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THE QUEST FOR UNIFORMITY IN MEDIATION CONFIDENTIALITY: FOOLISH CONSISTENCY OR CRUCIAL PREDICTABILITY?

ELLEN E. DEASON¹

I. INTRODUCTION

Almost everyone has heard someone proclaim that "consistency is the hobgoblin of little minds."² Those more familiar with the quote can retort that it is only "foolish consistency" that Emerson condemned with his memorable phrase.³ There certainly is little consistency, foolish or otherwise, in the current laws, rules and judicial practices that govern confidentiality in mediation. Experimentation by the states has led to a rich, but conflicting, variety of approaches.⁴ By adopting the Uniform Mediation Act (UMA), the states would greatly advance predictability through a coordinated approach to confidentiality. This goal is anything but foolish. In fact, it is crucial to the continued development of mediation as an effective mode of dispute resolution. Further, to the extent that a state's current confidentiality rules differ from the balance struck in the UMA, the importance of a predictable system nationwide should outweigh a single state's investment in its previous policy choices. I read Professor Hughes to argue that we did not need uniformity and, even if we did, the UMA offers too much protection against disclosure.⁵ In my view, he is mistaken on both counts.

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1. Associate Professor, University of Illinois College of Law. Professor Deason served as an advisor to the Uniform Mediation Act Drafting Committees on mediation confidentiality in the federal court system. This article benefited from comments by Nancy Rogers, Richard Reuben and Marc Hilber, who also provided excellent research assistance. This project was supported by a summer grant from the University of Illinois College of Law.

2. RALPH WALDO EMERSON, *Self-Reliance*, in *SELF-RELIANCE AND OTHER ESSAYS* 19, 24 (Dover Thrift ed., Dover Pub. 1993) (1841).

3. *Id.*

4. See *infra* Part III.B.1.

5. This article was prepared in response to Scott H. Hughes, *The Uniform Mediation Act: To The Spoiled Go The Privileges*, 85 MARQ. L. REV. 9 (2001) [hereinafter Hughes Article].

II. THE IMPORTANCE OF CONFIDENTIALITY IN MEDIATION

Confidentiality for mediation communications is regarded as fundamental to effective mediation. This judgment is reflected in the strong scholarly support for mediation confidentiality⁶ and in the statutes passed in every state to protect communications from disclosure.⁷ Strong confidentiality protection is, in many instances, crucial to establishing working relationships within the mediation framework between the adversary parties and with the mediator.

First, confidentiality fosters communication between the parties and the mediator. It can make an agreement possible even when one cannot be reached in ordinary negotiation. Improving communication is also the goal in other settings, such as consultations, where the legal system protects the privacy of relationships by granting a privilege from discovery and testimony between attorney and client, doctor and patient, and priest and penitent.⁸ Forthright communication is even

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6. Many scholars endorse privilege as the most effective method for protecting mediation confidentiality. See, e.g., Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986); Eileen Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U. L. REV. 181 (1981); Jonathan M. Hyman, *The Model Mediation Confidentiality Rule*, 12 SETON HALL LEGIS. J. 17 (1988); Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1 (1995); Michael Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988). Additional scholars agree that confidentiality is important, but favor means other than privilege for its protection. See, e.g., Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91 (1999) (arguing that Federal Rule of Evidence 408 provides adequate confidentiality protection for mediation); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 2 (1986) (recognizing that confidentiality is "important, necessary, and appropriate" in "core cases" but arguing that a privilege is unnecessary to protect confidentiality); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315 (1989) (proposing a rule that a neutral shall not disclose or testify concerning settlements). But see Scott H. Hughes, *A Closer Look—The Case for a Mediation Privilege Has Not Been Made*, 5 DISP. RESOL. MAG. Winter 1998, at 14 (arguing that "it is important to remember that no empirical data exists that connects the success of mediation with the availability of a confidentiality privilege").

7. See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION LAW, POLICY & PRACTICE* app. A (2d ed. 1994) (SARAH R. COLE ed., Supp. 1998); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU. L. REV. 715, 733, app. at 757 (1997).

8. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and

more challenging in mediation than in these other settings, however, because relationships in mediation are multiple and complex. An attorney, doctor, or priest is consulted as a trusted figure who will act or provide advice in the party's best interest. In this context, confidentiality enhances the freedom to communicate, enabling this trusted figure to gather the information necessary and to advise the party accordingly, without the client, patient, or penitent fearing that those communications might be turned against him in a legal proceeding.⁹ Within mediation, in contrast, the initial level of trust is far lower. The goal in mediation is effective communication with an adversarial party. The role of the mediator herself—to facilitate direct communications and serve as an intermediary for indirect communications—is evidence of the difficulty of this goal. Moreover, even the mediator is not a trusted counselor, but merely a neutral. Ideally, parties will trust the mediator because of her neutral role, but they cannot expect her to act wholly in the interests of any one of them.

A fundamental part of the difficulty in communicating with an adversary is the threat of disclosure to one's disadvantage. This threat has more facets in mediation than in other protected settings. In an attorney-client consultation, for example, disclosures typically do not originate from either of the pair who exchanges information.¹⁰ Instead, the privilege functions to prevent an outside adversary from compelling the attorney or client to reveal their communications. In mediation, however, the adversary with whom the exchange needs to take place is also a major source of potential disclosures. If a lawsuit is a possibility, or especially if one is already underway, much that might be said in a good faith attempt to reach settlement during a mediation could become an admission against interest in the courtroom in the absence of confidentiality protections. It would be unrealistic to trust that the opposing party would refrain from using these communications to its litigation advantage.¹¹ Even without a lawsuit, by the time disputing parties reach mediation, their relationship often has degenerated into

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administration of justice").

9. *See id.*

10. One exception is in a dispute over fees or malpractice, where MODEL RULES OF PROFESSIONAL CONDUCT R. 1.6 (2001) permits a lawyer to reveal confidential information "to the extent the lawyer reasonably believes necessary" to establish a claim or defense in a controversy with a client.

11. *See, e.g., Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979) (explaining that without confidentiality, mediation participants "of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game").

animosity and distrust. Therefore, in many mediations, confidentiality does far more than merely enhance the candid nature of the discussion; between some adversaries, confidentiality may be akin to a precondition for any discussion.

Because mediation involves communications with an adversary, the legal structures that promote confidentiality must do more than function as a restraint on outside parties who seek disclosure; they must also provide a substitute for trust between those who are communicating. This is accomplished by limiting the adverse party's ability to disclose or make use of mediation communications. In this respect, assurances of confidentiality reduce the chilling potential of disclosures, whether initiated from inside or outside the group of mediation participants. Parties are then free to explore possibilities for a resolution to their dispute without worrying about the consequences in the courtroom if their exploration does not succeed.¹²

Second, confidentiality is important for maintaining the neutrality of the mediator. As cogently expressed in *NLRB v. Joseph Macaluso, Inc.*,¹³ a mediator who testifies will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality. It is true that this departure from neutrality is not personal or intentional when a mediator is compelled to testify under subpoena. Nonetheless, if a mediator can be converted into the opposing party's weapon in court, then her neutrality is only temporary and illusory.

Neutrality is a bedrock principle of mediation that provides the basis for an effective working relationship between a mediator and parties to a mediation.¹⁴ In mediations that use caucuses, one of the keys to reaching an agreement is often information that the parties convey to the mediator even though they do not want it disclosed to the other side.

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12. The possibility of disclosure outside the courtroom may also have a chilling effect on communication in mediation. The UMA leaves this aspect of confidentiality to the parties because, unlike discovery or court testimony, it can be managed effectively through agreement. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (NCCUSL), DRAFT UNIFORM MEDIATION ACT WITH PREFATORY NOTE AND REPORTER'S NOTES §2(1) (May 2001) [hereinafter MAY 2001 DRAFT]. All citations to the MAY 2001 DRAFT will be followed by sections in brackets that reference the final version of the UMA [hereinafter UMA] that is printed in full in the pages that follow within this edition of the *Marquette Law Review*. There will not, however, be corresponding sections to the Prefatory Note or Reporter's Notes because these portions of the final UMA were not completed at the time of publication.

13. 618 F.2d 51, 55-56 (9th Cir. 1980).

14. See, e.g., Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 837 (1999) (describing neutrality as "a primary value of mediation").

When a mediator must reveal this information in court, it harms the functioning of the mediation process by undermining future parties' expectations of mediator neutrality.¹⁵

Third, when a dispute in mediation is also the subject of a lawsuit, confidentiality provisions perform an important role by keeping the judging function separate from the mediation function. This separation is especially important for court-annexed mediation programs or referrals from other decision-making bodies, because the referral links these functions more closely than when a privately mediated dispute is later litigated. Without assurances of confidentiality between court mediators and judges or arbitrators, parties may fear that their conversations with the mediator could be conveyed informally to the decision-maker. This fear of backdoor disclosures could be quite chilling for mediation, notwithstanding limitations on introducing mediation information as evidence in a lawsuit.¹⁶ The problem is especially great if the parties face the prospect of a bench trial in the event that they fail to settle the case.

Moreover, confidentiality between mediators and judges helps protect the integrity of both processes. As with other *ex parte* communications, communications between a mediator and the assigned judge cast doubt on the judge's decision-making neutrality.¹⁷ Such communications can also raise questions about the independence of the mediator from judicial influences. When courts provide mediation, and especially when they mandate mediation, they need to carefully prevent improper cross-communication if they are to avoid the appearance of bias on the part of the judge or mediator.¹⁸

In sum, the challenge of communicating with an adversary, the presence of a neutral intermediary, and the potential for information

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15. See, e.g., *Marchal v. Craig*, 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997) (stating that the court rule preventing mediator testimony protects the mediation process itself).

16. Cf. Frank E.A. Sander, *A Friendly Amendment*, 6 DISP. RESOL. MAG., Fall 1999, at 11 (noting the problem of a perceived information leakage from a mediating judge to the judge who will try the case).

17. Consequently, both state and federal codes of judicial ethics prohibit *ex parte* communications. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990); CODE OF CONDUCT FOR FEDERAL JUDGES Canon 3(A)(3), 175 F.R.D. 364, 367 (1998).

18. See, e.g., *Township of Aberdeen v. Patrolmen's Benevolent Assoc.*, Local 163, 669 A.2d 291 (N.J. Super. Ct. App. Div. 1996) (vacating the arbitration award where the arbitrator impermissibly relied on information presented during mediation but not at the arbitral hearing). But see *Fenske v. Fenske*, No. C4-99-2007, 2000 WL 622589 (Minn. Ct. App. May 16, 2000) (approving trial court's use of a mediator as a court-appointed expert witness who made recommendations following an unsuccessful mediation). Cf. Sander, *supra* note 16 (discussing appearance of impropriety created by judicial mediation).

informally reaching a judge all make confidentiality especially important for mediation. Each of these aspects of mediation also carries its own implications for how confidentiality protections need to be structured. While many state statutory provisions and court rules are focused primarily on one or two of these purposes for confidentiality, the UMA manages to advance them all. The privilege held by each of the parties allows them to control the conditions under which they communicate with the opposing side.¹⁹ The privilege held by the mediator allows her to protect the process by maintaining her neutrality.²⁰ And the prohibition against a mediator disclosing communications to a court maintains the separation and integrity of both mediation and judicial decision-making.²¹ These legal measures can increase parties' confidence that mediation will not harm their interests and thus will be effective in encouraging their meaningful participation.

III. THE NEED FOR UNIFORMITY IN MEDIATION CONFIDENTIALITY

Valuing confidentiality is one thing, but promoting uniformity in confidentiality laws is altogether another. Consistency would certainly be foolish if the sole purpose for aligning the legal structures that govern confidentiality was to promote uniformity for its own sake. That, however, is far from the case. In mediation, as in other settings in which privileges encourage communications, protection for those communications must be predictable if confidentiality is to have its intended effect.²² To optimize communication among mediation participants and provide a foundation for their perception of the mediator's (and when applicable, the court's) neutrality, the benefits of confidentiality must be effective *ex ante*, during the mediation process, and prior to any dispute over the scope of confidentiality. The positive influence of confidentiality is lost if, during the mediation, the parties and their lawyers do not have confidence in their ability to protect

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19. MAY 2001 DRAFT, *supra* note 12, § 5(b)(1); [UMA § 4(b)(1)].

20. *Id.* § 5(b)(2)–(3); [UMA § 4(b)(2)–(3)].

21. *Id.* § 8(a)–(c); [UMA § 7 (a)–(c)].

22. *See* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Id.

communications from future disclosure and in the system's protection for mediator and judicial neutrality.

Such confidence would be easy to build if mediation occurred in a locked box that could be sealed at the end of the process. This isolation, however, is unrealistic for mediation—there are too many other values that compete with confidentiality for this one principle to control without exception. Confidentiality not only runs counter to the general value we place on hearing all the evidence in our adversarial system of justice,²³ but it also can impair specific goals important to society.²⁴ As a result, confidentiality cannot be absolutely protected, and there will inevitably be some level of uncertainty associated with mediation communications. In this climate, it is not useful to regard confidentiality as an "all or nothing" proposition. Mediation participants need to develop more nuanced expectations about circumstances that may trigger the need for disclosure. An adequate level of predictability requires, at a minimum, knowledge of the boundaries at which uncertainty begins for confidentiality.

Predictability is not, of course, the same as uniformity. Indeed, uniformity is not necessary for predictability if one can know that certain conditions will lead inevitably to a particular result, and can then control those conditions. This would mean knowing what law of confidentiality will govern a suit filed in a chosen forum and ensuring that confidentiality disputes are in fact resolved in that forum. Unfortunately, as discussed below, there are so many variables involved in determining confidentiality protection that a high level of predictability is unrealistic. First, parties have only a limited ability to control the forum in which their mediation communications may become a relevant issue. Second, parties also have only a limited ability to control the law that will apply to a confidentiality dispute. Knowing the characteristics of the applicable law is important not only because of the many variations among the states, but also because the ambiguities in many current statutes introduce uncertainty to their application.

This multi-faceted lack of control is nothing new. It is embedded in our multi-jurisdictional dual court system and complex choice-of-law rules. The importance of where suit is filed and what law will determine the level of confidentiality loses its force, however, if all the options for

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23. See, e.g., JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 70 (1961) (stating court is entitled to "every [person's] evidence").

24. Some exceptions to accommodate specific goals that require disclosures are discussed *infra* at note 45.

courts and applicable law lead to identical limits on disclosures. Thus, uniform mediation rules will be the most reliable way (and perhaps the only realistic way) to improve predictability for mediation confidentiality.

A. Flexibility of Forum

The first step in determining what law would be applied in a litigated confidentiality dispute is to determine the likely forum. It is difficult to foresee, at the time of a mediation, that a dispute will arise and threaten confidentiality, let alone to forecast the circumstances that will determine the forum options for that dispute. Forum prediction is most certain, however, when suit is filed prior to mediation and the mediation either terminates without an agreement or results in a disagreement about a purported settlement agreement. In these specific situations, the already-established ongoing litigation forum is the typical location for resolving confidentiality disputes that may follow.²⁵

The forum for a confidentiality dispute is much harder to predict when mediation of a filed case is successful or when the case otherwise terminates before a dispute arises. Courts rarely retain jurisdiction over a completed case unless they need to monitor the implementation of a settlement agreement. Frequently, a later dispute between mediation parties that triggers a lawsuit may be brought in any court that meets jurisdiction and venue requirements. The filing party has this flexibility even if the suit raises confidentiality issues about a mediation held under the auspices and rules of a different court. Therefore, it is inaccurate to assume that the court that sponsored a court-annexed mediation will also decide any subsequent confidentiality dispute linked to that mediation. There may be a geographical shift,²⁶ a shift from state to

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25. See, e.g., *Clark v. Stapleton Corp.*, 957 F.2d 745 (10th Cir. 1992) (discussing breach of confidentiality in court's mediation program); *Doe v. Nebraska*, 971 F. Supp. 1305 (D. Neb. 1997) (rejecting claim of confidentiality for mediation settlement proposals in order to decide motion for sanctions arising out of court's mediation program); *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778 (S.D.N.Y. 1995) (sanctioning attorney for violation of confidentiality provisions of court's mediation program and referral order); *In re Waller*, 573 A.2d 780 (D.C. 1990) (disciplining attorney for conflict of interest revealed in court-ordered mediation); *Paranzino v. Barnett Bank*, 690 So.2d 725 (Fla. Dist. Ct. App. 1997) (sanctioning plaintiff for breach of confidentiality provisions following court-ordered mediation); *Few v. Hammack Enter., Inc.*, 511 S.E.2d 665 (N.C. Ct. App. 1999) (considering evidence from mediation to conclude that parties reached an agreement in a court-sponsored mediation program).

26. See, e.g., *Datapoint Corp. v. Picturatel Corp.*, No. CIV.A.3:93-CV-2381D, 1998 WL 25536 (N.D. Tex. Jan. 14, 1998) (deciding challenge to a settlement reached in a related case in the Southern District of Texas mediation program).

federal court,²⁷ or a shift from federal to state court.²⁸ If statements from the parties' mediation are relevant to their later suit, then a court other than the one that sponsored the mediation may well make the confidentiality decision.

In mediations that take place without a lawsuit in the background the parties face even more uncertainty regarding potential forums in the event of a later dispute. If a mediation occurs between citizens of the same state who raise only issues subject to state law, then the parties may be fairly safe in predicting that if a suit follows their mediation, it will likely take place in state court in their home state. With respect to a mediation between citizens of different states or a mediation on a topic that could develop into a federal claim, however, confidentiality may become an issue in either federal or state court. Additionally, a mediation between citizens of different states or a mediation with a multi-state component could spawn a lawsuit located in any one of multiple forums.²⁹

Moreover, parties in any mediation must consider the possibility that someone who is not participating in their mediation may bring a lawsuit and seek discovery or testimony concerning their mediation communications.³⁰ This creates even greater uncertainty in predicting possible forums, as the filing decision is often not in the hands of either party. Parties do have the option to reduce their forum uncertainty by entering into a private agreement that designates their choice of judicial forum in the event that a dispute arises out of the mediation. The force of such agreements, however, is uncertain and they certainly are not

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27. *See, e.g.,* *Smith v. Smith*, 154 F.R.D. 661 (N.D. Tex. 1994) (quashing subpoena to mediator to testify regarding state court mediation); *Hudgins v. Security Bank of Whitesboro*, 188 B.R. 938 (Bankr. E.D. Tex. 1995) (determining validity of a settlement agreement from state court mediation).

28. *See, e.g.,* *Allen v. Leal*, 27 F. Supp. 2d 945, 949–50 (S.D. Tex. 1998) (remanding to state court to hear counterclaim on breach of mediation settlement agreement allegedly coerced by mediator).

29. *See, e.g.,* *Asten, Inc. v. Wangner Sys. Corp.*, No. C.A. 15617, 1999 WL 803965 (Del Ch. Sept. 23, 1999) (considering validity of agreement reached in Florida mediation to settle federal claims in patent litigation in South Carolina between two Delaware corporations with principal places of business in South Carolina).

30. *See, e.g.,* *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511 (W.D. Pa. 2000) (plaintiffs sought discovery regarding mediation held on potential claims); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 2000) (plaintiff sought discovery regarding mediation on claims that were never filed); *In re March*, 1994 Special Grand Jury, 897 F. Supp. 1170 (S.D. Ind. 1995) (federal prosecutors sought information for criminal prosecution from mediation held under auspices of state court).

likely to be effective against a stranger to the mediation.³¹

In short, for many mediations, the level of complexity is such that it is hard to predict the location of a suit that might be filed if a confidentiality dispute arises after settlement. Such a prediction would require knowing the nature of the dispute and hence whether federal subject matter jurisdiction would be satisfied, plus the geographical limitations imposed by personal jurisdiction and venue requirements. Furthermore, even if the parties could foresee such details, in all but the simplest disputes these factors might well permit numerous forum choices.

Given the wide variation in the confidentiality provisions currently in force, forum choice by itself can generate uncertainty in applicable law. Only about half the states have enacted a generally applicable mediation confidentiality provision.³² The rest of the states have confidentiality provisions only for mediations concerning specific subjects or in specific settings, such as court-annexed programs. In these states, mediations that are not covered under a narrow subject matter statute typically have no confidentiality protection beyond a relatively weak evidentiary exclusion for certain aspects of negotiation.³³ Furthermore, among states with generally applicable mediation provisions, statutes are extremely variable. They employ legal frameworks that include privilege, evidentiary exclusion, or testimonial incapacity, as well as combinations that do not fit well into any category.³⁴ Exceptions to confidentiality are equally variable.³⁵ With so many possibilities, forum choice by itself makes statutory coverage hard to foresee. Forum uncertainty, however, is only the beginning of the predictive analysis. The question of applicable law and interpretive issues concerning that law add additional levels of uncertainty to any

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31. See ROGERS & MCEWEN, *supra* note 7, § 9:24.

32. See MAY 2001 DRAFT, *supra* note 12, at Prefatory Note § 3 (citing twenty-four statutes).

33. This evidentiary exclusion is provided in many states by a state-law version of Federal Rule of Evidence (FRE) 408. The scope of these evidentiary exclusions is narrower than the confidentiality protections provided by a typical mediation statute. See, e.g., *In re Bidwell*, 21 P.3d 161 (Or. Ct. App. 2001) (holding that admission of letters offered to support prevailing party's application for attorneys fees was not barred by Oregon Evidence Code 408, but they were protected as confidential mediation communications). The benefits and limitations of FRE 408 as the primary vehicle for ensuring mediation confidentiality are summarized in Ehrhardt, *supra* note 6, at 102-08 and Kirtley, *supra* note 6, at 11-14.

34. See generally Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, (forthcoming).

35. See Kirtley, *supra* note 6, at 39-52.

attempt to predict the confidentiality of mediation communications.

B. Factors Creating Uncertainty Concerning Applicable Law

Assume that the parties to a mediation can gaze into a crystal ball and foresee the form and forum of a subsequent lawsuit in which their mediation communications may be relevant. This section explores why, even if parties were armed with this knowledge, it would be hard to predict the outcome of a confidentiality dispute. First, interpretive questions abound because the law of mediation confidentiality is still so young and in flux. The existence of a wide variety of legislative approaches has contributed to interpretive answers that could charitably be termed "flexible," especially when a court is applying the unfamiliar law of another forum. Due to ambiguities and gaps in coverage, many of the current "first generation" mediation statutes would benefit from an overhaul. Second, interpretation aside, in many circumstances, identifying the applicable confidentiality law that the court will need to interpret is itself the threshold issue, is itself uncertain. The UMA would ameliorate both problems and, by reducing the need to consider these uncertainties, would greatly enhance predictability in mediation confidentiality.

1. Uncertainty in Interpretation

Ambiguous legal frameworks for confidentiality protection in some state statutes have led to confusion, unanticipated court decisions, and thus poor predictability. For example, many state statutes do not define mediation or set criteria for when the statute applies,³⁶ which may leave parties unsure whether or not their discussion will be classified as mediation and included under the statute's protections. In addition, unusual or poorly drafted requirements for coverage can run counter to parties' expectations or be used in an attempt to avoid confidentiality obligations.³⁷ Carefully crafted limits on scope are also necessary to

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36. See, e.g., ARK. CODE ANN. § 16-7-206 (Michie 1999); KAN. STAT. ANN. § 60-452 (Supp. 1999); LA. REV. STAT. ANN. § 9:4112 (West Supp. 2001); NEV. REV. STAT. ANN. 48.109 (Michie 1996); N.J. STAT. ANN. § 2A:23A-9 (West 2000); N.D. CENT. CODE § 31-04-11 (1996); S.D. CODIFIED LAWS § 19-13-32 (Michie Supp. 2001). Among states that do define mediation, there is certainly no consensus. Compare MASS. GEN. LAWS ANN. ch. 233, § 23C (West 2000) (defining mediation to require a written agreement with a mediator who has thirty hours of training, four years of experience, or is accountable to a mediation agency appointed by a court or agency, or that has existed for three years), with NEB. REV. STAT. § 25-2903(6) (1995) (defining mediation as "intervention into a dispute by a third party who has no decisionmaking authority and is impartial to the issues being discussed").

37. See, e.g., *Wilmington Hospitality, L.L.C. v. New Castle County*, Civ. A. No. 18436,

perform an exclusionary function—preventing parties to a lawsuit from cloaking other interactions with a mantle of mediation confidentiality that may not be justified on public policy grounds.³⁸ The UMA would provide a simple but consistent framework to guide parties' expectations.³⁹

A surprising number of state statutes are ambiguous about the legal form of their confidentiality protection. They frequently provide no label.⁴⁰ They often combine and mix confidentiality doctrines.⁴¹ They may confusingly identify their confidentiality protection as one legal construct, but then incorporate language that arguably creates other legal forms of protection.⁴² When a privilege is created in this fashion, there is no designated holder, a problem that also plagues statutes that even explicitly establish a privilege.⁴³ The designation of holders is

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2001 WL 291948, at *4 (Del. Ch. Mar. 7, 2001) (rejecting the argument that court-referred mediation is not covered by confidentiality rules because parties failed to comply with the requirement for a written agreement to mediate); cf. *Fields-D'Arpino v. Restaurant Assoc., Inc.*, 39 F. Supp. 2d 412 (S.D.N.Y. 1999) (disqualifying a lawyer from representing party after determining that he conducted mediation in the dispute).

38. See, e.g., *White v. Holton*, No. 927915E, 1993 WL 818800 (Mass. Sup. Ct. Oct. 4, 1993) (determining that conflict management consultant's report was not protected within state's statutory definition of mediation); *Anderson v. Anderson*, 514 S.E.2d 369 (Va. Ct. App. 1999) (holding that mediation confidentiality provisions did not apply when psychologist functioned as therapist, not mediator).

39. See MAY 2001 DRAFT, *supra* note 12, §§ 3(2)–(4), 4; [UMA § 2(1)–(3), 3].

40. See, e.g., UTAH CODE § 78-31b-8 (2001) (providing that mediation participants and neutral may not disclose and may not be required to disclose mediation communications).

41. The Texas alternative dispute resolution statute, for example, can be read to contain a privilege held by the parties, an evidentiary exclusion, and immunity from service of process. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053(c), 154.073(a) (Vernon 1997).

42. See, e.g., *Haghighi v. Russian-American Broadcasting Co.*, 945 F. Supp. 1233, 1235 (D. Minn. 1996) (stating that "it is unclear whether [the Minnesota statute] creates a privilege or a rule of competency"), *rev'd on other grounds*, 173 F.3d 1086 (8th Cir. 1999); Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota*, 18 HAMLINE J. PUB. L. & POL'Y 329, 335 (1997) (arguing that MINN. STAT. § 595.01(1)(l) (2000) establishes a mediation privilege even though it is framed in terms of competency); Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N.D. L. REV. 45, 56 (1998) (observing lack of clarity in North Dakota mediation statute, which may create a rule of privilege or of inadmissibility).

43. See generally OKLA. STAT. ANN. tit. 12, § 1805 (West 1993); 42 PA. CONS. STAT. ANN. § 5949 (West 2000). Moreover, there is great inconsistency among the statutes that designate holders. Some designate the parties to the mediation as the holders. See, e.g., ARIZ. REV. STAT. ANN. § 12-2238(B)(1) (West 1994); FLA. STAT. ANN. § 44.102(3) (West Supp. 2001); S.D. CODIFIED LAWS § 19-13-32 (Michie Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (Vernon 1997); WASH. REV. CODE ANN. § 5.60.070(1)(a) (West 1995); WYO. STAT. ANN. § 1-43-103(b) (Michie 1999) (mediator may claim privilege only on behalf of party). Others make the mediator an independent holder. See, e.g., COLO. REV.

important because it defines the purposes that the privilege serves: a privilege held by the parties allows them to protect their expectations of confidentiality; one held by the mediator furthers mediator neutrality.⁴⁴

More fundamentally, while a mixture of multiple confidentiality doctrines may seem like a harmless abundance of caution, the resulting lack of clarity can have unintended consequences. For example, California's mediation confidentiality provisions are contained in sections of the state evidence code on evidentiary exclusions and witness competency, but waiver provisions arguably make the evidentiary exclusion operate as the equivalent of a privilege that can be invoked at a participant's behest.⁴⁵ This sort of ambiguity creates leeway in characterizing confidentiality protections and in interpreting them. In fact, both state and federal courts in California have crafted exceptions to confidentiality that allow mediators to testify, even though the incompetency provision is phrased in absolute terms and such judge-made exceptions are not authorized by the state statute.⁴⁶ The UMA would cure such ambiguities by clearly defining the legal format using the familiar construct of privilege, simultaneously bringing the form of confidentiality protection into alignment with its functions.

Along with ambiguity, many mediation statutes create uncertainty due to gaps in their coverage. While awareness of the issues that drafters need to anticipate has grown along with growth in the scope and

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STAT. ANN. § 13-22-307(a) (West 1997); IOWA CODE ANN. § 679C.3 (West Supp. 2000); KAN. STAT. ANN. § 60-452a(a) (Supp. 2000); LA. REV. STAT. ANN. § 9:4112(E) (West Supp. 2001); OHIO REV. CODE ANN. § 2317.023(C)(1)-(2) (Anderson 1998); OR. REV. STAT. § 36.222(3) (1999); TEX. CIV. PRAC. & REM. CODE § 154.073(b) (Vernon 1997). Other statutes make the mediator a joint holder with the parties. See, e.g., UTAH CODE ANN. § 78-31b-8 (Supp. 2000).

44. See *supra* Part II.

45. Mediation is covered in sections 1115-1128 of the California Evidence Code under the heading "Evidence . . . Excluded by Extrinsic Policies." Consistent with an evidentiary exclusion, section 1119 makes written or oral communications during mediation inadmissible. In addition, however, section 1122, entitled "conditions to admissibility," permits disclosure if agreed to and put in writing. This section thus appears to function as a waiver provision with all the parties and the mediator holding the equivalent of a privilege. Even so, its implications are not entirely clear. Compare *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 468 n.3 (Ct. App. 1998) (confidentiality may be waived), with *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1129 n.23 (N.D. Cal. 1999) (wording suggests waivers by parties would not be sufficient for disclosure unless mediator and any nonparty participants also waive).

46. *Rinaker*, 74 Cal. Rptr. at 469-70, 472-73 (holding that mediator's testimony could be compelled if necessary to protect against perjury and to uphold defendant's due process right to cross-examine and impeach adverse witness); *Olam*, 68 F. Supp. at 1129 (hearing mediator's testimony on plaintiff's claim that mediated memorandum of understanding was obtained by duress).

frequency of mediation, many statutes are nonetheless dated and omit topics that have proved important as mediation has continued to develop. For example, one source of uncertainty for mediation confidentiality stems from unresolved conflicts with other areas of state law that require or permit disclosures. Many state mediation statutes do not include any guidance for recurring conflicts that occur between the goal of mediation confidentiality and policies that encourage or require disclosures on topics such as child abuse, ongoing crime, or mediator misconduct.⁴⁷ The UMA solves this problem with a list of explicit exceptions drawn from the cumulative experience of the states.⁴⁸

Another type of policy conflict often left unresolved in state mediation statutes arises in conjunction with efforts to enforce or resist enforcement of settlement agreements resulting from mediation.⁴⁹ On one hand, many states require written signed settlement agreements⁵⁰ or

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47. Some states at least partially resolve such policy conflicts between disclosure and confidentiality. One approach is a comprehensive resolution subordinating mediation confidentiality to all state statutes that include disclosure requirements. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238(B)(3) (West 1994); COLO. REV. STAT. § 13-22-306(2)(c) (West 1997); KAN. STAT. ANN. § 60-452a (b)(4) (Supp. 1999). Other states make individual statutory exceptions to mediation confidentiality for specific disclosures. *See, e.g.*, IOWA CODE §§ 679C.2(5) (child abuse), 679C.2(6) (claim against mediator), 679C.2(4) (ongoing or future "criminal activity") (West Supp. 2000); KAN. STAT. ANN. §§ 60-452a(b)(2) (child abuse), 60-452a(b)(1) (claims against neutral), 60-452a(b)(iii) (ongoing criminal activity) (Supp. 1999); OR. REV. STAT. §§ 36.222(5) (claim against mediator), 36.222(6) (child abuse) (1999); S.D. CODIFIED LAWS §§ 19-13-32 (claim against mediator), 19-13-32 (crime or fraud) (Michie Supp. 2000); Utah Code Ann § 78-31b-8(6) (2000) (child abuse); WASH. REV. CODE ANN. § 5.60.070(1)(g) (West 1995) (claim against mediator); WIS. STAT. ANN. § 904.085(4)(d) (West 2000) (child abuse); WYO. STAT. ANN. §§ 1-43-103(c)(iii) (child abuse), 1-43-103(c)(ii) (future crime or harmful act) (Michie 1999). In some states, unresolved conflicts with statutes that require disclosures are assigned to the courts to consider on a case-by-case basis. *See, e.g.*, ARK. CODE ANN. § 16-7-206(c) (Michie 1999); LA. REV. STAT. ANN. § 9:4112(D) (West Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(e) (West 2001).

48. MAY 2001 DRAFT, *supra* note 12, § 7 Reporter's Working Notes § 2. *See infra* note 102 (listing exceptions).

49. *See, e.g.*, Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. (forthcoming 2001).

50. These requirements may be specific to mediated settlement agreements. *See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. § 1415(e)(2)(G) (Supp. IV 1998); FLA. R. CIV. PRO. 1.730; IND. CT. ADR R. 2.7(E)(2); MINN. STAT. ANN. § 572.35 (West 2000); N.C. SUPER. CT. MEDIATED SETTLEMENT CONF. R. 4(C); N.Y. JUD. LAW § 849-b(4)(d) (McKinney Supp. 2001) (community dispute resolution centers program); UTAH CT. R. 101(e). Or they may apply to any settlement of a lawsuit. *See, e.g.*, ALASKA R. CIV. PRO. 81(e); ARIZ. R. CIV. PROC. 80(d); LA. CIV. CODE ANN. art. 3071 (West Supp. 2001); MICH. CT. RULE 2.507(H); NEV. R. DIST. CT. 16; N.M. STAT ANN. § 40-2-4 (Michie 1999) (settlements terminating marriages); N.Y. CIV. PRAC. L.&R. § 2104 (McKinney 1978); TEXAS R. CIV. PRO. 11.

link a writing requirement directly to an evidentiary limitation.⁵¹ On the other hand, state contract law often recognizes oral agreements.⁵² Proving an oral agreement has deleterious consequences for confidentiality because it typically necessitates testimony about mediation communications.⁵³ While many courts have resolved this conflict in favor of a signed writing and thus maintained confidentiality in mediation,⁵⁴ a significant number of other courts have instead applied general state contract principles permitting oral contracts.⁵⁵ Some courts

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51. For example, some privilege statutes make an exception for the disclosure of settlement agreements only when they are written and signed. *See, e.g.,* COLO. REV. STAT. ANN. § 13-22-302(2.5) (West 1997) ("mediation communication" in court-annexed ADR protected by privilege defined to exclude written, executed settlement agreements); FLA. STAT. ANN. § 44.102(3) (West Supp. 2001) (exception to privilege for court-ordered mediation limited to executed settlement agreements); OHIO REV. CODE ANN. § 2317.023 (Anderson 1998) (mediation provisions do not affect admissibility of written, signed settlement agreement); WASH. REV. CODE ANN. § 5.60.070(1)(e) (West 1995) (exception to mediation privilege for written agreement signed by the parties resulting from a mediation proceeding).

52. *See, e.g.,* *Lampe v. O'Toole*, 685 N.E.2d 423 (Ill. App. Ct. 1997) (holding properly proved oral settlement is enforceable even without signed release); *John Deere Co. v. A & H Equipment, Inc.*, 876 P.2d 880 (Utah Ct. App. 1994) (holding settlement agreement enforceable even though not reduced to writing, signed by the parties or entered on the minutes of the court).

53. *See, e.g.,* *Vernon v. Acton*, 732 N.E.2d 805, 809 (Ind. 2000) ("nearly everything said during a mediation session could bear on either whether the disputants came to an agreement or the content of the agreement") (quoting NCCUSL, UMA DRAFT § 8(a)(1) Reporter's Notes § 2 (Mar. 2000)); *Wilmington Hospitality, L.L.C. v. New Castle County*, Civ. A. No. 18436, 2001 WL 291948, at *5 (Del. Ch. Mar. 7, 2001) ("[When] there is *no* written settlement signed by *anyone*, it is impossible for the parties to litigate over the terms of the putative agreement without breaching the confidentiality of the mediation process in a substantial way."). For example, when the court in *Few v. Hammack Enter., Inc.*, 511 S.E.2d 665, 669-70 (N.C. Ct. App. 1999), affirmed a finding that the parties had reached an oral settlement in mediation, its decision was based on an evidentiary hearing with testimony describing the mediation.

54. Some courts have interpreted a writing requirement to preclude evidence of oral agreements. *See, e.g.,* *Hanna v. Schmidt*, 707 So. 2d 966 (Fla. Dist. Ct. App. 1998); *Schwartz v. Adamson*, No. C8-98-1416, 1999 WL 170676, at *2 (Minn. App. Mar. 30, 1999); *Bartley v. Fed. Express Corp.*, 683 N.Y.S.2d 737 (N.Y. Sup. Ct. 1998); *see also* *Vernon*, 732 N.E.2d 805 (reading writing requirement into state mediation provision in order to protect confidentiality). Others have interpreted a privilege or an evidentiary exclusion to preclude evidence of oral agreements. *See, e.g.,* *Gordon v. Royal Caribbean Cruises, Ltd.*, 641 So. 2d 515, 517 (Fla. Dist. Ct. App. 1994); *Kennedy v. Emge*, 972 S.W.2d 616 (Mo. Ct. App. 1998); *Zidell v. Zidell*, No. 05-96-00052-CV, 1997 WL 424429 (Tex. App. July 30, 1997).

55. *See, e.g.,* *Kaiser Found. Health Plan v. Doe*, 903 P.2d 375 (Or. App. 1995) (holding that a mediated settlement agreement need not be in writing to be binding), *modified on other grounds*, 908 P.2d 850 (Or. App. 1996); *see also* *Ashley Furniture Indus. v. Sangiacomo N.A.*, 187 F.3d 363, 378 (4th Cir. 1999) (holding that a mediated settlement agreement on trade dress issues need not be written to be enforceable under North Carolina law); *Sheng v. Starkey Lab., Inc.*, 117 F.3d 1081 (8th Cir. 1997) (enforcing an oral mediated agreement under

are even willing to enforce written but unsigned documents using the fiction that they indicate valid oral agreements.⁵⁶ The UMA protects against confidentiality breaches to prove oral agreements by limiting its exception to executed agreements that can be proved by a written document or other record.⁵⁷

The difficulties deepen when the issue is not the existence of an agreement, but whether the agreement was validly reached.⁵⁸ Proving a contract defense such as fraud or coercion typically involves examining the mediation process in a way that poses a threat to confidentiality, but this threat cannot be avoided by the simple means of requiring a written agreement as a prerequisite to enforcement.⁵⁹ For this intractable problem of contract defenses, the UMA established one of its few opportunities for balancing the equities in an individual case.⁶⁰

Another important omission in state statutes is that they fail to provide procedures for courts to use when they consider a request for an exception to confidentiality that is either assigned to the courts on a case-by-case basis or unaddressed in the mediation statute. As a result, courts have waived confidentiality summarily⁶¹ or invented their own procedures to maintain confidentiality during their decision process (along with their own standards for the decision).⁶² The importance of such procedures becomes evident when testimony is taken in open court on a confidentiality issue. The conclusion is foregone: the evidence has already been made public. As observed by the *Olam* court, "use of an

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Minnesota principles of contract law); *New York Air Brake Corp. v. General Signal Corp.*, 873 F. Supp. 747 (N.D.N.Y. 1995) (enforcing an oral employment settlement under New York law).

56. See, e.g., *Smith v. Columbia Gas Transmission Corp.*, 176 F.3d 475 (Table), No. 97-2786, 1999 WL 198799 (4th Cir. Apr. 9, 1999) (enforcing unsigned mediated agreement on a finding that mediation communications demonstrated an oral agreement); *Power Serv., Inc. v. MCI Constructors, Inc.*, No. Civ.A. 97-927-A, 2000 WL 459436 (E.D. Va. Mar. 7, 2000) (finding binding oral agreement evidenced by unsigned settlement memorandum); *Few v. Hammack Enter., Inc.*, 511 S.E.2d 665, 671 (N.C. Ct. App. 1999) (remanding for hearing on exact terms of oral settlement after affirming that parties' agreement was evidenced by unsigned document).

57. MAY 2001 DRAFT, *supra* note 12, § 7(a)(1); [UMA § 6(a)(1)].

58. See generally Deason, *supra* note 49.

59. While a signed writing provides strong evidence that the parties intended an agreement, it typically cannot resolve whether the agreement was procured by fraud, duress, or without settlement authority.

60. This policy decision is discussed *infra* Part IV.

61. See, e.g., *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998).

62. See, e.g., *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (mediator's testimony under seal); *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 469-70, 472-73 (Ct. App. 1998) (mediator's testimony in camera).

insensitive procedure to determine the probative significance of the protected communications could cause severe damage to the substantive . . . privilege rights."⁶³ Only a few states provide a mechanism, such as an in camera hearing, to ensure that confidentiality is maintained while courts decide whether an exception to confidentiality provisions is appropriate.⁶⁴ Some statutes that even explicitly authorize courts to balance the equities do not set forth protective procedures.⁶⁵

These and other holes and ambiguities in statutory coverage create a confusing diversity of provisions among the states. Even within a single state, these holes and ambiguities contribute to uncertainty about the scope of confidentiality protections because the courts lack guidance. In contrast, the UMA drafters have benefited from experience with the full spectrum of state statutes and issues raised in court cases. The UMA incorporates this experience into a comprehensive treatment of confidentiality issues that anticipates tension points where confidentiality can become an issue.

2. Uncertainty in the Determination of Applicable Law

The focus of the prior section on interpretive issues assumes that one knows what law a court will be interpreting. The applicable law is, however, a major source of uncertainty for mediation confidentiality.⁶⁶ Choice of law is a notoriously difficult element to predict in many multi-state lawsuits.⁶⁷ Under the best of circumstances, horizontal choice of

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63. *Olam*, 68 F. Supp. 2d at 1126.

64. See, e.g., ARK. CODE ANN. § 16-7-206(c) (Michie 1999); LA. REV. STAT. ANN. § 9:4112(D) (West Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(e) (West 2001) (all providing in camera procedure for resolving conflicts between confidentiality requirements and other statutes requiring disclosure); see also NEB. REV. STAT. § 43-2908 (1998) (providing that in mediation under the Parenting Act, certain disclosures of abuse or neglect shall be reported to the judge for an in camera hearing on whether to make a report to the state Department of Health and Human Services).

65. See, e.g., CONN. GEN. STAT. § 52-235d(b)(4) (1999) (permitting courts to allow disclosure if interest of justice outweighs the need for confidentiality); LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (West Supp. 2000) (permitting courts to make individualized confidentiality decisions when settlement interpretation of enforcement is at issue); OHIO REV. CODE ANN. § 2317.023(C)(4) (Anderson 1998) (permitting court exception to prevent manifest injustice); WIS. STAT. ANN. § 904.085(4)(e) (West 2000) (permitting exception in similar circumstances).

66. See, e.g., Deason, *supra* note 34; Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RES. 157 (1994).

67. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 4 (4th ed. 2001) ("[T]here are factors involved in choosing the applicable law other than insuring uniformity of result and at least equally as important as the uniformity factor.").

state law is plagued by the great variation in the appropriate mode of analysis, which depends on both the forum state and the subject matter of the case.⁶⁸ The disparities among current state mediation laws only exacerbate the baseline uncertainty normally associated with the complexity of the choice-of-law analysis. The great variation among the states means that the law a court chooses to apply in deciding a confidentiality issue can be crucial to the outcome. Exceptions that permit disclosure of mediation communications under one state's law may not exist under another state's law. Or, even more dramatically, a mediation without any protection under one state's law may be strictly confidential under that of another.

Vertical choice of law between state and federal law can also be inscrutable, particularly on an issue like confidentiality that straddles the line between substance and procedure. Again the challenge is magnified in the context of mediation, where the federal court's analysis of choice of law depends on the form of confidentiality protection at issue. Why should this discussion of a state uniform law take note of federal choice of law issues? Recall that parties to a mediation typically do not know what court might decide future legal issues concerning that mediation if those issues arise. The fate of mediation confidentiality in federal court therefore forms part of a party's calculus when considering a strategy for a prospective mediation. As states try to provide a legal climate that will optimize the mediation process they must consider that, from the parties' point of view, uncertainty about confidentiality in federal court can undermine the predictability created under state law.

Confidentiality is unusual in that many different federal rules can control the choice of law depending on the legal format chosen to protect against disclosure. The applicable law of privilege, the form of protection chosen for the UMA and already adopted by many states,⁶⁹ is determined under Federal Rule of Evidence ("FRE") 501.⁷⁰ If the rule

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68. See, e.g., EUGENE F. SCOLES, et al., *CONFLICT OF LAWS* (3d ed. 2000) (discussing seven different choice-of-law methodologies for tort and contract conflicts).

69. See, e.g., ARIZ. REV. STAT. ANN. § 12-2238 (West 1994); IOWA CODE ANN. §§ 679C.2-679C.3 (West Supp. 2001); KAN. STAT. ANN. § 60-452a (Supp. 1999); LA. REV. STAT. ANN. § 9:4112 (West Supp. 2001); ME. R. EVID. § 408; OHIO REV. CODE ANN. § 2317.023 (Baldwin 1998); OKLA. STAT. tit. 12, § 1805 (1993); OR. REV. CODE ANN. § 36.222 (Anderson 1998); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); S.D. CODIFIED LAWS § 19-13-32 (Michie Supp. 2000); TEX. CIV. PRAC. & REM. CODE § 154.053(c) (Vernon 1997); UTAH CODE ANN. § 78-31b-8(2)(b) (Supp. 2000) (court ADR program); VA. CODE ANN. § 8.01-581.22 (Michie 2000); WASH. REV. CODE ANN. § 5.60.070 (West 1995); WYO. STAT. ANN. § 1-43-103 (Michie 1999).

70. Rule 501 provides:

of decision is federal, the court is directed to rely on federal common law. Conversely, if the rule of decision is state, the court is directed to apply state law of privilege. When a case is a mix of federal claims and pendent state-law claims, most circuits apply the federal law of privilege.⁷¹ Some courts, however, take a piecemeal claim-by-claim approach and apply state privilege law to evidence relating to a state-law claim regardless of the composition of the overall case.⁷² This interpretation is important for mediation because so many disputes that raise confidentiality issues concern the existence, interpretation, or validity of a mediated settlement agreement, matters typically considered under state contract rules of decision.

In *Olam v. Congress Mortgage Co.*, the underlying claims were a mix of federal and pendent state law issues.⁷³ When the plaintiff claimed duress and rejected the settlement agreement the parties had signed in mediation, the court separated this enforcement dispute from the underlying federal and state-law issues for purposes of choice-of-law analysis.⁷⁴ To determine whether it should look to the federal or state law of privilege, the court applied FRE 501 to the duress claim standing alone, and selected state privilege law because state law would supply the rule of decision for this contract claim.⁷⁵ If other federal courts

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GENERAL RULE. Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

71. See, e.g., *Pearson v. Miller*, 211 F.3d 57, 65–66 (3d Cir. 2000); *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 n.10 (9th Cir. 1992); *Hancock v. Hobbs*, 967 F.2d 462, 466–67 (11th Cir. 1992); *Hancock v. Dodson*, 958 F.2d 1367, 1372 (6th Cir. 1992); *von Bulow v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982); *Mem'l Hosp. v. Shadur*, 664 F.2d 1058, 1061 & n.3 (7th Cir. 1981).

72. See, e.g., *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995); *Waterloo Gutter Protection Sys. Co v. Absolute Gutter Prot., L.L.C.*, 64 F. Supp. 2d 398, 411–15 (D.N.J. 1999); *Freeman v. Fairman*, 917 F. Supp. 586, 588 (N.D. Ill. 1996); *Evanko v. Elec. Sys. Assoc.*, No. 91 Civ. 2851, 1993 WL 14458, at *1 (S.D.N.Y. Jan. 8, 1993); *Shaklee Corp. v. Gunnell*, 110 F.R.D. 190, 192 (N.D. Cal. 1986).

73. 68 F. Supp. 2d 1110, 1115 (N.D. Cal. 1999).

74. *Id.* at 1119.

75. *Id.* at 1121. If the court had looked to the underlying mix of federal and state claims,

follow this lead and sever issues concerning settlements for purposes of determining applicable law, and if states adopt the UMA widely, then predictability would be enhanced because uniform state privilege law would govern most confidentiality issues concerning mediated settlement agreements. The immediate effect of the *Olam* decision, however, is to contribute to the uncertainty about confidentiality, for its analytical technique of segregating a single claim has been rejected in other situations where a party similarly claimed a privilege for evidence that would be relevant only to a state law claim.⁷⁶ This adds doubt to any prediction about what analytical path a court would choose to follow to select the law of privilege.

Moreover, courts have additional analytical options. Instead of framing the question in terms of the applicable law of privilege, a court may instead ask what law governs the settlement agreement. Courts thus far have not developed a coherent theory to answer this question. For example, in selecting the law to govern settlements of federal claims, some courts focus on the need to protect the federal statutory right that the parties are releasing and tend to apply federal common law to evaluate the settlement;⁷⁷ other courts emphasize the contractual nature of settlement and tend to apply state contract law.⁷⁸ Courts are

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it would have applied federal common law confidentiality rules under Ninth Circuit precedent. See, e.g., *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1169 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 2000).

76. See, e.g., *United States v. Keystone Sanitation Co.*, 899 F. Supp. 206, 208 (M.D. Pa. 1995) (order on reconsideration) (stating in dicta that even if accountant privilege were relevant only to the pendent state claim, federal law of privilege would govern); *Smith v. Smith*, 154 F.R.D. 661, 671 (N.D. Tex. 1994) (stating in dicta that even if mediation privilege were relevant only to pendant state claim, federal law of privilege would "supersede[] any contrary state law"); *Doe v. Special Investigations Agency*, 779 F. Supp. 21 (E.D. Pa. 1991) (applying principles of federal privilege in cases with federal and state claims even though evidence sought was relevant only to the pendent state law claim).

77. See, e.g., *Malave v. Carney Hosp.*, 170 F.3d 217, 220 (1st Cir. 1999) (holding when the underlying cause of action is federal, motion to enforce settlement agreement is determined by federal law); *Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997) (holding that federal common law principles govern construction of a settlement agreement involving a right to sue derived from a federal statute).

78. See, e.g., *Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1370 (Fed. Cir. 1999) (interpreting release contained in settlement agreement according to state law); *Jeff D. v. Andrus*, 899 F.2d 753, 759-60 (9th Cir. 1990) (holding that construction and enforcement of settlement agreements is governed by local law on interpretation of contracts); *Eastern Energy, Inc. v. Unico Oil & Gas, Inc.*, 861 F.2d 1379, 1380 (5th Cir. 1988) (stating that "construction and enforcement of settlement agreements is governed by principles of state law applicable to contracts generally"). See also *Sheng v. Starkey Lab., Inc.*, 117 F.3d 1081, 1083 n.1 (8th Cir. 1997) (applying state contract law to determine enforceability of a mediated settlement agreement in a Title VII claim without resolving the

split both within and among the circuits, leaving the parties to roll the dice on applicable law.⁷⁹

Furthermore, there are other arrows in a court's analytical quiver that may be appropriate depending on the legal form of the confidentiality protection at issue. FRE 501 guides courts in determining the applicable law of privilege, but the analysis differs when other evidentiary mechanisms are employed to protect confidentiality. An alternative (or additional) state law mechanism makes the mediator incompetent to testify.⁸⁰ Under federal law all witnesses are competent, but FRE 601 directs the federal courts to use state competency rules when state law supplies the rule of decision.⁸¹ For other forms of confidentiality protection, the *Erie* doctrine is the source of the appropriate analysis for applicable law. It governs the applicability in federal court of evidentiary exclusions used by many states to provide confidentiality for mediation communications⁸² and of writing

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general question of applicable law).

79. See, e.g., *Heuser v. Kephart*, 215 F.3d 1186, 1190 & n.4 (10th Cir. 2000) (noting divergence of views on the law governing actions for breach of settlement of a Title VII claim); *Fleming v. United States Postal Serv.*, 27 F.3d 259, 260 (7th Cir. 1994) ("it remains unsettled in this circuit whether a dispute over the settlement of a federal case arises under state law—on the theory . . . that it is merely a contract dispute with a remote federal origin—or under federal law") (citing contradictory cases). See generally CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 4541 (2d ed. 1996).

80. See, e.g., CAL EVID. CODE § 703.5 (West 2001); MINN. STAT. § 595.02(1)(a) (West 2000); N.J. STAT. ANN. § 2A:23A-9 (West 2000). Other states protect mediators from being subpoenaed to testify at another's behest. See, e.g., ARIZ. REV. STAT. ANN. § 12-2238(C) (West 1994); ARK. CODE ANN. §16-7-206(b) (Michie 1999); KAN. STAT. ANN. § 60-452a(a) (Supp. 1999); LA. REV. STAT. ANN. § 9:4112(b)(2) (West Supp. 2001) (parties also not subject to process or subpoena); MO. ANN. STAT. § 435.014(1) (West 1992); NEV. REV. STAT. ANN. 48.109(3) (Michie 1996); OKLA. STAT. ANN. tit. 12, § 1805(C) (West 1993) (parties also exempt from judicial process); R.I. GEN. LAWS § 9-19-44 (1997); WIS. STAT. ANN. § 904.085(3)(b) (West 2000). Some courts have adopted similar provisions. See, e.g., M.D. Pa. Local R. 16.8.6 (f) ("The mediator shall not be called as a witness at trial."); Ind. ADR R. 2.11, IND. CODE tit. 34 app. Court Rules (Civil) (mediators not subject to process).

81. Rule 601 provides:

GENERAL RULE OF COMPETENCY. Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the competence of a witness shall be determined in accordance with State law.

FED. R. EVID. 601.

82. See, e.g., ARK. CODE ANN. §16-7-206(a) (Michie 1999); CAL. EVID. CODE § 1119 (West Supp. 2001); MO. ANN. STAT. § 435.014 (West 1992); NEB. REV. STAT. § 25-2914 (1995); NEV. REV. STAT. ANN. 48.109(3) (Michie 1996); S.D. CODIFIED LAWS § 19-13-32 (Michie Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Vernon 1997); WIS.

requirements for settlement agreements that prevent exposure of mediation communications in enforcement disputes.⁸³

This multiplicity of analytical approaches would not be significant for predictability if all the approaches pointed to the same conclusions for choice of law. After all, under both FRE 501 and FRE 601, courts take their cue from the "rule of decision," and that concept also features prominently in the *Erie* analysis. Despite this superficial similarity, however, the outcome of the different doctrinal analyses need not be identical. As discussed above in the context of enforcing settlement agreements, courts' determinations of the appropriate rule of decision are themselves fraught with inconsistencies. Moreover, under the *Erie* doctrine, federal courts invoke the rule of decision analysis only when the issue is substantive, for example outcome determinative, as opposed to procedural.⁸⁴ Mediation confidentiality protections could be classified as either: limits on the disclosure of mediation communications serve substantive state interests in encouraging mediation, however these state provisions are typically found in procedural rules and many operate procedurally through their control of evidence.⁸⁵ Courts have not taken a consistent position on whether such rules should be treated as substantive or procedural.⁸⁶

In sum, because states currently use so many different legal frameworks to protect mediation confidentiality, because these statutory frameworks can be ambiguous to categorize, and because federal courts use different analytical approaches to choice of law depending on their categorization of the mechanism at issue, vertical choice of law for confidentiality is an amazingly complex, multi-factorial analysis. It is hard to avoid concluding that, under current conditions, predicting the law that will govern a confidentiality dispute between mediation parties in federal court is a virtually impossible task.

STAT. ANN. § 904.085(3)(a) (West 2000).

83. See *supra* note 47 (citing statutes).

84. *Hanna v. Plumer*, 380 U.S. 460, 465-68 (1965); *Guar. Trust Co. v. York*, 326 U.S. 99 (1945).

85. The federal evidentiary exclusion that protects settlement negotiations to some extent is also found in a procedural rule. See FED. R. EVID. 408.

86. Compare *Rheault v. Luftansa German Airlines*, 899 F. Supp. 325, 328 (E.D. Mich. 1995) (refusing to apply Michigan court rule that requires a writing for settlement agreements because the rule is procedural, not substantive), with *Lefevre v. Keaty*, 191 F.3d 596 (5th Cir. 1999) (applying state law rule requiring written settlement to mediated agreement). See also *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517 (Fla. Dist. Ct. App. 1992) (applying state procedural and evidentiary law to quash mediator subpoena regarding settlement of Jones Act case controlled by substantive federal law).

In this environment, the possibility of uniformity offered by the UMA is a tantalizingly simple solution to the uncertainties that currently plague mediation confidentiality law. If adopted widely, the Act would make choice of law among the states irrelevant and would eliminate many of the sources of confusion that make interpreting current statutes difficult. State law cannot, of course, completely determine confidentiality in federal court, but it applies in a significant number of cases and it can influence the development of federal common law in the direction of effective, consistent protections for mediation confidentiality.

C. Contributions of State Uniformity

First, greater uniformity in state confidentiality provisions would significantly improve parties' abilities to predict the protection they can expect for their mediation communications. The UMA is an improvement on almost every existing state statute in terms of its comprehensive coverage of confidentiality issues that are likely to arise. Moreover, it avoids the ambiguities that now leave room for multiple interpretations by different courts. These two developments, without more, would increase parties' confidence in their expectations for confidentiality. Additionally, uncertainty in interpretation would decline as a body of case law develops around the common statute. While not binding, decisions from courts in other states could provide some guidance for parties and courts in jurisdictions that have yet to decide issues under the Act.

It does not seem accidental that states with comprehensive mediation statutes—Texas,⁸⁷ Florida,⁸⁸ Ohio,⁸⁹ Oregon⁹⁰ and California,⁹¹ to name a few—are also leaders in incorporating mediation into their patterns of dispute resolution, both in and out of court. This association between statutory protection for confidentiality and the use of mediation does not, of course, prove a causative link. However, if confidentiality is important in mediation, it is logical that a unified framework for protecting it can have a beneficial effect. If so, nationwide uniformity should stimulate and encourage the use of

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87. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.0001–073 (Vernon 1997 & Supp. 2001).

88. FLA. STAT. ANN. § 44.102(3) (West Supp. 2001) (court-ordered mediation); FLA. STAT. ANN. § 61.183 (West 2001) (marital relations).

89. OHIO REV. CODE ANN. § 2317.023 (Anderson 1998).

90. OR. REV. STAT. §§ 36.100–36.245 (1999).

91. CAL EVID. CODE §§ 1115–1128 (West 1995 & Supp. 2001).

mediation.

Why then do we not see examples of the converse of this prediction? One might expect a reduction in the use or effectiveness of mediation when parties lack confidentiality protections.⁹² One response is that confidentiality problems have not yet become frequent enough to generate any measurable negative effect. This effect is a function of the overall level at which parties use mediation. Thankfully, only a small proportion of mediations develop problems that threaten to expose mediation communications that the parties had expected would be confidential. Thus, with a relatively low number of mediations, uncertain expectations for confidentiality do not have the potential to disrupt the process in the way that they do as mediation becomes more established.

Until recently, it was probably not really necessary for mediation participants to explore the limitations of confidentiality in detail. Blanket assurances from the mediator that their communications would not be disclosed might not have been entirely accurate, but they were unlikely to prove wrong in any particular case. More importantly, the dearth of confidentiality disputes meant that an imprecise assurance of complete confidentiality could satisfy the parties and their counsel. They were unlikely to confront instances of court-ordered disclosures that would make them worry about the prospect for disclosures in their own case.⁹³ As the frequency of mediation has risen, however, so has the prevalence of litigation that involves challenges to confidentiality.⁹⁴ It inevitably follows that parties will become more aware of the limitations of confidentiality protections. While it may be, as Professor Hughes has argued, that uncertainty about confidentiality has not previously inhibited the growth of mediation,⁹⁵ that potential is growing. Thus, at the present time, predictability is increasingly important in order to avoid confused expectations and the adverse consequences they may create for mediation.

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92. See, e.g., Green, *supra* note 6, at 36.

93. See, e.g., Freedman & Prigoff, *supra* note 6, at 42 (reporting that "most mediation is now done under the assumption that communications are privileged under the law, even if they really are not privileged").

94. This conclusion is based on my personal impression that reported cases concerning confidentiality issues have increased, especially in the last few years. The increased involvement of courts in sponsoring mediation may also be related to the number of secondary disputes that implicate confidentiality. It may be that cases already in litigation when mediation takes place are more likely to generate further litigation than cases that are mediated without a filed suit.

95. See Hughes, *supra* note 6.

Next, and somewhat ironically, uniform state-law confidentiality provisions would be a practical way to increase predictability in the federal courts and thus in the overall climate for mediation. The federal courts operate their mediation programs under local court rules, a framework that encourages inconsistent confidentiality protections.⁹⁶ There is, at present, no movement toward a national federal court rule or a more broadly applicable statutory mediation privilege. Thus the impetus toward more effective mediation confidentiality largely remains with the states.

A uniform state framework for confidentiality would at least reduce many of the interpretation problems that arise when federal courts apply state confidentiality law. Not only would the starting point for a federal court's reading be more clear than many current state statutes, but soon there would be a developed body of state law to inform federal courts' interpretations. Additionally, by establishing privilege as the means to protect confidentiality, the UMA would greatly reduce the problems inherent in predicting a court's selection from the multiple choice-of-law analyses that apply depending on the type of legal protection at issue.

State uniformity could also play a significant role in the development of federal protections for mediation confidentiality by encouraging a federal mediation privilege. When federal courts consider recognizing a federal common law privilege, they must evaluate, among other factors, whether the privilege would serve public ends and how it would affect state practices.⁹⁷ Widespread state adoption of the UMA would be strong evidence that public policy supports a mediation privilege. As stated in *Jaffee v. Redmond*, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege."⁹⁸ Moreover, in adopting a psychotherapist privilege in that case, the Supreme Court noted that the appropriateness of the privilege "is confirmed by the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege."⁹⁹ State

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96. See Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652(d) (Supp. IV 1998). See generally Gregory A. Litt, Note, *No Confidence: The Problem of Confidentiality by Local Rule in the ADR Act of 1998*, 78 TEX. L. REV. 1015 (2000).

97. The privilege analysis was set forth most recently in *Jaffee v. Redmond*, 518 U.S. 1, 9-13 (1996), which recognized a federal common law psychotherapist-patient privilege under Federal Rule of Evidence 501.

98. *Id.* at 13.

99. *Id.* at 12. The Court also noted that a psychotherapist privilege was included among the specific privileges recommended by the Advisory Committee for adoption as part of the

adoption of the UMA would similarly support recognition of a mediation privilege by the federal courts. Just as importantly, it would simplify a federal court's task of defining a common law privilege when it adopts one. With the UMA as a model, the federal courts could follow the states' lead and boost both vertical and horizontal uniformity of law, enhancing predictability to the maximum extent possible.

In sum, because of the normal doctrinal complexities that determine where a suit is filed and what law will determine the outcome of the dispute, forecasting the location and nature of lawsuits is always difficult. It is even more challenging when the dispute concerns confidentiality, because of the potential interaction between the type of protection and the choice of law analysis. The most effective way to foster predictability is to avoid these worries entirely by creating a system in which, wherever a suit is filed and whatever law is applied, the outcome for mediation confidentiality will be the same because all possible forums have adopted the UMA.

IV. THE UMA'S CONFIDENTIALITY PROTECTIONS

Even if one is convinced of the benefits of uniformity in state mediation law, one may still have objections to the uniformity decisions embodied in the UMA. It may be the case that "a compromise that no one likes is a good compromise" is applicable here. From my point of view, the UMA is not perfect. Like Professor Hughes,¹⁰⁰ I have argued that mediator testimony should not be put off-limits for disputes about mediated settlement agreements. In my view, it should be permitted, but only rarely when circumstances leave no alternative.¹⁰¹ I am confident that most academics, mediation practitioners, and state legislative drafting committees can find some provision on which they disagree with the UMA. The issue then becomes whether the topic of the disagreement is important enough to stand in the way of the goal of uniformity.

Disagreements over UMA provisions are perhaps inevitable given that confidentiality is not an absolute value. Maintaining confidentiality in mediation must compete with important interests in other contexts that are furthered by disclosures of certain communications. Most of

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Federal Rules of Evidence. *Id.* at 14–15. The fact that a mediation privilege was not included on this list should not be significant, however, given the dearth of mediation at the time compared to its present frequency.

100. See Hughes Article, *supra* note 5.

101. See Deason, *supra* note 49.

the statutory exceptions to mediation confidentiality are based on policy judgments that in specific circumstances the need for disclosure exceeds the benefit of maintaining mediation confidentiality. These judgments are often close calls on which reasonable decision-makers may disagree, which helps explain the wide variation and resulting lack of predictability in current statutes.

When a current state statute differs from the UMA on one of these close policy calls, the state will have to decide if its prior policy choice justifies rejecting or modifying the UMA. In many instances, the UMA policy choice may be acceptable. If there are objections, however, states should not reject the UMA approach in its entirety. It may be that taking a positive step toward uniformity in mediation confidentiality is more important than the precise form of the confidentiality protections. The UMA may also be controversial in states without a comprehensive statute, but these states have an additional reason to embrace the Act. Based on the experience of states that take a unified approach to mediation, those that currently live with piecemeal statutory coverage will encourage the growth of mediation by adopting the UMA.

The UMA reflects the complexity of policy choices evidenced by the variation among current statutes with a carefully constructed set of exceptions to confidentiality that are defined for specific circumstances.¹⁰² The need for these exceptions was evaluated by drawing on state experience with existing statutory provisions and on disclosure issues raised in court.¹⁰³ The UMA's list of exceptions thus incorporates state determinations that, on balance, particular public interests requiring disclosure outweigh the need to maintain certain types of mediation communications in confidence.¹⁰⁴ By standardizing this list of exceptions, the UMA makes clear the precise limits on confidentiality, and by doing so greatly enhances predictability. For example, an informed party would know that certain threats of crime,

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102. MAY 2001 DRAFT, *supra* note 12, § 7(a); [UMA § 6(a)]. Section 7(a) lists seven exceptions to privilege: (1) There is no privilege for a mediation communication that is in a recorded agreement signed by the parties; (2) information publicly available or made in a mediation open to the public; (3) a threat to inflict bodily injury; (4) information used to plan, commit, or conceal a crime; (5) information relevant to abuse and neglect in a proceeding where a child or adult protective service is a party; (6) information relevant to a claim of malpractice or professional misconduct filed against a mediator; (7) or information relevant to a claim of malpractice or professional misconduct filed against a party or participant based on their conduct in mediation except that a mediator may not be compelled to give evidence about this communication. *Id.*

103. See *id.* § 7 Reporter's Notes.

104. See *supra* note 47.

discussions of child abuse, or unethical professional conduct in mediation are potentially subject to disclosure. These are targeted disclosures that apply only to a limited extent to fulfill the purposes of the exception.¹⁰⁵

There remain, however, even more difficult situations that sometimes call for an exception, but for which an exception may not always be appropriate. These situations are virtually impossible to consider divorced from the circumstances of a specific case; the policy decisions are very close and depend on the specific facts. The UMA recognizes two types of proceedings in which a bright line rule for all cases is not appropriate—court proceedings involving a felony and proceedings to reform or avoid an agreement reached in mediation.¹⁰⁶ The drafters concluded that mediation communications should usually remain confidential in these proceedings, but anticipate some scenarios in which denying disclosure could work an injustice.¹⁰⁷ Therefore the Act permits disclosure of mediation communications in a felony case or in a challenge to a settlement agreement only when a court decides it is necessary following statutory guidance.¹⁰⁸ The court's decision is to be based on a comparison between the merits of disclosure and maintaining confidentiality, in the context of the particular mediation and the particular lawsuit. The statutory standard for overcoming confidentiality is high: the party seeking discovery or to introduce the evidence must show that it is otherwise unavailable and "*substantially outweighs* the interest in protecting confidentiality."¹⁰⁹

The difficulty in crafting an appropriate policy for mediation confidentiality in criminal cases is illustrated by the total lack of consensus among current statutes. Some states define their confidentiality protection so that it does not apply at all in criminal proceedings.¹¹⁰ Other states are inclusive, drawing no distinction

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105. A court may admit only the portion of the communication necessary for purposes of the exception. MAY 2001 DRAFT, *supra* note 12, § 7(d); [UMA § 6(d)]. This disclosure does not make the communication, or other mediation communications, discoverable or admissible for any other purpose. *Id.*

106. *Id.* § 7(b); [UMA § 6(b)].

107. *See, e.g., id.* §§ 5 Reporter's Notes § 5, 7 Reporter's Notes § 11.

108. *Id.* § 7(b); [UMA § 6(b)].

109. *Id.* (emphasis added).

110. *See, e.g.,* CAL. EVID. CODE § 1119 (West 1995 & Supp. 2001) (evidentiary exclusion of mediation communications applicable in a "noncriminal proceeding"); MONT. CODE ANN. § 26-1-811 (1999) (mediation privilege in domestic relations cases applies only in civil actions, with some exceptions); OHIO REV. CODE ANN. § 2317.023(B) (Anderson 1998) (mediation privilege for civil and administrative proceedings).

between the application of their privilege in civil and criminal proceedings.¹¹¹ In the middle ground, states apply their confidentiality protections in some, but not all, criminal proceedings.¹¹² This variability reflects the multitude of possible judgments that can be made on the challenging issues that arise in this context.

Court decisions are similarly split, which also supports the conclusion that it is difficult to ascertain, in the abstract, the need for mediation confidentiality in criminal cases. In some circumstances courts have pierced confidentiality, reasoning that the loss of evidence could seriously damage the accuracy of the proceeding or impinge on constitutional rights.¹¹³ In other jurisdictions, however, courts have rejected a limitation on mediation confidentiality in criminal proceedings and concluded that a breach of confidentiality, even in a criminal case, would have too great a chilling effect on mediation and cannot be permitted.¹¹⁴

Earlier drafts of the UMA attempted to forge a single "bright-line" policy for mediation confidentiality in criminal cases,¹¹⁵ but this attempt was unsuccessful. In explaining why the UMA leaves the decision to the courts, the Reporters note the desirability of some mediation programs that in all likelihood will involve discussions of crime, such as mediations among youth gangs.¹¹⁶ If mediation communications are not privileged

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111. See, e.g., ARK. CODE ANN. § 16-7-206(a) (Michie 1999) (covering dispute resolution communications "relating to the subject matter of any civil or criminal dispute"); IOWA CODE ANN. § 679C.2 (West 1998 & Supp. 2000) (privilege applies "in any judicial or administrative proceeding"); OR. REV. STAT. § 36.222(7) (1999) (limitations on disclosure apply in "any subsequent judicial proceeding, administrative proceeding or arbitration proceeding").

112. See, e.g., IDAHO R. EVID. 507(2) (client has mediation privilege "in any civil or criminal action to which the client is a party").

113. See, e.g., *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464 (Ct. App. 1998) (holding mediation confidentiality provisions inapplicable in juvenile delinquency proceeding in order to preserve minor's right to effective cross-examination and impeachment of an adverse witness); *State v. Castellano*, 460 So. 2d 480 (Fla. Dist. Ct. App. 1984) (refusing to quash subpoena of mediator when accused claimed that threats made during the mediation would support his plea of self defense).

114. See, e.g., *United States v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987) (recognizing federal mediation privilege in criminal case for statements made during mediation in community program); *Bird v. State*, 367 S.E.2d 300 (Ga. Ct. App. 1988) (refusing to recognize an exception to state mediation privilege in criminal proceeding for statements made in court-sponsored criminal mediation); *People v. Snyder*, 492 N.Y.S.2d 890 (N.Y. Sup. Ct. 1985) (deciding that when legislature established Community Mediation Centers the intent was to keep communications confidential even in criminal cases).

115. See, e.g., NCCUSL, DRAFT UMA § 5(a) (Dec. 2000) (privilege applies in civil proceedings, including juvenile court proceedings, and in criminal misdemeanor proceedings).

116. See MAY 2001 DRAFT, *supra* note 12, § 5 Reporter's Notes § 5.

in criminal cases, it could diminish the effectiveness of such progress. They also note the risk that strict confidentiality requirements will in some cases violate rights conferred by the U.S. Constitution.¹¹⁷ The strength of these competing concerns cannot be evaluated, however, without taking into account the circumstances of the individual case. For example, constitutional rights will not affect the balance for or against disclosure unless it is the defendant who seeks to introduce mediation communications. It is criminal defendants who have a right, rooted in both the Due Process Clause and the Compulsory Process Clause, to testify on their own behalf.¹¹⁸ Similarly, the right to cross-examine a witness originates in the Confrontation Clause and is held by criminal defendants, not the prosecution.¹¹⁹

Moreover, in *Rock v. Arkansas*¹²⁰ the Supreme Court mandated a case-by-case analysis when a defendant's right to testify is at stake. While recognizing that the right to present relevant evidence is not without limitation, the Court overturned a state *per se* rule that excluded testimony if the witness had been hypnotized.¹²¹ Despite all the inaccuracies that could have been introduced into the defendant's memory by suggestion, the Court reasoned that the need for the testimony and the effects of hypnosis would vary with individual circumstances that should be weighed when a defendant's right to testify is at stake.¹²² It is therefore unlikely that a state could constitutionally enact a *per se* rule that would prevent all defendants from testifying about events in mediation without an individualized analysis of admissibility.

The states also part company in their policies toward permitting contract defenses to a settlement agreement to invade mediation confidentiality. Statutes are often silent on this issue, but those that resolve it do so in conflicting ways, many of them imposing a categorical rule.¹²³ Courts without statutory guidance have tended either to assume

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117. *Id.*

118. See *Rock v. Arkansas*, 483 U.S. 44 (1987).

119. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974) (holding that refusal to allow a defendant to cross-examine a key prosecution witness regarding his probation status denied defendant's constitutional right to confrontation despite state policy to maintain the confidentiality of juvenile delinquency adjudications).

120. 483 U.S. 44 (1987).

121. *Id.* at 51-53.

122. The Court made clear that it was *not* considering the admissibility of testimony by previously hypnotized prosecution witnesses. *Id.* at 58 n.14.

123. The largest group of states protects confidentiality of mediation without any explicit provision for considering defenses to enforcement of a settlement agreement. See, e.g., ARIZ.

that a contract defense justifies mediation disclosures¹²⁴ or to weigh the need for disclosure in the particular case.¹²⁵

As with the question of mediation confidentiality in criminal cases, a decision on permitting disclosures relevant to contract defenses should not be made outside the context of a particular dispute. A blanket rule that permits parties to raise contract defenses or an equally broad rule that prohibits them from ever doing so would, in either case, create incentives harmful to the goals of mediation. If mediation parties could freely disclose mediation communications in any challenge to the validity of a settlement agreement, there would be no limit on the use of duress or other contract defenses to invade the confidentiality of a

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REV. STAT. ANN. § 12-2238 (West 1994); ARK. CODE ANN. §16-7-206 (Michie 1999); CAL. EVID. CODE § 1123 (West 1995 & Supp. 2001); FLA. STAT. ANN. § 44.102(3) (West 1998 & Supp. 2000); KAN. STAT. ANN. § 60-452a (1994 & Supp. 1999); ME. R. EVID. § 408; MASS. GEN. LAWS ANN. ch. 233, § 23C (West 2000); MO. ANN. STAT. § 435.014 (West 1992); MONT. CODE ANN. § 26-1-813 (1999); NEV. REV. STAT. ANN. 48.109 (Michie 1996); N.J. STAT. ANN. § 2A:23A-9 (West 2000); OHIO REV. CODE ANN. § 2317.023 (Anderson 1998); OKLA. STAT. ANN. tit. 12, § 1805 (West 1993); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (Michie 1995 & Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053(c), 154.073 (Vernon Supp. 2001); UTAH CODE ANN. § 78-31b-8 (Supp. 2001); WASH. REV. CODE ANN. § 5.60.070(1)(e) (West 1995); WIS. STAT. ANN. § 904.085(4)(a) (West 2000). In some states, however, the statute allows courts to consider disclosures on a case-by-case basis. *See, e.g.*, LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (West Supp. 2000); OHIO REV. CODE ANN. § 2317.023(C)(4) (Anderson 1998); WIS. STAT. ANN. § 904.085(4)(e) (West 2000). Yet others abrogate confidentiality whenever specific contract defenses are at issue. *See, e.g.*, MINN. STAT. ANN. § 595.02(l) (West 2000); N.D. CENT. CODE § 31-04-11 (1997); 42 PA. CONS. STAT. ANN. § 5949(b)(3) (West 2000); VA. CODE ANN. § 8.01-576.12 (Michie 2000), or even more broadly, in any settlement enforcement proceedings, *see, e.g.*, 5 U.S.C. § 574(b)(6) (1994 & Supp. IV 1998) (Administrative Dispute Resolution Act); CONN. GEN. STAT. § 52-235d(b)(2) (1999); IOWA CODE § 679C.2(7) (West Supp. 2000); N.C. GEN. STAT. § 7A-38.1(l) (1999); OR. REV. STAT. § 36.222(4) (1999); WYO. STAT. ANN. § 1-43-103(c)(v) (Michie 1999).

124. *See, e.g.*, Allen v. Leal, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998) (releasing parties from confidentiality requirements to evaluate claim of settlement invalidity); Vela v. Hope Lumber & Supply Co., 966 P.2d 1196, 1197-98 & n.2 (Okla. Ct. App. 1998) (enforcing mediated agreement after a hearing on claims of economic duress, coercion, unconscionability and undue influence); Golden v. Hood, No. E1999-02443-COA-MR3-CV, 2000 WL 122195 (Tenn. Ct. App. Jan. 20, 2000) (describing an affidavit detailing mediation communications in support of duress claim); Lerer v. Lerer, No. 05-99-00474-CV, 2000 WL 567020 (Tex. Ct. App. May 3, 2000) (noting affidavits describing mediation communications to support defense of insufficient mental capacity); Brinkerhoff v. Campbell, 994 P.2d 911, 916 (Wash. Ct. App. 2000) (remanding for evidentiary hearing on statements made on day of mediation to resolve claim of misrepresentation).

125. *See, e.g.*, Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (weighing the need for mediator's testimony on duress against desirability of maintaining mediation confidentiality); Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994) (considering exception to statutory confidentiality when fraud alleged); Randle v. Mid-Gulf, Inc., No. 14-95-01292, 1996 WL 447954 (Tex. App. Aug. 8, 1996) (concluding that the party who seeks to enforce settlement cannot invoke confidentiality against defense of duress).

mediation. It would not be long before such results could undermine parties' confidence in mediation in general. Conversely, a rule that implements the opposite approach and prevents all disclosures could create a risk that parties will be coerced or tricked into agreements without recourse. This would undermine a principle of mediation that is even more fundamental than confidentiality—the autonomy of the parties in reaching a mediated agreement. Mediation would no longer be consensual if a strict confidentiality rule were to prevent parties from challenging the validity of agreements they did not enter freely. Thus, neither a bright line rule permitting disclosure nor an absolute rule maintaining confidentiality is justified or workable.¹²⁶

By assigning courts the task of evaluating the need for exceptions in felony proceedings and when defenses are raised to settlement enforcement, the UMA admittedly is not providing parties with maximum predictability. In my view, however, this shortcoming is unavoidable. If the Act were to mandate disclosures in felony proceedings and for settlement enforcement under all circumstances, mediation confidentiality would be unnecessarily infringed in many cases. If instead it did not permit these exceptions at all, the Act would risk becoming an empty promise of confidentiality. In cases involving state statutes that do not explicitly authorize disclosures in criminal cases or for contract defenses, courts will proceed on their own to impose an exception or to evaluate the need for an exception to confidentiality.¹²⁷ In my view, it is preferable to give courts standards for that evaluation. This will alert mediation parties to the possibility, however distant, that they may face a disclosure, which in my view is more preferable than leaving courts entirely without guidance and overstating to the parties the prospect of confidentiality. Because of the impossibility of resolving in advance the balance between permitting a disclosure and maintaining confidentiality on these two topics, the uncertainty associated with case-by-case judicial determinations must be regarded as a necessary evil.

V. CONCLUSION

In conclusion, the UMA provides a balanced approach to issues of maintaining confidentiality in mediation. Given that the adversary setting makes these issues more complex than those that surround the protection of confidential communications in most other contexts, this is

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126. See generally Deason, *supra* note 49.

127. See cases cited *supra* in notes 111–112, 121–122.

a significant achievement. The Act serves the triple purposes of mediation confidentiality while at the same time avoiding an absolutist approach that would not survive application by the courts.

The UMA's compromises and choices are necessary to advance uniformity because of the overwhelming variety that now exists in mediation confidentiality provisions. The same variety means that the difficult policy decisions embodied in the UMA are bound to trigger dissent. Many states with mediation statutes are likely to conclude that some of the UMA provisions are at odds with their own policy choices. That dissent, however, should be set aside in order to further the goal of predictability, which is crucial to the overall effectiveness of mediation confidentiality. Realistically, predictable mediation confidentiality is beyond reach without uniform provisions. States therefore need to avoid chauvinism and adopt the UMA, even if it means compromising specific positions, in order to help foster an overall climate conducive to mediation.

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