with a mediation." This definition does not restrict itself to communications made during a formal mediation session, but rather includes communications generated outside the session but directly related to the mediation. For example, a communication by a party to another party in a multi-session mediation, which communication occurred between sessions but was related to the subject of the mediation, would be included within the definition.

In furtherance of the purpose of broad protection, communications involving mediators, mediation programs and others present during the mediation, if generated in connection with the mediation, are also protected.

1(f). Similarly, the definition of "mediation document" is broadly inclusive and is designed to include documents which are presented by parties during the course of a mediation, or which are prepared in connection with the mediation, whether or not they are prepared during the mediation itself. For example, in a multi-session mediation, a working paper prepared by one party between sessions would be included within the definition. The definition excepts agreements by the parties which specify that they may be disclosed or enforced in order to facilitate enforcement of written agreements reached by disputants as a result of

mediation, and also to facilitate disclosure of documents by parties where there is agreement to do so.

The definition also excepts from coverage summary records of a mediation program necessary to evaluate or monitor the performance of the program. This exception envisions records which are not specific as to identities of disputants but which may be useful in evaluating how well the program is functioning, and for which some disclosure may be required by law. This exception reflects a policy choice to facilitate evaluation, and hopefully improvement, of mediation programs throughout the country.

2. The general rule for confidentiality extends a privilege to all mediation documents and mediation communications as defined. The privilege prohibits not only admission into evidence of the communications or documents, but also applies to disclosure by any other process or through discovery. However, the protection afforded by the general rule does not extend to the underlying facts: rather, only the communications, behaviors and documents generated in connection with the mediation are protected. Thus, otherwise discoverable facts, communications or documents, cannot be immunized from disclosure by being incorporated into mediation communications or mediation documents, and are admissible into evidence and subject to discovery as otherwise provided by law.

A policy choice was made to make the privilege non-specific as to who can assert it. Thus, although the mediation process is designed to resolve the parties' dispute, any person participating in the mediation can raise the privilege with respect to communications and documents which come within the rule. Mediators, mediation programs, parties and others present during the mediation session will not be required to submit to process requiring disclosure of protected materials which are generated in connection with a mediation.

3. Mediation is a private dispute resolution modality. This provision will distinguish mediation proceedings from most adjudicatory processes, whose hearings are public and whose files, unless sealed or otherwise protected from disclosure, are public as well.

4(a). This provision provides an exception to the privilege and restriction on disclosure if all parties to the mediation con-

sent in writing to disclosure. In empowering only the parties to permit disclosure of otherwise confidential communications or documents, the Committee was cognizant of the claim that requiring disclosure by a mediator might impair the mediator's reputation for neutrality. However, by limiting the disclosure to situations where the parties unanimously desire the disclosure, the Committee believes that problems of perceived mediator neutrality are obviated. The process of mediation is designed to empower the parties to resolve their own dispute, and if they wish to have disclosed communications or documents generated in connection therewith, they should be able to do so. In practical effect, there should rarely be occasion for mediators to have to testify under this exception, since the parties themselves should be able to provide whatever testimony is necessary to prove the particular facts involved.

4(b). This exception was felt to be necessary in order to prevent mediators or mediation programs from seeking to prevent disclosure in order to shield themselves from liability for their conduct in the mediation. To assure that this exception is not used as a pretext for otherwise prohibited disclosure, the disclosure under this exception is limited to the purposes of the claim for liability.

4(c). There are a number of statutes and regulations in most jurisdictions which embody public policy in favor of disclosure of otherwise privileged communications by certain persons such as physicians, attorneys and the like. For example, in many jurisdictions evidence of child abuse must be disclosed to appropriate authorities even where the person with the reporting responsibility has received the information in a context which would otherwise be privileged. Similarly, the Rules of Professional Conduct require attorneys to disclose information in certain contexts which could require attorneys who participate in mediation to disclose communications which would be privileged under the general rule. Other examples would be required reporting of program results or intent of participants to commit a future crime.

This provision is drafted so that individual jurisdictions can insert appropriate expressions of public policy which are deemed to override the general rule of confidentiality of mediation and which are tailored to the particular jurisdiction. Similar to sub-

paragraph (b), the disclosure of any communication or document permitted by this exception would be limited to the specific purpose and to the extent that it is required to be disclosed by the favored expression of public policy.

SYMPOSIUM RULE: CONFIDENTIALITY IN MEDIATION

1. *Definitions.* As used in this statute/rule:

(a.) "Mediation" is the deliberate and knowing use of a neutral third person by disputing parties to help them negotiate a resolution of their dispute. For purposes of this statute/rule, a mediation commences at the time of initial contact with a mediator or mediation program.

(b.) A "mediator" is a person who performs mediation.

(c.) A "party" is a mediation participant other than the mediator and may be a person, public officer, corporation, association, or other organization or entity, either public or private.

(d.) A "mediation program" is a plan or an organization through which mediators and/or mediation may be provided.

(e.) A "mediation communication" is any communication or behavior in connection with a mediation by or between any party, mediator, mediation program or any other person present during a mediation session other than a party or mediator.

(f.) A "mediation document" is any written material, including copies thereof, prepared for the purpose of or in the course of, or pursuant to, a mediation, including but not limited to, memoranda, notes, files, records and work product of a mediator, mediation program or party, except that it shall not include (1) agreements by the parties which specify that they may be disclosed or enforced, or (2) summary records of a mediation program necessary to evaluate or monitor the performance of the program.

2. *General Rule.* Except as otherwise provided by this statute/rule, all mediation documents and mediation communications are privileged and confidential and shall not be disclosed where the parties and mediator have agreed that they shall be confidential pursuant to this statute/rule. If confidential pursuant to this statute/rule, they are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding.

3. *Public Record.* No part of the proceedings of a mediation shall be considered a public record.

4. *Exceptions.*

(a.) Disclosure by Parties. Notwithstanding Section 2 of this statute/rule, a party to a mediation may disclose a mediation communication or mediation document, and such mediation communication or mediation document are not privileged or confidential with respect to disclosure by a party, if:

(1.) All parties to the mediation agree to disclosure;

(2.) The mediation communication or mediation document is relevant to that party's legal claims against the mediator or mediation program arising out of a breach of the legal obligations of the mediator or the mediation program;

(3.) The mediation communication or mediation document provides evidence of ongoing or future criminal activity;

(4.) Disclosure of the mediation communication or mediation document is required to prevent manifest injustice;

(5.) The mediation communication or mediation document is relevant to the resolution of a dispute regarding the existence or meaning of any agreement that resulted from the mediation;

(6.) Disclosure of the mediation communication or mediation document is required by statute;

(7.) Disclosure of the mediation communication or mediation document is relevant to the enforcement of an agreement to mediate; or

(8.) The parties to mediation are together engaged in litigation with third parties and a court determines that fairness to the third parties requires disclosure of the fact or substance of the agreement resulting from mediation; only the agreement, and not any other mediation communication or mediation document, may be disclosed, unless disclosure of the mediation communication or mediation document is permitted by any other exception to this statute/rule.

(b.) Disclosure by the Mediator or Mediation Program. Notwithstanding Section 2 of this statute/rule, a mediator or mediation program may disclose a mediation communication or mediation document, and a mediation communication or mediation document is not privileged or confidential with respect to disclosure by a mediator or mediation program, if:

(1.) The parties and the mediator, and mediation program, if the mediation is carried out by a mediation program, agree to disclosure;

(2.) The mediation communication or mediation document is relevant to a party's legal claims against the mediator or mediation program arising out of a breach of the legal obligations of the mediator or mediation program;
(3.) The mediation communication or mediation document provides evidence of ongoing or future criminal activity;
(4.) Disclosure of the mediation communication or mediation document is required to prevent manifest injustice, provided such disclosure may only be made upon a determination by a court that disclosure is necessary to prevent manifest injustice;
(5.) Disclosure of the mediation communication or mediation document is required by statute; or
(6.) The mediation communication or mediation document is relevant to the resolution of a dispute regarding the existence or meaning of any agreement that resulted from the mediation, provided that all the parties agree to disclosure.