XL. MEDIATION

§ 21:312 General principles of mediation

Mediation has been described in a number of different ways. In simple terms, mediation is "a process through which a third party assists two or more others in working out their own solution to a conflict."[1] The Uniform Mediation Act defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[2] While it is a common belief that mediation is a consensual process, it is becoming more common for courts to require parties to engage in mediation (or some other form of alternative dispute resolution process) before trying their dispute in a judicial forum. Still, this mandatory

---

20, 2002), in which the author, a judge of the Iran-United States Claims Tribunal in The Hague, laments the growing formality of international arbitration that "inevitably has taken on more characteristics of litigation," and opines that a "crisis of legitimacy" is brewing because of "the problem of coping with an international system that substitutes for what national courts do, but in a diverse, global context that lacks generally accepted appellate or other control mechanisms." Although Judge Brower views impracticable the establishment of harmonious specific reasons for refusal of international arbitral awards under Article V of the New York Convention, and regards it as unrealistic that an "international court of arbitral awards" could be established effectively to enforce the New York Convention, Judge Brower concludes:

> A crisis clearly is upon us; whether it will sink the system, however, is debatable. In the end, the success of the global adjudication system depends on the constant vigilance and active engagement of judges, arbitrators, and lawyers alike. In short, the posited crisis is but one manifestation of life in this pluralistic and increasingly democratic world in which we live. To borrow from Churchill's famous pronouncement on democracy as a form of government: International arbitration is the worse form of international dispute resolution, except all those other forms that have been tried from time to time.

[Section 21:312]

[1]Slaikeu, When Push Comes to Shove: A Practical Guide to Mediating Disputes xiii (1996). See also Kovach, Mediation: Principles and Practice 23 (1994) (mediation is "simply the facilitation of a settlement between individuals."); Moore, The Mediation Process: Practical Strategies for Resolving Conflict 14 (2d ed. 1996) ("[M]ediation is the intervention into a dispute or negotiation by an acceptable . . . third party who has no authoritative-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."); Oehmke, Commercial Arbitration § 2:1 (3d ed.) ("Mediation is a consensual process where a mediator facilitates communication and negotiation between parties, assisting them to reach a voluntary agreement of their dispute.").

[2]National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act § 2(1) (2001) [hereinafter UMA]. The UMA can be accessed online at http://www.law.upenn.edu.htm.

form of mediation is still a process by which the parties control their own destiny. Mediation, unlike binding forms of alternative dispute resolution (e.g., arbitration) vests no power in the mediator to decide the parties' dispute. The mediator simply facilitates communication and negotiation between the parties in an attempt to assist the parties in voluntarily reaching a resolution of their own dispute. As one commentator put it:

> The emphasis on the negotiation in mediation excludes any adjudication. Indeed, mediation is altogether different from authoritative adjudication. The concept of mediation is the antithesis of justiciability . . . . In contrast to arbitration, a mediator has no authority to issue a decision. Different from other alternative dispute resolution (ADR) processes, a mediator is not aligned with a disputant but, rather, assists disputants to negotiate a resolution of their dispute, without the authority to issue a binding decision. The mediator is appointed by an appropriate authority or engaged by the disputants.[3]

The non-binding feature of mediation perhaps accounts for the fact that there is relatively little case law discussing the subject. Unlike arbitration which has generated a tremendous amount of decision law and commentary, the mediation process has attracted far less attention. Nevertheless, there is a growing belief among jurists and practitioners alike that mediation, if properly timed and conducted, can be quite successful in resolving disputes.[4]

In contrast to the relative dearth of decision law on mediation, the process has attracted a great deal of legislative attention. The National Conference of Commissioners on Uniform State Laws has calculated that "legal rules affecting mediation can be found in more than 2500 statutes."[5] Mediation laws can be found in statutes ranging from domestic relations to debtor/creditor disputes.[6] It is important for practitioners involved in mediation to understand the local laws governing the process. A number of

---

[3]Oehmke, Commercial Arbitration § 2:1 (3d ed.).

[4]See Cole, et al., Mediation: Law, Policy, Practice (2001 2d ed. and 2001 supp.); Reuben, The Lawyer Turns Peacemaker, 82 A.B.A. J. 54 (Aug. 1996); Rogers and McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13 Ohio St. J. on Disp. Resol. 831 (1998). See also Denburg v. Parker Chapin Flattau & Klimpl, 82 N.Y.2d 375, 604 N.Y.S.2d 900, 624 N.E.2d 995 (1993) (society benefits when parties have the autonomy to shape their own resolutions to their disputes rather than having them judicially imposed).

[5]UMA, Prefatory Note (2001). See also Mediation: Law, Policy, & Practice §§ 5:1 to 5:19.

[6]See Tex. Fam. Code Ann. § 153.0071(d)(1) (2002) (mediated settlement

jurisdictions have enacted mediation acts that govern civil disputes. For example, Minnesota's Civil Mediation Act sets forth the rules governing civil mediations.[7] Among other things, in order for a settlement agreement achieved through a mediation to be enforceable, it must contain:

> A provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; or the parties were otherwise advised of these conditions.[8]

Failing to comply with these requirements will result in a written settlement agreement "not being worth the paper it is written on." In *Haghighi v. Russian-American Broadcasting Co.*,[9] the parties concluded their mediation session by having their attorneys prepare a hand-written document setting forth the terms of their agreement. The parties contemporaneously on each page

---

agreements involving parental rights must prominently display a statement "in boldfaced type or capital letters or underline, that the agreement is not subject to revocation."); Minn. Stat. § 572.41 (2003) (setting forth procedure for debtor and creditor mediation).

[7]Minn. Stat. §§ 572.31 et seq.

[8]Minn. Stat. § 572.35. See also Beazer East, Inc. v. Mead Corp., 412 F.3d 429, 60 Env't. Rep. Cas. (BNA) 1737, 35 Envtl. L. Rep. 20133 (3d Cir. 2005) (Local federal appellate rules make it impossible to enforce oral settlement reached at mediation. Appellant claims that there was a oral settlement at the mediation. The U.S. Court of Appeals for the Third Circuit denied the appeal based on its local appellate rules. The rules provide that statements made during the mediation process may not be disclosed, so appellant had no way to prove the existence of an oral settlement agreement. In addition, the rules provide that if a settlement is reached it shall be reduced to writing. A straight forward reading of these words is that there is no agreement without a writing.); White v. Fleet Bank of Maine, 2005 ME 72, 875 A.2d 680 (Me. 2005) (Based on mediator's testimony court finds that oral settlement agreement in mediation was enforceable even though the parties could not agree to written terms after the mediation. The parties reached an agreement in mediation and agreed to memorialize the agreement later. When the parties circulated the written agreement, they could not come to agreement on all terms and became increasingly antagonistic with each other. Based on the testimony of the mediator and two other witnesses, the trial court concluded that the parties had reached an oral agreement on all essential terms at the mediation and intended it to be enforceable. The Supreme Court of Maine found that there was ample evidence to prove an oral agreement and confirmed the trial court's decision.).

[9]Haghighi v. Russian-American Broadcasting Co., 173 F.3d 1086 (8th Cir. 1999).

signed the handwritten settlement agreement.[10] Unfortunately, the handwritten settlement agreement did not state that it was binding as required by the Minnesota Act. The Eighth Circuit, following the lead of the Minnesota Supreme Court, found that the settlement agreement was unenforceable. This was so notwithstanding the fact that the document stated it was a "Full and Final Mutual Release of All Claims." Moreover, there was no evidence to establish that the parties waived the protections of the Act:

> After the evidentiary hearing, the district court made no factual finding that [appellant] had waived its statutory protection. Waiver requires evidence of a voluntary and intentional relinquishment or abandonment of a known right, and there is no evidence that [appellant] intentionally waived its right to have the Act enforced. Besides, a statutory right cannot be waived if waiver would violate public policy. Here the Act is "likely . . . intended . . . to encourage parties to participate fully in a mediation session without the concern that anything written down could later be used against them." This intent would be frustrated if settlement documents that do not state they are binding can be enforced against the parties.[11]

In *Short Bros. Constr., Inc. v. Korte & Luthohan Contractors, Inc.*,[12] an order to mediate was an act of docket management and was not an injunctive order. As a result, the order to mediate was not an appealable interlocutory order. Refusal to participate in

---

[10]Haghighi v. Russian-American Broadcasting Co., 577 N.W.2d 927 (Minn. 1998) (upon questions certified by the federal district court, held that handwritten document prepared by parties' attorneys at the conclusion of the mediation session conducted pursuant to the Minnesota Civil Mediation Act was unenforceable as a mediated settlement agreement, where the document failed to state that it was a binding agreement).

[11]Haghighi v. Russian-American Broadcasting Co., 173 F.3d 1086, 1088-89 (8th Cir. 1999). See also Aetna, Inc. v. Lexington Ins. Co., 76 Pa. D. & C.4th 19, 2005 WL 2840327 (C.P. 2005) (Court determined that claim was not included in a settlement based on fact that it was not discussed during the mediation. Two insurance carriers entered into a settlement agreement through mediation. Subsequently an issue arose as to whether a claim by one carrier was included in the settlement. The other carrier argued that mediation was confidential, and the court could not hear evidence of what transpired in the mediation to interpret the settlement agreement. The Pennsylvania trial court concluded that the claim was not included in the settlement based in part on the fact that the claim had not been discussed during the mediation. Citing a Third Circuit opinion which stated that "[h]aving undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke confidentiality ordinarily accorded settlement agreements" to prevent the court from determining the extent of the settlement.).

[12]Short Bros. Const., Inc. v. Korte & Luitjohan Contractors, Inc., 356 Ill. App. 3d 958, 293 Ill. Dec. 444, 828 N.E.2d 754 (5th Dist. 2005).

court ordered mediation may result in dismissal with prejudice.

In *Office Environments, Inc. v. McKelvey-Kell*,[13] the trial court ordered the parties to mediate. One party canceled the mediation on several occasions resulting in the mediator demanding a deposit. That party refused to pay the deposit. The local rules relating to mediation only allowed the court to assess "mediation costs and attorney fees relevant to the process." Based on the fact that the mediation had not commenced, the Indiana Court of Appeals found that the trial court's sanction was for the party's failure to comply with the its order to mediate and was, therefore, proper. A different result would occur had the refusal happened after the mediation started in which case the limitation on sanctions in the local rules would have applied. Several courts assessed monetary sanctions for party's failure to attend mediation or mediate in good faith.[14]

§ 21:313 Uniform Mediation Act

In August 2001, the National Conference of Commissioners on Uniform State Laws approved the Uniform Mediation Act.[1] The American Bar Association House of Delegates approved the Uniform Mediation Act on February 4, 2002. Implementing legislation has been introduced in a number of states, including New York, South Carolina, Vermont and Oklahoma. In May 2003, Nebraska became the first state to enact the Uniform Mediation Act.[2]

Notwithstanding the need to bring uniformity to a landscape that consists of more than 2,500 statutes containing legal rules affecting mediation, the adoption of the Uniform Mediation Act is unlikely to be smooth.[3] States have enacted a varied and complex array of mediation statutes. More than 250 state statutes pertain

---

[13]Office Environments, Inc. v. Lake States Ins. Co., 833 N.E.2d 489 (Ind. Ct. App. 2005).

[14]See Frank v. L.L. Bean Inc., 377 F. Supp. 2d 233 (D. Me. 2005); Harrelson v. Hensley, 891 So. 2d 635 (Fla. 5th DCA 2005); Holler v. De Hoyos, 898 So. 2d 1216 (Fla. 5th DCA 2005); Outar v. Greno Industries, Inc., 2005 WL 2387840 (N.D. N.Y. 2005).

[Section 21:313]

[1]National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act §§ 1 to 16 (2001) [hereinafter "UMA"].

[2]Neb. Rev. Stat. §§ 25-2930 to 25-2942 (2003).

[3]UMA, prefatory note (2001).

to the public policy of favoring confidentiality in mediation.[4] About half of the states have adopted mediation statutes of general application to the question of confidentiality and evidentiary privilege accorded to mediation communications.[5] It is an open question how readily state legislators will be to supplant existing mediation laws with the Uniform Mediation Act.

Perhaps more problematic, however, is the fact that a number of the Act's features are controversial. Most of the criticism has been directed toward Section 9 of the Uniform Mediation Act. This section governs the mediator's disclosure of conflicts of interest and qualifications. The section requires the mediator to "make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator," and "disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation."[6] Moreover, [i]f a mediator learns any fact described in Subsection (a)(1) [facts affecting impartiality] after accepting a mediation, the mediator shall disclose it as soon as practicable."[7]

The sanction for violating the Act's conflicts of interest disclosure requirements is the loss of privilege against disclosure under Section 4 of the Act.[8] The penalty for nondisclosure applies not only to conflicts of interest but also "qualifications." This is the case even though the Act "does not require that a mediator

---

[4]UMA, prefatory note (2001).

[5]See Ariz. Rev. Stat. Ann. § 12-2238 (1993); Ark. Code Ann. § 16-7-206 (1993); Cal. Evid. Code §§ 1115 et seq. (1997); Iowa Code Ann. § 679C.2 (1998); Kan. Stat. Ann. § 60-452 (1964); La. Rev. Stat. Ann. § 9:4112 (1997); Me. R. Evid. 408 (1993); Mass. Gen. Laws ch. 233, § 23C (1985); Minn. Stat. Ann. § 595.02 (1996); Neb. Rev. Stat. § 25-2914 (1997); Nev. Rev. Stat. § 48.109(3) (1993); N.J. Rev. Stat. 2A:23A-9 (1987); Ohio Rev. Code Ann. § 2317.023 (1996); Okla. stat. tit. 12, § 1805 (1983); Or. Rev. Stat. Ann. § 36.220 (1997); 42 Pa. Cons. Stat. Ann. § 5949 (1996); R.I. Gen. Laws § 9-19-44 (1992); S.D. Codified Laws § 19-13-32 (1998); Tex. Civ. Prac. & Rem. Code § 154.053(c); Utah Code Ann. § 30-3-38(4) (2000); Va. Code Ann. § 8.01-576.10 (1994); Wash. Rev. Code § 5.60.070 (1993); Wis. Stat. § 904.085(4)(a) (1997); Wyo. Stat. Ann. § 1-43-103 (1991).

[6]UMA § 9(a)(1) & (2).

[7]UMA § 9(b). Disclosure of the mediator's qualifications is handled a bit differently. Qualification information is disclosed "at the request of the mediation party." UMA § 9(c). Moreover, the Act "does not require that a mediator have a special qualification by background or profession." UMA § 9(f).

[8]UMA § 9(d) ("A person that violates Subsection (a), (b), or (c) is precluded by the violation from asserting a privilege under Section 4").

have a special qualification by background or profession."[9] The adoption of ethical disclosure requirements similar to those placed upon arbitrators in the mediation context and tying the violation of those ethical standards to a loss of confidentiality has generated a great deal of criticism.[10]

Another front of criticism has developed over the Uniform Mediation Act's protection of confidential communications. The Act adopts a "privilege" approach to insuring the confidentiality of mediation communications. As the comments to the Uniform Mediation Act note:

> Section 4(b) grants a privilege for mediation communications that, like other communications privileges, allows a person to refuse to disclose and to prevent other people from disclosing particular communications . . . . The Drafters ultimately settled on the use of the privilege structure, the primary means by which communications

---

[9]UMA § 9(f).

[10]For example, the International Academy of Mediators on October 31, 2001 adopted a resolution opposing the adoption of the Uniform Mediation Act because of its concern over Section 9 of the Act:

> Section 9 links the violation of "ethical" rules or standards of conduct/practice by a mediator to voiding the evidentiary privilege in underlying civil litigation between the parties. This jeopardizes the parties' expectations of mediation confidentiality. Mediators should, and in fact do, routinely make disclosures consistent with the intent and language of the UMA. A mediator's failure to disclose, however, should not have the effect of vitiating the privilege protecting the confidentiality of mediation communications . . . . The UMA imposes obligations involving concepts of "impartiality" and "qualifications" of a mediator without any definition and guidance. It is not possible to determine what may constitute an adequate Section 9 disclosure. The UMA punishes the parties for inadvertent non-disclosure conflicts or "qualifications" by the mediator while at the same time stating that mediators need not have any specific qualifications. Section 9(d) provides a vehicle for counsel to engage in fishing expeditions into the mediation process, including the confidential caucuses. Section 9 presents a clear and present danger to the mediating parties of converting their expectation of a confidential settlement negotiation into litigation. The litigator now has an open invitation to invade and challenge almost any mediation by asserting the prospect of non-compliance with Section 9. Under present law existing in all jurisdictions, a failure to disclose does not void mediation confidentiality or privilege. It is not clear why NCCUSL inserted this radical provision at the reading for approval without providing opportunity for public comment.

Resolution of the International Academy of Mediators Opposing Adoption of the Uniform Mediation Act (Oct. 31, 2001). See also Executive Summary of Report Unanimously Approved by the Pennsylvania Bar Association, the Dispute Resolution Committee on the Uniform Mediation Act (Nov. 29, 2001) (opposing the UMA on grounds that Section 9 jeopardizes the confidential nature of mediation).

The drafters of the UMA have responded to the International Academy of Mediators' opposition by emphasizing that the Act only blocks the mediator's ability to assert a claim of privilege. The parties are still able to prevent testimony of confidential communications. Moreover, the disclosure requirements merely restate the ethical standards that mediators have already broadly embraced.

> are protected at law, an approach that is narrowly tailored to satisfy the legitimate interests and expectations of participants in mediation, the mediation process, and the larger system of justice in which it operates. The privilege structure also provides greater certainty in judicial interpretation because of the courts' familiarity with other privileges, and is consistent with the approach taken by the overwhelming majority of legislatures that have acted to provide broad legal protections for mediation confidentiality.[11]

A number of commentators have criticized the Uniform Arbitration Act's lack of a broad "confidentiality" provision.[12] Certain jurisdictions, like Texas, have long established mediation acts containing broad confidentiality protection:

> [A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.[13]

Arguably, the Texas statute is "the broadest ADR confidentiality provision in the country."[14] The Uniform Mediation Act's "privilege" approach to confidentiality has not satisfied a number of commentators that believe a more stringent confidentiality approach should be adopted.

> In our view the proposed UMA does a relatively poor job of protecting the confidentiality of the mediation process. The proposal at-

---

[11]UMA § 4, Comments at http://www.law.upenn.edu.htm. The drafters rejected several other approaches to mediation confidentiality, including a categorical exclusion for mediation communications (an overly broad approach according to the drafters), the extension of evidentiary settlement discussion rules to mediation (an underbroad approach) and mediator incompetency (an under-inclusive approach).

[12]New York State Dispute Resolution Association, Uniform Mediation Act ("UMA") summary (Mar. 21, 2003) ("It [UMA] is not a broad "confidentiality" law which would otherwise prevent disclosure of communications outside of mediation proceedings."), also available at http://www.nysdra.org__details.asp?ID=66.

[13]Tex. Civ. Prac. & Rem. Code Ann. § 154.073(a). Moreover, the Texas Act requires the mediator to "at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute." Tex. Civ. Prac. & Rem. Code Ann. § 154.053(b). Moreover, the Texas Act states that "[u]nless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court." Tex. Civ. Prac. & Rem. Code Ann. § 154.053(c).

[14]Sherman, Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience, 38 S. Tex. L.J. 541, 542 (1997).

> tempts to safeguard confidentiality through a complex and dizzying array of privileges and exceptions . . . . The UMA proposal has headed in the wrong direction by not beginning with a wide umbrella of confidentiality protection followed by appropriate exceptions. Whereas the Texas ADR Procedures Act's confidentiality provisions start with the general proposition that all ADR communications are confidential, save for several exceptions, the UMA focuses instead on privileges from discovery and admissibility in later proceedings.[15]

The Act's drafters have sought to blunt criticism over adopting a "privilege" approach to confidentiality. The drafters have added a section that states, in part, "[M]ediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State."[16] The "legislative" history of this provision, as set forth in the drafter's comments, reveal it to be the result of criticism that early drafts failed to impose an affirmative duty on mediation participants not to disclose mediation communications to third persons outside the context of the proceedings in which the Section 4 privilege applies.[17] The drafters found it impracticable to draft a comprehensive confidentiality rule. The drafters were concerned that to do so would impose a severe risk of civil liability on the many unknowing mediation participants who might discuss their mediations with others for a number of reasons. Therefore, a compromise was reached whereby the confidentiality of mediation communications is afforded protection either by way of agreement or by virtue of other law or rule existing in the relevant jurisdiction.

§ 21:314 Confidentiality of mediation communications

It is widely perceived that the cornerstone to an effective mediation is that communications shared in the process will be kept

---

[15]Fagan and Shannon, A Potential Threat to Texas ADR (2003). See also Shannon, Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems, 32 Tex. Tech L. Rev. 77 (2000). Ironically, others criticize the UMA on grounds that the privilege against disclosure cuts too broad. See New York State Dispute Resolution Association, Uniform Mediation Act ("UMA") Summary, (Mar. 21, 2003) ("Some members of the committee disagree with granting the privilege to the mediator and non-party participants. Other professional privileges (e.g. attorney-client) may be invoked only by the parties themselves, and may be impliedly waived (e.g. by raising related issues in litigation). Critics of the UMA argue that extending the privilege beyond the parties is unjustified, especially as the privilege must be expressly waived, and may unnecessarily impede legitimate court proceedings.").

[16]UMA § 8.

[17]UMA § 8, comments (2001).

strictly confidential.[1] But a duty of strict confidentiality can create tension with other legitimate concerns. Must silence be kept if one party defrauds another during a mediation process? May a party avoid the consequences of a bargain made during mediation by asserting confidentiality as a shield?[2]

One of the more prominent decisions addressing this subject is the California Supreme Court's decision in *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*,[3] where a homeowner's association sued a developer and general contractor for construction defects. Pursuant to a comprehensive case management order, the Superior Court appointed a retired judge to act as a mediator. The parties were ordered to make their best efforts to cooperate in the mediation process. This process consisted of a five-day round of mediation sessions at which the parties were to bring their experts. The homeowner's association showed up with nine experts in tow. The defendant, however, arrived late and brought no defense experts. The mediator canceled the session concluding that it was fruitless to go on. After more procedural wrangling during which the defense sought to postpone further mediation efforts, the mediator filed a report with the Superior Court noting that defense counsel "has spent

---

[Section 21:314]

[1]See Freedman and Prigoff, Confidentiality in Mediation: The Need for Protection, 2 Ohio St. J. Disp. Resol. 37 (1986); Harter, Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Insuring Mediator Confidentiality, 41 Admin. L. Rev. 315 (1989).

[2]For commentary supporting the position that confidentiality must yield if justice is not otherwise served, see Hughes, The Uniform Mediation Act: To the Spoiled Go the Privileges, 85 Marq. L. Rev. 9 (2001). Mr. Hughes opens his article with a hypothetical mediation in which a grieving widow accepts a $100,000 settlement offer from an insurance adjuster offered during a mediation because the adjuster represented to her that the limits of liability under the policy were this amount. Later on she discovered that the adjuster lied and that the policy limits were $250,000. May the mediator testify about the adjuster's misrepresentation? The author notes that the case law and statutory environment presents a mixed bag:

> Under recent case law, both the mediator and the plaintiff would most likely testify. Under the statutes of some states, they would certainly testify; however, under others, it is unclear. Unfortunately, under the terms of the proposed Uniform Mediation Act (UMA), the mediator would not have to fret about testifying.

Hughes, The Uniform Mediation Act: To the Spoiled Go the Privileges, 85 Marq. L. Rev. 9, 11–12 (2001). But see § 21:154 (noting criticism that the UMA provides insufficient confidentiality protection to parties in mediation).

[3]Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., 26 Cal. 4th 1, 108 Cal. Rptr. 2d 642, 25 P.3d 1117 (2001).

the vast majority of his time trying to derail the mediations . . . ."[4]

The homeowner's association moved for sanctions of $30,578.43 for the costs incurred in engaging in the failed mediation sessions. The trial court granted the motion. In analyzing the matter, the California Supreme Court ruled:

> The mediator and the Court of Appeal here were troubled with what they perceived to be a failure of Bramalea to participate in good faith in the mediation process. Nonetheless, the legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process. Whether a mediator in addition to participants should be allowed to report conduct during mediation that the mediator believes is taken in bad faith and therefore might be sanctionable under [California Code of Civil Procedure], is a policy question to be resolved by the legislature. Although a party may report obstructive conduct to the court, none of the confidentiality statutes currently makes an exception for reporting bad faith conduct or for imposition of sanctions under that section when doing so would require disclosure of communications or a mediator's assessment of a party's conduct although the legislature presumably is aware that [the California Code of Civil Procedure] promotes imposition of sanctions when similar conduct occurs during trial proceedings.
>
> Therefore, we do not agree with the Court of Appeal that the court may fashion an exception for bad faith in mediation because failure to authorize reporting of such conduct during mediation may lead to "an absurd result" or fail to carry out the legislative policy of encouraging mediation. The legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation. Therefore, even were the court free to ignore the plain language of the confidentiality statutes, there is no justification for doing so here.[5]

Notwithstanding the broad policy argument put forward by the

---

[4]Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., 26 Cal. 4th 1, 6, 108 Cal. Rptr. 2d 642, 646, 25 P.3d 1117, 1121 (2001).

[5]Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., 26 Cal. 4th 1, 17, 108 Cal. Rptr. 2d 642, 655, 25 P.3d 1117, 1127–28, (2001) (footnote omitted). See also 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, BYU. L. Rev. 715 (1997); Irvine, Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation, 26 Rutgers L.J. 155 (1994); Princeton Ins. Co. v. Vergano, 883 A.2d 44 (Del. Ch. 2005) (Mediator not permitted to testify in suit for rescission of settle-

California Supreme Court, the confidentiality shield does not always prove impervious to assault. In a very similar situation, the Eighth Circuit upheld sanctions. In *Nick v. Morgan's Foods, Inc.*,[6] the trial court ordered the parties to mediation. The defendant, however, failed to prepare the required memorandum for the mediator and sent a representative with insufficient settlement authority to the mediation. Monetary sanctions, under the Federal Rules of Civil Procedure and the applicable local rules, were upheld by the Eighth Circuit.

Disclosure has also been ordered where a party claimed that it signed a mediated settlement agreement under duress. In *Randle v. Mid Gulf, Inc.*,[7] plaintiff claimed that notwithstanding fatigue and chest pains, the mediator told him that he could not leave "until a settlement was reached." As a result, he signed the settlement agreement. Fortunately, as an unreported decision, this case carries no precedential value. The case is wrongly decided. If parties can open up mediated settlements simply by asserting they were under some physical discomfort and did not understand the nature of the process, then an exception "swallowing the rule" has been created. The more difficult situation arises where a misrepresentation by a party or mediator is alleged as the grounds for avoiding an otherwise agreed-upon settlement. The cases are split. In *Smith v. Smith*,[8] a mediator successfully quashed a subpoena challenging a mediated settlement agreement due to misrepresentation. On the other hand, in *Olam v. Congress Mortgage Co.*,[9] a mediator was compelled to testify in a challenge to a mediation agreement based on claims of undue

---

ment agreement due to fraudulent misrepresentation in mediation. A hospital settled a malpractice action for a spinal chord injury for $945,000 in mediation. The next day the hospital obtained a video of the defendant dancing the jig, which she could not have done with the spinal chord injury. The hospital sues for rescission of the settlement on the basis of fraud and offers the mediator's testimony that the settlement would not have occurred had the video been available at the mediation. The Delaware Chancery Court finds that the mediation was confidential and the mediator could not testify. The court notes that mediation is not a "truth seeking" process, like the discovery process, and a party can demand corroboration of a fact before relying on the fact in mediation.).

[6]Nick v. Morgan's Foods, Inc., 270 F.3d 590, 87 Fair Empl. Prac. Cas. (BNA) 344, 81 Empl. Prac. Dec. (CCH) ¶ 40819, 50 Fed. R. Serv. 3d 1311 (8th Cir. 2001). See also Texas Dept. of Transp. v. Pirtle, 977 S.W.2d 657 (Tex. App. Fort Worth 1998) (award of costs and attorney's fees upheld for party's failure to mediate in good faith).

[7]Randle v. Mid Gulf, Inc., 1996 WL 447954 (Tex. App. Houston 14th Dist. 1996), writ denied, (Apr. 18, 1997).

[8]Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994).

[9]Olam v. Congress Mortg. Co., 68 F. Supp. 2d 1110, 52 Fed. R. Evid. Serv.

influence and lack of capacity.[10] Similarly, in *FDIC v. White*,[11] a mediated settlement agreement was subject to attack on grounds of coercion. Notwithstanding a local rule protecting the confidentiality of mediation communications, the court ruled that the statements were subject to disclosure as there was no such privilege under federal law.[12]

Finally, there may be constitutional concerns in isolated situations. In *Rinaker v. Superior Court*,[13] the court recognized a juvenile's constitutional right to confrontation in a civil juvenile delinquency proceeding. This constitutional right overrode a

---

834 (N.D. Cal. 1999).

[10]Interestingly, the California Supreme Court in *Foxgate* did not overrule *Olam* but instead distinguished the decision. The principle basis for distinguishing *Olam*, at least according to the California Supreme Court, was the fact that the parties in the earlier decision had agreed to waive confidentiality.

[11]F.D.I.C. v. White, 76 F. Supp. 2d 736 (N.D. Tex. 1999).

[12]The court's ruling is difficult to square with 28 U.S.C.A. § 652(d) which calls for each district court's local rules to provide for mediation confidentiality. See also In re Grand Jury Subpoena Dated December 17, 1996, 148 F.3d 487, 49 Fed. R. Evid. Serv. 1308 (5th Cir. 1998) (refusing to quash a subpoena issued to the Texas Agricultural Mediation Program requesting the disclosure to a grand jury of all files relating to program mediations notwithstanding the confidentiality provisions of the Federal Administrative Dispute Resolution Act, U.S.C.A. §§ 571 to 581, providing confidentiality to mediations in which federal agencies are involved). But see Williams v. State, 770 S.W.2d 948 (Tex. App. Houston 1st Dist. 1989) (subpoena improper where it sought statements from a victim-offender mediation program for sentencing purposes); People v. Snyder, 129 Misc. 2d 137, 492 N.Y.S.2d 890 (Sup 1985) (quashing subpoena in criminal proceeding seeking mediation records because statute allowed for no exceptions even though arguably the defendant had waived confidentiality). But see Datapoint Corp. v. Picturetel Corp., 1998 WL 25536 (N.D. Tex. 1998) (mediated settlement agreement not privileged where a third party sought its production in a subsequent lawsuit involving some of the parties to the previous mediation); Armstrong v. HRB Royalty, Inc., 2005 WL 3371087 (S.D. Ala. 2005) (offer made seven weeks after a mediation with no participation of the mediator was not protected by the confidentiality provision of the mediation agreement or statute).

[13]Rinaker v. Superior Court, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (3d Dist. 1998). See also State v. Williams, 184 N.J. 432, 877 A.2d 1258 (2005) (Mediation communications are admissible in criminal trial if the need for the evidence outweighs the need for confidentiality. In the criminal trial, defendant attempted to introduce testimony of mediator that the victim stated in a civil mediation that he had wielded a shovel. While the Uniform Mediation Act had not yet been passed in New Jersey, the New Jersey Supreme Court looked to the act for guidance. The Act provides that a mediation communication may be offered in a criminal trial if "there is a need for the evidence that substantially outweighs the interest of protecting confidentiality." The court concluded that the threat with a shovel was not sufficient to overcome the confidentiality provision where the attack by the defendant was with a machete.).

mediator's statutory right not to be called as a witness.

Disclosure of confidential mediation communications to third parties can also have dire consequences. In *Paranzino v. Barnett Bank of South Florida, N.A.*,[14] a bank was sued by its customer after it issued her a $100,000 certificate of deposit even though she deposited $200,000 in cash. The trial court ordered the parties to mediation but it proved unsuccessful. During the mediation, the bank offered $25,000. After the mediation, the customer contacted the *Miami Herald* and relayed "her version of the events relating to the action." The *Miami Herald's* article described the dispute, including the $25,000 settlement offer made by the bank. The bank moved to strike the customer's suit and for sanctions because she, with the knowledge and cooperation of her attorney, breached the confidentiality of the mediation process. The court granted the bank's motion and dismissed the case with prejudice. The Court of Appeals affirmed.

In *Schauf v. Schauf*,[15] the same individual acted first as a mediator and then as master. The Kansas Court of Appeals stated that this was not a good practice and discussed the practical problems with using one person to serve as a mediator and a judge, arbitrator, or master, i.e., the fact that parties are encouraged to disclose confidential information and assessment of risk in the mediation, and the fact that the mediation proceedings are confidential. However, the court found that there was no statutory prohibition against such dual service, and it would not assign error where the appellant did not object to the dual service at the time.

§ 21:315 Failure to mediate in good faith

Unsuccessful mediations often generate frustration for all those involved. On occasion, a party may go so far as to conclude that some or all of the other parties were not acting in good faith. Is there any recourse for those who can establish that a mediation it participated in was not conducted in good faith? The decisions are split.[1]

---

[14]In Paranzino v. Barnett Bank of South Florida, N.A., 690 So. 2d 725 (Fla. 4th DCA 1997), cause dismissed (Fla. June 2, 1997).

[15]Schauf v. Schauf, 33 Kan. App. 2d 665, 107 P.3d 1237 (2005).

[Section 21:315]

[1]See Alternative dispute resolution: sanctions for failure to participate in good faith in, or comply with agreement made in, mediation, 43 A.L.R.5th 545.

In *Decker v. Lindsay*,[2] while the court had the power to order parties to engage in mediation, it did not have the power to require them to settle or to negotiate in good faith.[3] One of the bases upon which courts conclude they have no ability to control how parties participate in mediation rests in the "open courts" provision found in a number of state constitutions. Under state law, private litigants have a right to have their disputes adjudicated. While courts may mandate parties mediate before they exercise their rights to adjudication, a court may not effectively deny this right by, in essence, requiring the parties to reach a settlement under the guise of acting in good faith.[4]

Similarly, the confidentiality provisions contained in many state mediation statutes prohibit the disclosure of communications, including misbehavior, to third parties, including the trial judge.[5]

Those concluding that it is permissible to regulate the conduct of parties engaged in mediation often find authority in the Rules of Civil Procedure governing judicial proceedings. For example, Rule 16 of the Federal Rules of Civil Procedure provided the anchor for sanctions for failing to participate in good faith in a mediation session in *Ferrero v. Henderson*.[6]

---

[2]Decker v. Lindsay, 824 S.W.2d 247 (Tex. App. Houston 1st Dist. 1992).

[3]See also Texas Parks and Wildlife Dept. v. Davis, 988 S.W.2d 370, 375 (Tex. App. Austin 1999) ("court may compel parties to participate in mediation, it cannot compel the parties to negotiate in good faith or settle their dispute"); Gleason v. Lawson, 850 S.W.2d 714 (Tex. App. Corpus Christi 1993) (voiding sanctions imposed by trial court because of reasoning set forth in Decker).

[4]See Decker v. Lindsay, 824 S.W.2d 247 (Tex. App. Houston 1st Dist. 1992).

[5]See Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., 26 Cal. 4th 1, 108 Cal. Rptr. 2d 642, 25 P.3d 1117 (2001); Rojas v. Superior Court, 33 Cal. 4th 407, 15 Cal. Rptr. 3d 643, 93 P.3d 260 (2004) (disclosure of written materials, including witness statements, reports, analyses of test data, and photographs, prepared for or used in a mediation cannot be compelled in subsequent litigation and there are no good-cause exceptions to this rule, and, therefore, the only photographic evidence of mold and test results prepared for and used in the mediation were not subject to discovery in the subsequent litigation).

[6]Ferrero v. Henderson, 14 A.D. Cas. (BNA) 1055, 2003 WL 21796381 (S.D. Ohio 2003). See also Nick v. Morgan's Foods, Inc., 270 F.3d 590, 87 Fair Empl. Prac. Cas. (BNA) 344, 81 Empl. Prac. Dec. (CCH) ¶ 40819, 50 Fed. R. Serv. 3d 1311 (8th Cir. 2001) (monetary sanctions imposed under the Federal Rules of Civil Procedure for failing to prepare a required mediation memorandum and provide a party representative with settlement authority). See also Leamon v. Krajkiewcz, 107 Cal. App. 4th 424, 132 Cal. Rptr. 2d 362 (5th Dist. 2003), as supplemented on denial of reh'g, (Mar. 25, 2003) (where a provision of standard

§ 21:316 Mediation disclosure requirements

A California court has applied disclosure requirements more commonly associated with arbitrations to a mediation.[1] In *Furia v. Helm*,[2] an attorney agreed to act as a mediator in a home remodeling dispute. In a letter addressed to both parties, he made it clear that he was the owner's attorney, but promised to act neutrally in his capacity as mediator. The attorney, however, sent another letter only to the owners, stating that "I am not going to be truly neutral during our efforts to negotiate an agreement." The mediation failed and eventually the project was completed by another contractor. A dispute arose as to whether the contractor abandoned the project or was dismissed by the owner. The contractor sued the mediator, claiming that it relied upon his advice with respect to the project and, as a result, was forced to defend himself against the owner's claim that he abandoned the project.

The California Court of Appeals ruled that the contractor could sue the mediator for legal malpractice notwithstanding the fact that the attorney was not acting as his counsel. In this case, the attorney's duty toward the contractor arose not from an attorney-client relationship, but because the attorney agreed to act as mediator for both parties. By agreeing to act as mediator, the attorney assumed the duty of performing as a mediator with the skill of prudence ordinarily to be expected of one performing that role. This duty includes an obligation to disclose all relevant facts to the parties pertaining to the mediator's capacity to act in a neutral manner. This duty was breached when the mediator sent the second letter to his client revealing that he was not going to act impartially as earlier promised. The contractor, nonetheless, failed to recover from the mediator. The court determined that they failed to prove causation. While his complaint alleged that he relied upon the attorney's advice to abandon the project, he took the position before the Contractor's Licensing Board that he

---

form residential purchase agreement required parties to mediate, a party commencing action in Superior Court without first attempting resolution through mediation would not be entitled to recover attorney's fees otherwise available under contractual prevailing-party attorneys' fee provision).

[Section 21:316]

[1]See Houston Village Builders, Inc. v. Falbaum, 105 S.W.3d 28 (Tex. App. Houston 14th Dist. 2003) 2003) (arbitration award vacated based on evident partiality of arbitrator who did not disclose his attorney/client relationship with home builders association of which the defendant developer was a member).

[2]Furia v. Helm, 111 Cal. App. 4th 945, 4 Cal. Rptr. 3d 357 (1st Dist. 2003), as modified, (Sept. 10, 2003).

did not abandon the project but instead was fired. The Licensing Board found in the contractor's favor. Under the doctrine of judicial estoppel, the contractor was precluded from alleging in his complaint against the mediator that he had abandoned the project in reliance upon the mediator's advice.