

DRAFTING MEDIATION PRIVILEGES: LESSONS FROM THE CIVIL JUSTICE REFORM ACT

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INTRODUCTION

Mediation confidentiality provisions or privileges are now prevalent throughout the United States. Forty-one states have enacted some form of mediation privilege.¹ As part of the Administrative Dispute Resolution Act of 1990,² Congress enacted legislation to protect confidentiality in mediations involving federal agencies.³ An additional source for such provisions is the Civil Justice Reform Act of 1990 (CJRA),⁴ which required each federal district court to implement a civil justice expense and delay reduction plan (Plan(s)) by the end of 1993. Those Plans seek to implement mechanisms designed to address causes of excessive expense and delay in the federal courts.

A number of the Plans formulated by the district courts include court-annexed alternative dispute resolution (ADR) programs, one of the main delay and expense reduction techniques which Congress sought to have the districts consider. A significant number of districts have implemented mediation programs.⁵ These mediation programs vary widely in the confidentiality protection offered to mediation proceedings.

This Article analyzes the Plans and local court rules of a number of districts to demonstrate some of the problems that can arise when drafting mediation privileges. Section I reviews the provisions of the CJRA pursuant to which some of the districts promul-

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¹ NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 9:33 n.1 (2d ed. 1994).

² 5 U.S.C. §§ 571 to 593 (Supp. IV 1992). The Act contains a sunset provision effective October 1, 1995. Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, § 11, 104 Stat. 2738 (1990).

³ 5 U.S.C. § 574.

⁴ 28 U.S.C. §§ 471-82 (Supp. V 1994); *see also* S. REP. NO. 416, 101st Cong., 2d Sess. 1-2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

⁵ Some of these mediation programs antedate the CJRA. *See, e.g.*, U.S. DIST. CT. W. DIST. OF WASH. LOCAL R. 39.1.

gated confidentiality provisions. Section II discusses the importance of confidentiality provisions in mediation programs and evaluates some of the objections that have been lodged against creating mediation privileges. Section III then reviews the confidentiality provisions that exist in various court-annexed mediation programs in light of these objections and raises questions about the scope and wording of those provisions. Finally, Section IV suggests a possible alternative to the types of confidentiality provisions that currently exist in these court-annexed mediation programs.

I. THE CIVIL JUSTICE REFORM ACT OF 1990

Congress enacted the CJRA to address the problems of excessive cost and delay in prosecuting civil litigation.⁶ By passing the CJRA, Congress sought to revive the promise of Rule 1 of the Federal Rules of Civil Procedure, which is to "secure the just, speedy, and inexpensive determination of every action." Congress felt that "[b]y improving the quality of the process of civil litigation, [the CJRA would] contribute to improvement of the quality of justice that the civil justice system delivers."⁷

Congress found that all users of the federal courts, as well as the courts themselves, shared responsibility for these problems of excessive cost and delay.⁸ The CJRA reflects a policy judgment that reform is best achieved from the bottom up — with "users of the Federal court system[] playing a principal role in the formulation of effective civil justice expense and delay reduction plans."⁹ Thus, the CJRA sought to enlist all participants in federal court litigation to formulate solutions to these problems. In "identifying, developing and implementing solutions to problems of cost and delay," Congress found that consultation among these groups would effectively promote communication of techniques for litigation manage-

⁶ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102(2), 104 Stat. 5089 (1990).

⁷ S. REP. NO. 416, 101st Cong., 2d Sess. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6804.

⁸ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102(2), 104 Stat. 5089 (1990). Specifically, Congress found that:

The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.

Id.

⁹ S. REP. NO. 416, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6806.

ment and cost and delay reduction.¹⁰ In other words, Congress determined that the best ideas for civil justice reform were likely to come from those persons who dealt with the problems on a day-to-day basis and who had the practical experience to evaluate which proposals would be most effective.¹¹

To tap this resource, each district was required to form advisory committees consisting of attorneys and other persons who are representative of major categories of litigants in the district. Each district court, in consultation with its advisory committee, was required to implement a Plan to reduce civil justice expense and delay.¹² Specifically, Congress required the districts to formulate Plans to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."¹³ Districts could either adopt their own Plan or a model Plan developed by the Judicial Conference of the United States. Each advisory group was required to assess thoroughly the court's civil and criminal dockets in formulating the Plan. Accordingly, each district was to address problems peculiar to its own docket.¹⁴

The CJRA required the districts and advisory committees to

¹⁰ Pub. L. No. 101-650, § 102(4).

¹¹ S. REP. NO. 416, 101st Cong., 2d Sess. 4 (1990), 14-16, *reprinted in* 1990 U.S.C.C.A.N. 6806, 6817-19.

¹² In addition to requiring each district to formulate a Plan, the CJRA created three additional layers of experimentation: (a) demonstration programs; (b) early implementation districts ("EIDs"); and (c) pilot programs. Pub. L. No. 101-650, §§ 103, 104. EIDs are district courts that developed and completed plans on an expedited basis (i.e., between six and twelve months after the CJRA was enacted). *Id.* at § 103(c)(1); S. REP. NO. 416, 101st Cong., 2d Sess. 64 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6804, 6853. Congress created the EIDs to "encourag[e] district courts and advisory groups to implement their plans with all deliberate speed, without forcing them to move so rapidly so as to undermine the spirit of the legislation." S. REP. NO. 416, 101st Cong., 2d Sess. 64 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6804, 6853. Those EIDs that drafted mediation confidentiality provisions are included in the analysis of confidentiality provisions contained in Section III. An evaluation of the pilot and demonstration programs is beyond the scope of this article.

¹³ 28 U.S.C. § 471.

¹⁴ 28 U.S.C. § 472(c)(1). In particular, Congress directed each advisory group to:

- (A) determine the condition of the civil and criminal dockets;
- (B) identify trends in case filings and in the demands being placed on the court's resources;
- (C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and
- (D) examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

Id.

engage in a program of experimentation, but the advisory groups were not left entirely to their own devices. Although it encouraged innovation, Congress provided some broad guidelines. For example, Congress found that "an effective litigation management and cost and delay reduction program should incorporate several inter-related principles."¹⁵ As a result, the CJRA mandated that the districts consider a number of proven cost and delay reduction techniques. In this way, Congress sought to "promulgate[] a national strategy and national framework for attacking the cost and delay problem."¹⁶

Among the cost and delay reduction techniques each district and advisory group were to consider was the use of ADR.¹⁷ Indeed, "expanding and enhancing the use of [ADR]" is one of the "six essential components" upon which the CJRA is said to be built.¹⁸ This emphasis on ADR recognizes that "no single method of dispute resolution" is ideal for all types of cases.¹⁹ Instead, an ideal system will deploy "a whole battery of dispute-resolving mechanisms, variously directed, variously driven and variously employed."²⁰ To realize these goals, districts formulating their Plans were required to consider authorizing the referral of appropriate cases to ADR programs that were either previously designated in the district or that the court may choose to make available. Congress specifically enumerated "mediation, minitrial, and summary jury trial" as appropriate ADR techniques.²¹

¹⁵ Pub. L. No. 101-650, § 102(5).

¹⁶ S. REP. NO. 416, 101st Cong., 2d Sess. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

¹⁷ Pub. L. No. 101-650, § 102(5)(D).

¹⁸ S. REP. NO. 416, 101st Cong., 2d Sess. 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6804, 6817. The Senate Report stated that the CJRA:

is built upon six essential components aimed at improving litigation management and reducing litigation costs and delays. Briefly, those principles are:

- (1) building reform from the "bottom up";
- (2) promulgating a national, statutory policy in support of judicial case management;
- (3) imposing greater controls on the discovery process;
- (4) establishing differentiated case management systems;
- (5) improving motions practice and reducing undue delays associated with decisions on motions; and
- (6) expanding and enhancing the use of alternative dispute resolution.

Id.

¹⁹ *Id.* at 27-28, *reprinted in* 1990 U.S.C.C.A.N. 6804, 6830-31 (*quoting* Maurice Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 CREIGHTON L. REV. 801, 806 (1988)).

²⁰ *Id.*

²¹ 28 U.S.C. § 473(a)(6)(B).

The CJRA gave the districts no further guidance on how to design, implement, or administer their ADR programs. Not surprisingly, the programs implemented under the Plans (and the programs that antedate the CJRA) differ widely from one another. Indeed, this may well be the result Congress sought to achieve under the CJRA. The key to the CJRA was "decentralization."²² The "principles and guidelines" contained in the CJRA only provide broad categories for each advisory group to consider.²³ Congress did not mandate that districts adopt any particular technique. Moreover, the advisory group's recommendations were to take into account the particular problems and issues the individual districts faced.²⁴ Through this structure, Congress essentially sought to create ninety-four laboratories for civil justice reform, with ninety-four different experiments. Such experimentation was considered to be the "heart" of the CJRA.²⁵

This experimentation resulted in numerous diverse programs. For instance, federal court mediation programs differ in the extent to which communications made during mediation proceedings are protected from subsequent disclosure. Before discussing these specific differences, this Article will first discuss the importance of such protection in promoting successful mediation outcomes.

II. CONFIDENTIALITY IN MEDIATION

While most experts agree that some form of mediation confidentiality²⁶ is necessary, defining the parameters of such protections has led to much debate and disagreement.²⁷ This

²² S. REP. NO. 416, 101st Cong., 2d Sess. 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6806, 6817.

²³ 28 U.S.C. § 473.

²⁴ 28 U.S.C. § 472(c)(2).

²⁵ S. REP. NO. 416, 101st Cong., 2d Sess. 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6804, 6818; *see* Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 49 (1992).

²⁶ Folberg and Taylor distinguish between two different kinds of confidentiality: privacy from public disclosure and privilege against court testimony. JAY FOLBERG & ALISON TAYLOR, *MEDIATION* 264 (1984). Privacy from public disclosure means that "[m]ediators are bound not to discuss with other people what is revealed to them in the mediation unless such revelations are agreed to by the participants or compelled by a court order or statute." *Id.* By contrast, privilege involves the circumstances specified by case law, rule, or statute that entitle the mediator or the mediation participant to refuse to disclose comments made during the mediation or to produce documents prepared for the mediation. *Id.* This paper uses confidentiality in the latter, legal sense.

²⁷ *See* Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1, 1 (1988); Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17 (1988).

disagreement is not surprising given the directly competing policy arguments involved in any mediation confidentiality provision.

The importance of confidentiality in mediation derives directly from the nature of the mediation process. In mediation, a neutral third party assists the disputing parties in negotiations aimed at achieving a settlement. Mediation differs from adjudication and some other forms of ADR because the mediator has no power to compel testimony or the production of evidence. Nor does the mediator issue a ruling based on the presentations of the parties. Instead, the mediator acts as a facilitator to help the parties reach voluntary agreements. The mediator assists the parties through techniques designed to circumvent the strategic, cognitive, and other barriers that often impede negotiations.²⁸

For the process to work, it is essential for the mediator to encourage the parties to discuss candidly with her all of the relevant issues, especially those that may be impeding settlement.²⁹ To help the parties resolve their dispute, the mediator must be able to evaluate the parties' real motives and interests.³⁰ The mediation process involves drawing out of the parties a list of all relevant issues and encouraging compromise and accommodation.³¹ The mediator's ability to assure that facts conveyed to her will remain confidential aids this process.³² Indeed, as one commentator has noted, mediation becomes "impossible if the parties [are] constantly looking over their shoulders."³³

The participants, of course, need to be candid with each other as well as with the mediator. Such candor is facilitated by a credi-

²⁸ Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235, 248 (1993).

²⁹ CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 158-62 (1986); FOLBERG & TAYLOR, *supra* note 26, at 263-65 (recommending that a mediator fully describe mediation procedures, such as the extent of confidentiality and the logistics of the process, in addition to answering questions from the parties); see *United States v. Gullo*, 672 F. Supp. 99, 104 (W.D.N.Y. 1987).

³⁰ Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 445 (1984) (hereinafter "*Protecting Confidentiality*").

³¹ See Prigoff, *supra* note 27, at 1; Mnookin, *supra* note 28, at 248; cf. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 601 (1981) (footnote omitted) (commenting that informal conciliation is more likely to succeed when a party "has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own").

³² Eileen P. Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U. L. REV. 181, 196-97 (1981).

³³ See Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. DISP. RESOL. 37, 38 (1986).

ble and consistent application of a mediation privilege. In a slightly different context, the Second Circuit found that:

The guarantee of confidentiality permits and encourages counsel to discuss matters in an uninhibited fashion. . . . If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to a poker game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of [the] program. . . .³⁴

Confidentiality is particularly important in court-annexed programs, where parties may fear that if they do not reach a resolution of their dispute, anything they say may be reported back to the court. But such protections are necessary in any mediation. A successful mediation may require the parties to admit facts that would be adverse to their positions if the mediation failed and litigation ensued.³⁵ An apology might also pave the way toward resolving the dispute.³⁶ Absent some sort of confidentiality provision, such statements may be admissible in subsequent litigation.³⁷ For this reason, one or both parties may be reluctant to disclose information or admit fault, thereby undermining the prospects of a successful mediation.³⁸ A privilege protecting communications from disclosure would tend to eliminate such wariness.³⁹

³⁴ *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 929-30 (2d Cir. 1979) (discussing mandatory preargument settlement conferences pursuant to the court's Civil Appeals Management Plan); *see United States v. Gullo*, 672 F. Supp. 99, 104 (W.D.N.Y. 1987) (explaining that a privilege serves to ensure the effectiveness of mediation programs).

³⁵ FOLBERG & TAYLOR, *supra* note 26, at 264-65.

³⁶ STEPHEN GOLDBERG, ET AL., *DISPUTE RESOLUTION* 137-39 (2d ed. 1992).

³⁷ *Id.* at 138; *see* FED. R. EVID. 801(d)(2). Of course, it is possible that the statements may be inadmissible under Federal Rule of Evidence 408 or other similar state rules which prohibit admission of certain statements made during compromise negotiations. As discussed *infra*, however, Rule 408 may not provide broad enough protection.

³⁸ FOLBERG & TAYLOR, *supra* note 26, at 265. The Fifth Circuit made this point plain in *Branch v. Phillips Petroleum*, 638 F.2d 873, 881 (5th Cir. 1981). In that case, the court prohibited discovery of information from an EEOC conciliation proceeding because the prospect of disclosure would discourage negotiated settlements and thereby undermine the congressional policy favoring unlitigated resolution of employment discrimination claims. As the court noted, "the prospect of disclosure or the possible admission into evidence of proposals made during conciliation efforts would tend to inhibit the kind of free and open communication necessary to achieve unlitigated compliance with the requirements of Title VII." *Id.*

³⁹ *Protecting Confidentiality*, *supra* note 30, at 445. Confidentiality also helps to promote full disclosure of information when the mediation involves particularly sensitive

Alternatively, some parties may be participating in mediation with the expectation that nothing they say will be binding on them.⁴⁰ This may be especially true where parties to a mediation are unsophisticated or where the parties are not represented by counsel.⁴¹ The mediator's assurances concerning confidentiality may foster an unwarranted sense of security concerning the scope of protection from disclosure.⁴² Confidentiality may also prevent a sophisticated party from using mediation as an additional form of discovery or from otherwise taking advantage of the naivete of another party.⁴³

Some commentators have suggested that it is somewhat circular to argue that a mediation privilege should be based on the parties' expectations when their expectations may be the result of nothing more than the mediator's assurances of confidentiality.⁴⁴ This view is not necessarily correct. Court-conducted settlement proceedings (which arguably include court-sponsored mediation) have historically been confidential in that they are closed to the press and public.⁴⁵ Moreover, if courts are intent on addressing perceived civil justice reform problems through the implementation of court-annexed mediation programs, then they should design programs based upon both the reasonable expectations of the users of those programs and the considered judgments of experts in these dispute resolution techniques as to what features are necessary to make the programs function properly.

In addition to the salutary effects with respect to the parties,

issues. Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 309 (1971).

⁴⁰ See Prigoff, *supra* note 27, at 2; Freedman & Prigoff, *supra* note 33, at 42.

⁴¹ See Prigoff, *supra* note 27, at 2.

⁴² Of course, mediators should disclose that they may be compelled by court order to testify. See MOORE, *supra* note 29, at 160.

⁴³ Prigoff, *supra* note 27, at 2; ROGERS & McEWEN, *supra* note 1, at § 9:03; Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements By Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 324 (1989).

An important consideration for the drafters of Federal Rule of Evidence 408, which excludes certain uses of evidence related to compromises and offers to compromise, was to protect against such imbalances. See S. REP. NO. 1277, 93d Cong., 2d Sess. 10 (1974), *reprinted in* 1974 U.S.C.A.N. 7051, 7057 (rejecting the common law rule that statements made during negotiations were admissible unless hypothetically stated to be without prejudice because "protecting hypothetical phrased statements . . . constituted a preference for the sophisticated, and a trap for the unwary"). Rule 408 is discussed further, below. See *infra* notes 70-87 and accompanying text.

⁴⁴ See Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. DISP. RESOL. 1, 32 (1986).

⁴⁵ *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 903-04 (6th Cir. 1988) (discussing summary jury trials).

confidentiality also protects the mediator's status as a neutral,⁴⁶ a key component in mediation programs.⁴⁷ Unlike some other privileges, such as the attorney-client privilege, the nature and purpose of a mediation privilege requires that the mediator be permitted to invoke a privilege in at least some situations where all the parties to the mediation have waived confidentiality.⁴⁸ The reason for this rule should not be, as some have argued,⁴⁹ that the privilege is necessary to protect the mediator from the burdens of testifying. Such matters of convenience do not outweigh the important public policy in favor of requiring those with relevant evidence to testify or to be subject to discovery.⁵⁰

Instead, allowing the mediator to control the privilege with respect to obtaining documents or testimony from her appears to be necessary to promote the use of mediation (especially court-annexed mediation) as a viable dispute resolution technique. Before parties will divulge information to the mediator, they must believe that the mediator is neutral and that disclosures will not harm their positions.⁵¹ A mediator's neutrality may appear to be compromised where the mediation has not been successful and one of the parties attempts to use the mediator's testimony to further their subsequent litigation efforts. If the mediator is subpoenaed and forced to testify, the great likelihood is that her testimony will aid

⁴⁶ Jay Folberg, *Confidentiality and Privilege in Divorce Mediation*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 319, 319 (Jay Folberg & Ann Milne, eds., 1988); *Protecting Confidentiality*, *supra* note 30, at 445-46 (footnote omitted).

⁴⁷ Friedman, *supra* note 32, at 198.

⁴⁸ See 2 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 503(c)[01] (Joseph M. McLaughlin ed., 1995) (discussing the attorney-client privilege); *Henderson v. United States*, 815 F.2d 1189, 1192 (8th Cir. 1987) (stating that the "attorney-client privilege belongs to and exists solely for the benefit of the client").

⁴⁹ Freedman & Prigoff, *supra* note 33, at 38; see Hyman, *supra* note 27, at 21.

⁵⁰ Jeremy Bentham aptly made this point:

Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.

⁴ *THE WORKS OF JEREMY BENTHAM* 320-21 (J. Bowring ed., 1843) (*quoted in* *Branzburg v. Hayes*, 408 U.S. 665, 688-89 & n.25 (1972)).

⁵¹ Folberg, *supra* note 46, at 319.

one side more than the other. Although the mediator may be presenting an unbiased and accurate recitation of the facts, the party against whom the testimony is offered may not see it that way.⁵² Under these circumstances, the party against whom the testimony is offered may feel that the mediator is biased against him. Such appearances (however unfounded) detract from the perception that the mediator is a neutral, disinterested party in whom the disputants can confide.⁵³ Thus, the availability of the mediator to testify at later proceedings may inhibit a party from fully engaging in the mediation process.⁵⁴ More importantly, the fact that such testimony has taken place may discourage later mediation participants from fully confiding in the mediators, a result that may undermine the viability of court-annexed mediation.⁵⁵

In *NLRB v. Joseph Macaluso, Inc.*,⁵⁶ the Ninth Circuit relied heavily on the necessity for maintaining the appearance of mediator neutrality in finding a common law mediation privilege.⁵⁷ The

⁵² See *In the Matter of Tomlinson of High Point, Inc. and United Brotherhood of Carpenters and Joiners of America*, 74 NLRB 681, 685 (1947) ("If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.").

⁵³ *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55-56 (9th Cir. 1980); see *New York State Inspection v. New York State Pub. Employment Relations Bd.*, 629 F. Supp. 33, 51 (N.D.N.Y. 1984).

It is important to remember that the relevant interest that confidentiality protects with respect to the mediator is the appearance of impartiality, not the actuality of impartiality. Even some commentators who profess to recognize this distinction fail to keep it clear in their arguments. For example, in suggesting that maintaining mediator neutrality does not provide a strong argument for confidentiality, Kevin Gibson argues that:

Thus, the claim is that if a mediator testifies about his or her perceptions within the mediation, at least one of the principals will perceive the testimony as demonstrating that the mediator was biased during the negotiations. But such a claim fails to recognize that the mediator may have sufficient professional distance to remove him or herself to an impartial position when at work.

Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 46 (footnotes omitted). These two sentences address very different points. The first sentence focuses on the appearance of impartiality while the second focuses on actual impartiality. Although it may be true that the mediator is able to put aside any preconceptions or biases, that does not necessarily mean that her subsequent testimony will not cause one or more of the mediation participants to suspect or believe that some favoritism or partiality existed.

⁵⁴ *Id.*; see *Wilson v. Attaway*, 757 F.2d 1227, 1245 (11th Cir. 1985).

⁵⁵ See *In the Matter of Tomlinson*, 74 NLRB at 685.

⁵⁶ 618 F.2d 51 (9th Cir. 1980).

⁵⁷ *Id.* While some federal courts have recognized a federal mediation privilege, that view is not universal. Compare *Maine Cent. R.R. Co. v. Brotherhood of Mainte-*

case concerned whether a NLRB hearing judge properly disallowed the testimony of a Federal Mediation and Conciliation Service (FMCS) mediator. According to long-standing FMCS policy, "mediators, if they are to maintain the appearance of neutrality essential to successful performance of their task, may not testify about the bargaining sessions they attend."⁵⁸ Because the mediator's testimony was crucial to resolution of an important factual dispute in the case, the court was required to decide whether that policy was a sufficient basis, by itself, to quash the subpoena served on the mediator.⁵⁹

To make that determination, the court applied the utilitarian balancing test often applied to privileges.⁶⁰ Protecting the mediator from testifying must have "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."⁶¹ In Dean Wigmore's words, the public interest protected must be substantial, "because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth."⁶²

nance of Way Emps., 117 F.R.D. 485, 486-87 (D. Me. 1987) (applying *Macaluso* to find privilege) with *Smith v. Smith*, 154 F.R.D. 661, 673-75 (N.D. Tex. 1994) (declining to recognize federal mediation privilege). Other courts have quashed deposition subpoenas served on mediators; however, it is not clear that the reason for doing so was the recognition of a mediation privilege. See *Port Arthur, Tex. v. United States*, 517 F. Supp. 987, 1003 n.105 (D.D.C. 1981).

⁵⁸ *Macaluso*, 618 F.2d at 53.

⁵⁹ *Id.* at 54.

⁶⁰ The test usually applied is Dean John Henry Wigmore's four-part test, which focuses on "the instrumental purpose of the communication and the cost/benefit effect on the litigation process." ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 520 (1983). The four factors that must be satisfied are:

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

8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (John T. McNaughton rev. ed. 1961) (footnote omitted). Although these criteria are open-ended, Wigmore proposed a very narrow reading of this test. Note, *Developments — Privileged Communications*, 98 HARV. L. REV. 1450, 1472 (1985).

⁶¹ *Macaluso*, 618 F.2d at 54 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

⁶² *Id.* at 54 (quoting 1 J. WIGMORE, EVIDENCE § 11, at 296 (1940)).

Applying a balancing test, the court found the strong public policy favoring federal mediators' perceived and actual impartiality outweighed the benefits from enforcing the subpoena.⁶³ In reaching that result, the court relied heavily on the FMCS's own determination in their regulations that requiring mediators to testify would decrease their effectiveness.⁶⁴ The FMCS's regulations stress the importance of "impartiality and integrity" in the mediation process. Those goals are promoted when "[l]abor and management or other interested parties participating in mediation efforts . . . have the assurance and confidence that information disclosed to commissioners and other employees of the Service will not subsequently be divulged, voluntarily or because of compulsion, unless authorized by the Director of the Service."⁶⁵

The court's opinion in *Joseph Macaluso* broadly requires the "complete exclusion of mediator testimony [to preserve] an effective system of labor mediation."⁶⁶ Once a party voluntarily agrees to participate in an FMCS mediation, "that party must be charged with acceptance of the restriction on the subsequent testimonial use of the mediator."⁶⁷ While this language is sweeping, it leaves some room to find that the mediation privilege might yield in individual cases.⁶⁸ Indeed, implicit in the Ninth Circuit's use of a balancing test is the concept that while confidentiality is important, it is not absolute. Like all privileges, a mediation privilege is an exception to the principle that the public is entitled to "every man's evidence."⁶⁹ The key policy question relevant to drafting an appropriate mediation privilege is where to draw the line between the need for confidentiality and the need for disclosure under certain circumstances.

Some commentators (foremost among them Professor Eric Green) argue that a slightly modified version of Federal Rule of Evidence 408 or similar state rules would be sufficient to protect mediation confidentiality.⁷⁰ Rule 408 states that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable

⁶³ *Id.*

⁶⁴ *Id.* at 55.

⁶⁵ *Id.* (quoting 29 C.F.R. § 1401.2(a) (1979)).

⁶⁶ *Id.* at 56.

⁶⁷ *Id.*

⁶⁸ *Id.* n.2. See, e.g., *Drukker Communications, Inc. v. National Labor Relations Bd.*, 700 F.2d 727, 733-34 (D.C. Cir. 1983).

⁶⁹ *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *United States v. Bryan*, 339 U.S. 323, 331 (1950).

⁷⁰ Green, *supra* note 44, at 32.

consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.⁷¹

The rule seeks to promote the strong public policy favoring the compromise and settlement of disputes.⁷² Rule 408 accomplishes that goal "by insulating the bargaining table from unnecessary intrusions."⁷³ Rule 408 benefits the court system by reducing court congestion and costs, by avoiding unnecessary lawsuits, and by placing the conduct of trials "on a more ethical footing" by requiring fair play in pretrial maneuvers.⁷⁴

Rule 408 does not specifically mention mediation, but it is probable that mediation will be considered the type of settlement discussion that the Rule encompasses.⁷⁵ Rule 408, however, offers limited protection. Rule 408 is not a privilege, it is an evidentiary exclusion.⁷⁶ Only the litigants at a trial or other proceeding for which the Federal Rules of Evidence are applicable can invoke

⁷¹ FED. R. EVID. 408.

⁷² FED. R. EVID. 408 advisory committee's note (commenting that a basis for the rule is "promotion of the public policy favoring the compromise and settlement of disputes"). See *Bank of America Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 344-46 (3d Cir. 1986); *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976) (finding, in a pre-rules case, that due to burgeoning federal court dockets, settlements promote the cause of justice). Rule 408 is also premised on the ground that evidence of a compromise offer is not particularly relevant. FED. R. EVID. 408 advisory committee's note ("The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances."). However, given the broad admissibility standard established in Rule 401, the better view is that the main ground supporting Rule 408 is the encouragement of settlements.

⁷³ *Bottaro v. Hatton Assoc.*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982); see *Ramada Development Co. v. Rauch*, 644 F.2d 1097, 1106 (5th Cir. 1981).

⁷⁴ 2 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 408[02] at 408-21-22 (Joseph T. McLaughlin ed., 1995).

⁷⁵ See Green, *supra* note 44, at 15-19; (citing *EEOC v. Air Line Pilots Ass'n*, 489 F. Supp. 1003, 1008 n.4 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981)); ROGERS & McEWEN, *supra* note 1, at § 9:03.

⁷⁶ ROGERS & McEWEN, *supra* note 1, at § 9:04; see Green, *supra* note 44, at 17 (asserting that Rule 408 creates a "quasi-privilege").

Rule 408 to prevent the admission of evidence from mediations.⁷⁷ Unlike a privilege, the rule does not prevent other disclosures. Most importantly, Rule 408 does not protect confidential information from discovery under the Federal Rules of Civil Procedure.⁷⁸

Rule 408 is also limited in that it does not exclude all evidence of settlement discussions but, rather, only certain uses of the evidence. The rule specifically states that evidence is inadmissible only when offered to prove liability for a claim or the invalidity of the claim or its amount.⁷⁹ The rule allows evidence from compromise negotiations to be used for another purpose, such as to show bias or prejudice of a witness or to negate a contention of undue delay.⁸⁰ Many other uses not specifically listed in the rule are also allowed.⁸¹

Although Rule 408 limits confidentiality in a number of important ways, Professor Green argues that no empirical evidence exists to support the view that a broader privilege is needed for mediation.⁸² Indeed, one could argue that settlements continue unabated despite Rule 408's limitations. It is possible that because Rule 408 expanded the common law rule, lawyers generally feel more free in their settlement discussions. Alternatively, it is possi-

⁷⁷ See FED. R. EVID. 1101.

⁷⁸ See *Bennett v. La Pere*, 112 F.R.D. 136, 138-40 (D.R.I. 1986); *Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739, 749 & n.23 (D.D.C. 1983); *Manufacturing Systems, Inc. of Milwaukee v. Computer Tech., Inc.*, 99 F.R.D. 335, 336 (E.D. Wis. 1983); but see *Morse/Diesel Inc. v. Trinity Industries, Inc.*, 142 F.R.D. 80, 84 (S.D.N.Y. 1992) (stating that discovery of terms of settlement agreement requires a "particularized showing of a likelihood that admissible evidence will be generated" by dissemination of the information) (quoting *Bottaro v. Hatton Assoc.*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982)).

⁷⁹ Some courts have interpreted "liability" and "invalidity of a claim" narrowly. See *Thomas v. Resort Health Related Facility*, 539 F. Supp. 630, 637-38 (E.D.N.Y. 1982).

⁸⁰ FED. R. EVID. 408.

⁸¹ See, e.g., *Crues v. KFC Corp.*, 768 F.2d 230, 234 (8th Cir. 1985) (showing reasonableness); *Vulcan Hart Corp. v. National Labor Relations Bd.*, 718 F.2d 269, 277 (8th Cir. 1983) (allowing admission of statements made to settle a claim not at issue in the proceeding); *Bituminous Construction, Inc. v. Rucker Enter., Inc.*, 816 F.2d 965, 969 (4th Cir. 1987) (showing understanding of obligations under an agreement); *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1345-46 (4th Cir. 1991) (showing motive or intent); *Catullo v. Metzner*, 834 F.2d 1075, 1079 (1st Cir. 1987) (showing breach of fiduciary duty). For other permissible uses of such evidence see WEINSTEIN, *supra* note 74, at ¶ 408[05].

⁸² Green, *supra* note 44, at 32. Some empirical data exists, however, outside the mediation context indicating that people were less willing to talk about certain subjects when they were told that no privilege protected the communications. Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1982). Moreover, mediators apparently widely believe that confidentiality is an important ingredient necessary to promote the growth of mediation. Hyman, *supra* note 27, at 21 n.5.

ble that many attorneys are unaware of the loopholes to protection of settlement negotiations.⁸³ More likely, lawyers are aware of the limitations of Rule 408's protections, and, as a result, they remain circumspect in their communications with opposing counsel.

If this is the case, then the protections of Rule 408 do not create the ideal environment for mediation. At least with respect to court-annexed mediation programs, broader confidentiality provisions can thus be seen as part of a commitment to foster greater settlement of disputes without court intervention by taking steps to provide an even more efficacious dispute resolution system than that which exists in direct interparty negotiation.⁸⁴ Providing for mediation confidentiality is thus just one part of the strong public policy in favor of using mediation to address problems of delay and cost in civil litigation.⁸⁵ As one court noted, "[a]lthough it is unclear whether the privilege acts in any primary sense to encourage participation in the [mediation] program, it directly serves to insure the effectiveness of the program and thereby, secondarily, it serves to promote continued support for and existence of the program."⁸⁶

Professor Green acknowledges that Rule 408 provides "uneven and incomplete coverage."⁸⁷ He argues, however, that a separate mediation privilege is unnecessary because Rule 408 can be supplemented through contract or protective orders.⁸⁸ Although these methods of protecting confidentiality admittedly have problems, Professor Green rejects the idea of a statutory or rule-based mediation privilege because he fears that these mediation privileges will be drafted poorly. He states:

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

⁸³ See Jane Michaels, *Rule 408: A Litigation Mine Field*, 19 LITIGATION 34, 34 (Fall 1992).

⁸⁴ See ROGERS & McEWEN, *supra* note 1, at § 9:02 (suggesting the possibility of arguing that "mediation is a last effort when negotiations between parties have faltered and, but for broadened confidentiality, mediation would fail in this mission").

⁸⁵ S. REP. NO. 416, 101st Cong., 2d Sess. 14 (1990), *reprinted in* 1990 U.S.C.A.N. 6804, 6817.

⁸⁶ *United States v. Gullo*, 672 F. Supp. 99, 104 (W.D.N.Y. 1987).

⁸⁷ Green, *supra* note 44, at 19.

⁸⁸ *Id.* at 19-22, 25-29.

should not be confidential. If the attempt at enactment of a mediation privilege is unsuccessful, it may be understood as a rejection of confidentiality protection for all mediations.⁸⁹

Professor Green raises a number of valid points. First, he is quite right to argue that an absolute, or "blanket," privilege is inappropriate. As is explored more fully in Section III, privileges should not be absolute, and any attempt to provide total confidentiality for mediation proceedings is ill-conceived. Judging from the experience with other privileges, blanket protection is simply unnecessary to protect either the zone of privacy necessary to engage the parties fully in the mediation process or to protect the mediator's appearance as a disinterested neutral.

Professor Green's concern that such blanket privileges will be promulgated has proved to be all too accurate, at least with respect to the CJRA. The drafters of the CJRA-inspired mediation privileges have for the most part failed to grapple with many of the thorny drafting issues such privileges present. For example, to what extent should the parties control the privilege? Should the mediator also be entitled to invoke the privilege? What specific exceptions, if any, should be included in the rule? Should the confidentiality provision contain an explicit standard as to when confidentiality should be overcome? These issues are simply left unaddressed in most of the mediation privileges discussed below.

The fact that some (or even most) mediation privileges are drafted poorly, however, does not mean that all drafting attempts should cease. Rather, these poorly drafted privileges only demonstrate the need to draft confidentiality provisions more carefully. Indeed, more careful draftsmanship is really the only route that remains open. As a practical matter, we are well past the stage where we can leave protection of mediation confidentiality to the parties and the courts through contracts and protective orders.

When Professor Green wrote his article, only fourteen states had confidentiality statutes.⁹⁰ That number has now grown to forty-one.⁹¹ This, of course, does not even include the many privileges, like those drafted as a result of the CJRA, that now exist in local court rules. Thus, the strong trend appears to be toward applying extensive protection for mediation either statutorily or by

⁸⁹ *Id.* at 35-36.

⁹⁰ *Id.* at 15.

⁹¹ ROGERS & McEWEN, *supra* note 1, at § 9:33; see also Joshua P. Rosenberg, Note, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. DISP. RESOL. 157, 158 (1994).

court rule. The federal government has moved in the same direction.⁹² It would be impracticable, if not impossible, to turn back the clock and eliminate these provisions. Given these circumstances, the best approach to providing the appropriate level of confidentiality for mediation is to analyze the mediation privileges currently in existence and to propose amendments to make those privileges function better.

Moreover, the judiciary's cautious approach to recognizing new privileges may overly impede development of a mediation privilege.⁹³ This hesitancy may undermine the strong public policy in favor of promoting mediation and other forms of ADR as a means to address problems of civil justice expense and delay.⁹⁴ The courts that recognize their own inadequacy in creating new privileges also recognize that legislatures are best capable of creating such privileges.⁹⁵ Legislatures (and courts through their rulemaking power) have undertaken that task with respect to mediation privileges. Rather than abandoning those efforts, the better approach is to critique and improve them.

III. CONFIDENTIALITY PROVISIONS UNDER THE CJRA PLANS

A review of the Plans and the local rules promulgated to implement those Plans show that a number of districts made only passing reference to ADR techniques. Some Plans merely indicated that the court would encourage ADR.⁹⁶ Others stated that they would study ADR further.⁹⁷ These Plans often made minimal efforts, such as maintaining lists of court-approved neutrals in the

⁹² In 1990, Congress passed the Administrative Dispute Resolution Act to encourage federal agencies to use mediation and other forms of ADR. 5 U.S.C. § 571-93 (Supp. IV 1992). Section 574 of the statute recognizes the importance of mediation confidentiality and creates specifically drafted mediation confidentiality protections. 5 U.S.C. § 574.

⁹³ See *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (declining to create a privilege prohibiting disclosure of materials from peer reviews); *United States v. Nixon*, 418 U.S. 683, 710 (1974) (explaining that privileges are "not lightly created nor expansively construed, for they are in derogation of the search for truth"); *Smith v. Smith*, 154 F.R.D. 661, 673 (N.D. Tex. 1994).

⁹⁴ See, e.g., *supra* notes 17-21 and accompanying text.

⁹⁵ See, e.g., *University of Pennsylvania*, 493 U.S. at 189 ("The balancing of conflicting interests of this type is particularly a legislative function.").

⁹⁶ See, e.g., United States District Court for the District of North Dakota, Civil Justice Expense & Delay Reduction Plan § 6 (effective Dec. 1, 1993), *reprinted in* FEDERAL LOCAL COURT RULES 770 (Lawyers Cooperative Publishing Supp. Apr. 1994) (hereinafter "LOCAL RULES").

⁹⁷ See, e.g., United States District Court for the Western District of Virginia, Civil Justice Expense & Delay Reduction Plan § Three II(A) (effective Dec. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 1117.

clerk's office or making available a pamphlet containing descriptions of ADR alternatives.⁹⁸ Some districts declined to adopt any ADR procedures.⁹⁹

A significant number of districts embraced some form of ADR. Though some Plans stated that the district would refer cases to ADR or implement some type of court-annexed program, they provided no information concerning the nature or operation of the program.¹⁰⁰ These districts typically provided no further details on their programs, and usually had no provision for confidentiality.¹⁰¹

Other districts, however, went much further. These districts enacted court-annexed ADR programs, including court-annexed mediation programs.¹⁰² Some of these programs had been in existence before the CJRA.¹⁰³ The Plans or local rules describing these

⁹⁸ See, e.g., United States District Courts for the Eastern and Western Districts of Arkansas, Civil Justice Expense & Delay Reduction Plan ¶ 11 (effective Dec. 30, 1991), *reprinted in* LOCAL RULES, *supra* note 96, at 59 (pamphlet); United States District Court for the District of Montana, Civil Justice Expense & Delay Reduction Plan app. I, § VI(B) (effective Apr. 1, 1992), *reprinted in* LOCAL RULES, *supra* note 96, at 392 (list of mediators); United States District Court for the District of South Dakota, Civil Justice Expense & Delay Reduction Plan § 13 (effective Dec. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 980-81 (list of ADR resources).

⁹⁹ United States District Court for the District of Alaska, Civil Justice Expense & Delay Reduction Plan § I(I) (effective Dec. 13, 1991), *reprinted in* LOCAL RULES, *supra* note 96, at 35-36; United States District Court for the Eastern District of Virginia, Civil Justice Expense & Delay Reduction Plan § III(A)(6) (effective Dec. 31, 1991), *reprinted in* LOCAL RULES, *supra* note 96, at 1110.

¹⁰⁰ United States District Court for the Southern District of Ohio, Civil Justice Expense & Delay Reduction Plan § A, *reprinted in* LOCAL RULES, *supra* note 96, at 790 ("The Western Division of the Court at Dayton will undertake, within the limitations of staff and funding, implementation of a formalized ADR program, such as Settlement Week mediation using volunteer mediators."); U.S. DIST. CT. W. DIST. TENN. LOCAL R. 15(c) ("The court may order a settlement conference, an early neutral evaluation, a mini-trial, summary jury trial, or mediation by an attorney or retired judge.").

¹⁰¹ It is possible that some of these districts may address confidentiality in local standing orders, through mediation agreements entered into among the parties in the cases referred to mediation or otherwise. This Article makes no attempt to canvass these other sources for mediation confidentiality provisions.

¹⁰² A number of courts use settlement conferences run either by the judge assigned to the case, another judge or magistrate judge in the district, or a panel of volunteer or paid attorneys. See, e.g., U.S. DIST. CT. KAN. LOCAL R. 214; United States District Court for the Eastern District of Oklahoma, Civil Justice Expense & Delay Reduction Plan § IV(A) & App. 2 (effective Dec. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 800 & 805-10; U.S. DIST. CT. MID. DIST. TENN. LOCAL R. 20(D)(4)(c). This Article will concentrate only on those programs specifically designated as mediation programs.

¹⁰³ See, e.g., United States District Court for the Eastern District of Michigan, Civil Justice Expense & Delay Reduction Plan § VI (effective Dec. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 507.

programs contain varying levels of detail concerning how the mediation programs function.

Some of the Plans that mentioned confidentiality did so only in passing, if at all. The Middle and Western Districts of North Carolina are good examples.¹⁰⁴ These Plans, although quite specific in a number of respects, make limited provisions for confidentiality and scatter those provisions throughout the rules. First, in the Middle District of North Carolina, parties have the option of submitting position papers to the mediator before the mediation settlement conference. The "[p]osition papers are confidential, shall be held so by the mediator, and need not be served on the other parties."¹⁰⁵ Second, both districts implicitly apply Federal Rule of Evidence 408 to the mediation proceedings.¹⁰⁶ Third, both districts require the mediator to describe the conditions under which communications with the mediator will be held in confidence during the conference, but fail to state the nature of those conditions.¹⁰⁷

Other Plans do not even provide this minimum level of detail concerning confidentiality. These Plans do not discuss the issue at all, even though they establish court-annexed mediation programs.¹⁰⁸ For example, the Southern District of California's Plan provides for an experimental ADR program requiring district court judges to order nonbinding arbitration or mediation in two types of randomly chosen cases: (i) all even-numbered simple contract or tort cases filed in the district where the judge finds that the potential judgment does not exceed \$100,000; and (ii) every even-

¹⁰⁴ U.S. DIST. CT. MID. DIST. N.C. LOCAL R. 602(a); United States District Court for the Western District of North Carolina, Civil Justice Expense & Delay Reduction Plan § Four (I)(F)(2)(f)-(g) (effective Oct. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 762.

¹⁰⁵ U.S. DIST. CT. MID. DIST. N.C. LOCAL R. 605(c).

¹⁰⁶ *Id.* at 605(f)(7) (requiring the mediator to inform parties that negotiating statements and offers are inadmissible at trial); United States District Court for the Western District of North Carolina, Civil Justice Expense & Delay Reduction Plan § Four (I)(F)(2)(g) (effective Oct. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 762 (same).

¹⁰⁷ U.S. DIST. CT. MID. DIST. N.C. LOCAL R. 605(f)(6); United States District Court for the Western District of North Carolina, Civil Justice Expense & Delay Reduction Plan § Four (I)(F)(2)(f) (effective Oct. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 762.

¹⁰⁸ These districts include Southern California and South Carolina. *See, e.g.*, United States District Court for the Southern District of California, Civil Justice Expense & Delay Reduction Plan ¶ I (effective Oct. 18, 1991), *reprinted in* LOCAL RULES, *supra* note 96, at 110; United States District Court for the District of South Carolina, Civil Justice Expense & Delay Reduction Plan § VII(B)(1), *reprinted in* LOCAL RULES, *supra* note 96, at 960-61.

numbered trademark and copyright case.¹⁰⁹ The Plan has no confidentiality provision applicable to this mediation program. Somewhat incongruously, however, the Plan does provide that mandatory Early Neutral Evaluation conferences are "off the record, privileged and confidential."¹¹⁰

Another district without a mediation confidentiality provision is the Middle District of Alabama. The district's Plan establishes "an informal, voluntary program through which appropriate cases are referred to a senior district judge or the magistrate judges to conduct mediation."¹¹¹ No mention is made of confidentiality. However, "[e]ach senior district judge or magistrate judge is given total discretion in how the [mediation] conferences are to be conducted."¹¹² Presumably, this power also includes the power to establish appropriate confidentiality requirements. Of course, any confidentiality protection granted under this procedure may not be as effective in promoting candor as a written confidentiality provision because a party may not be able to predict whether and to what extent confidentiality will be enforced.¹¹³ The court's discretion also should encompass the power to allow the parties to make their own agreement concerning confidentiality. Such agreement, however, is unlikely to be effective against requests from third parties for information concerning the mediation.

There are a number of possible explanations for the lack of any provision concerning confidentiality in these and other Plans. Most simply, the advisory groups may not have considered the issue. If the advisory groups considered the issue, then they may have determined that the protections offered under Federal Rule of Evidence 408, party agreements, or the provisions contained in privately sponsored mediation contracts were sufficient. Alternatively, the advisory group may have determined that a state mediation confidentiality statute would create sufficient confidentiality. Whether this latter belief would be correct is at least debatable given the limited protection offered by some state statutes¹¹⁴ and

¹⁰⁹ United States District Court for the Southern District of California, Civil Justice Expense & Delay Reduction Plan ¶ I (effective Oct. 18, 1991), *reprinted in* LOCAL RULES, *supra* note 96, at 110.

¹¹⁰ *Id.* at ¶ N(7)(ii), *reprinted in* LOCAL RULES, *supra* note 96, at 111.

¹¹¹ United States District Court for the Middle District of Alabama, Civil Justice Expense & Delay Reduction Plan ¶ VII (effective Dec. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 4.

¹¹² *Id.*

¹¹³ See *Branzburg v. Hayes*, 408 U.S. 665, 702-03 & n.39 (1972); ROGERS & McEWEN, *supra* note 1, at § 9:10.

¹¹⁴ For example, some statutes only provide confidentiality provisions for specified

the significant conflict of laws issue that arises from applying a state statute to a federal court mediation program.¹¹⁵ District courts may have considered it inappropriate to adopt any detailed rules so that they could maintain flexibility in administering ADR.¹¹⁶ Finally, districts may have considered their local rulemaking authority inadequate to create a mediation privilege.¹¹⁷

In addition to the confidentiality provisions discussed above, the Plans or Local Rules of at least eighteen districts contain separate mediation confidentiality provisions of some variety.¹¹⁸ These confidentiality provisions vary somewhat in wording and in the scope of protection they offer, although there are many similarities among them. For example, to protect against future disclosures, mediation sessions are generally not recorded.¹¹⁹ A number of the

mediation programs. See, e.g., N.Y. JUDICIARY LAW § 849-b(6) (McKinney 1992) (confidentiality provision applicable to Community Dispute Resolution Centers program).

¹¹⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 138, 139 (1971); Rosenberg, *supra* note 91, at 160.

¹¹⁶ United States District Court for the Eastern District of Tennessee, Civil Justice Expense & Delay Reduction Plan App. I(D), *reprinted in* LOCAL RULES, *supra* note 96, at 993 ("The court considered carefully all types of ADR now being practiced in various districts across the country but rather than include specific details regarding ADR in the Eastern District of Tennessee, the court felt it was important to maintain flexibility as each specific case will require a judicially-tailored method of ADR.").

¹¹⁷ See FED. R. CIV. P. 83 (stating that courts may only adopt local rules to the extent that they are not inconsistent with the Federal Rules of Civil Procedure); *but see* Edwin J. Wesely, *The Civil Justice Reform Act; The Rules Enabling Act; the Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83 — What Trumps What?*, 154 F.R.D. 563 (suggesting that the CJRA provides a legislative override of the Rules Enabling Act, thus allowing a district to implement a plan inconsistent with the Federal Rules of Civil Procedure).

¹¹⁸ These districts are: the Northern District of Alabama; the Central District of California; Connecticut; the Middle and Southern District of Florida; Massachusetts; New Jersey; the Eastern District of North Carolina; the Northern District of Ohio; the Western District of Oklahoma; Oregon; the Middle District of Pennsylvania; the Northern and Southern Districts of Texas; Utah; the Virgin Islands; and the Eastern and Western Districts of Washington. U.S. DIST. CT. N. DIST. ALA. LOCAL R. 83.2.10; U.S. DIST. CT. CENT. DIST. CALIF. LOCAL R. 23.9; U.S. DIST. CT. CONN. LOCAL R. 36(5); U.S. DIST. CT. MID. DIST. FLA. LOCAL R. 9.07(b); U.S. DIST. CT. S. DIST. FLA. LOCAL R. 16.2(G)(2); U.S. DIST. CT. MASS. LOCAL R. 16.4(C)(4)(f); U.S. DIST. CT. N.J. LOCAL R. 49(E)(4); U.S. DIST. CT. E. DIST. N.C. LOCAL R. 32.07(h); U.S. DIST. CT. N. DIST. OHIO LOCAL R. 7:3.8; U.S. DIST. CT. W. DIST. OKLA. LOCAL R. 46(E)(5); U.S. DIST. CT. ORE. LOCAL R. 240-2(d); U.S. DIST. CT. MID. DIST. PENN. LOCAL R. 1011.6(c)-(f); United States District Court for the Northern District of Texas, Civil Justice Expense & Delay Reduction Plan § III(F) (effective Mar. 1, 1994), *reprinted in* LOCAL RULES, *supra* note 96, at 1037; U.S. DIST. CT. S. DIST. TEX. LOCAL R. 22(I); U.S. DIST. CT. UTAH LOCAL R. 212(j)(9); United States District Court for the Virgin Islands, Civil Justice Expense & Delay Reduction Plan § 2(4)(d)-(e) (effective Dec. 31, 1991), *reprinted in* LOCAL RULES, *supra* note 96, at 1100; U.S. DIST. CT. E. DIST. WASH. LOCAL R. 39.1(d)(3); U.S. DIST. CT. W. DIST. WASH. LOCAL R. 39.1(c)(5).

¹¹⁹ Such provisions exist in the districts of Northern Alabama, Middle and Southern Florida, Eastern North Carolina, Western Oklahoma, Oregon, Middle Penn-

Plans also directly address the limitations inherent in Federal Rule of Evidence 408 by providing that mediation communications are not discoverable.¹²⁰

There are also some drafting issues that the designers of these provisions did not need to address. For example, there was no need to define mediation to exclude other dispute resolution practices to which confidentiality was not meant to apply.¹²¹ If mediation is defined too broadly, then there is a danger that information that should not be protected will be insulated from disclosure.¹²² These confidentiality provisions were drafted specifically and exclusively for the districts' mediation programs.¹²³ Thus, there is no danger that they will be applied to practices they were not intended to cover.

On the whole, the confidentiality provisions adopted have problems of over-inclusion and under-inclusion. This Article will not attempt to analyze all of these provisions in detail. Instead, to highlight at least some of the problems found in the rules, this Article will examine three specific (but overlapping) problems:

sylvania, and Eastern and Western Washington. United States District Court for the Northern District of Alabama, Civil Justice Expense & Delay Reduction Plan § IV(B)(11) (effective Dec. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 20.5; U.S. DIST. CT. MID. DIST. FLA. LOCAL R. 9.07(b); U.S. DIST. CT. S. DIST. FLA. LOCAL R. 16.2(G)(2); U.S. DIST. CT. E. DIST. N.C. LOCAL R. 32.07(h); U.S. DIST. CT. W. DIST. OKLA. LOCAL R. 46(E)(5); U.S. DIST. CT. ORE. LOCAL R. 240-2(d); U.S. DIST. CT. MID. DIST. PENN. LOCAL R. 1011.6(e); U.S. DIST. CT. E. DIST. WASH. LOCAL R. 39.1(d)(3); U.S. DIST. CT. W. DIST. WASH. LOCAL R. 39.1(c)(5). In the Central District of California, the parties may consent to have the proceedings recorded. U.S. DIST. CT. CENT. DIST. CALIF. LOCAL R. 23.9.

In programs where the mediation privilege is narrow or where there is no privilege, mediators may take a practical step to create effective confidentiality for mediation sessions—they may dispose of all records relating to the hearings. *See* Friedman, *supra* note 32, at 202. A mediation privilege preventing disclosure of documents is an improvement over such *ad hoc* practices because if such a rule is in place, documents will be preserved, possibly leading to improvements in program efficiency, continuity, and research potential. *See id.*

¹²⁰ These districts include Connecticut, Middle and Southern Florida, Massachusetts, Eastern North Carolina, Oregon and Eastern and Western Washington. U.S. DIST. CT. CONN. LOCAL R. 36(5); U.S. DIST. CT. MID. DIST. FLA. LOCAL R. 9.07; U.S. DIST. CT. S. DIST. FLA. LOCAL R. 16.2(G)(2); U.S. DIST. CT. MASS. LOCAL R. 16.4(f); U.S. DIST. CT. E. DIST. N.C. LOCAL R. 32.07(h); U.S. DIST. CT. ORE. LOCAL R. 240-2(d); U.S. DIST. CT. E. DIST. WASH. LOCAL R. 39.1(d)(3); U.S. DIST. CT. W. DIST. WASH. LOCAL R. 39.1(c)(5).

¹²¹ *See* Hyman, *supra* note 27, at 19-22 (observing that without appropriate boundaries, "confidentiality may intrude into such a wide variety of social transactions that it would create severe and unwarranted hardships").

¹²² ROGERS & MCEWEN, *supra* note 1, at § 9:10.

¹²³ In this regard, the CJRA-inspired provisions are similar to the majority of mediation privileges. *See id.* at § 9:12.

(i) the existence of drafting problems that make the privileges unclear; (ii) the fact that absolute or near absolute privileges have been drafted; and (iii) the lack of specification as to who controls and may invoke the privilege.

Drafting problems are found in several of the privileges promulgated under the auspices of the CJRA. For example, under the rules applicable to the District of Connecticut's voluntary ADR program (which includes mediation):

All ADR sessions shall be deemed confidential and protected by the provisions of Fed. R. Evid. 408 and Fed. R. Civ. P. 68. No statement made or document produced as part of an ADR proceeding, not otherwise discoverable or obtainable, shall be admissible as evidence or subject to discovery.¹²⁴

This provision appears to be internally inconsistent. The first sentence of the rule adopts Rule 408, which allows evidence from settlement discussions to be used for certain purposes.¹²⁵ However, the rule then contradicts itself in the next sentence by stating that no statement made at the ADR session shall be admissible at all.¹²⁶ Is this provision a broad privilege or a limited evidentiary exclusion?

Although troubling, such an obvious drafting error is not the most serious concern with respect to these privileges. A court faced with the more obvious drafting problems can likely resolve them in a logical fashion.¹²⁷ For example, in *Bennett v. Bennett*,¹²⁸ the Maine Supreme Court was asked to construe a Maine statute which provided that any agreement reached during a mediation must be reduced to writing.¹²⁹ When the parties failed to reach agreement, the court was required under the statute to determine

¹²⁴ U.S. DIST. CT. CONN. LOCAL R. 36(5). The District of Massachusetts has a similar provision. U.S. DIST. CT. MASS. LOCAL R. 16.4(C)(4)(f); see also United States District Court for the District of Massachusetts, Civil Justice Expense & Delay Reduction Plan Art. IV, Rule 4.03(d)(6) (effective Oct. 1, 1992), reprinted in LOCAL RULES, *supra* note 96, at 494.

¹²⁵ See *supra* notes 70-81 and accompanying text.

¹²⁶ Professor Green notes that contract provisions stipulating mediation confidentiality often have two purposes. First, the contract invokes Rule 408 in order to make clear that the parties intended the rule to cover the mediation. Next, the contract will "clarify the uncertainties and fill in the gaps in the evidence rule by directly addressing uncertain areas, such as . . . discoverability." Green, *supra* note 44, at 19. If the second sentence of the Connecticut rule limited itself to discovery, then such a reading would explain the rule. However, the addition of admissibility into the second sentence adds nothing but confusion as to the scope of protection the rule offers.

¹²⁷ See *Bennett v. Bennett*, 587 A.2d 463, 464 (Me. 1991).

¹²⁸ 587 A.2d 463 (Me. 1991).

¹²⁹ 19 ME. REV. STAT. ANN. tit. 19, § 665 (West 1964 & Supp. 1990).

whether the parties had made a good faith effort to mediate.¹³⁰ In *Bennett*, one of the parties to a mediation claimed that an agreement had been reached, although the parties did not reduce a settlement to writing. Read literally, the statute required the court to review the proceedings for good faith because the mediation failed, even though no party claimed any bad faith participation. If the court was required to make a far-ranging inquiry into good faith participation each time mediating parties failed to reach agreement, then many of the benefits of court-annexed ADR would be lost. For example, dispute resolution proceedings would no longer operate predominantly without court involvement. Moreover, if the parties reasonably expected the court to review the mediation proceedings in case of a failure to reach a settlement, the candor necessary for successful mediations could be lost.

To avoid such a result, the *Bennett* court found that absent an allegation of lack of good faith participation, the court would not make the review called for in the statute.¹³¹ *Bennett* demonstrates that courts can make obvious adjustments to poorly drafted statutes. Although it would be better if these problems were corrected in the drafting process, these obvious flaws do not present the most significant concern with respect to the confidentiality provisions examined. A larger problem found in the majority of these provisions is that they fail to give the court any guidance to aid it in deciding whether to overcome the privilege in a particular case.¹³²

This flaw is most clearly seen in the absolute, blanket privileges. The vast majority of the confidentiality provisions are drafted too broadly. These blanket privileges tend to provide no definition of the terms they employ, making it somewhat unclear as to the exact scope of coverage. For the most part, specific exclusions from the privilege are rare and quite limited. Read literally, some provisions seem to create inviolable protection from disclosure.

Typical examples of broad, absolute provisions are found in the Eastern and Western Districts of Washington. The Western District local rules state:

All proceedings of the mediation conference, including any statement made by any party, attorney or other participant,

¹³⁰ *Id.*

¹³¹ 587 A.2d at 464.

¹³² See Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 29 (1992) (criticizing SPIDR ethical standard regarding confidentiality because it does not provide criteria for determining in which cases confidentiality may be overcome).

shall, in all respects, be privileged and not reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission. No party shall be bound by anything done or said at the conference unless a settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that agreement.¹³³

The Eastern District of Washington's rule is virtually identical.¹³⁴ Evidence from a mediation is only admissible in these districts if the parties reach a settlement and reduce that settlement to writing. In that case, the written agreement may be introduced in a subsequent proceeding.¹³⁵ Such a rule is, of course, necessary to ensure the enforceability of mediated agreements. Research has revealed no other published opinions addressing whether other disclosures are permitted under the rule. The court has emphasized, however, that absent a settlement agreement reduced to writing, "no evidence may be introduced under Local Rule 39.1(d)(3)."¹³⁶ In such a case, a trial court may properly exclude the testimony of the mediator as to whether a settlement had been reached.¹³⁷

On a superficial level, a mediation privilege such as this would appear to work well. Indeed, other CJRA-inspired provisions follow this relatively absolutist model.¹³⁸ These rules obviously create broader protection than would exist under Federal Rule of Evidence 408. Unlike Rule 408, they prohibit all evidentiary uses of mediation communications, including any attempts to impeach a witness or to show bias or prejudice,¹³⁹ as well as prohibiting disclosures through discovery.¹⁴⁰ If the drafters intended to provide a zone of confidentiality in which candid settlement discussions can

¹³³ U.S. DIST. CT. W. DIST. WASH. LOCAL R. 39.1(c)(5).

¹³⁴ U.S. DIST. CT. E. DIST. WASH. LOCAL R. 39.1(d)(3).

¹³⁵ *Barnett v. Sea Land Serv., Inc.*, 875 F.2d 741, 744 (9th Cir. 1989).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ These include the confidentiality provisions found in the district courts for Middle and Southern Florida, Eastern North Carolina, Oregon, and Northern and Southern Texas. See U.S. DIST. CT. MID. DIST. FLA. LOCAL R. 9.07(b); U.S. DIST. CT. S. DIST. FLA. LOCAL R. 16.2(G)(2); U.S. DIST. CT. E. DIST. N.C. LOCAL R. 32.07(h); U.S. DIST. CT. ORE. LOCAL R. 240-2(d); United States District Court for the Northern District of Texas, Civil Justice Expense & Delay Reduction Plan § III(F) (effective July 1, 1993), reprinted in LOCAL RULES, *supra* note 96, at 1037; U.S. DIST. CT. S. DIST. TEX. LOCAL R. 22(I).

¹³⁹ FED. R. EVID. 408.

¹⁴⁰ U.S. DIST. CT. W. DIST. WASH. LOCAL R. 39(c)(5) (providing that "any statement . . . shall, in all respects, be privileged").

occur, then the rule seems to accomplish that goal.¹⁴¹

The primary drawback to such absolute rules, however, is that they are inaccurate and misleading. Privileges should not be absolute,¹⁴² and courts rarely treat them as being absolute.¹⁴³ Read literally, however, a rule such as this seems to contemplate that there are no circumstances sufficient to outweigh mediation confidentiality. If such circumstances exist, they are not mentioned in the rule. A judge deciding whether to uphold or overcome the privilege is not given any information on the policy the privilege seeks to promote or the relative weight to be given the privilege. It is this failure to provide any guidelines for overcoming the privilege that is the most troubling aspect of these blanket rules.

Apparently, absolute rules like these create a number of potential dangers. First, a court may apply the statute literally to hold that there are no circumstances that are of sufficient importance to overcome the mediation privilege.¹⁴⁴ Such an interpretation could lead to unjust results in subsequent civil or criminal proceedings. Second, an unqualified privilege could lead to the backlash against confidentiality Professor Green predicted.¹⁴⁵ Alternatively, a court unwilling to provide absolute confidentiality for mediation communications may interpret the privilege in so narrow a fashion that the protections it offers are eviscerated.¹⁴⁶

¹⁴¹ ROGERS & McEWEN, *supra* note 1, at § 9:12.

¹⁴² The prevailing opinion among mediators seems to recognize that absolute privileges are improper. SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION ("SPIDR"), ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY § 3 (1986) ("Maintaining confidentiality is critical to the dispute resolution process. There may be some types of cases, however, in which confidentiality is not protected."); see Gibson, *supra* note 132, at 26-29 (noting that mediation confidentiality need not be absolute, but criticizing SPIDR standard for failing to give criteria for overcoming privilege); see also Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L.J. 155, 181-82 (1994); *Protecting Confidentiality*, *supra* note 30, at 452.

¹⁴³ See, e.g., *supra* note 60.

¹⁴⁴ See, e.g., *People v. Snyder*, 492 N.Y.S.2d 890 (Sup. Ct. 1985).

¹⁴⁵ Green, *supra* note 44, at 35-36.

¹⁴⁶ A court may also simply avoid interpreting the scope of a blanket privilege. The Virginia Supreme Court recently took this approach in *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36 (Va. 1995). In *Snyder-Falkinham*, the court was asked to decide whether a trial court had improperly admitted evidence from a mediation session held pursuant to Virginia's Dispute Resolution Program that tended to show that the plaintiff had, in fact, agreed to a settlement of the underlying action. *Id.* at 38-39. Virginia's statutory mediation privilege states, in part, that "[a]ny communication made in or in connection with the dispute resolution proceeding which relates to the controversy, whether made to the neutral or the dispute resolution program or to a party, or to any other person if made at a dispute resolution proceeding, is confidential." VA. CODE ANN. § 8.01-576.10 (Michie Supp. 1994).

In short, because no privileges are absolute, broadly written confidentiality privileges such as these are an open invitation to inconsistent interpretations of the scope of confidentiality. Some decisions may construe the privilege too narrowly, thereby defeating the purpose of the confidentiality provision. Others will be too broad, and may, as Professor Green suggested, create a backlash against mediation confidentiality.¹⁴⁷

Another problem associated with such absolute privileges is the question of who controls the privilege. In certain circumstances, someone may invoke another's privilege on behalf of that person. For example, a lawyer may invoke the attorney-client privilege on behalf of his client, but it is the client who ultimately controls it and who may determine whether it should be waived.¹⁴⁸ A broadly-worded rule does not tell the judge either who may invoke the privilege or who controls it. Analogizing to the attorney-client privilege, a court may determine that if the mediation participants waive the privilege, then they can require the mediator to testify. As previously discussed, however, a separate testimonial and discovery privilege is necessary to protect the mediator's appearance of neutrality.¹⁴⁹ If the rule does not spell out whether the mediator can refuse to testify or produce documents regardless of the parties' consent, how is the court to know how to apply the rule in the case before it?

The difficulties a court faces in construing absolute privileges are well-illustrated in *Fenton v. Howard*,¹⁵⁰ a case interpreting an Arizona privilege applicable to conciliations of family disputes. The case arose out of an auto accident in which the plaintiff alleged emotional distress resulting from severe facial scarring sustained in the accident. The plaintiff claimed his marriage began to deteriorate as a result of the scarring. He filed for dissolution of the marriage, and later he and his wife participated in counseling through

The statute is not a true blanket privilege because it contains some exceptions to confidentiality. None of the statutory exceptions, however, were applicable to the question at issue, i.e., whether confidentiality is abrogated when there is a dispute over the existence or meaning of an agreement allegedly reached as a result of the mediation. Rather than determine whether the statute contained an implied exception to confidentiality in these circumstances or whether the statute should be interpreted according to its plain meaning so that the evidence would be excluded, the Virginia Supreme Court avoided the issue by determining that the question had not been properly preserved for appeal. *Snyder-Falkinham*, 457 S.E.2d at 39.

¹⁴⁷ Green, *supra* note 44, at 35-36.

¹⁴⁸ See, e.g., *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985).

¹⁴⁹ See *supra* notes 46-69 and accompanying text.

¹⁵⁰ 575 P.2d 318 (Ariz. 1978).

the Arizona Court of Conciliation. To obtain support for his emotional distress claim, the plaintiff subpoenaed the assistant director of the Court of Conciliation, seeking both deposition testimony and documents relating to the counseling services.

The Arizona privilege statute provided only that all communications were confidential and could "not be disclosed without the consent of the party making such communication."¹⁵¹ Both plaintiff and his wife consented to the disclosures. The statute did not specify whether the mediator was required to testify or produce documents if the parties waived their privilege; nonetheless, the lower court held that such consent did not cover the notes and observations of the counselor.¹⁵² The Arizona Supreme Court determined that the Conciliation Court may refuse to disclose matters even though not privileged under the statute if disclosure would hamper the court in performing its functions.¹⁵³ Because the statute did support that holding, the court based its decision on the "inherent power to do those things which are necessary for the efficient exercise of its jurisdiction."¹⁵⁴ The Arizona Supreme Court then read into the statute a balancing test that weighed the court's right to protect its ability to function effectively against the need of the litigant for the information sought.¹⁵⁵

Although the majority's decision can be justified in terms of protecting the effectiveness of the conciliation program, its rationale for doing so was completely at odds with the language of the statute. As a concurring justice noted in criticizing the majority's reliance on the "inherent powers of the court" to justify its decision:

The majority leave the impression that the Conciliation Court system may be disrupted by requiring one of the conciliation counselors to testify at a deposition, and of course a judge has inherent power to prevent this. There is no suggestion or inference in the statute that the counselors of the Conciliation Court are entitled to any special treatment or have a personal privilege protecting their so-called work product.¹⁵⁶

This is, of course, the correct reading of the statute. As written, the only privilege belongs to the parties participating in the concilia-

¹⁵¹ ARIZ. REV. STAT. ANN. § 25-381.16(D) (1991).

¹⁵² *Fenton*, 575 P.2d at 320.

¹⁵³ *Id.* at 320-21.

¹⁵⁴ *Id.* at 320 (citation omitted).

¹⁵⁵ *Id.* at 321.

¹⁵⁶ *Id.* (Holohan, J., specially concurring).

tion.¹⁵⁷ Had the drafters intended to grant the mediator a testimonial privilege, they should have specified that result in the statute. Otherwise, a court interpreting a privilege (such as the Arizona statute or the Washington rule) may not know whether to grant such a privilege to the mediator. Drafting a specifically delineated privilege will tend to provide a more secure foundation for the privilege.

There is a wide area of divergence among the CJRA-inspired provisions concerning the extent to which the rules explicitly state that the parties control the scope and continuing validity of the confidentiality protections. The statutes often do not state, however, whether the mediator may control his own disclosures. For example, in the Central District of California there is a significant degree of party control.¹⁵⁸ The local rules create a broad confidentiality provision, but subject its protections to agreement of the parties:

All settlement proceedings shall be confidential and no statement made therein shall be admissible in any proceeding in the case, unless the parties otherwise agree. No part of a settlement proceeding shall be reported, or otherwise recorded, without the consent of the parties, except for any memorialization of a settlement.¹⁵⁹

To protect the atmosphere of candor necessary for successful mediations, the drafters seem to have taken the view that subjecting a waiver of confidentiality to the agreement of all the parties would create sufficient confidentiality.¹⁶⁰ But the provision appears inadequate in other ways. Again, this rule fails to indicate what, if any, exceptions to confidentiality exist if the parties do not agree to disclosure. Moreover, it is at best unclear whether the mediator may be required to testify if the parties agree, although the rule suggests that such testimony would be permissible. Even though both parties are willing to allow such testimony, the mediator's actual testimony may still create an appearance of partiality that may be detrimental to the mediation program's continuing viability.¹⁶¹

¹⁵⁷ *Id.*

¹⁵⁸ Most parties in the district are required to participate in one of four settlement procedures. U.S. DIST. CT. CENT. DIST. CALIF. LOCAL R. 23.2. The procedures include "mediation-type settlement proceedings" before "a retired judicial officer or other private or non-profit dispute resolution body[.]" U.S. DIST. CT. CENT. DIST. CALIF. LOCAL R. 23.5.3.

¹⁵⁹ U.S. DIST. CT. CENT. DIST. CALIF. LOCAL R. 23.9.

¹⁶⁰ See ROGERS & McEWEN, *supra* note 1, at § 9:12.

¹⁶¹ NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 55-56 (9th Cir. 1980).

One confidentiality provision that attempts to address the problem of protecting mediator neutrality is the one promulgated in the Northern District of Alabama.¹⁶² The Northern District of Alabama's mediation confidentiality provision states:

The entire mediation process is confidential and by entering into mediation the parties mutually covenant with one another to preserve confidentiality on the basis established in this Plan. The parties and the mediator may not disclose information regarding the process, except the terms of the settlement, to the court or to third persons unless all parties agree. . . . The mediation process must be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and State rules of evidence. The mediator is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute, including actions between persons not parties to the mediation process.¹⁶³

The rule preserves party control, but limits that control by creating an absolute disqualification for the mediator from being a witness in any action relating to the dispute. Other courts have enacted similar provisions.¹⁶⁴ These rules posit that to protect neutrality, a near absolute disqualification is necessary.¹⁶⁵ The Northern District of Alabama rule leaves some room for mediator disclosures other than testimony.

As a practical matter, the Northern District of Alabama Plan

¹⁶² In the Northern District of Alabama, judges are required to conduct an ADR conference during the early stages of a case to determine whether "the issues of the case, the needs and relationships of the parties, and any other factors the court may deem relevant" make ADR appropriate for potential resolution of the dispute. United States District Court for the Northern District of Alabama, Civil Justice Expense & Delay Reduction Plan App. C, § III(B) (effective Dec. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 19. Although the judge has the power to order ADR, the "Plan contemplates that judges will not ordinarily order ADR over the objection of a party." *Id.* at § II(A)(1)(d).

¹⁶³ *Id.* at App. C, § IV(B)(10).

¹⁶⁴ These include the districts of New Jersey, Northern Ohio, Western Oklahoma, and Middle Pennsylvania. See U.S. DIST. CT. N.J. LOCAL R. 49(E)(4) ("The mediator shall not be subject to subpoena by any party."); U.S. DIST. CT. N. DIST. OHIO LOCAL R. 7:3.8 ("The Mediator is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute, including actions between persons not parties to the mediation process."); U.S. DIST. CT. W. DIST. OKLA. LOCAL R. 46(E)(5) ("The mediator may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute."); U.S. DIST. CT. MID. DIST. PENN. LOCAL R. 1011.6(f) ("The mediator shall not be called as a witness at trial.").

¹⁶⁵ In this way, the drafters of these rules reached the same policy determination as the Ninth Circuit in the *Joseph Macaluso* case. See *Joseph Macaluso*, 618 F.2d at 56.

avoids one area about which the mediator might reasonably be expected to testify, i.e., whether the parties participated in good faith in the mediation. The Plan "contemplates that judges will not ordinarily order ADR over the objections of a party."¹⁶⁶ Where both parties have agreed to participate in the process, it seems unlikely in most cases that they will not participate in good faith thereafter.

Again, however, the absolutes created in this rule seem overbroad. For example, the rule would prohibit the mediator from disclosing information she was statutorily required to report unless she obtained the consent of all parties to the mediation. In most cases, it is likely that such permission would not be forthcoming. In that situation, the court would have to decide whether confidentiality should remain in effect. Like the other provisions discussed, the Northern Alabama rule does not give the court any guidelines for making that decision.

The District of New Jersey's confidentiality provision provides a variant on the party-control model.¹⁶⁷ The New Jersey confidentiality rule provides that:

All information presented to the mediator shall, on request, be deemed confidential and shall not be disclosed by anyone, including the mediator, without consent, except as necessary to advise the Court of an apparent failure to participate. The mediator shall not be subject to subpoena by any party. No statements made or documents prepared for mediation shall be disclosed in any subsequent proceeding or construed as an admission.¹⁶⁸

Like the Northern District of Alabama, confidentiality is subject to party control. In New Jersey, however, confidentiality is not automatic—it is contingent upon request of the parties.¹⁶⁹ Such a pro-

¹⁶⁶ United States District Court for the Northern District of Alabama, Civil Justice Expense & Delay Reduction Plan § II(A)(1)(d) (effective Dec. 1, 1993), *reprinted in* LOCAL RULES, *supra* note 96, at 9.

¹⁶⁷ New Jersey's local court rules allow each judge and magistrate to refer, without the consent of the parties, two complex civil actions to mediation. U.S. DIST. CT. N.J. LOCAL R. 49(D).

¹⁶⁸ U.S. DIST. CT. N.J. LOCAL R. 49(E)(4).

¹⁶⁹ The District of New Jersey's mediation rules are inconsistent on this point. Although Rule 49 requires a request for confidentiality, that requirement is not contained in the district's Guidelines for Mediation, which appear as Appendix P of the local rules. The Guidelines state only that:

Neither the parties nor the mediator may disclose any information presented during the mediation process without consent. The only exception to this rule of confidentiality is when disclosure may be necessary to advise the compliance judge of an apparent failure to participate in the mediation process.

U.S. DIST. CT. N.J. LOCAL R. App. P (Guidelines for Mediation).

vision may disadvantage less sophisticated parties who might not be aware of the confidentiality option.¹⁷⁰

The mandatory nature of the New Jersey program creates an important exception not included in other programs. The New Jersey rules require that "[c]ounsel and the parties in each civil action referred to mediation shall participate therein and shall cooperate with the mediator."¹⁷¹ To enforce that requirement, the New Jersey rule allows the mediator or another party to report a failure to participate to the court.¹⁷² Other districts have similarly limited confidentiality.¹⁷³ Such provisions, however, are not without potential problems. If interpreted too broadly, such provisions could ameliorate the protections provided by the rule.¹⁷⁴ For this reason, many of the CJRA-inspired rules provide that information concerning the mediation proceedings cannot be revealed to the court.¹⁷⁵

The discussion thus far sufficiently demonstrates at least some of the potential pitfalls in drafting mediation privileges. Although these pitfalls are common among the CJRA-inspired provisions, they can be remedied.

IV. AN ALTERNATE APPROACH TO MEDIATION CONFIDENTIALITY

Even though the various confidentiality provisions adopted as a result of the CJRA are both underinclusive and overinclusive, this does not mean that statutory or rule-based mediation privileges should be rejected. More careful drafting can cure most of the problems with the confidentiality provisions discussed above. Indeed, the primary problem with the CJRA-inspired provisions is the lack of guidance they provide to a court in determining what, if any, exceptions to recognize and how to resolve the tension between the need for some disclosures and the recognized need for confidentiality in mediation. That problem is not adequately re-

¹⁷⁰ But see Hyman, *supra* note 27, at 29 ("An explicit agreement [to impose confidentiality] prevents inexperienced parties from blindly subjecting themselves to a complicated set of privileges and exceptions.").

¹⁷¹ U.S. DIST. CT. N.J. LOCAL R. 49(E)(1).

¹⁷² *Id.*; cf. Wagshal v. Foster, 28 F.3d 1249, 1253-54 (D.C. Cir. 1994) (reasoning that it was proper in a mandatory mediation program for a mediator recusing himself from case to report to the judge "in a general way" on the past course of the mediation and to make suggestions on future course of mediation).

¹⁷³ See, e.g., U.S. DIST. CT. E. DIST. N.C. LOCAL R. 32.09(f); U.S. DIST. CT. MID. DIST. PENN. LOCAL R. 1011.6(b), (d).

¹⁷⁴ See Bennett v. Bennett, 587 A.2d 463, 464 (Me. 1991).

¹⁷⁵ See, e.g., U.S. DIST. CT. W. DIST. WASH. LOCAL R. 39.1(c)(5).

solved if mediation confidentiality provisions are abandoned.¹⁷⁶ The absence of any mediation privilege places the court in a similar position to the one that it occupies when it interprets a broadly worded mediation confidentiality provision like those cited above. There are a number of possible policies which a mediation privilege could seek to foster. A rule may seek to create an atmosphere of candor to promote communications between the parties, may seek to protect the appearance of mediator neutrality, or may seek to do both. Without a well-drafted rule, judges are left to determine which of these policies to consider. The court must fend for itself in determining the proper factors to consider when it is asked to create an exception and the proper balancing test to apply to the situation. This situation is rife with the possibility of inconsistent decisions concerning the scope of the privilege, which may undermine the efficacy of any privilege that is recognized.

There are three possible alternatives to the blanket privileges that predominate in the CJRA programs. Only one of those alternatives adequately balances the need for certainty and the need to provide courts with guidance on how to interpret or, if necessary, overcome the confidentiality provision. One solution that does not work is to create a flexible privilege that gives courts wide discretion to qualify the privilege on a case-by-case basis. Such a flexible standard is an improvement over no privilege at all because it removes the possibility that no privilege will be recognized and because such a standard is likely to describe in some way the policy or policies the confidentiality provision seek to promote. Leaving resolution of confidentiality to case-by-case analysis, however, may give rise to the same problems of inconsistent interpretation that arise when no privilege is created. Inconsistency could limit the effectiveness of the privilege by making it harder for mediation participants to predict whether their statements will remain confidential.¹⁷⁷ Indeed, such a rule leaves open to inconsistent interpretation issues as to which there already may be significant consensus. For example, if it is generally agreed that position papers specifically prepared for the mediation should be confidential, there seems to be no reason why the confidentiality rule should not spell that out clearly.¹⁷⁸

¹⁷⁶ See Green, *supra* note 44, at 29-30 (suggesting that courts should employ a public policy approach).

¹⁷⁷ See *Branzburg v. Hayes*, 408 U.S. 665, 702-03 & n.39 (1972); ROGERS & McEWEN, *supra* note 1, at § 9:10; see also Friedman, *supra* note 32, at 207 (noting that confidentiality provisions need to be clearly defined if they are to be of practical value).

¹⁷⁸ See U.S. DIST. CT. MID. DIST. N.C. LOCAL R. 605(c).

The second possible solution is to draft a broad confidentiality rule with specific exceptions.¹⁷⁹ Such a rule is an improvement over the broad provisions drafted under the CJRA because it explicitly recognizes that no privilege rule is absolute. A superficially absolute rule is deceptive in light of the balancing that is a necessary part of privilege analysis.¹⁸⁰ Such a rule is a "snare and a delusion" for those who do not recognize the uncertainty inherent in privileges.¹⁸¹ A rule that delineates exceptions to confidentiality may also eliminate some of the possibility for inconsistent interpretations.

These gains come only with a significant cost: the elimination of flexibility. It is unlikely that the drafters will be able to anticipate all of the factual scenarios in which abrogation of confidentiality might be important. Even if these scenarios could be anticipated, it would seem equally unlikely that they would be susceptible to precise codification. If an appropriate circumstance for disclosure arose for which there was no provisions in the rule's exceptions, then significant hardship might result. In this case, an inflexible but certain rule may tend to be either overinclusive or underinclusive and, thus, may not promote the policies underlying the privilege.¹⁸² Inflexibility might also cause the court to allow disclosure by stretching the exceptions in the rule. Such a result might invite future courts to alter significantly the confidentiality scheme the drafters intended to implement.

The better solution is to combine these two approaches. Such a provision will contain a broad rule of confidentiality that creates a presumption of confidentiality for mediation sessions. The rule will provide the court with specific exceptions to that confidential treatment. More importantly, the rule will create an appropriate balancing test that will allow the court sufficient discretion to address individual situations the drafters may not have contemplated without allowing the court too much room to alter the privilege scheme.¹⁸³

¹⁷⁹ See, e.g., Hyman, *supra* note 27, at 30-31.

¹⁸⁰ See *supra* note 60.

¹⁸¹ CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 105 (Edward W. Cleary et al. eds., 3d ed. 1984); see also *Simrin v. Simrin*, 43 Cal. Rptr. 376, 379 (Dist. Ct. App. 1965) (recognizing that "[f]or the unwary spouse who speaks freely, repudiation [of a confidentiality agreement applicable to marriage counseling] would prove a trap; for the wily, a vehicle for making self-serving declarations").

¹⁸² Note, *Developments—Privileged Communications*, 98 HARV. L. REV. 1450, 1487-88 (1985).

¹⁸³ Cf. RICHARD A. POSNER, *OVERCOMING LAW* 134 (1995) (noting that statutory rules, as opposed to standards, limit to some degree judicial discretion).

The likely result of such an approach is a complex rule or statute. Although such complexity is not a virtue, it may be necessary given the complexity of the mediation confidentiality issue.¹⁸⁴ Such complexities may also sacrifice some certainty in the application of the rule and thereby cause the parties to rely less on the protection the rule offers and to be more circumspect in mediations. This result, however, is not inevitable. Because no privilege is absolute, a flexible rule establishes its exceptions (or standards for exceptions) *ex ante* rather than leaving them for *ex post* determination by the court. Thus, parties can still determine with some reasonable certainty the probability of most disclosures. Moreover, to the extent that the statute creates a sufficiently high hurdle for disclosure, it may discourage litigants from routinely seeking disclosure, an effect that should also promote greater security that disclosures will remain confidential.¹⁸⁵

An example of a mediation confidentiality provision that establishes such a compromise between apparent certainty and flexibility is contained in the Administrative Dispute Resolution Act of 1990 (ADR Act).¹⁸⁶ Congress passed the ADR Act to encourage federal agencies to use mediation and other forms of ADR. Section 574 of the statute recognizes the importance of mediation confidentiality and creates specifically drafted mediation confidentiality protections.¹⁸⁷ The ADR Act's protections were "created to enable parties to ADR proceedings to be forthcoming and candid, without fear that frank statements may later be used against them."¹⁸⁸

Section 574 avoids many of the drafting problem found in the CJRA provisions. As a general rule, the statute is similar to the CJRA-inspired provisions in that it creates broad confidentiality protection for mediation communications. The statute states that parties and mediation neutrals "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication."¹⁸⁹

¹⁸⁴ Green, *supra* note 44, at 8; *see generally* Hyman, *supra* note 27 (analyzing complex mediation privilege rule).

¹⁸⁵ *Developments*, *supra* note 182, at 1489.

¹⁸⁶ 5 U.S.C. §§ 571 to 593 (Supp. IV 1992).

¹⁸⁷ 5 U.S.C. § 574. This section appears in the Appendix to this Article, along with certain relevant defined terms.

¹⁸⁸ S. REP. NO. 543, 101st Cong., 2d Sess. 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3931, 3941.

¹⁸⁹ 5 U.S.C. §§ 574(a), (b). Section 571(5) defines "dispute resolution communication" as follows:

Unlike many of the provisions contained in the Plans, however, section 574 does not stop with creating this broad privilege. The section creates carefully crafted exceptions to the scope of mediation confidentiality through the use of specific exclusions. For example, section 574 allows disclosure where the need for confidentiality no longer exists, such as where a "dispute resolution communication has already been made public."¹⁹⁰

The statute also builds in flexibility by providing the court with a framework for evaluating disclosure issues not specifically enumerated in the statute. A court is permitted to order both neutrals and parties to disclose such communications if disclosure is necessary to: "(i) prevent a manifest injustice; (ii) help establish a violation of law; or (iii) prevent harm to the public health or safety."¹⁹¹ Disclosures sought for these reasons are subject to a balancing test: the alleged necessity for the disclosure must be of "sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential."¹⁹² This balance is broad enough to encompass both interests which a mediation privilege should protect—the creation of a zone of privacy and the protection of the appearance of mediator neutrality.

In this manner, the section goes a long way toward preventing inconsistent court rulings. Unlike a number of the Plan provisions, the statute does not create apparently absolute protection. In addition to specific enumerated exclusions from confidentiality, the statute provides the court with three general areas where disclosure may be allowed. Although it is certainly possible for a court to broadly construe phrases such as "manifest injustice,"¹⁹³ the rule hems in the court to a certain degree. Section 574 tells the court how it should weigh disclosure and confidentiality. The court is directed not only to consider the individual case at hand, but also

[A]ny oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.

Id. at § 571(5).

¹⁹⁰ 5 U.S.C. §§ 574(a)(2), 574(b)(3).

¹⁹¹ 5 U.S.C. §§ 574(a)(4), 574(b)(5).

¹⁹² *Id.*

¹⁹³ See Hyman, *supra* note 27, at 41 (explaining that an exception for "manifest injustice" would "swallow the rule" if construed too broadly).

to consider the broader effect that disclosure will have on the efficacy of future dispute resolution proceedings. This section thus gives the court the necessary parameters it needs to balance the inevitable tension between confidentiality and disclosure.

The flexibility built into this provision allows a court to deal with unusual situations not addressed in the specific exceptions. For example, the court's ability to allow disclosure to "prevent a manifest injustice" would permit the court to allow disclosure to address any abuse of the mediation process or other fraud, bad faith, or illegal conduct.¹⁹⁴ The court can use the same exception in cases implicating a criminal defendant's constitutional right to confrontation or compulsory process.¹⁹⁵ The exception for violations of law and the prevention of harm to public safety or health are important in public interest cases where mediation confidentiality has been a particular concern.¹⁹⁶

The statute also protects the status of mediation neutrals by establishing separate standards for compelling disclosures from them as opposed to parties.¹⁹⁷ In this way, the statute recognizes that maintaining the appearance of mediator neutrality is an additional important consideration with respect to disclosures from neutrals.¹⁹⁸ Thus, while disclosure may be required from both neutrals and parties where required by statute, "a neutral should make such communication public only if no other person is reasonably available to disclose the communication."¹⁹⁹ A party may disclose if

¹⁹⁴ Green, *supra* note 44, at 29 (commenting that a statute without such exceptions is overbroad).

¹⁹⁵ *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Davis v. Alaska*, 415 U.S. 308 (1974). It is not clear that a mediation privilege must yield in all criminal cases. In *United States v. Nixon*, 418 U.S. 683, 713 (1974), the Court found that claims of executive privilege were insufficient to prevent disclosure pursuant to a grand jury subpoena. There, the Court held that:

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

Id. However, when there has not been such a demonstrated, specific need, the existence of a mediation privilege may provide a sufficient basis to quash a grand jury subpoena. *United States v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987).

¹⁹⁶ See, e.g., Harter, *supra* note 43, at 341; Thomas S. Leatherbury & Mark A. Cover, *Keeping Public Mediation Public: Exploring the Conflict Between Confidential Mediation and Open Government*, 46 SMU L. REV. 2221 (1993).

¹⁹⁷ 5 U.S.C. § 574(a). See also Hyman, *supra* note 27, at 33-34.

¹⁹⁸ See generally *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980).

¹⁹⁹ 5 U.S.C. § 574(a)(3).

all parties to the proceeding consent, but a neutral may only disclose if, in addition, she and any affected nonparties consent as well.²⁰⁰ The ADR Act also addresses a common area where the mediator's testimony might be sought—the situation where a dispute resolution communication is relevant to resolving a dispute over the existence or meaning of an agreement.²⁰¹ In that situation, confidentiality is waived only with respect to the parties. The mediator may not testify or produce documents unless she consents to do so.²⁰²

The statute is not perfect by any means. First, the statute is long and complex, which may make it difficult for unsophisticated parties who may not have legal representation to understand it. Although this complexity is a drawback, section 574 is by no means the only example of a complex mediation privilege. Other privileges proposed by the American Bar Association²⁰³ and other mediation experts²⁰⁴ are equally complex. Such complexity may well be a necessary evil when attempting to draft an appropriately flexible and inclusive privilege.

Section 574 is also not free from inappropriate limitations on the scope of confidentiality. Section 574 provides that the "parties may agree to alternative confidential procedures for disclosures by a neutral."²⁰⁵ This provision may not adequately protect the appearance of mediator neutrality. Although the parties may not question the appropriateness of the mediator testifying before the mediation begins, their view of whether the mediator is testifying impartially may change after the mediator actually takes the stand. Moreover, allowing the parties to alter the scope of confidentiality raises the possibility that sophisticated parties may be able to take advantage of their unsophisticated opponents. The statute limits that possibility by providing that the parties must inform the medi-

²⁰⁰ *Id.* at § 574(a)(1) (providing that a neutral may not disclose unless "all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing").

²⁰¹ *Id.* at § 574(b)(6). This subsection also applies to "determining the existence or meaning of an . . . award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award[.]"

²⁰² *Id.*; 5 U.S.C. § 574(a)(1).

²⁰³ See American Bar Association Standing Committee on Dispute Resolution Report to the House of Delegates, 12 SETON HALL LEGIS. J. 65 (1988).

²⁰⁴ See Symposium Rule: Confidentiality in Mediation, 12 SETON HALL LEGIS. J. 71 (1988).

²⁰⁵ 5 U.S.C. § 574(d); see also Hyman, *supra* note 27, at 30 (suggesting a similar rule).

ator of any modifications to the confidentiality scheme.²⁰⁶ The mediator apparently may not take any steps to alter such an agreement; she may, however, be able to point out the implications of the agreement to the unsophisticated party.

The parties may also circumvent other protections of mediator neutrality in the statute. Section 574 provides that confidentiality is waived as to the parties (but not as to the neutral) when "the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award."²⁰⁷ If, however, the parties publicly disclose the relevant dispute resolution communications, the neutral may be required to testify. This may result because section 574 also abrogates the privilege as to the neutral where the dispute resolution communication has already been made public.²⁰⁸ These provisions may not adequately protect the appearance of mediator neutrality. A better result would be to limit these exceptions. In this way, a mediator could still testify concerning the scope or existence of a mediated agreement, but only in cases where the court determines that such testimony is necessary to prevent a manifest injustice.²⁰⁹

At least one clear drafting error also exists in the statute. The statute provides that the parties are permitted to disclose a dispute resolution communication if the communication "was provided to or was available to all parties to the dispute resolution proceeding."²¹⁰ As written, it would allow disclosure of a document or oral communication made for purposes of mediation only. For example, if a party made a statement at the mediation that he thought his claim was worth \$100,000, that statement could presumably be disclosed since it was "available to all parties to the dispute resolution proceeding." This reading cannot be correct because, if it were, section 574 would offer less protection than Federal Rule of Evidence 408.

If these problems can be corrected, section 574 would provide a good example of a well-drafted mediation confidentiality provision. Unlike the provisions adopted in some of the Plans, section 574 creates an atmosphere of candor necessary for successful medi-

²⁰⁶ *Id.*

²⁰⁷ 5 U.S.C. § 574(b)(6).

²⁰⁸ *See id.* at § 574(a)(2).

²⁰⁹ *See id.* at § 574(a)(4)(A).

²¹⁰ *Id.* at § 574(b)(7).

ation and protects mediator impartiality without creating an over-inclusive privilege.

CONCLUSION

The CJRA has achieved an important goal—it has prompted courts to experiment with alternative procedures for resolving disputes, including mediation programs. Those programs have the potential to reduce significantly the problems of expense and delay the CJRA sought to address. To achieve that goal, however, the mediation programs need to be well thought out. As courts continue to evaluate these experimental mediation programs, they should re-evaluate the issue of mediation confidentiality. Those courts that have failed to adopt any confidentiality rule should seriously consider doing so. Those that already have a rule should consider whether it properly protects mediation confidentiality.

The mediation confidentiality rules created in response to the CJRA vary widely in the scope of protection they afford. Some provisions are overinclusive; they create absolute or near-absolute protection for mediation communications while failing to provide for any exceptions to confidentiality. These provisions also typically fail to give the court any guidance as to the appropriate factors it should consider in deciding whether to overcome the privilege. Other provisions are underinclusive, or are poorly drafted, making it unclear what information is protected.

These problems should be of great concern. They may give rise to significant disputes in the future. Moreover, to the extent that they fail to create the proper atmosphere of candor necessary for successful mediations, these provisions may discourage parties from participating in mediation. Such a result is antithetical to the purposes for which the CJRA was enacted.

APPENDIX I

The Administrative Dispute Resolution Act

§ 571. Definitions.

For the purposes of this subchapter, the term —

...

(7) “in confidence” means, with respect to information, that the information is provided —

(A) with the expressed intent of the source that it not be disclosed;

or

(B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed[.]

§ 574. Confidentiality.

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication or any communication provided in confidence to the neutral, unless —

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to —

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication, unless —

- (1) the communication was prepared by the party seeking disclosure;
- (2) all parties to the dispute resolution proceeding consent in writing;
- (3) the dispute resolution communication has already been made public;
- (4) the dispute resolution communication is required by statute to be made public;
- (5) a court determines that such testimony or disclosure is necessary to —

- (A) prevent a manifest injustice;

- (B) help establish a violation of law; or

- (C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

- (6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

- (7) the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) The parties may agree to alternate confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon the neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of the dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent the use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) This section shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title.