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LEGISLATION PROTECTING CONFIDENTIALITY IN MEDIATION: ARMOR OF STEEL OR EGGSHELLS?

I. Introduction

Daren and Paula enter into mediation to resolve a disagreement regarding a private loan. Daren admits he owes Paula \$5,000 and they write up an agreement specifying that he will pay her \$500 a month for ten months. The contract contains all the requirements for a valid, binding contract. However, it does not include "express" language allowing disclosure of the communication;¹ nor does it specify the agreement as "enforceable."² Later, Daren breaches, and Paula wishes to utilize the contract along with Daren's admission of debt as evidence. In many jurisdictions today, she cannot do so because the contract and all discussions pursuant to the mediation are confidential and privileged³ from subsequent legal proceedings.

As an alternative to litigation, mediation has gained increasing popularity through community programs, court-ordered mediations, and attorneys specializing in alternative dispute resolution ("ADR") techniques.⁴ Mediation involves one or more neutral persons who help facilitate communication between the disputing parties to reach an agreement.⁵ The mediator must

remain neutral⁶ and has no power to impose a decision on the parties.⁷

The mediation process has thrived largely because high costs and lengthy trials burden litigation.⁸ Litigation often disempowers clients by turning decision-making power over to a judge or jury. Verdicts can be severe and may not reflect the best interests or basic desires of the parties involved. The imposition of a win/lose model invites antagonism and extremism; such litigation can even obscure any hope for a truly satisfactory resolution between parties.⁹

Mediation provides opportunities which litigation lacks.¹⁰ Mediation empowers parties to work together to find otherwise inconceivable solutions.¹¹ The process encourages and often elicits honesty and frankness in creating a fair and equitable resolution for all parties.¹² Mediation allows parties to carve out highly unique answers from complicated disputes. Additionally, as compared to litigation, few rules exist in mediation, making it a tempting resource.

The benefits of mediation have prompted state legislatures to create laws encouraging potential plaintiffs to consider mediation. The most typical legislation allows parties to protect information discussed during mediation as "privileged," exempting it from future admission in court. Such provisions resemble the privilege protecting information shared between

attorney and client.¹³ Successful mediation depends upon honest, open communication,¹⁴ thereby necessitating legislation providing for confidentiality in mediation proceedings.

Responding to the state level trend toward mediation,¹⁵ Congress passed the Alternative Dispute Resolution Act ("ADRA") of 1998,¹⁶ and the National Conference of Commissioners on Uniform State Law are drafting the Uniform Mediation Act ("UMA").¹⁷ Both attempt to provide national direction and encouragement of this alternative method of dispute resolution.

These legislative gestures encouraging the mediation process present new legal uncertainties.¹⁸ Is this new protection of confidentiality reliable? Will it withstand challenges in court? Do circumstances exist where disputants may not desire statutory protection of mediation communication? Do exceptions to the mediation privilege exist?

This comment explores the process of mediation, the need for privileged communication, and the legislation protecting confidentiality.¹⁹ It discusses several cases that have confronted mediation legislation and produced different results.²⁰ This "split" among court decisions presents the question: will courts deferentially adhere to legislation protecting mediation confidentiality, even if disallowing vital and relevant evidence would cause an unjust disservice to one

party?²¹ In other words, how strong is the armor of the mediation legislation?

The analysis discusses tests the courts have implemented to determine the admissibility of mediation communication as evidence.²² This comment assumes that parties have entered into mediation to produce a mutually satisfying result. If the agreement carries no legal weight, even an apparently successful mediation can fail. Therefore, this comment proposes that traditional contract law govern finalized agreements, with the mediation privilege applying only to agreements which are not finalized.²³ This comment also advocates the right of parties to choose to create a confidential, non-binding agreement if they wish.²⁴

II. Background

A. *Process of Mediation*

1. *Common Characteristics of Mediation*

Mediations vary tremendously in style, form, and process,²⁵ but common elements underlie all mediations. All mediation involves one or more neutral third parties.²⁶ The mediation process empowers the disputing parties to resolve disagreements on their own terms,²⁷ with the mediator acting as guide, facilitator, or referee, but not as judge.²⁸ Unlike litigation, where laws are used to resolve a dispute,²⁹ mediation relies on

the parties themselves to find a solution instead of depending on the judiciary, often without reference to relevant laws. This allows the parties to determine highly unique and individualized solutions.

Mediation agreements vary greatly in complexity ranging from simple written apologies to complex peace treaties.³⁰ Mediation attempts to discover underlying, sometimes emotional issues that form the basis of many disputes. For example, the mediation process may reveal the "true" issue in a financial dispute to be an emotional one, such as the simple desire of one or both parties to feel "heard." On the other hand, mediation can and often does involve legal issues, tremendous sums of money, and other external considerations.

2. *The Need for "Privileged" Communication*

Regardless of the underlying issues involved, the mediation process fundamentally relies on the parties' ability to communicate openly with each other and discover common ground for negotiation. Parties often must concede on some issues, and likewise will gain on others. A sample mediation agreement describes this process:

Mediation is an approach to resolving disputes on a non-adversary basis. Through the process of mediation you have the opportunity to negotiate your own settlement rather than have one imposed upon you by an attorney or judge. Successful mediation requires recognition by both parties that each must

consider the position of the other, each must be willing to compromise and that neither should have to "win" or "lose."³¹

The possibility that a party could use mediation discussions in litigation would severely impede the atmosphere of candor central to the heart of the mediation process. For example, in the introductory hypothetical involving Daren and Paula,³² Daren will admit he owes Paula money in the context of "protected" mediation. He maintains control of whatever solution the parties ultimately devise, knowing that if the mediation process breaks down, the opposing party cannot use his statements, opinions, offers, and confessions as a weapon against him in further proceedings.

B. *Utilization of the Mediation Process*

1. *A Historical View*

Settlement negotiations have accompanied litigation for centuries,³³ and resemble mediation in that they rely upon open communication and flexibility.³⁴ Through settlement negotiations, the two parties hope to resolve their case and avoid a protracted and disagreeable court battle.³⁵

Federal legislation protecting settlement negotiations³⁶ laid the groundwork for current mediation privilege legislation. As states have enacted protections, concerns about eliminating important evidence from admissibility in legal proceedings have

emerged.³⁷ Nevertheless, public policy reasons for encouraging settlements have outweighed countervailing concerns, and judges frequently refer to federal confidentiality protections.³⁸ States have enacted even stronger versions of protection in the form of mediation privileges, such as California Evidence Code, Section 1119.³⁹

2. Community Conflict Resolution Programs

Many communities now offer programs designed to help people resolve disputes without going to court.⁴⁰ Community Boards of San Francisco ("CBSF"),⁴¹ for example, provides a no cost, fair, and effective way for disputing parties to reach their own agreements.⁴² The disputing parties meet with a panel of trained volunteers who listen, guide, and steer the parties toward discovering their own solution. Other localized programs follow nearly identical processes.⁴³

Community based mediation programs demonstrate awareness of recent legislation protecting mediation⁴⁴ and rely heavily on it.⁴⁵ However, a blind-faith belief that protective legislation is binding and infallible may be misguided. Consequently, these programs may not adequately inform their clients of possible legal ramifications resulting from mediation. In *Rinaker v. Superior Court*,⁴⁶ the defendants, both minors, attempted to resolve a dispute with the plaintiff through a community

mediation program. During the mediation, the plaintiff made statements that clearly exculpated the defendants.⁴⁷ Later, the defendants sought to call the mediator to testify about the statements made by the plaintiff during mediation.⁴⁸ The mediator refused to testify, claiming absolute privilege.⁴⁹ The defendants claimed that without such testimony the court could convict them unjustly and unconstitutionally.⁵⁰ The court agreed with the defendants, ignored the new legislation in the interest of justice, and ordered the mediator's testimony heard.⁵¹

In *The Regents of the University of California v. Sumner*,⁵² the parties settled a prior action using a community mediation program.⁵³ They reached an agreement and the "terms of the settlement were dictated into a tape recorder by [counsel]."⁵⁴ The parties signed a written contract which included the terms transcribed from the tape recording.⁵⁵ Later, however, the defendant had "second thoughts about the matter,"⁵⁶ and the California appellate court had to decide whether to admit the contract as evidence. According to traditional contract law, the court could fully enforce the signed agreement.⁵⁷ However, defendant relied on legislation protecting anything produced in a mediation as privileged,⁵⁸ and also relied on *Ryan v. Garcia*,⁵⁹ which upheld a mediation privilege.⁶⁰ The court overruled *Ryan*, adopting the dissenting view,⁶¹ and upheld the contract as enforceable.⁶² The appellate court found that defendant waived

her privilege because she introduced the transcript of the dictated settlement into evidence,⁶³ and therefore had no grounds to object later. Additionally, although the parties agreed upon the terms *during* the mediation, they wrote the contract *after* the mediation concluded.⁶⁴ The court held the contract existed not "pursuant to" the mediation, but separate from it.⁶⁵ Therefore, since the parties did not draft the contract *during* the mediation, the court held protective legislation inapplicable.⁶⁶ For these two reasons, the *Sumner* court distinguished *Ryan*, although the court indicated it would not have followed *Ryan* regardless because the court disagreed with *Ryan's* holding.⁶⁷

3. Court-Ordered Mediations

The benefits of mediation⁶⁸ extend beyond the parties to the courts themselves, as any successfully mediated dispute removes the case from the courts. The last decade has seen a tremendous increase in court ordered mediation.⁶⁹ Many communities mandate mediation before allowing a case to go to trial.⁷⁰ Some small claims courts provide mediation services at the courthouse,⁷¹ requiring that the claimant mediate on the day of the hearing, only allowing the hearing to proceed if mediation fails.⁷²

Court-ordered mediations do not always provide parties with actual text of legal statutes governing mandated mediation.⁷³

Instead they provide an "agreement to mediate,"⁷⁴ similar to language utilized by community mediation programs.⁷⁵ These agreements emphasize the confidential nature of mediation,⁷⁶ and that everything said or written as a result of mediation is not admissible as evidence in a court of law.⁷⁷ These court-ordered mediations may mislead the parties for two reasons. First, the legislation does provide methods to expressly exempt the mediation privilege,⁷⁸ which are not mentioned in the agreement to mediate. Second, it is unclear whether a resultant contract, signed by the parties and approved by a judge, carries any legal authority.

In *Olam v. Congress Mortgage Co.*,⁷⁹ the federal court examined the confidentiality of a court-ordered mediation.⁸⁰ Olam had first sued Congress Mortgage Company ("CMC") in state court regarding violations of the Truth in Lending Act.⁸¹ That court suggested the parties attempt to resolve their differences in a mediation.⁸² Both parties agreed, and through mediation produced a memorandum of understanding that embodied their agreement.⁸³ In *Olam*, CMC attempted to enforce this memorandum in federal court. Olam claimed the mediation privilege protected the memorandum, that the memorandum constituted an unconscionable contract, and that she never understood the mediation process.⁸⁴ CMC claimed both parties signed the memorandum making it legally enforceable.⁸⁵ According to CMC,

Olam "expressly waived any privileges she might have held for communications with the mediator."⁸⁶ The *Olam* court applied a balancing test, comparing the need for relevant evidence with the need for protecting confidentiality in mediation.⁸⁷ The district court noted that the mediator knew of crucial and highly probative evidence about central, factual issues.⁸⁸ The mediator's testimony thus would greatly improve the court's ability to determine the pertinent historical facts.⁸⁹ After weighing the competing concerns, the court commented, "it became clear that the mediator's testimony was essential to doing justice here—so we decided to use it and unseal it."⁹⁰

4. *Private Attorneys Specializing in Mediation*

Although the mediation model empowers disputants to resolve their own problems with minimal or no professional advice, many disputants feel that awareness of governing laws and potential judicial outcomes strengthen their positions. Some disputants retain attorneys to counsel them on governing law and legal options. With legal counsel, they enter into mediation with a more concrete sense of how much they may gain or lose, and ultimately establish a bottom line.⁹¹ Other disputants fear they would make poor advocates for themselves in a mediation, so hire attorneys to speak for them.⁹²

In many situations, especially with corporate disputants, mediation intertwines with substantial legal details, necessitating the assistance of attorneys during the proceedings.⁹³ In multi-party mediations, or mediations involving one large party, the process can include a complex negotiation worked out between numerous attorneys. The goal is to reach an agreement that complies with the law, avoids costly litigation, and serves the interest of all parties.

Some attorneys now specialize in mediation. In *Ryan v. Garcia*,⁹⁴ the parties hired a private mediator to resolve a dispute regarding negligent construction and fraud.⁹⁵ Before beginning mediation, the parties signed a confidentiality agreement which included the exact language of the statute protecting confidentiality.⁹⁶ After five hours of negotiating with the private mediator, the parties reached an oral agreement.⁹⁷ Later, plaintiff sued to enforce the agreement and relied on statements made during the mediation.⁹⁸ The trial court admitted the statements into evidence and plaintiff won his case.⁹⁹ However, the appellate court reversed,¹⁰⁰ citing mediation legislation and other public policy reasons¹⁰¹ for shielding communications made during mediation. A notable dissent states: "[T]he majority goes too far in imposing limits on the ability of parties to enter into enforceable oral agreements."¹⁰² The dissent indicated that after the parties

reach an agreement in a mediation, a privilege should not protect any statements regarding the agreement.¹⁰³

In *Haghighi v. Russian-American Broadcasting Co.*,¹⁰⁴ opposing parties utilized a mediator to resolve a contract dispute.¹⁰⁵ The mediator required both parties to sign a mediation agreement that incorporated Minnesota legislation protecting the confidentiality of the mediation.¹⁰⁶ The parties came to an agreement, wrote a contract, and signed it.¹⁰⁷ Initially the parties followed the terms of their handwritten contract in good faith.¹⁰⁸ Later, defendant breached, and plaintiff moved to enforce the agreement.¹⁰⁹ The district court allowed the contract as evidence and found for plaintiff.¹¹⁰ On appeal, the court submitted the issue to the Minnesota Supreme Court because the issue turned on construction of state law regarding the mediation privilege. The court stated, "The statute's plain language rendered the handwritten document unenforceable, even if that result was unintended."¹¹¹ The circuit court then stated: "we are bound by that decision,"¹¹² and ruled the contract inadmissible as evidence, reversing the lower court.¹¹³

5. Other forms of Mediation

Mediation benefits disputing parties in a variety of circumstances¹¹⁴ including plea bargaining, settlement

negotiations, and employment contracts. In *Hooters of America, Inc. v. Phillips*,¹¹⁵ Hooters adopted an in-house dispute resolution program.¹¹⁶ Every employee signed an obligatory agreement to submit to in-house mediation in order to receive "raises, transfers, and promotions."¹¹⁷ When plaintiff brought a sexual harassment suit, Hooters intervened, claiming violation of the agreement to mediate, and mandated plaintiff's participation in its in-house program.¹¹⁸ The Fourth Circuit found the Hooters mediation program "so one sided that their only possible purpose [was] to undermine the neutrality of the proceeding,"¹¹⁹ and that the program was "crafted to ensure a biased decisionmaker [sic]."¹²⁰ As a consequence, the court deemed the agreement-to-mediate unenforceable and permitted the plaintiff to proceed with her case. Although *Hooters* did not involve confidentiality, it demonstrated two points. First, some employers now require employees to mediate before bringing suit.¹²¹ Second, courts can simply throw out the agreement to mediate.¹²²

In *Folb v. Motion Picture Industry Pension & Health Plans*,¹²³ the issue of confidentiality in settlement negotiations emerged. The district court stated:

Today, the Court is faced with a somewhat more attenuated concern: whether the "imperative need for confidence and trust" that would support creation of a privilege protecting confidential communications with a mediator should extend so far

as to protect all oral and written communications between the parties to a mediation.¹²⁴

The parties in *Folb* participated in a mediation¹²⁵ and signed a contract "agreeing to maintain the confidentiality of the mediation and all statements made in it."¹²⁶ At trial, plaintiff attempted to compel defendant to produce a brief used during mediation as well as notes regarding settlement communications.¹²⁷ The opinion discussed at length the mediation privilege,¹²⁸ the public policy reasons which support such a privilege,¹²⁹ and various case holdings.¹³⁰ The court upheld the mediation privilege, denying *Folb*'s attempt to compel the evidence.¹³¹ The court went further, asserting "we should adopt a federal mediation privilege. While the contours of such a federal privilege need to be fleshed out over time . . . it is appropriate, in light of reason and experience, to adopt a federal mediation privilege" ¹³²

C. *New Legislation Protecting Confidentiality in Mediation*

1. *Protection for Disputants in California and Other States*

The states have responded to the growth of mediation¹³³ with rigorous protections for anything said or written during a mediation. Recent California legislation says in part:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation

consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the writing shall not be compelled . . . in any proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.¹³⁴

Three important exceptions to the mediation privilege exist in California.¹³⁵ First, the privilege does not extend to evidence otherwise discoverable outside mediation.¹³⁶ Second, all persons involved in a mediation may "expressly agree in writing" to disclose the contents of the mediation.¹³⁷ Third, a party may not attempt to protect evidence from disclosure solely by introducing it in a mediation.¹³⁸

Most states have some type of mediation legislation.¹³⁹ According to the *Folb* court, "every state in the Union, with the exception of Delaware, has adopted a mediation privilege of one type or another."¹⁴⁰ Some states have very broad legislation to protect mediation proceedings,¹⁴¹ containing few exceptions, while others provide minimal protection.¹⁴²

2. Protection for the Mediator

For mediation to remain confidential, an exemption from testifying as to information learned pursuant to the mediation process must apply to all parties privy to such information. To achieve this protection, many states specifically prohibit mediators from testifying with respect to mediation communication.¹⁴³ This serves two purposes. First, it protects the disputants from the introduction of mediation communication into evidence in court disputes. Second, it encourages community members to volunteer their services as mediators without fear of having to later testify in court.¹⁴⁴

The California Evidence Code provides protection for mediators:

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law¹⁴⁵

Thus, mediators receive strong protection in California. Some states have enacted even stronger protection.¹⁴⁶ For example, Florida's statutory protection for mediators approaches an absolute immunity.¹⁴⁷ In Florida, mediators "shall have judicial immunity in the same manner and to the same extent as a judge."¹⁴⁸

3. *Limits and Exceptions to the Legislation*

Generally confidentiality statutes protect only civil cases¹⁴⁹ and immunity does not apply to subsequent criminal proceedings.¹⁵⁰ The California legislation provides for the admissibility of communications or writings made "for the purpose of, or in the course of, or pursuant to, a mediation"¹⁵¹ if "[a]ll persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally . . . to disclosure of the communication, document, or writing."¹⁵² Further, California exempts from the mediation privilege any signed agreement which expressly states enforceability.¹⁵³

Other states have similar exemptions. North Dakota provides exceptions for evidence that "relates to a breach of duty by the mediator,"¹⁵⁴ or where the "validity of the mediated agreement is in issue."¹⁵⁵ Oregon provides exceptions for statements made concerning child abuse or elder neglect,¹⁵⁶ and for "any proceeding to enforce, modify or set aside a mediation agreement."¹⁵⁷

Case law continues to carve out exceptions to mediation immunity or to hold that communications made during mediation do not fall within statutory protections.¹⁵⁸ Dissecting the language of a statute becomes paramount, especially with precise definitions of "mediation," "mediator," "pursuant to," and

"waiver." For example, a statute may or may not extend to words spoken just before a formal mediation begins, or just after completing a mediation, depending upon the interpretation of the term "pursuant to" (the mediation).

4. Federal protection

a. Federal Rules of Evidence

The Federal Rules of Evidence do not provide an express mediation privilege. "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, [privileges] shall be governed by the principles of the common law as they may be interpreted by the courts of the United States."¹⁵⁹ Thus, the Federal Rules do not specifically delineate privileges, but instead defer to state or common law.¹⁶⁰

The federal scheme of deferring to the states does not necessarily discourage the application of privileges. The *Folb* court commented that the purpose of Rule 501 "was to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis . . . and to leave the door open to change."¹⁶¹

The Federal Rules of Evidence have attempted to provide some protection for certain kinds of communications in the public interest.¹⁶² Though no federal rule specifically

addresses mediation immunity, Federal Rule of Evidence, Section 408, comes closest. Section 408 says in part: "Evidence of (1) Furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, *is not admissible to prove liability.*"¹⁶³ However, the rule does not protect against using any such evidence for another purpose.¹⁶⁴ The notes following the rule state that the "purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible."¹⁶⁵

b. Alternative Dispute Resolution Act of 1998 and the Uniform Mediation Act

While the wave of mediation legislation at the state level rose from over 100 statutes to over 2,500 statutes,¹⁶⁶ Congress has enacted an Act of its own, the Alternative Dispute Resolution Act of 1998 ("ADRA").¹⁶⁷ The ADRA mandates that every federal district authorize the use of alternative dispute resolution processes in all civil actions.¹⁶⁸ Further provisions set out definitions¹⁶⁹ and provide for "program support" to establish and improve these programs.¹⁷⁰

The ADRA does not provide any immunities for participants of a mediation, but promulgates the use of mediations by the federal district courts.

The ABA and the National Conference of Commissioners on Uniform State Law are jointly drafting a Uniform Mediation Act ("UMA").¹⁷¹ The purpose of the UMA is to create one set of rules followed by both federal courts and all fifty states. This concerns advocates of the mediation privilege because the UMA will attempt to forge a middle ground between various existent statutes, potentially resulting in less protection for mediation proceedings in many states.¹⁷² The current draft of the UMA states, "There is no privilege [if] there is a need for the evidence that substantially outweighs the importance of the policy favoring the protection of confidentiality."¹⁷³ Further, the UMA lacks explicit protections for mediator reports, intake records, and attorney's fees.¹⁷⁴ On the other hand, the Act will increase protection of mediation confidentiality for many states and the federal courts.¹⁷⁵

III. Identification of the Legal Problem

An inherent conflict exists between encouraging mediation protections and discovering truth. If courts uphold confidentiality legislation, then courts may prohibit admission into evidence of relevant, possibly crucial communications.

Society benefits when people mediate their differences and come to a peaceful, non-adjudicatory agreement. Privileged communication allows disputants entering into a mediation to say

anything and everything, to put "all the cards" out on the table.¹⁷⁶ On the other hand, truth and justice form the pillars of the judicial system, making it necessary to compel discovery of agreements or testimony made during a mediation in order for courts to make fair and accurate rulings.

The rise in mediation practice makes the dilemma increasingly evident.¹⁷⁷ The more mediation, the more likely issues will surface, especially in subsequent legal proceedings. Therefore, it is of timely concern that disputants involved in a mediation know to what extent they can speak freely, and whether they can legally enforce any agreements made.

Mediation agencies, programs, and attorneys utilize confidentiality agreements to accurately inform disputants of governing laws.¹⁷⁸ Currently, however, these laws do not clearly state whether confidentiality extends to all communications made during mediation. Courts have held written, signed contracts unenforceable in order to uphold legislative protection of confidentiality.¹⁷⁹ Other courts have not upheld the privilege, in order to discover truth and enforce justice.¹⁸⁰

IV. Analysis

A. *Successful Mediation Depends Upon Privileged Communication*

Mediation allows parties to formulate a solution that works for all involved. Each party approaches the table with a hope (sometimes faint) that a solution lies hidden in the mess of their complex conflict. The parties "haggle," talk, and listen, proposing any idea that comes to mind, until a workable resolution begins to gel. For that to happen, all parties must share information openly. Exposing weaknesses, giving up some demands, and discovering new common ground are frequent occurrences in mediation. In support of the need for open communication, the Ninth Circuit Court of Appeals commented: "The complete exclusion of mediator testimony is necessary"¹⁸¹ for effective mediation. Likewise, the *Folb* court commented on the importance of a mediation privilege: "Refusing to establish a privilege to protect confidential communications in mediation proceedings creates an incentive for participants to withhold sensitive information in mediation or refuse to participate at all."¹⁸²

However, for every protected communication, the justice system potentially loses evidence that may lead to the truth. "The general rule is that the public is entitled to every person's evidence and that testimonial privileges are disfavored."¹⁸³ Creation of a statutory privilege may have drastic results because it would exclude any evidence that fell under its umbrella, even highly relevant evidence, or perhaps

the only evidence in a case. To follow a protective statute and disallow evidence may result in a travesty of justice. The mediation privilege could result in unfair or even unjust consequences.

The mediation privilege also produces benefits. Anything said in a mediation process *might never have been said* without the protective privilege. The privilege results in the availability of additional information between the parties that enables them to resolve their conflict in an effective manner. Thus, a dichotomy exists. Strong protection of confidentiality encourages mediation but introduces possible injustice by suppressing all communications from later judicial proceedings. However, revoking such privilege would likely stifle the mediation process.

As an indication of future trends, most states have chosen to encourage mediation, even at the expense of losing some potential evidence.¹⁸⁴ Mediation is presently gaining favor. States are enacting legislation allowing participants to confidentially communicate in mediations.

B. An "Absolute" Privilege Would not Serve its Intended Purpose, Therefore a "Partial" Privilege is Appropriate

Under the muzzle of absolute privilege,¹⁸⁵ truth suffers tremendously. For this reason, the law discourages absolute privilege, even holding the attorney-client privilege as

partial.¹⁸⁶ It follows that the mediation privilege, although necessary,¹⁸⁷ *must* be partial. In constructing language for a partial privilege, it is necessary to draw a line somewhere. For example, California statutes attempt to illuminate such a line in mediation, and delineate exactly what communication is protected.¹⁸⁸

If an "absolute" privilege existed, then anything resulting from a mediation would remain shrouded in legal protection and neither party could enforce an agreement. Even with a signed agreement, either party could decide to breach at any point, and litigation would follow. The hard work involved in a mediation would count for nothing, and the parties would have to start over using the traditional litigation process (wishing they had never gone to mediation). Even a zealous advocate of mediation privileges would not call for an absolute privilege of mediation sessions, but only a partial one.

Further, a cloak of absolute privilege would render the mediation process vulnerable to abuse. Parties could intentionally reveal inculpatory evidence for the sole purpose of protecting it from any future disclosure. Disputants could participate in a mediation, willing to say anything in order to obtain the best deal for themselves, but never intending to honor an agreement unless it favored them.

C. Don't wear a vest of legislative protection while being shot at by bullets of a civil suit (especially if you don't fully understand the legislation)

Legislators intended the mediation privilege to encourage people to communicate openly by instituting protection from liability for anything said. On its face, this provides powerful protection for anyone choosing to utilize mediation. But does this privilege mislead people? In *Rinaker*, the defendant asked the court to uphold the mediation privilege¹⁸⁹ and the court refused to do so, saying that confidentiality must yield to the right to impeach a witness.¹⁹⁰ The *Rinaker* decision did not force the mediator to testify outright, but remanded the case requesting the trial court to conduct an *in camera* hearing to decide the necessity of the mediator's testimony.¹⁹¹ The *Rinaker* decision leaves us to ponder whether the courts will uphold the mediation privilege when doing so may clearly infringe on justice. If the courts can uphold or deny the mediation privilege randomly, what value does the privilege have?

One writer suggested reciting the following to all mediation participants (analogous to Miranda rights, but for mediation proceedings): "You have the right to remain silent. I may later testify against you in court. Anything you say to me in mediation I may have to repeat in court."¹⁹² Perhaps this

could serve as fair warning. *Rinaker* supports this language, since the court ultimately forced the mediator to testify.¹⁹³

Likewise in *Sumner*, the defendants believed California Evidence Code, section 1152.5,¹⁹⁴ a predecessor to section 1119,¹⁹⁵ protected everything said in mediation. When they attempted to exercise their assumed privilege, however, the court found several ways around the legislation.¹⁹⁶ The court quoted the dissent from *Ryan*: "Our views are indeed more closely in accord with Justice Raye's dissenting opinion in *Ryan*,"¹⁹⁷ which would have allowed oral statements into evidence in subsequent legal proceedings.¹⁹⁸ Both the *Sumner* and *Rinaker* rulings demonstrate the wavering stability of mediation "protection."

Other cases attempted to uphold a mediation privilege, focusing on the intent of the legislature.¹⁹⁹ Courts in these cases seemed more willing to comply with a mediation privilege when suppressing the evidence would not egregiously wrong one party. In *Folb*, the court boldly adopted "a federal mediation privilege applicable to all communications made in conjunction with a formal mediation."²⁰⁰ That may have been somewhat easier for the court to do because the party relying on the privilege, the plaintiff, did not have an otherwise clear-cut case, thus not producing a sense of flagrant injustice in disallowing the evidence.

Likewise, in *Haghighi*, the Court of Appeals for the Eighth Circuit followed the precise wording of the applicable legislation,²⁰¹ upholding the mediation privilege.²⁰² *Haghighi* may serve as the best example of a court simply enforcing a mediation privilege and not looking beyond or around it. The disputants had clearly created an enforceable contract, intending that it be binding.²⁰³ However, the court disallowed the contract as evidence because the parties had made it "pursuant to" a mediation.²⁰⁴ "[T]he statute's plain language rendered the handwritten document unenforceable, even if that result was unintended."²⁰⁵ *Haghighi*, like *Folb*, involved a "simple" contract case, with relatively low stakes, making it easier for the court to adhere to the privilege. Contrast this with *Rinaker* where the court refused to adhere to the privilege. In *Rinaker*, two minors were charged with vandalism,²⁰⁶ with possible juvenile incarceration at stake; therefore the court readily compelled the mediator to testify.²⁰⁷ The *Rinaker* court found a Constitutional infringement on the right to cross examine a witness, which, according to the court, superceded statutory protection against testifying.²⁰⁸

D. *The Balancing Test in Olam Provides a Tempting, but Inadequate Solution.*

A balancing test similar to that used in *Olam* may seem to present a natural solution. After all, two competing interests

collide: the state legislation to encourage mediation versus the need for testimony.²⁰⁹ The *Olam* court suggests honoring both interests by “balancing” on a case by case basis.²¹⁰

Statutory interpretation may never eliminate all judicial balancing. The legislators attempted to foresee and eliminate all problems a mediation privilege might create by including language preventing abuse and injustice, while still supporting freedom of communication inside mediation.²¹¹ Therefore, the courts must look at legislation carefully to determine the extent to which a privilege applies. Further, they must divine legislative intent before ruling. A balancing test is almost, then, requisite.

In *Olam*, the court thoroughly analyzed the mediation privilege,²¹² finding it to shield participants in a mediation so that the process could thrive,²¹³ but on the other hand, possibly producing injustice by the exclusion of perhaps the only evidence available.²¹⁴ The *Olam* court set aside the mediation privilege to reveal the truth.²¹⁵ The court wrote, “The evidence from all sources demonstrates it is clear the testimony from within the mediation is essential to doing justice here.”²¹⁶ With those words, the court ordered the transcripts unsealed and admitted as evidence.²¹⁷

The *Olam* court relied heavily on *Rinaker*,²¹⁸ acknowledging that *Rinaker* had in essence created a two-stage balancing

test.²¹⁹ After calling the *Rinaker* decision "the most important opinion by a California court in this arena,"²²⁰ the *Olam* court proceeded to refine that balancing test.²²¹ The court then flushed out the elements of the test. First, the court must determine what the parties said or wrote in the mediation, and the importance of the words to the case at bar. This first step constitutes a balancing test: "the judge considers all the circumstances and weighs all the competing rights and interests, including the values that would be threatened not by public disclosure of mediation communications, but by ordering the mediator to appear"²²²

The court arrives at the second stage of the test only after stage one's balancing test determines the necessity of the proposed testimony.²²³ In stage two, the court must assess the "importance of the values and interests that would be harmed if the mediator was compelled to testify."²²⁴ Stage two allows the court to dictate whether to apply the mediation privilege.

The language of the legislation does not include this two-stage analysis. It is entirely judge-made. With this test, the courts can bypass legislation by deciding the necessity of the protected communication is necessary to a case and does not trample upon the sanctity of mediation. However, the very existence of the balancing test belittles the mediation process. Stage one alone could undermine the interests of protecting

mediation, because it allows courts to compel an in camera hearing,²²⁵ which in itself violates the principles of mediation. Stage two represents a more blatant violation because the courts can force that testimony into open court.²²⁶

The *Olam* court was well aware of possible damage to the mediation process.²²⁷ “[O]rdering mediators to participate in proceedings arising out of mediations imposes economic and psychic burdens that could make some people reluctant to agree to serve as a mediator, especially in programs where that service is pro bono or poorly compensated.”²²⁸ Yet the court proceeded to utilize the test,²²⁹ thereby weakening the mediation privilege.

A balancing test creates uncertainty for those who would consider mediation as an alternative to litigation. On its face, state legislation provides confidentiality for communication during mediation,²³⁰ yet the courts can use a balancing test to virtually destroy that promise of confidentiality. Disputants and mediators cannot be certain that a future court will not order them to testify. The balancing test actually encourages caution rather than openness among prudent disputants. This would compromise the mediation process. Therefore, the balancing test potentially, if not certainly, harms the mediation process, and does not represent an adequate solution.

E. Mediation Seeks to Resolve Disputes, Therefore Courts Should Enforce Agreements Made During Mediation

As an alternative to litigation, disputing parties seek an agreement that resolves the initial problem. Any rules, procedures, and privileges concerning mediation must serve that ultimate purpose. If uncertainties exist regarding the mediation process, disputants cannot rely on mediation to best serve their interests. Legislatures and judges alike must keep the goal of mediation—to produce an agreement between the disputants—in the forefront of their minds while creating laws effecting the mediation process.

It is futile to go to great extents to protect the mediation process, but then deny the parties a right to enforce the produced agreement. Many states, including California, allow parties to make their agreement binding and enforceable in court, but the parties must utilize specific language drafted in the legislation. Without that specific language, a completed agreement created in a mediation may have no legal effect. *Haghighi* represents the clearest example of a situation where parties had not used the exact language required by the statute,²³¹ and a later court would not allow the contract into evidence.²³² The mediation process failed in *Haghighi*. Legislative protection rendered the contract, and hence the fruit of the parties' labor, unenforceable.

V. Proposal

The popularity and success of mediation has promulgated over 2,000 pages of legislative protection for confidentiality.²³³ This confidentiality provides a unique ingredient to the mediation process, encouraging parties to speak openly toward reaching an agreement. However, mediation protection can result in finalized agreements that are non-binding, even if written and signed to satisfy standard contract law. The current legislation allows parties to draft binding agreements,²³⁴ but only with proper and precise language.²³⁵ Without this language, these agreements are not admissible in court and therefore not enforceable. This comment proposes changing the language of mediation privileges to ensure the admissibility of mediation agreements in court, *unless* the parties choose to expressly shield the agreement from later disclosure. An agreement represents the end result of a successful mediation, and the parties should rely upon it. An agreement often results from lengthy discussion and a "meeting of the minds." When a party cannot enforce that agreement, the process has failed them, and the integrity of mediation, as an alternative to litigation, suffers.

In summary, basic contract law should govern all finalized agreements, written and oral, whether created within mediation

or not. However, the parties should have the right to expressly waive enforceability if they so choose. The current legislation produces precisely the reverse result.

This proposal would only affect finalized agreements and communications pertinent to them. Full protection from disclosure should extend to anything occurring in mediation *not germane* to a final agreement. No balancing test, or other considerations should allow a court to compel evidence. Likewise, confidentiality protection should extend to the entire mediation proceeding if the mediation fails to produce an agreement. Public policy considerations behind mediation privilege remain. Parties in mediation should not fear subpoenas or *any other* compelled testimony stemming from their words, admissions, and other communications made during the mediation process.

VI. Conclusion

The mediation process requires that parties involved speak freely and candidly. Legislatures, accordingly, have enacted a variety of protections for the confidentiality of communications within a mediation. Though at first a welcome boost to the mediation process, these protections can backfire. First, the parties themselves may be unable to enforce a mediated agreement. Second, the "armor" of legislative protection may

fail easier than legislative intent would dictate. Several cases have held the court's quest for truth and justice to outweigh the privilege of confidential mediation.²³⁶

Even if this "armor" is of steel, perhaps it is too heavy for disputants to wear, encumbered by increasing legislation, rules of procedure, and governing case law. Examples of "confidential" disclosures being allowed into future legal proceedings further plague this armor. Mediation in its pure form may lapse into extinction, killed off by legal machinery. Nevertheless, mediation serves as a viable, empowering, and efficient alternative, rapidly becoming as popular as litigation is dreaded. Legislatures must act quickly to protect the process of mediation *and* its intended result. Strictly upholding a confidentiality privilege in all circumstances *except* for written or oral agreements produced from the mediation is one effective way to protect the mediation process.

1. See CAL. EVID. CODE § 1122(a)(1) (West 1997).

2. See CAL. EVID. CODE § 1123(b) (West 1997).

3. See CAL. EVID. CODE § 1119(b) (West 1997). A privilege is a right to refuse to disclose information. See e.g. FED. R. EVID. DELETED & SUPERSEDED MATERIALS 503.

4. Alternative dispute resolution is a "catch-all phrase" used to encompass mediation, negotiation, arbitration, or any other method of resolving disputes other than litigation. Of these, mediation is "perhaps the most important of the alternative dispute resolution processes." DONALD G. GIFFORD, LEGAL NEGOTIATION, THEORY AND APPLICATION, 203 (1989). For a more thorough description of ADR, see also ROGER FISHER AND WILLIAM URY, GETTING TO YES (Bruce Patton ed., Penguin Books 2d ed. 1991).

5. See CDRC Standards of Practice for California Mediators (California Dispute Resolution Council, 2000).

6. BLACK'S LAW DICTIONARY 981 (6th ed. 1990).

7. See Foxgate Homeowners Ass'n v. Bramalea Cal. Inc., 92 Cal. Rptr 2d 916, 928 (Ct. App. 2000) (citing Cal. Evid. Code §1121 (West 2000)). Note that the parties may request the mediator to make evaluative decisions, but normally the mediator does not have binding authority.

8. J. KAHALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 40-41 (1986).

9. See Roger C. Clapp, *Family Law Disputes Cry Out for Mediated Settlements*, 53-MAY DISP. RESOL. J. 34, 35 (1998). From a financial perspective, it is also possible for all parties to lose. Additionally, litigation often destroys relationships, where mediation sometimes builds them. See *id.*

10. See generally Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 566-571 (1997) (arguing numerous reasons why mediation is beneficial and citing many additional resources for further investigation).

11. See Christopher H. Macturk, Note, *Confidentiality in Mediation: the Best Protection has Exceptions*, 19 AM. J. TRIAL ADVOC. 411, 411-115 (1995).

12. See *id.* See also *Foxgate Homeowners Ass'n v. Bramalea Cal. Inc.*, 92 Cal. Rptr 2d 916, 928 (Ct. App. 2000) (citing Cal. Evid. Code §1121 (West 2000)). Literally hundreds of articles discussing mediation can be found at <<http://www.mediate.com>>.

13. See CAL. EVID. CODE § 954 (West 1997).

14. See Macturk, *supra* note 11, at 411-414. See also CDRC Standards of Practice for California Mediators 8 (California Dispute Resolution Council, 2000).

15. Privileges can also be found in the Federal Rules of Evidence, but they are not actual law, they merely provide insight. FED. R. EVID. *DELETED AND SUPERCEDED MATERIALS* 501-12. Federal courts rely on state substantive law to determine how to apply any privileges. FED. R. EVID. 501.

16. 28 U.S.C. § 651 (1998).

17. *Uniform Mediation Act Draft* (Nov. 2000)
<<http://www.mediate.com/articles/umanovemberdraft.cfm>>.

18. One writer expressed this idea well: "Mediation, the newly discovered panacea for whatever current difficulties we may have with our ancient tried and tested system of jurisprudence, brings with it a new and potentially counterproductive phenomenon: the mediation privilege." William H. Stolberg & Kyle D. Pence, *The Mediation Privilege—An Impermeable Wall*, 68-MAY FLA. B.J. 66, 68 (1994).

19. The mediation privilege is a legislative grant protecting confidential communications made during a mediation. James L. Knoll, *Protecting Participants in the Mediation Process: The Role of Privilege and Immunity*, 34 TORT & INS. L.J. 115, 115 (1998).

20. See *infra* Part II.B.2-5.

21. See *infra* Part IV.C-D.

22. See *infra* Part IV.D.

23. See *infra* Part V.

24. Compare CAL. EVID. CODE § 1122 (West 1997) (requiring parties to expressly waive mediation privilege in order for the document produced from the mediation to be admissible as evidence).

25. See discussion *infra* Part II.B.2. For example, some programs use a panel of volunteer mediators, some use just one person. See *id.*

26. BLACK'S LAW DICTIONARY 981 (6th ed. 1990); See also CAL. EVID. CODE § 1115(a) (West 1997).

27. See *infra* Part II.A.1.

28. See Michael J. Roberts, *Why Mediation Works* (visited Jan. 30, 2001) < <http://www.mediate.com/articles/roberts.cfm>>.

29. The definition of litigation includes "lawsuit," "legal action," and "judicial contest." BLACK'S LAW DICTIONARY 981 (6th ed. 1990).

30. DONALD G. GIFFORD, *LEGAL NEGOTIATION, THEORY AND APPLICATION*, 48 (1989).

31. Letter from Martha Uelmen, Attorney, *Law and Mediation Offices of Martha A. Uelmen*, to clients (2000) (on file with author).

32. See *supra* Part I.

33. “[A]ll the Illinois tribes then remaining, made a treaty of peace with Great Britain, and a treaty of peace, limits, and amity, under her *mediation*, with Six Nations, or Iroquois, and their allies” *Johnson v. McIntosh*, 21 U.S. 543, 549 (1823) (emphasis added).

34. DONALD G. GIFFORD, *LEGAL NEGOTIATION, THEORY AND APPLICATION*, at 32-36 (1989).

35. See *id.* at 184-85.

36. FED. R. EVID. 408.

37. See generally REPORT OF SENATE COMMITTEE ON THE JUDICIARY, FED. R. EVID. S.REP. NO. 1277, 93D CONG., 2D SESS., at 10 (1974) (voicing a variety of concerns about the federal rules of evidence that protect offers to compromise).

38. Over 2300 citations referred to Federal Rules of Evidence 408 and 410. Search of WESTLAW (Mar. 05, 2001).

39. CAL. EVID. CODE § 1119 (West 1997).

40. *E.g.*, Community Boards of San Francisco, 1540 Market Street, Suite 490, San Francisco, CA 94102.

41. *Id.*

42. *See id.*

43. *E.g.*, Conflict Resolution Center of Santa Cruz County ("CRC"), 783 Rio Del Mar Boulevard, Suite 65, Aptos, CA 95003.

44. *See, e.g.*, Community Boards Confidentiality Agreement (1999), *supra* note 37. The community Boards brochure says: "Agreements may be oral or written. While *not legally binding*, they represent the participants' commitment to the resolution of their dispute." *Id.* (emphasis added). The literature from CRC states "mediation is a non-binding process," and that all "mediation discussion and materials are to be privileged and confidential," and that section 1152.5 of the California

Evidence Code applies to all proceedings. Standard form of CRC (1999), *supra* note 40. Observe that the reference to section 1152.5 of the California Evidence Code is wrong because that section was superceded. See *supra* note 35.

45. See, e.g., Community Boards Confidentiality Agreement (1999), *supra* note 37. "For mediation to be successful, the participants must feel free to discuss the issues openly. In order to promote this communication, we agree that all statements and written documents made during the course of the mediation are confidential and cannot be used in legal proceedings." *Id.*

46. 74 Cal. Rptr. 2d 464 (Ct. App. 1998).

47. See *id.* at 467.

48. See *id.* at 467.

49. See *id.* at 468. The statutory provisions referred to in the case are fully discussed. See *infra* Part II.C.

50. See *Rinaker*, 74 Cal. Rptr. 2d at 469.

51. See *id.* at 473. Because there were minors involved with this case, it may be arguable that the holding is limited to cases concerning minors. Nevertheless, this is an example of the mediation legislation not being strictly followed. See *infra* Part 2.C.3. But see *Ryan v. Garcia*, 27 Cal. Rptr. 2d 158 (Cal. App. 1994) (strictly adhering to legislation protecting communications made during a mediation).

52. 50 Cal. Rptr. 2d 200 (Ct. App. 1996).

53. See *id.* at 201. The name of the program was Judicial Arbitration and Mediation Services, which utilized retired judges to preside over the mediation. *Id.*

54. *Id.* at 201.

55. See *id.* at 201.

56. See *id.* at 202.

57. See *id.* at 201.

58. See *Sumner*, 50 Cal. Rptr. 2d at 202. For a discussion on the legislation relied upon, see *supra* Part 2.C.1.

59. 33 Cal. Rptr. 2d 158 (Ct. App. 1994).

60. See *id.* at 162.

61. See *id.* at 203.

62. See *id.*

63. See *id.* at 202.

64. See *Ryan*, 33 Cal. Rptr. 2d at 202.

65. *See id.*

66. *See id.* at 203.

67. *See id.*

68. *See supra* Part I (discussing the benefits of mediation).

69. *See* Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 582 (1997).

70. *See* Agreement to Mediate, Santa Cruz County Judicial District (1999) (on file with author).

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. For example, one agreement to mediate states in part, "a negotiated settlement is not a matter of public record, and is more likely to be honored by both parties. As an added protection for the claimant, our agreement form carries a clause which allows it to be converted to a judgment should the debtor default." Agreement to Mediate, Santa Cruz County Judicial District (1999) (on file with author).

76. Agreement to Mediate, Santa Cruz County Judicial District (1999) (on file with author).

77. *See id.*

78. *See, e.g.,* CAL. EVID. CODE § 1122-23.

79. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

80. *See id.*

81. *See id.* at 1113.

82. *See id.* at 1115.

83. *See id.* at 1117.

84. *See* Olam, 68 F. Supp. 2d at 1118.

85. *See id.* at 1119.

86. *See id.* at 1119.

87. See *id.* at 1131.

88. See *id.* at 1136.

89. See *id.*

90. See *Olam*, 68 F. Supp. 2d at 1139.

91. In legal negotiation theory, a party's "bottom line" is referred to as the "Best Alternative to a Negotiated Agreement," or "BATNA." DONALD G. GIFFORD, *LEGAL NEGOTIATION, THEORY AND APPLICATION*, 51 (1989).

92. See generally Jonathan M. Hyman, *Slip-Sliding into Mediation: Can Lawyers Mediate their Clients Problems?*, 5 *Clinical L. Rev.* 47 (1998).

93. See *id.*

94. 33 Cal. Rptr. 2d 158 (Ct. App. 1994).

95. *See id.* at 159.

96. *See id.*

97. *See id.* at 160.

98. *See id.*

99. *See id.*

100. *See Ryan*, 33 Cal. Rptr. 2d at 164.

101. *See id.* at 160-01.

102. *See id.* at 164.

103. *Id.*

104. 173 F.3d 1086 (8th Cir. 1999).

105. *See id.* at 1087.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.* at 1087.

110. See *Haghighi*, 173 F.3d at 1087.

111. *Id.* at 1088.

112. *Id.* at 1089.

113. See *id.*

114. See Michael J. Roberts, *Why Mediation Works* (visited Jan. 30, 2001) < <http://www.mediate.com/articles/roberts.cfm>>.

115. 173 F.3d 933 (4th Cir. 1999).

116. See *id.* at 935.

117. *Id.* at 936.

118. See *id.* at 936.

119. *Id.* at 938.

120. *Id.*

121. See *Hooters*, 173 F.3d 933.

122. See *id.*

123. 16 F. Supp. 2d 1164 (C.D. Cal. 1998).

124. *Id.* at 1172.

125. See *id.* at 1167.

126. *Id.*

127. *See id.*

128. *See id.* at 1178-80.

129. *See Folb*, 16 F. Supp. 2d at 1171. “[S]uccessful mediation requires open communication between parties to a dispute.” *Id.* at 1173. However, the court also provides a counter-argument: “[W]hile a certain level of confidentiality may be necessary to make mediation effective, ‘it is wrong to assume that mediation needs absolute confidentiality.’ ” *Id.* at 1173 (quoting Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 26) [hereinafter *Confidentiality in Mediation Article*].

130. *See Folb*, 16 F. Supp. 2d at 1171.

131. *See id.* at 1180-81.

132. *Id.* at 1179.

133. See generally David M. Stern, *Mediation: An Old Dog with Some New Tricks*, 24 No. 4 LITIG. 31 (1998).

134. CAL. EVID. CODE § 1119 (West 1997).

135. See *infra* Part II.C.3.

136. See CAL. EVID. CODE § 1120(a) (West 1997).

137. See CAL. EVID. CODE § 1122(a)(1) (West 1997) (emphasis added).

138. See CAL. EVID. CODE § 1120(a) (West 1997). I call this the "smoking gun" exception, because if a party has a highly incriminating piece of evidence (a smoking gun), it cannot be introduced during a mediation with the sole purpose of excluding it from admissibility in later proceedings. "Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or

protected from disclosure solely by reason of its introduction or use in a mediation." *Id.*

139. See *Folb*, 16 F. Supp. 2d at 1179.

140. See *id.*

141. See CAL. EVID. CODE §§ 1115-1128.

142. See, e.g., Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N.D. L. REV. 45, 59 n.40.

143. See, e.g., CAL. EVID. CODE § 703.5 (West 1997).

144. See Information Statement, Conflict Resolution Center of Santa Cruz County (CRC), 783 Rio Del Mar Boulevard, Suite 65, Aptos, CA 95003. "Participation in the Conflict Resolution Center mediation process is voluntary, both by you *and by the mediators.*" *Id.* (emphasis added).

145. CAL. EVID. CODE § 1121 (West 1997).

146. FLA. STAT. ANN. § 44.107 (West 1997).

147. *See id.*

148. *Id.*

149. *See, e.g.,* CAL. EVID. CODE § 1119 (West 1997).

150. *But see* Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464 (Cal. App. 1998) (demonstrating that the mediation privilege applies to juvenile delinquency hearings because they are not considered criminal cases, even though incarceration is possible).

151. CAL. EVID. CODE § 1122(a) (West 1997).

152. CAL. EVID. CODE § 1122(a)(1) (West 1997).

153. See FED. R. EVID. 1123(b). The contract must state on it that "it is enforceable or binding or words to that effect."
Id.

154. Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N.D. L. REV. 45, 53 (1998).

155. *Id.*

156. See OR. REV. STAT. § 36.222(6) (1998).

157. OR. REV. STAT. § 36.222(4) (1998).

158. See e.g., *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464 (Cal. App. 1998).

159. See FED. R. EVID. 501.

160. *But see* FED. R. EVID. DELETED & SUPERSEDED MATERIALS 501-13.

161. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998).

162. See FED. R. EVID. 407-08.

163. FED. R. EVID. 408 (emphasis added).

164. See *id.*

165. Senate Comm. On Judiciary, FED. R. EVID., S.Rep. No. 1277, 93d Cong., 2d Sess., p. 10 (1974).

166. See Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L.

REV. 575, 577 (1997). See also *Uniform Mediation Act Draft*,
Prefatory Note 1 (Nov. 2000)
<<http://www.mediate.com/articles/umanovemberdraft.cfm>>

167. 28 U.S.C. § 651 (1998).

168. See 28 U.S.C. § 651 (1998).

169. See 28 U.S.C. § 651(a) (1998).

170. See 28 U.S.C. § 651(f) (1998).

171. *Uniform Mediation Act Draft* (Nov. 2000)
<<http://www.mediate.com/articles/umanovemberdraft.cfm>>.

172. See Ron Kelly, *Letter to UMA Drafters Identifying Key
Positive Aspects and Remaining Problems in Current Draft* (Last
modified Dec., 2000)
<<http://www.ronkelly.com/RonKellyMedAct.html>>.

173. National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act §8(5)(b) (Draft Print 2000) <<http://www.mediate.com/articles/umanovemberdraft.cfm>>.

174. *See id.*

175. The current draft has passed the first several hurdles toward becoming law, but remains in the law-making process.

176. *See, e.g.,* CAL. EVID. CODE §§ 1115-1128 (West 1997).

177. *See Kovach, supra* note 165, at 577.

178. *See Uelmen, supra* note 27.

179. *See, e.g.,* Haghghi v. Russian-American Broadcasting Co., 173 F.3d 1086 (8th Cir. 1999).

180. See, e.g., *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464 (Cal. App. 1998).

181. *NLRB v. Macaluso*, 618 F. 2d 51 (9th Cir. 1980).

182. *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164, 1172 (C.D. Cal. 1998).

183. *Id.* at 1171.

184. See discussion *supra* Part II.C.1.

185. A true "absolute privilege" would enable the holder of confidential information to not disclose it under any and all circumstances, whether criminal or civil. Even the Constitutional right of a defendant to not testify against himself is not absolute because it is limited to civil cases. See CAL. EVID. CODE § 930 (West 1997).

186. See, e.g., CAL. EVID. CODE §§ 950-962 (West 1997).

187. See discussion *supra* Part II.A.2.

188. See CAL. EVID. CODE §§ 1115-1128 (West 1997).

189. See *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 467 (Cal. App. 1998).

190. See *id.* at 469.

191. See *id.*

192. Ron Kelly, *Mediation Information About Mediation* (posted temporarily online Jan. 20, 1999) (on file with author).

193. See *Rinaker*, 74 Cal. Rptr. 2d at 473. The “forced” testimony was in camera, for the judge to decide whether it was Constitutionally needed in court. *Id.* at 473.

194. See *The Regents of the Univ. of Cal. v. Sumner*, 50 Cal. Rptr. 2d 200, 202 (Ct. App. 1996). Section 1152.5 of the California Evidence Code required the parties to sign an agreement to mediate which stated verbatim the text of the Code. CAL. EVID. CODE § 1152.5 (West 1994) *amended by* CAL. EVID. CODE §§ 1115-1128 (West 1997).

195. See CAL. EVID. CODE § 1119 (West 1997).

196. See *Sumner*, 50 Cal. Rptr. 2d at 202-03.

197. *Id.* at 203.

198. See *id.*

199. See e.g., *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164, 1172 (C.D. Cal. 1998); *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158 (Ct. App. 1994).

200. *Folb*, 16 F. Supp. 2d at 1179-80.

201. See *Haghighi v. Russian-American Broad. Co.*, 173 F.3d 1086, 1087 (8th Cir. 1999).

202. See *id.*

203. See *id.*

204. See *id.*

205. *Id.* at 1088.

206. See *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 467 (Cal. App. 1998).

207. See *id.* This testimony was in camera. See *id.*

208. See *id.* at 473.

209. See discussion *supra* Part II.A.2.

210. See *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1131-32 (N.D. Cal. 1999).

211. See, e.g., CAL. EVID. CODE §§ 1115-1128.

212. See *Olam*, 68 F. Supp. 2d at 1131-32.

213. See *id.*

214. See *id.*

215. See *id.*

216. *Id.* at 1139.

217. *See id.* at 1151.

218. *See Olam*, 68 F. Supp. 2d at 1131.

219. *Id.*

220. *Id.*

221. *See id.* at 1131-32.

222. *Id.* at 1131.

223. *Id.* at 1132.

224. *Olam*, 68 F. Supp. 2d at 1132.

225. *See id.* at 1131-32.

226. *See id.*

227. *See id.* at 1132.

228. *Id.* at 1133.

229. *See id.*

230. *See, e.g.*, CAL. EVID. CODE §§ 1115-1128.

231. *See Haghghi v. Russian-American Broad. Co.*, 173 F.3d 1086, 1087 (8th Cir. 1999).

232. *Id.* at 1088.

233. See Kovach, *supra* note 67, at 582. The conclusion assumes that a legislative statute has an average of at least one page to spell it out.

234. See CAL. EVID. CODE § 1122 (West 1997).

235. The proper language varies from state to state. For example, in California, the parties must expressly agree in writing to disclosure, or a finalized agreement must provide that it is enforceable. See CAL. EVID. CODE §§ 1122(a)(1), 1123(b) (West 1997).

236. See, e.g., *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464 (Cal. App. 1998).