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IN THE WAKE OF TARASOFF: MEDIATION AND THE DUTY TO DISCLOSE

The popular movement towards alternative methods of dispute resolution is fast creating a network of mediation programs designed to resolve disputes without resorting to the powers of the state. The central actor in these negotiations is the mediator whose job it is to facilitate, but never adjudicate,1 solutions for negotiating disputants. Hailed by supporters as superior to adversarial contests,2 mediation3 relies heavily on cooperation to arrive at mutually acceptable settlements. In this context, mediators often dispense with evidentiary or procedural protections under the theory that there are no prosecutors in mediation, only negotiators.

Nevertheless, there is at least one potential prosecutor in every mediation: the state. Sensing this, mediation programs have sought to eliminate the potential for prosecution by extending promises of confidentiality to disputants. These guarantees of confidentiality often purport to bar information revealed during negotiations from the courts. But therein lies the proverbial rub, for as mediators expand their services into areas traditionally reserved to the judicial system,4 the extent to which society will support the confidentiality of mediated negotiations remains unclear. This is especially true where the participants reveal involvement in past criminal activity or an in-

1. See McGinness & Cinquegrana, Legal Issues Arising in Mediation: The Boston Municipal Court Mediation Program, 67 MASS. L. REV. 123, 126 (1982). "Central to the concept of mediation is the avoidance by the mediator of any decision-making" activity. Id. at 126.

2. See, e.g., Bok, A Flawed Profession, 55 N.Y. ST. B.J. 31 (Nov. 1983). Bok criticized "the familiar tilt in the law curriculum toward preparing students for legal combat" and called for a new educational emphasis on "the gentler arts of reconciliation and accommodation." Id. at 32. See also Brown, The Role of the Law Office in the Administration of Justice, 67 A.B.A. J. 1127, 1129 (1981).

3. For the purposes of this Comment, "mediation" will be defined as a conflict resolution process in which an impartial third party (the mediator) assists the participants to negotiate a consensual settlement. In mediation, decisionmaking authority rests with the parties. Unlike the arbitrator, the mediator can neither function as fact finder nor render a binding decision. Rather, the mediator "assists disputants . . . by identifying and evaluating alternatives." See COLO. REV. STAT. § 13-22-302(4) (Supp. 1985).

4. In the United States and Canada, nearly 200 independent programs now specialize in mediation, arbitration, or conciliation. See DIRECTORY OF DISPUTE RESOLUTION PROGRAMS (L. Ray ed. 1983) (compiled by ABA Special Comm. on Dispute Resolution). At least in theory, mediation may be, as some commentators claim, "a genuine problem-solving skill appropriate for resolving any issue." H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 7 (1982).
attention to commit future crimes. Because disputants are often encouraged to discuss their opinions candidly, without the assistance of counsel, and to delve into collateral issues that would not be raised in formal litigation, admissions of wrongdoing, liability, or other self-incriminating facts by a party can easily reach the ear of the mediator. Once confronted with incriminating statements, the mediator may have a duty under case law or by

5. The limits to public tolerance of a mediation program that works with, but fails to report, potentially dangerous criminals has been questioned even by staunch supporters of mediation. Eileen Friedman, Assistant City Attorney, Prosecutor's Division, in Columbus, Ohio, noted that in the Columbus Night Prosecutor's Program (a program that routes criminal cases into mediation rather than litigation), "last year there were twelve murders between parties who had been seen in our office. . . . Mediation didn't work. The person who had come in and said, 'I need mediation,' later became the defendant in a murder case." Friedman, Program and Panel Discussion, in ALTERNATIVE DISPUTE RESOLUTION: MEDICATION AND THE LAW: WILL REASON PREVAIL? 52 (1983) (compiled by ABA Special Comm. on Dispute Resolution) [hereinafter cited as Friedman, Program and Panel Discussion]. Friedman went on to speculate: "Who knows what could be done with one spectacular murder case if the facts of the mediation—which may not in fact have been related to the later crime but was part of a whole chain of events—were greatly publicized. It could completely destroy our program." Id. Friedman called for "legislative action" to defuse this potential powderkeg.

6. See Massachusetts Bar Association and Crime and Justice Foundation, Legal Issues Arising in Mediation: The Boston Municipal Court Mediation Program (prepared by MBA Task Force on Alternative Dispute Resolution Mechanisms) (Apr. 1982). The Boston Municipal Court Mediation Program utilizes a "convener," a member of the referral staff, who discusses the role of attorneys after the mediation process has been explained to both parties. Id. at 29. The convener explains that it is not necessary for an attorney to be present with the disputants during the session. Id. Should a disputant insist on counsel at the session, the convener may ask the attorney to remain in the waiting room during sessions, available to his client only when the client requests a recess to confer. Id. at 30. If the attorney is allowed into the room, he may be requested to speak only when asked by the mediator, and to sit out of view of the participants. Id. at 28. Mediation will be held only if there are no objections. Id. at 30. For an edited version of this report, see McGinness & Cinquegrana, supra note 1, at 133.

7. See, e.g., Friedman, Protection of Confidentiality in the Mediation of Minor Disputes, 11 CAP. U.L. REV. 181 (1981). Friedman provides a graphic example from the Columbus Night Prosecutor's Program of collateral issues which often arise from a single umbrella issue: A hearing was conducted between the extended families of divorced parents to discuss an assault stemming from a confrontation over a twelve-year old runaway daughter. The ensuing discussion revealed drug use by one of the nephews involved, questions concerning the mother's mental state and capability of caring for the children, and accusations that the stepfather was committing incest. Id. 198. Friedman concluded that "[w]ithout protection for the confidentiality of this process, real communication would be inhibited and these problems could not be addressed." Id. The tendency of mediation programs to probe collateral issues may depend on their inclination to take a "therapeutic" approach. See generally Phear, Family Mediation: A Choice of Options, 39 ARB. J. 22, 27-28 (1984).

8. See, e.g., Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), in which the California Supreme Court found a psychotherapist negligently liable for failing to report a patient who threatened to murder a coed. The idea
statutory interpretation to disclose such information to the authorities.\textsuperscript{9}

At a time when mediation and arbitration are being touted as possible solutions to overcrowded dockets\textsuperscript{10} and inappropriate “adversarial” contests,\textsuperscript{11} supporters should address the possibility that, far from enjoying special discretionary powers to withhold evidence from the court, the mediator is as obligated as any other professional to disclose knowledge of criminal activity once a duty arises from a client’s revelation. Where there is such a duty, the mediator who imparts knowledge of criminal activity to law enforcement authorities may have functioned as an “arm of the court,”\textsuperscript{12} so

that the duty created by the \textit{Tarasoff} court might be applied to mediators has been raised in mediation circles. \textit{See} ABA Special Comm. on Resolution of Minor Disputes, Legal Issues Involved in the Operation of a Neighborhood Justice Center 5 (unpublished manuscript, n.d.) (on file at the ABA Special Comm. on Dispute Resolution); E. Baach, \textit{Duty to Keep Secrets: A Re-Evaluation} 2 (Occasional Paper No. 83-2, July 1983) (Society of Professionals in Dispute Resolution) (on file at the ABA Special Comm. on Dispute Resolution); Freedman, \textit{Confidentiality: A Closer Look}, in \textit{Alternative Dispute Resolution: Mediation and the Law: Will Reason Prevail?} 70 (1983) (compiled by ABA Special Comm. on Dispute Resolution); Murphy, \textit{Mediation and the Duty to Disclose}, \textit{Confidentiality in Mediation: A Practitioner’s Guide} 87 (1985) (compiled by ABA Special Comm. on Dispute Resolution). The construction of the duty based on a professional’s special relationship with his clients and its possible applicability to the mediator will be examined extensively in this Comment.

9. For a good analysis of reporting statutes, see generally Besharov, \textit{The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect}, 23 \textit{Vill. L. Rev.} 458 (1978). Today there are reporting statutes for child abuse in every state.


11. When informal hearings are involved, the Supreme Court has shied away from requiring representation by counsel so as not to impose an adversarial atmosphere. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court recognized the right to a hearing, but would not recognize right to counsel since it “would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals.” \textit{Id. at} 570.

12. \textit{See} Rice, \textit{Mediation and Arbitration as a Civil Alternative to the Criminal Justice System—An Overview and Legal Analysis}, 29 Am. U.L. Rev. 17, 30 (1979). Establishing that mediation is a state action and the mediator functions as an arm of the court by gathering evidence for the prosecution is easier where the mediation programs have made arrangements (formally or informally) with the local courts to divert some disputes directly to mediation. In order for a diversion program to have clients, it must have an agreement with the prosecutor and, at least in the criminal context, one of the parties to the mediated agreement may be a prosecutor. The diversion program, in turn, clears the court’s dockets. \textit{Id. at} 32. Such mutual
that his client requires the same constitutional protections against self-incrimination that are provided in formal litigation.

This Comment proceeds from the premise that a mediator saddled with a duty to disclose does serve as an arm of the court. When forced into this role by statute or case law, the mediator may pose as great a threat to his client as would a prosecuting attorney. Such disclosure by mediators could be popularly perceived as hypocritical because many mediation programs tacitly invite their clients to make these revelations. Further, mediation programs often claim, either expressly or by implication, to be alternatives to, rather than extensions of, the courtroom. Duties to disclose may damage the viability of alternative means of dispute resolution by demonstrating that, after all, there is no true alternative to litigation.

In this Comment, Part I will examine the origins of the duty to disclose at common law, established by such cases as Tarasoff v. Regents of the University of California, and by an increasing number of "reporting statutes" mandating disclosure of information. Part II will evaluate the viability of confidentiality guarantees constructed by mediators to bar this evidence from the courtroom. In Part III, the Comment will conclude that legislation should be adopted to reflect a public policy that favors the long-term benefits derived from mediation programs over the relatively short-term benefits gained from disclosure of individual criminal acts.

I. THE ORIGINS OF THE DUTY TO DISCLOSE

A duty to disclose knowledge of criminal activity to law enforcement authorities may arise at common law or by statute. Failure to perform the duty at common law would constitute a tort, whereas breach of a duty created by statute would be a misdemeanor or felony. Mediators acting in a jurisdiction with a duty to disclose will derive that duty from one or both of these sources. Rarely will affirmative duties to act be imposed upon individuals. Rather, duties to act will usually be grounded upon elements of the mediator's professional identity that justify imposing a stricter duty, or relief assistance may give rise to a "symbiotic relationship" in which the interdependency between the state and diversion programs belies their separate identities for constitutional purposes. Id. at 31. A symbiotic relationship between a mediation program and the state could be found where programs are affiliated with a prosecutor's office, and is evidenced by agreements incorporating the prosecutor's discretion in referring cases. Id. at 32. Similarly, the fact that mediation/arbitration programs involve the resolution of criminal conduct (an "exercise . . . of powers traditionally exclusively reserved to the state") indicates that even programs like the Boston Municipal Court Mediation Program, which are privately funded, may constitute state action for the purpose of fifth and fourteenth amendment rights. Id. at 33. For a detailed discussion of this theory, see infra notes 111-19 and accompanying text.

13. See supra note 8.
from such duties altogether. Therefore, it is necessary to understand how the mediator functioning in his professional capacity could have a duty to disclose, either by common law or statute.

A. Tortious Liability for Failure To Disclose: Tarasoff and the Common Law

For the mediator, a tortious duty to disclose may be created by the "special relationship" the mediator enjoys with the parties at negotiation. While courts are reluctant to impose liability in cases of nonfeasance, affirmative duties to protect others may be found when special relationships exist. Once a duty is established, its breach constitutes a case of misfeasance that is generally actionable.

Of the many decisions establishing such a duty, few are more famous than those handed down by the California Supreme Court in Tarasoff v. Regents of the University of California; the first in 1974 and the second after a rehearing two years later. The Tarasoff court found a psychotherapist at the University of California negligent when he failed to warn a third party of his patient's threats to murder a coed. The Tarasoff decision relied on a traditional negligence standard to find, within the therapist's professional relationship, a breach of a duty to warn. A duty, or obligation, recognized by the law, requires the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks.

14. For a discussion of these "special relationships," see generally Note, Untangling Tarasoff: Tarasoff v. Regents of the University of California, 29 Hastings L.J. 179, 185 (1977).

15. Caldwell v. Bechtel, Inc., 631 F.2d 989, 1000 (D.C. Cir. 1980) (finding that an engineering firm owed its employee a duty of due care to take reasonable steps to protect him from foreseeable risk of harm to his health posed by silica dust in subway tunnels). In their analysis of Tarasoff, the United States Court of Appeals for the District of Columbia Circuit stated that courts have been eroding the rule of common law nonfeasance by creating exceptions based upon a relationship between the actors. Id. In reaching its decision, the court noted that "case law provides many such analogous situations." Id. See generally W. Prosser, Handbook of the Law of Torts § 56, at 341-42 (4th ed. 1971).


17. 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974).


19. See Note, supra note 14, at 180. On rehearing, the Tarasoff court noted that the psychotherapist did warn the campus police. Tarasoff, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 19. Thus, besides finding a duty in the "special relationship," the original Tarasoff court could also find misfeasance on the more traditional grounds that "[o]nce the defendant has commenced to render service, he must employ reasonable care; if reasonable care requires the giving of warnings, he must do so." 529 P.2d at 559, 118 Cal. Rptr. at 135.

The court first conceded that the psychotherapist’s duty to prevent a foreseeable harm should be predicated upon a special relationship between the psychotherapist and his patient which imposed a duty to control the patient’s conduct, or a special relationship between the psychotherapist and the victim which created a duty to protect the victim. Once the court established either relationship, the ensuing higher standard of care could require the psychotherapist to restrain his patient or to warn his patient’s intended victim.

It is the special relationship exception to the common law that may impose a duty in tort to disclose upon the mediator who hears of current or future criminal activity and fails to act. By finding a special relationship between the psychotherapist and both the patient and victim, the Tarasoff court was able to create substantial duties and then to declare these duties breached.

The Tarasoff court found a professional psychotherapist negligent by establishing that he had breached a duty to warn. Failure on the professional’s part to exercise reasonable care can constitute negligent breach, once a duty to adhere to that standard has been established. The court listed

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21. See Restatement (Second) of Torts § 315 (1965).
22. The harm must be foreseeable. See generally Thompson v. County of Alameda, 27 Cal. 3d 741, 751-53, 614 P.2d 728, 733-34, 167 Cal. Rptr. 70, 75-76 (1980). In Thompson, the Supreme Court of California held that the state was not liable where it released a dangerous offender who subsequently murdered an unforeseeable victim. The court explained that, in Tarasoff, a special relationship existed between the defendant therapist and the patient that “may support affirmative duties for the benefit of third persons.” 27 Cal. 3d at 752, 614 P.2d at 734, 167 Cal. Rptr. at 76 (citing Tarasoff, 17 Cal. 3d at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23 (emphasis added)). “The Tarasoff decedent was the known and specifically foreseeable and identifiable victim of the patient’s threats. We concluded that under such circumstances it was appropriate to impose liability on those defendants for failing to take reasonable steps to protect her.” 27 Cal. 3d at 752, 614 P.2d at 734, 167 Cal. Rptr. at 76. In Thompson, the court concluded that “for policy reasons the duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim.” 27 Cal. 3d at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80.
23. Tarasoff, 17 Cal. 3d at 436-37, 551 P.2d at 343, 131 Cal. Rptr. at 23.
24. Id. at 435-37, 551 P.2d at 342-43, 131 Cal. Rptr. at 22-23. See also Restatement (Second) of Torts § 315 (1965). The court conceded that legal duties are not discoverable facts but merely conclusions that liability should be imposed for damages done. Tarasoff, 17 Cal. 3d at 435, 551 P.2d at 342, 131 Cal. Rptr. at 22.
25. See generally Note, supra note 14, at 185.
26. Tarasoff, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20. “[P]laintiffs admit that defendant therapists notified the police, but argue . . . that the therapists failed to exercise reasonable care to protect [the victim] in that they did not confine [the patient] and did not warn [the victim] or others likely to apprise her of the danger.” Id. at 431, 551 P.2d at 340, 131 Cal. Rptr at 20.
27. W. Prosser supra note 15, § 30, at 143.
four ways that the professional in *Tarasoff* might have discharged his duty, including warning the victim, warning the police, securing voluntary or involuntary commitment, or taking "whatever other steps are reasonably necessary under the circumstances." However, the court conceded that where professional opinion and judgment can differ, the professional is "free to exercise his or her own best judgment without liability," adding that "proof aided by hindsight . . . is insufficient to establish negligence."29

Foreseeability, a critical element in tort law that is typically used to narrow the scope of the duty, was virtually ignored by the *Tarasoff* court because the psychotherapist had attempted to confine his patient, thus admitting his dangerousness and removing the question of foreseeability from the case.30 In *Johnson v. State*, the California court elaborated on this crucial point, noting that no duty can arise unless the relationship was such that a failure to warn would create a foreseeable peril not readily discoverable by endangered persons.31 Likewise, the duty in *Tarasoff* was to protect the "foreseeable victim of that danger."32

The relationship that dictates the level of specific foreseeability is the determinative factor in establishing duty under this line of case law. The California court made clear that there is no general duty to warn of each threat. Only if the professional determines, or under applicable professional standards reasonably should have determined, that a party poses a serious danger of violence to others, does he have a duty to exercise reasonable care to protect the foreseeable victim of that danger.33 In this sense, the *Tarasoff* decision's applicability to the mediator is narrow, for there can be no liability unless one of the negotiators threatens a third party. Furthermore, actual loss or damage to the interest of another resulting from the breach must also

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29. Id. at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.
30. See Note, supra note 14, at 199, 209.
32. Note, supra note 14, at 183.
33. 69 Cal. 2d 782, 786, 447 P.2d 352, 355, 73 Cal. Rptr. 240, 243 (1968) (where state failed to warn foster parent of foreseeable latent danger in accepting youth into her home and that failure led to plaintiff's injury, plaintiff can recover).
34. Id. at 786, 447 P.2d at 355, 73 Cal. Rptr. at 243.
35. *Tarasoff*, 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.

Thus, we made clear that the therapist has no general duty to warn of each threat. Only if he "does in fact determine or under applicable professional standards reasonably should have determined that a patient posed a serious danger of violence to others, [does he bear] a duty to exercise reasonable care to protect the foreseeable victim of that danger."

*Id.* at 752, 614 P.2d at 734, 167 Cal. Rptr. at 76 (quoting *Tarasoff*, 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25 (emphasis added)).
be demonstrated.\textsuperscript{37} Actual commission of a criminal act of which the professional was previously aware would apparently constitute adequate harm.

Once foreseeable danger to a party with whom the professional had a special relationship has been established, the issue becomes whether reasonable care was exercised to protect the threatened victim. Explaining its decision in a subsequent case, the California court observed that in \textit{Tarasoff} a special relationship existed between the defendant therapists and the patient which created "affirmative duties for the benefit of third persons."\textsuperscript{38} In that instance, liability was imposed for "failing to take reasonable steps to protect" the victim.\textsuperscript{39}

Once a court determines that "liability should be imposed for damage done,"\textsuperscript{40} the ease with which a court could saddle a mediator with a duty to disclose is evident. Where, for example, the potential victim threatened by disputants in a mediation program is foreseeable, the mediator would have an affirmative duty to disclose this information. Conceivably, this potential victim could be one of the mediating disputants, in which case the failure of the mediator to voice his concerns in the interest of neutrality\textsuperscript{41} would constitute actionable misfeasance. In the alternative, where the potential victim is not a party to the mediation, disclosure by the mediator of information gleaned during the sessions would reveal the fundamental weakness of the confidentiality guarantee extended by many mediation programs. In either scenario, the fundamental premises upon which mediation is grounded, neutrality of mediators and confidentiality of negotiations, would be seriously, and perhaps irreparably damaged, regardless of whether the threatened activity came to pass.\textsuperscript{42}

In addition to a duty to disclose, the court in \textit{Tarasoff} also found a duty to

\begin{itemize}
\item \textsuperscript{37} W. Prosser, supra note 15, § 30, at 143.
\item \textsuperscript{38} Thompson, 27 Cal. 3d at 752, 614 P.2d at 734, 167 Cal. Rptr. at 76 (citing Tarasoff, 17 Cal. 3d at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23).
\item \textsuperscript{39} Thompson, 27 Cal. 3d at 752, 614 P.2d at 734, 167 Cal. Rptr. at 76.
\item \textsuperscript{40} 17 Cal. 3d at 434, 551 P.2d at 342, 131 Cal. Rptr. at 22.
\item \textsuperscript{41} The United States Court of Appeals for the Ninth Circuit recognized the effect that forcing Federal Mediation and Conciliation Service (FMCS) mediators to testify had on the perception of impartiality: "To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding." NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 55 (9th Cir. 1980) (quoting Tomlinson of High Point, Inc., 74 N.L.R.B. 681, 688 (1947).
\item \textsuperscript{42} The \textit{Tarasoff} court recognized the damage it was doing to the confidentiality requirements of psychotherapists, but decided that the value of disclosure was greater. 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27. The link between confidentiality and mediator effectiveness has been widely acknowledged in mediation circles. \textit{See generally} Friedman, \textit{Program and Panel Discussion}, supra note 5.
\end{itemize}
establish custody and control over the patient. In that case, however, the psychotherapist had initiated custody but then released the patient later. Thus the court could find a duty to exercise custody and control based on the classic rule at common law that one who initiates assistance immediately subjects himself to a higher standard of care.

Whether a mediator could be accused of having initiated an attempt to take custody, so that his failure to actually do so would constitute actionable misfeasance, is problematic. Most mediation clinics do not have the facilities to physically take custody of a dangerous disputant without police assistance. However, many mediation programs do have an important role in deciding which defendants are “routed” from detention into mediation, or are never detained at all because the mediation program steps in to volunteer its services as an alternative to incarceration. In such cases, it could be analogized that, while the mediation program had no custody or control over the subject, it did possess the potential power to impose custody and control. Once again, a court with a predisposition to find liability for the harm suffered by a victim could use the Tarasoff analysis to assign liability to the mediation program in direct proportion to its responsibility for negligently contributing to the release of a dangerous criminal.

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43. Tarasoff, 17 Cal. 3d at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23.
44. See generally W. Prosser, supra note 15, § 56, at 340.
45. Friedman, Program and Panel Discussion, supra note 5, at 51 (discussing the input that the mediators in Night Prosecutor's Program have in determining which charges ought to be filed).
46. Id. at 52. The Night Prosecutor's Program “does not get involved until something criminal or potentially criminal has happened.” The program then attempts to substitute their services for formal litigation at “an early enough stage so that the assault may not be very serious.” Id.
47. See, e.g., Greenberg v. Barbour, 322 F. Supp. 745 (E.D. Pa. 1971). Liability was found when a hospital negligently failed to admit a man whose dangerous tendencies were known to the staff. The would-be patient left and assaulted a third person who later successfully sued the hospital. Id.
48. California's “Mandatory Mediation” program requires the mediator to advise the judge on how issues should be settled in the event parents in divorce mediation are unwilling, or unable, to reach a mediated settlement. Mediators in court-connected programs have been found to be comfortable making firm recommendations to judges. Phear, supra note 7, at 27-28. Although this program dealt with divorce issues unlikely to result in incarceration, Neighborhood Youth Diversion Programs have been established which divert youths from the court system. Nelson, Alternative Dispute Resolution: A Supermart for Law Reform, 14 N.M.L. Rev. 467, 474 (1984). This author, a judge for the United States Court of Appeals, Ninth Circuit, went on to advocate experimentation with neighborhood courts which could dispense restitutionary forms of punishment, such as community work, as an alternative to imprisonment. Id. at 476-77.
49. See, e.g., Underwood v. United States, 356 F.2d 92 (5th Cir. 1966) (negligently releasing a mentally ill airman who had been hospitalized and allowing him access to weapons he used to kill his former wife was proximately connected with her death); Fair v. United States,
Yet the practicality of mandating duties upon professionals to restrain parties that may be dangerous remains questionable. Creating a duty to warn the police has specifically been criticized by post-Tarasoff courts because such a duty "would be of little benefit in preventing assaults upon members of the public by dangerous persons unless [a court] were simultaneously and additionally to impose a concurrent duty on the police to act upon such warnings." The Tarasoff court conceded that no such duty to act exists.

Duties to warn of potential child abusers or the mentally disturbed are only specific examples of a national trend toward establishing duties to disclose information. In California, courts have found a duty of parents to warn a babysitter of the violent propensities of their children as well as a duty of the state to warn foster parents of the dangerous tendencies of their ward. Within the context of this larger movement, the Tarasoff duty to disclose was not a new concept. Rather, it reflected the growing predisposition of courts to attach liability to actions or inactions that in earlier days would have been considered nonfeasant.

Traditionally, duties have been established by analogizing to common law. Modern jurisprudence looks beyond the common law to the relationships of the parties and often enshrines the new duties in reporting statutes. Conceptually, the modern "duty" may be created only after judicial or legislative determinations of public policy have broadened liability in order to provide relief to parties. These judicial and legislative evaluations can produce very real duties that are ultimately mandated by the laws of the state.

B. Statutory Duties To Disclose

Like case law, statutes that assign duties to report information (reporting

234 F.2d 288 (5th Cir. 1956) (neglecting to tell wife of the impending release of her husband who had previously threatened to murder her was sufficient to justify a trial on the facts).

50. Thompson, 27 Cal. 3d at 756, 614 P.2d at 736, 167 Cal. Rptr. at 78. See Tarasoff, 17 Cal. 3d at 444, 432 n.3, 551 P.2d at 349, 341 n.3, 131 Cal. Rptr. at 29, 21 n.3 (explaining that while plaintiff's complaints merely alleged that the defendant failed to warn the victim's parents, but did not allege a failure to warn the victim herself or the authorities, "such omissions may properly be cured by amendment").

51. Tarasoff, 17 Cal. 3d at 444, 551 P.2d at 349, 131 Cal. Rptr. at 29.


53. See generally Johnson v. State, 69 Cal. 2d at 795, 447 P.2d at 362, 73 Cal. Rptr. at 250.

54. See Note, supra note 14, at 190, 191 n.78.

55. W. Prosser, supra note 15, § 53, at 325-26. Prosser notes that duty is "only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Id.
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Statutes commonly identify specific professionals rather than the general public. Reporting statutes, while ignoring some professionals, may require other enumerated professionals to disclose what they learn while working in their official capacities. An example of the potential quandry such statutes can create for the mediator was recently provided by the state of New York, where conflicting statutes left unclear the status of the mediator and his duty to report possible incidents of child abuse.

In that state, the Community Dispute Resolution Centers Program was established, under section 849(b) of the New York Judiciary Law, as a vehicle for the informal settlement of certain criminal matters as an alternative to more costly and complex judicial proceedings. With state aid, these centers provide neutral mediators who resolve conflicts without cost to indigents and at little or no cost to other participants. Decisions rendered are final and binding upon the parties. The enabling statute provides that all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. "Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present" at the dispute resolution would be considered "a confidential communication."

The Judiciary Law and its guarantee of confidentiality was apparently contradicted by section 413 of the New York Social Services Law, requiring persons and officials to report cases of suspected child abuse.

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56. See Besharov, supra note 9, at 466. The author observes that: mandatory reporting laws seek to encourage fuller reporting of known and suspected child abuse and neglect: 1) by requiring certain professionals to report their reasonable suspicions of child abuse or neglect; 2) by providing immunity from liability for those reporting in good faith; 3) by providing penalties for failure to report as required by law; 4) by providing a convenient and easily usable reporting system; 5) by identifying effective investigative and treatment services. Id. (footnotes omitted) (emphasis in original).


58. N.Y. JUD. LAW § 849-b(1) (McKinney Supp. 1986). The centers will not accept for dispute resolution any defendant with a pending felony charge. Id. § 849-b(4)(f).

59. Id. § 849-b(4)(c).

60. Id. § 849-b(5)(e). Many jurisdictions administering public sector mediation programs assure confidentiality of the process through legislation. See Comeaux, Procedural Controls in Public Sector Domestic Relations Mediation, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 79 (1982) (compiled by ABA Special Comm. on Dispute Resolution) (on file at the ABA Special Comm. on Dispute Resolution).


62. Id.

63. See generally L. FREEDMAN & J. ANTON, WITH L. RAY, LEGAL ISSUES IN DISPUTE
ing certain professionals to report suspected child abuse that they became aware of "in their professional or official capacity." A person required to report suspected child abuse or maltreatment who willfully failed to do so would be guilty of a misdemeanor and civilly liable for the damages proximately caused by such failure to report. A more direct statutory conflict existed between section 413 of the Social Services Law and section 849(b)(6) of the Judiciary Law because professionals having the responsibility of reporting child abuse sometimes serve as Dispute Program mediators as well.

Although no New York case has yet resolved the dilemma, the New York attorney general has addressed this issue in an opinion indicating that evidence of child abuse will be confidential if present in the designated work products or communications of the mediator. The opinion also considered whether section 413 applied to mediators, although they were not identified specifically in the statute's list of professionals with a duty to warn. The attorney general chose to interpret section 413 narrowly, applying it only to

RESOLUTION: CONFIDENTIALITY, LIABILITY, ENFORCEABILITY 1 (n.d.) (ABA Special Comm. on Alternative Means of Dispute Resolution) (on file at the ABA Special Comm. on Dispute Resolution) (overview of the legislative intent behind this statute). According to the authors:

Legislative staff members and other sources involved in the drafting and passage of the new law noted that the question of a confidentiality provision was debated extensively before finally deciding to include it. Mediation program directors argued for inclusion of the provision, citing the need to create an atmosphere where program participants could talk openly and freely. However, others argued that keeping mediation sessions confidential would give the impression of a closed, secret process shielded from public and media scrutiny and subject to possible abuse. Judges referring cases to the programs expressed concern that they were delegating important responsibilities for mediators and thus wanted powers of review. The final result was thus a compromise between these positions, reached in the hopes of insuring the long-run success of the mediation programs.

Id.

64. N.Y. SOC. SERV. LAW § 413 (McKinney Supp. 1986).
65. See infra note 70.
68. Id. at 47.
69. Id. at 49. "Dispute Program mediators should be spared the possibility of finding themselves torn between the demands of their program's confidentiality rules and their responsibility as citizens to cooperate in the detection of child abuse." Id.
70. N.Y. SOC. SERV. LAW § 413 (McKinney Supp. 1986). Section 413 requires "any physician, surgeon, medical examiner, coroner, dentist, osteopath, optometrist, chiropractor, podiatrist, resident, intern, psychologist, registered nurse, hospital personnel engaged in the admissions, examination, care or treatment of persons, a Christian Science practitioner, school official, social services worker, day care center worker or any other child care or foster care worker, mental health professional, peace officer, police officer or law enforcement official" to report child abuse. Id.
the listed professionals, and only when they were acting in their official capacities. Thus, when acting as a mediator in New York, one is not liable for nondisclosure of child abuse, even though the same individual might be liable if he discovered the abuse while functioning in another capacity.

All fifty states have statutes requiring designated professionals to report child abuse, although none specifically identify mediators as professionals. However, only some of these statutes, like New York's section 413, contain limiting phrases requiring professionals to report situations known to them "in their professional or official capacity." Statutorily mandated reporting, based on a professional's "special relationship" with his clients, gives rise to legal issues not only in tort law but also in contract, evidence, and ethics because many mediators are professionals in other areas such as the social services or law.

In recognition of these issues, mediators have constructed private guarantees of confidentiality between negotiating parties to thwart the duty to disclose. Part II will examine the nature of these private arrangements, as well as the implications for mediation should they prove to be inadequate.

II. The Confidentiality Guarantee in Mediation: Two Sides of a Wooden Nickel

Separating the mediator's knowledge of criminal activity from his duty to disclose is the guarantee of confidentiality extended to potential negotiating parties by mediation programs. These guarantees may be either express or implied; yet, their ultimate enforceability is doubtful. The mediator may have a duty to disclose all the same information as would any other professional covered by statute or case law.

71. "[I]n acting as a mediator, one does not serve as a physician, surgeon, medical examiner, etc. but as a citizen volunteer. Accordingly, the reporting requirements of section 413 do not apply to those acting as mediators." See supra note 67, at 49.
72. Id.
73. Besharov, supra note 9, at 465 n.36.
74. N.Y. SOC. SERV. LAW § 413 (McKinney Supp. 1986).
75. For example, in reaction to legislation mandating duties to disclose, the Colorado Council of Mediation Organizations (C.C.M.O.) drafted a Code of Professional Conduct for Mediators narrowing the mediator's guarantee of confidentiality. See Colorado Council of Mediation Organizations, Code of Professional Conduct for Mediators (Apr. 5, 1982) (available at the ABA Comm. on Dispute Resolution). Although the Code states that "[i]nformation received by a mediator in confidence, private session, caucus or joint session with the disputants is confidential and should not be revealed to parties outside of the negotiations," exception will be made "[i]n the event of child abuse by one or more of the disputants or in a case where a mediator discovers that a probable crime will be committed that may result in drastic psychological or physical harm to another person." Id. at 3. In such cases, the mediator is "obliged to report these actions to the appropriate agencies." Id.
The confidentiality of negotiations may be breached in two ways: one of the negotiating disputants may attempt to introduce evidence into litigation gleaned at mediation or the mediator may be self-compelled under a duty to disclose. However, whether a mediator takes the witness stand as the result of a third party's subpoena or under his own volition, the resulting injury to the integrity of mediation remains serious, depending upon what degree of confidentiality the mediator allowed the parties to believe they had throughout the negotiation.

Whether the agreement is written or oral, parties at a mediation can operate under one of two understandings concerning their cloak of confidentiality. The parties may understand that negotiations will be confidential unless the mediator is bound by law to disclose the data, or they may believe that all communications will be deemed confidential. Express contracts of both types have been produced by mediation programs.76

A. The Limited Confidentiality Guarantee

There are several problems with programs that forewarn clients of the mediator's duty to disclose. One criticism of this approach is the negative effect the warning may have on a disputant's willingness to engage in mediation77 rather than litigation. Even where clients have nothing to hide,78 they may be less likely to speak candidly after the professional warns that some information might be disclosed later.79 Realistically, mediators who warn...
clients of their duty to disclose may expect the news to "considerably dampen the atmosphere of ease and trust between professional and client."\(^8\)

Secondly, the mediator may also be deterred from inquiring too deeply into the root causes and collateral issues involved in the dispute at mediation for fear of uncovering information that might require disclosure under the law of the jurisdiction. This restricts the mediator's ability to address the multiplicity of issues that often arise during mediation.\(^8\) Negotiation would be limited to a few "safe" topics, as it commonly is during the criticized litigation proceeding. Simply because the mediator has reserved the right to disclose in a limited confidentiality guarantee does not mean he is eager to do so. Where mediators have a duty to disclose, it seems clear that "[e]ven if we assume their good faith, most professionals are loath to become involved in legal proceedings, to upset their clients, or to suffer publicity."\(^8\)

Even where mediators are not loath to disclose information to the authorities, a third consideration is the proper scope of the mediator's duty to disclose.\(^8\) On this point, case law may be obscure or contradictory, while reporting statutes may be partially or wholly contradicted by confidentiality statutes.\(^8\) Even mediators who acknowledge a duty to disclose and have made provisions for this contingency in their express mediation contracts may find themselves unsure of the scope of the duty in a given situation.\(^8\) Some mediators who believe that they have a duty to disclose information, or simply believe that they should disclose voluntarily on moral or ethical grounds, fear liability for doing so under the wrong circumstances.\(^8\)

The scope of the duty to disclose under many reporting statutes is broad

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80. Weisberg & Wald, supra note 78, at 204.
81. Providing for disclosure provisions in the confidentiality contracts between the mediator and disputants has been criticised by Frederick E. Snyder, Assistant Dean, Harvard Law School, because such a provision "might inhibit the free flow of discussion during the session and frustrate the ultimate goal of . . . mediation." Snyder, Crime and Community Mediation—The Boston Experience: A Preliminary Report on the Dorchester Urban Court Program, 1978 Wisc. L. REV. 737, 787.
82. Weisberg & Wald, supra note 78, at 199.
83. The naiveté of some programs regarding the extent of their duty can be striking. Consider the Boston Municipal Court Mediation Program, which boasts that in the event one party reveals his intention to commit a crime, the mediator will "bring this to the attention of the convenor immediately," so that "[i]f in the opinion of both . . . the party's stated intention is serious," the two may "inform the party of their ethical responsibility to testify in the event he carries out his threat." See McGinness & Cinquegrana, supra note 1, at 134 (emphasis added). This is hardly the vigorous solution that the Tarasoff court had in mind.
84. Weisberg & Wald, supra note 78, at 144 n.7, 147 n.20, 149 n.29, 151 n.37, 152, 156.
85. See generally id. at 156-57.
86. Id. at 145-46.
and vague and the mediator who discloses without a duty to do so, sometimes called a "voluntary reporter," runs the greatest risk of breach of contract. While the mediator in a Tarasoff jurisdiction is liable for breaching a duty to disclose, voluntary disclosure could also leave mediators liable if the presumption of their good faith in disclosing confidential information is successfully challenged. Confidentiality may be needlessly breached where the revelation of the confidential information is not required by law. Mediators who needlessly reveal information that their clients considered confidential could be civilly liable in a subsequent suit for breach of contract or tort. They could also be criminally liable for an unauthorized disclosure of information covered by a nondisclosure law.

Most mediators, aware of their duty to disclose, fear that disclosure could result in a suit brought by their former client for libel, slander, defamation, invasion of privacy, and breach of an express or implied confidentiality contract. Some commentators believe these fears are the main deterrent to more widespread disclosure of criminal activities. Although common law and case law may already confer immunity from liability for a good faith disclosure of information pursuant to a reporting statute, the exact scope of mandatory reporting statutes is unclear, as is their relationship to confidentiality laws.

Proving damages against a mediator who voluntarily discloses information not covered in a reporting statute could be difficult, especially if they are

87. Id. at 147 n.20.
88. Besharov, supra note 9, at 470.
89. Weisberg & Wald, supra note 78, at 157.
90. The danger that overzealous advocates of any position may risk liability for needlessly disclosing can exist regardless of whether the professional's initial duty flows from a legislative mandate. Id. at 159. See, e.g., Special Project, Self-help, 37 VAND. L. REV. 849, 1031-33 (1984) (discussing the role of ombudsmen appointed by state statute to facilitate dispute resolution between nongovernmental entities such as consumers and merchants). The use of ombudsmen by American state and local governments to solve some disputes has been popular since the 1960's. Id. at 1031. Ombudsmen serve disputing parties as impartial third persons who facilitate dispute resolution. Id. at 1039. As such, their role is often analogous to the roles visualized for court appointed mediators and arbitrators, as well as those employees of the state who currently route complaints to arbitration/mediation or to litigation. While an analysis of the similarities between ombudsmen and state-recognized mediators is beyond the scope of this Comment, it is worthwhile to note that potential problems identified by mediators have previously been recognized by other facilitators of dispute resolution. See generally Sander, Varieties of Dispute Processing, 70 F.R.D. 79, 111 (1976).
91. See Weisberg & Wald, supra note 78, at 167.
92. Besharov, supra note 9, at 475.
93. Id.
94. See Weisberg & Wald, supra note 78, at 144 nn.6-7, 151 n.37, 152 n.38.
95. Id.
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consequential damages. Where the program participants did not draft the agreement as a contract, liability to the nonmandated mediator for breach of a confidentiality guarantee depends on plaintiff's ability to prove that the mediation agreement is a contract. Difficulties may occur where, for instance, a mediation agreement is embodied in a consent order. While recognizable as a contract, the procedure by which this agreement might be challenged is review by appeal, not complaint in a civil court hearing as is typical in a contract case. Of course, the action against the mediator would be contempt of court, not breach of contract.

Not all mediation programs intend their written and oral confidentiality agreements to function as enforceable contracts, but where the court believes that the mediator has been unjustly enriched by duping his clients into negotiations, a contract could be implied. Contracts can be implied whenever the court is inclined to "give a remedy." For this purpose, negotiating parties could be construed to be the identifiable parties necessary to sign or agree to contract. Any objective "manifestation of mutual assent" will constitute consent when weighing the evidence of offer and acceptance, capacity, and understanding. A promise not to litigate as a prerequisite to mediation, or even the mere forbearance of litigation during mediation, could serve as the required consideration.

In this way, the mediator who discloses information could be liable for breach of contract.

96. See Bell, Admissions Arising Out of Compromise—Are They Irrelevant? 31 TEX. L. REV. 239, 246 (1953). But see NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 52-53 (9th Cir. 1980) (party testimony of negotiations allowed though mediator's testimony will be excluded). Bell notes that English courts seemed to support the contract theory as a means of barring evidence of offers of compromise, as well as any fact admitted during the course of negotiations. However, the actual reasoning of the English courts, expressly stated as early as 1852, was "to provide an atmosphere in which amicable settlements of differences would be encouraged." Bell, supra at 247.

97. See Note, Protecting Confidentiality in Mediation, 98 HARV. L. REV. 441, 450-51 (1984) (observing that agreements between negotiators to maintain the confidentiality of their negotiations may be found void as against public policy).


100. Restatement (Second) of Contracts § 9 (1981) (“There must be at least two parties to a contract, a promisor and a promisee, but there may be any greater number.”).

101. Id. § 18 (“Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.”).

102. Id. § 18 comments a-c.

103. Id. § 75. “[A] promise is bargained for is consideration if, but only if, the promise performance would be consideration.” Id. According to the Restatement (Second) of Contracts, consideration may be a promise for a promise, forbearance, modification or destruction of a legal relation, or an act other than the promise. Id. § 74. “Forbearance to assert a valid claim or a doubtful or honestly asserted claim may be consideration for a promise, just as surrender of a claim would be.” Id. § 74 comment d.
Another theory of liability is that disclosure of information by the mediator against one party, but not the other, could lead to an action for breach against the mediator for failure to uphold standards of neutrality expressly agreed to or implied upon commencement of the negotiations. Programs have reported accusations by one party that the mediator favored, or even conspired with, the opposing party to achieve a wrongful settlement. A perception of unfairness could also be the basis of a legal challenge.

B. The Absolute Confidentiality Guarantee

A second guarantee of confidentiality would be an express or implied agreement that all information revealed during negotiations will be barred from disclosure. The mediator who breaches this contract could obviously incur all the difficulties accompanying the more flexible model. However, there is an additional problem because the mediation program has not allowed for legitimate disclosures. By vowing not to disclose under any circumstances, the mediator almost certainly places himself in an untenable position.

The fundamental weakness of the absolute confidentiality guarantee is that agreements between private parties not to disclose information will not

104. L. Freedman, Legal Issues in Mediation: Are Mediators Liable for Their Actions in Mediation? 2 (n.d.) (ABA Special Comm. on Alternative Means of Dispute Resolution) (on file at the ABA Special Comm.).

105. Id.

106. For example, the text of the Newark Night Prosecutor's Release Form states:

NIGHT PROSECUTOR RELEASE FORM

This is to affirm that the undersigned, understands that this hearing, held by an officer of the Newark Night Prosecutor Program, is intended solely to discuss in full certain problems between the undersigned, and, and to arrive at an understanding of the consequences of certain actions, and to attempt to resolve the problems.

(signed)

Further, that any and all discussions held in the context of this hearing, or statements made in the context of this hearing, are entirely confidential and will not be used by this office in the event of criminal action, OR USED BY ANY PARTY TO THE HEARING IN EITHER CRIMINAL OR CIVIL PROCEEDINGS.

Further, that in signing this statement you agree to waive any right which you might have to subpoena any person associated with this program for the purpose of repeating any and all statements made by the participants in this program.

Hearing Officer Citizen

B. Gibson, The Problem of Confidentiality, Thomas More College (unpublished manuscript, 1979) (on file at the ABA Special Comm. on Dispute Resolution). See generally Freedman, supra note 8, at 80-81 (discussing the enforceability of waivers of the right to subpoena and agreements to maintain the confidentiality of the negotiations).
afford protection from legal discovery. It is generally conceded that, with certain exceptions, the court has a right to every man’s evidence. Furthermore, upholding private contracts between the mediator and his clients could frustrate other nonevidentiary law, such as local freedom of information statutes which apply to state-funded mediation programs. While privileges can and will be carved out of the law when justified by public policy considerations, they may not be carved out by the private parties themselves. There are few ways to prevent information from coming before the court, should the court desire to hear it. In short, a mediation program stripped of an enforceable confidentiality guarantee places the mediator and his client in a difficult situation whenever the client reveals information without knowing that the mediator must disclose it to authorities. Presumably, this would usually occur where the clients negotiate under the erroneous belief that they enjoy absolute confidentiality; however, mediation programs offering limited confidentiality could also place their clients in a false position by failing to make clear the precise parameters of the mediator’s duty.

C. The Collapse of the Confidentiality Guarantee: Due Process Concerns in a Mediation Without Confidentiality

Where the disputants in a mediation session reveal information later used against them in court, a finding of state action would be an implicit prerequisite for the application of due process standards.

107. See Grumman Aerospace Corp. v. Titanium Metals Corp. of America, 91 F.R.D. 84 (E.D.N.Y. 1981) (report not protected from discovery on ground that parties were barred from providing the requested discovery by confidentiality agreement); Garden State Plaza Corp. v. S.S. Kresge Co., 78 N.J. Super. 485, 500-03, 189 A.2d 448, 456-58 (App. Div.), cert. denied, 40 N.J. 226, 191 A.2d 63 (1963) (parole evidence rule governs court’s access to negotiated evidence); Cronk v. State, 100 Misc. 2d 680, 686, 420 N.Y.S.2d 113, 117-18 (N.Y. Ct. Cl. 1979) (agreement would not bar evidence even if it were a contract); In re Pittsburgh Action Against Rape, 494 Pa. 15, 24-26, 428 A.2d 126, 127-28 (1981) (no absolute privilege for statements to rape crisis center personnel); see also Note, Contracts to Alter the Rules of Evidence, 46 HARV. L. REV. 138, 142-43 (1932) (“[A] contract to deprive the court of relevant testimony . . . is an impediment to ascertaining the facts.”).

108. See, e.g., Note, supra note 107, at 141 n.21.

109. 8 WIGMORE ON EVIDENCE § 2191, at 71 (McNaughton rev. 1961) (quoting 12 LORD HARDWICKE, COBBETT’S PARLIAMENTARY HISTORY 675, 693 (1741)). But see 1 WIGMORE ON EVIDENCE § 7a(3) (Tillers rev. 1983); Wigmore, Contracts to Alter or Waive the Rules of Evidence, 16 ILL. L. REV. 87 (1921).

110. See supra note 94.

gram constitutes "state action," it triggers the applicability of the fifth and fourteenth amendments. The Supreme Court has established two requirements for state action. First, there must be "the exercise of some right or privilege created by the State" or by a rule of conduct imposed by the state or by a person for whom the state is responsible. Second, the party charged with violating an individual's due process rights must actually be a state actor as opposed to a private party. State actors may be state officials, but they can also be parties who have "acted together with" or "obtained significant aid from state officials," or engaged in conduct "otherwise chargeable to the state." A state statute mandating a duty to act on the part of a mediator can be thought of as an obligation chargeable to the state.

Where a client has been stripped of his protection under either a limited or absolute guarantee of confidentiality, and then reveals incriminating information to a mediator with a duty to disclose it, the client may have been

112. The fifth amendment has been incorporated by the Supreme Court through the fourteenth amendment. See infra note 134.
113. The fourteenth amendment protects individuals against violation of due process. U.S. Const. amend. XIV, § 1.
115. Id. at 937.
116. Id.
117. One example of mediators who may be uncovering information by exercising "some right or privilege created by the state" can be found in New York State, which has long provided for systems of arbitration and conciliation of claims within the court's jurisdiction. There, arbitrators enjoy "wide power, including subpoena of witnesses and evidence." Greenawalt, Alternatives to Court Resolution of Disputes: Report of NYSBA's Special Committee, 56 N.Y. St. B.J. 36, 37 (Oct. 1984). Significantly, any disputant may seek trial de novo in court within 30 days of the disposition of the arbitration. At this hearing, the testimony, report, and award of the arbitrators may not be admitted into evidence. Id. at 37.
119. "If courts adopt a liberal analysis of state action issues" whereby "any governmental authorization or encouragement of private procedure is state action. . . , they will impede the efforts of states to formulate effective dispute resolution alternatives to judicial litigation." Special Project, supra note 90, at 1020 n.1158 (1974) (discussing the constitutionality of "rent-a-judge" alternatives to litigation).
denied specific protections guaranteed under the Constitution. Once mediation programs are defined as state action, then the infringement on the disputant's constitutional rights created by unenforceable confidentiality guarantees must be addressed.

For example, the fifth amendment to the Constitution provides in part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." The Supreme Court has construed this protection as applying prior to trial when evidence has been obtained involuntarily. The Court affirmed the pretrial application of the privilege in *Miranda v. Arizona* by establishing that a "custodial interrogation" atmosphere can be so inherently coercive that individuals will invariably waive their right to remain silent unless their attorney intervenes or they are otherwise apprised of their rights. The privilege against self-incrimination is not dependent upon the nature of the proceeding in which the testimony is sought or can be used. Rather, the privilege is meant to prevent the prosecution from using statements stemming from a custodial interrogation of the defendant unless it demonstrates that procedural safeguards were effected to secure the privilege against self-incrimination.

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120. See Excerpt from Proceeding Before the Hon. Horace T. Ward, U.S. Dist. Judge, Dean v. Louisville & Nashville R.R., No. C81-2190A (N.D. Ga. Apr. 2, 1984) (response of the Director of the Neighborhood Justice Center of Atlanta to a subpoena of records of an attempted mediation in 1981). In defense of her Motion to Quash Subpoena, the director of the center, Edith Primm, noted that when disputants enter into mediation:

we do not advise them of their rights, they are entitled to bring an attorney if they wish, but we do not practice law in this setting, it is improper to do so, so these people, as all folks that come to mediation, are not advised by us as far as their rights regarding admissions against interest and so forth, so we feel certain that a first amendment or fifth amendment issue is present [where information is subpoenaed].


121. U.S. CONST. amend. V.

122. *Bram v. United States*, 168 U.S. 532 (1897) (where an accused murderer was questioned by a Halifax police detective in his private office, it violated defendant's fifth amendment rights and was not admissible).


124. Friedman, *Program and Panel Discussion*, supra note 5, at 50. Eileen Friedman, Assistant City Attorney, Prosecutor's Division, Columbus, Ohio, in analyzing the Night Prosecutor's Program, has conceded that:

"[i]t could be argued that we are coercive by our location alone; we are in the prosecutor's office. If the responding party feels that he or she doesn't want to show up, he or she may expect the sheriff or the police department to appear. We don't tell people that, but I think the very location may suggest coercion."

*Id.*

125. 384 U.S. at 444.

It might be argued that because disputants enter into mediation voluntarily and accept sanctions voluntarily, their testimony cannot be compelled in violation of the fifth amendment.\textsuperscript{127} However, the voluntary acceptance rationale is suspect in light of the coercion that often exists to participate in negotiations rather than suffer prosecution.\textsuperscript{128} Mediation may be mandated by the courts in lieu of litigation.\textsuperscript{129} A coercive atmosphere may be compounded further by the inability of most uncounseled respondents to assess either the nature or the probability of future prosecution.\textsuperscript{130} Sanctions may be "voluntarily" accepted where no actionable criminal conduct is being mediated. For example, an "especially sensitive or confused individual"\textsuperscript{131} could "misinterpret the zeal of the mediators as the demands of people who occupy positions of authority in the criminal justice system"\textsuperscript{132} and thus volunteer incriminating information. Under such circumstances, a disclosure could be interpreted as having been "compelled" during a hearing that the declarant believed to be an "official interrogation."\textsuperscript{133} Much would de-

\textsuperscript{127} See McGinness & Cinquegrana, supra note 1, at 124, 126. In the opinion of the Boston Municipal Court, the coercive power implicit in adjudication is absent from mediation because it is "voluntary," and the mediator is best viewed as a "facilitator" of disputes.

\textsuperscript{128} One instance in which "involuntary" acceptance of mediation might occur is where the mediation alternative is offered directly by the state and, at least in the criminal context, one of the parties to the mediated agreement is a state prosecutor. See, e.g., State v. Devatt, 173 N.J. Super. 188, 413 A.2d 973 (App. Div. 1980); State v. Lebbing, 158 N.J. Super. 209, 385 A.2d 938 (1978).


\textsuperscript{130} The inability of the disputant to realistically weigh his options in litigation and mediation is probably exacerbated in those programs where the mediator himself has no formal legal background. It is one thing for a client to choose a mediation program after realistically evaluating his options, but commentators rarely address the true "choice" that can be exercised by an ignorant disputant. While the ability to waive some constitutional rights is well known, the presumption against such waiver may not be overcome without assurances regarding the defendant's appreciation of the consequences of his decision. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

\textsuperscript{131} Snyder, supra note 81, at 786.

\textsuperscript{132} Id. at 787.

\textsuperscript{133} The sixth amendment right to counsel is probably inapplicable to voluntary mediation because this right attaches only after "criminal prosecutions" have commenced. The Supreme Court has held that the right to counsel is strictly controlled by the language of the amendment. See, e.g., Kirby v. United States, 406 U.S. 682 (1972). However, because of sanctions that may be accepted unnecessarily due to the party's ignorance of the technical merits of the threatened prosecution, it may be necessary to advise the accused on available defenses in order to allow him to proceed intelligently. However, the right would not come from the sixth amendment. If counsel is required, it would arise under the due process and equal protection clauses of the fourteenth and fifth amendments or pursuant to other amendments which guarantee specific rights and which, because of governmental action, are jeopardized and may be lost, thus necessitating the presence of counsel to ensure their protection. Miranda v. Arizona,
pend on the intrinsic reasonableness of such a belief, but it seems clear that where the mediator creates the grounds for a new prosecution, this action gives rise to fundamental constitutional questions.\textsuperscript{134}

In summary, guarantees of confidentiality are critical to avoid officially sanctioned circumvention of a potential defendant's constitutional rights. At the same time, no private contract is likely to prevent information from coming to the ear of the court. Instead, confidentiality guarantees should emanate from a public policy that acknowledges the intrinsic worth of effective alternatives to litigation.\textsuperscript{135} Confidentiality would then be preserved, not through the private contracts of mediation programs, but by recognized rules of evidence passed by legislatures regarding the admissibility of mediator testimony.

III. \textbf{ANOTHER SOLUTION: EVIDENTIARY PROTECTION FROM THE DUTY TO DISCLOSE}

Solutions to the dilemma created by the mediator's duty to disclose must overcome two potential challenges to the confidentiality of mediated disputes. First, confidentiality may be challenged by third parties who subpoena the mediator or his records.\textsuperscript{136} Second, a challenge to confidentiality may originate from the mediator who perceives a duty to disclose.

Using the testimony of mediators as evidence in court has long been opposed by most advocates of a well-developed mediation option. Proponents and opponents of the mediation process agree that forcing the mediator to disclose information damages the integrity of open negotiation. But those who would mandate duties to disclose, and employ the testimony of

\textsuperscript{134} U.S. at 444, remains the seminal case concerning the implicit pretrial right to counsel where formal proceedings have commenced. If mediation has been referred by a court, the sixth amendment would probably apply. See generally Snyder, supra note 81, at 781-85.

\textsuperscript{135} L. Tribe, supra note 118, at 709. "So long as an individual's answers to official questions might be employed by the questioning jurisdiction as evidence, or as leads to evidence, in a future criminal prosecution of that individual, the fifth amendment, applicable to the states through the fourteenth, confers a privilege to be silent." Id.

\textsuperscript{136} An extended examination of specific public policy arguments would be beyond the scope of this Comment, except where it is necessary to note that such issues probably would constitute the principle justification for narrowing the duty to disclose. The ABA's Special Committee on Dispute Resolution attributes its own philosophical genesis to Roscoe Pound's 1906 address before the ABA. See generally Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 40 Am. L. Rev. 729, 742, 749 (1906).

\textsuperscript{136} See, e.g., Friedman, Program and Panel Discussion, supra note 5, at 50. Eileen Friedman, the Assistant City Attorney, Prosecutor's Division, in Columbus, Ohio, observed that the Columbus Night Prosecutor's Program (NPP) receives "a large number of subpoenas for our mediators and our mediation records." Id. The NPP then contacts the defense attorney and the judge to attempt an informal agreement. "We have rarely had to produce records or mediators in court." Id.
mediators in court, usually argue that "the public interest in confidentiality" and the privileged mediator-client relationship does not outweigh society's need "for all available evidence."137 Much of the battle has been waged in the area of evidence, which controls what the court will hear.

Traditionally, the courts have been reluctant to bar evidence acquired during negotiations. In 1935, a Michigan court declared that this "policy of law" encouraged settlements, discouraged litigation and afforded the individual the "fair opportunity to buy his peace" while allowing into evidence independent facts from settlement negotiations.138 While the compromise offer itself was generally not admitted into evidence,139 the common law distinguished evidence of conduct or statements made during negotiations and usually found them admissible.140 Independent statements of fact of the type that would give rise to a duty to disclose were not privileged at common law.141

The enactment of the Federal Rules of Evidence142 expanded the limited privileges enjoyed by negotiation.143 Some jurisdictions have codified their evidence statutes using the substance and language of the federal rules, with results that could benefit the mediator's confidentiality privilege.144 For example, some statutes extend privileges of confidentiality to professional communications. These statutes presume that professionals share their client's interests in confidentiality and that challenges emanate from third parties.145

Strong public policy declarations from the legislatures and courts could ap-

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138. Sanderson v. Barkman, 272 Mich. 179, 261 N.W. 291 (1935) (automobile accident case holding testimony by defendant that plaintiff admitted he got off moving vehicle into path of defendant's automobile was admissable, even if parties discussed settlement or compromise).

139. Nehring v. Smith, 243 Iowa 225, 233, 49 N.W.2d 831, 835 (1951) (maintaining that "offers to buy one's peace or to compromise for the purpose of averting litigation . . . should not be given in evidence") (quoting Langdon v. Ahrends, 166 Iowa 636, 639, 147 N.W. 940, 941 (1914)).

140. See FED. R. EVID. 408 advisory committee note (discussing the linguistic contrivances often required at common law to distinguish an offer to compromise that was inadmissible from a simple declaration that could be admitted).

141. Freedman, supra note 8, at 74. Freedman argues that "[t]he admission of independent statements of fact made during settlement negotiations, under common law in some jurisdictions, constitute a significant limitation on the protection of confidentiality desired by mediation programs." Id.


143. See supra note 140.

144. Freedman, supra note 8, at 74. Among the states Freedman lists are Florida, Nevada, Arizona, New Mexico, Wisconsin, Nebraska, and Minnesota. Id. at 92 n.29.

145. Weisberg & Wald, supra note 78, at 157.
ply this concept to the mediator's affirmative duty to disclose. While evidentiary privileges do not enjoy the status of constitutional rights, concerns for protecting the client in certain professional relationships "are in some ways even stronger"146 than constitutional protections because of the defenselessness of the client during that relationship.

This section will discuss the evidentiary privileges that could be extended to the mediator. Many of the federal rules that codify and rationalize the common law provide legal theories that could protect the mediator from discovery and the affirmative duties to disclose. A final discussion will focus upon the construction of a statute encompassing the likely policy considerations at mediation.

A. Privileges Under Rule 408

Rule 408 of the Federal Rules of Evidence147 makes evidence of compromise and offers to compromise inadmissible. The second sentence of the rule states clearly that "evidence of conduct of statements made in compromise negotiations is . . . not admissible." This sentence seeks to promote "non-judicial settlement of disputes."148 By replacing the common law distinctions between offers of compromise and compromise negotiations149 with a broader privilege, the proponents of the federal rules hoped to promote "free and frank" discussions of settlement proposals.150 This is also a goal of mediation.151

To apply rule 408, there must be a dispute over the validity or amount of the claim with an attempt at compromise. There are no forum require-

146. Id.
147. The applicability of rule 408 to mediation is not a new idea. The Massachusetts Bar Association Task Force on Dispute Resolution submitted a comment to the Supreme Judicial Court of Massachusetts requesting that the official comments to proposed Massachusetts Rule of Evidence 408 (which has language identical to the federal rule) be amended to make clear its applicability to mediation. McGinness & Cinquegrana, supra note 1, at 129 n.39.
150. Freedman, supra note 8, at 75; Friedman, supra note 7, at 204-05. The Colorado legislature has declared mediation sessions to be settlement negotiations for evidentiary purposes. See COLO. REV. STAT. § 13-22-307 (Supp. 1985).
151. See Waltz & Huston, The Rules of Evidence in Settlements, 5 LITIGATION 11, 13-14 (1978). The courts have recognized a public policy intent in Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 458 (N.D. Cal. 1978) ("[Rule 501's] primary purpose is to protect the confidentiality of certain communications under circumstances where such confidentiality serves broad societal goals."); Reichenbach v. Smith, 528 F.2d 1072, 1074 (5th Cir. 1976) ("A primary reason for excluding evidence of a compromise is to encourage non-litigious solutions to disputes . . . the cause of justice is advanced by settlement compromises.").
ments. Once a claim is negotiated, compromise offers and independent or collateral facts are inadmissible evidence on the merits.

Independent or collateral facts are analogous to "independent or collateral" crimes that the mediator overhears out of court. When adopting rule 408, the Advisory Committee upheld the public policy favoring compromise and settlement by opting for the modern rule excluding collateral evidence to prove liability. The language of the rule precludes actions that may "hamper free communication between parties" by placing unjustifiable restraints on negotiation efforts.

Whether mediation represents "attempts to compromise" and "compromise negotiations" under the statute remains uncertain. However, when "compromise negotiations" do fall under the statute, it is clear that confidentiality is a prerequisite to successful settlement. The bulk of the case law involves the need for confidential negotiations to resolve labor disputes. As early as 1947, the National Labor Relations Board (NLRB) maintained that "the parties to conciliation conferences must feel free to talk without fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage to a party to the conference." Applying this argument by analogy may be the most effective

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152. FED. R. EVID. 408.
153. Id.
154. Id.
155. Of course, information otherwise discoverable is not barred simply because it is present in negotiations. Rather, the rule has been applied where the document, or statement, would not have existed but for the negotiations. Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1107 (5th Cir. 1981). Rule 408 states that it "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." FED. R. EVID. 408.
160. There has already been some expansion into nonlabor areas. See, e.g., CAL. CIV. PROC. CODE § 1747 (West 1982) (treating communications to domestic conciliator as official communications granted qualified privilege). The Oregon domestic conciliation statute provides complete confidentiality. OR. REV. STAT. § 107.600 (1983).
way to justify confidentiality in mediation negotiations.161

Every jurisdiction recognizes the general rule that compromise negotiations are inadmissible to prove liability.162 Neither common law163 nor the Federal Rules of Evidence164 today distinguish between compromise and settlement negotiations.165 The enlarged scope of the negotiation privilege has been recognized by the federal courts.166 Therefore, under a broad application of rule 408, all aspects of the mediation process could be privileged, including information not directly relevant to the mediated topic but produced pursuant to the settlement effort.

A broad interpretation of federal rule 408, along with state adoption of equally broad evidentiary rules, would require new statutory interpretation by the courts, or perhaps new statutes altogether. Rule 11(e)(6)(D) of the Federal Rules of Criminal Procedure167 has provided a precedent for widening the privileged status of compromise negotiations in order to promote public policy and judicial expediency.

B. Privileges Under Rule 11(e)(6)(D)

The evidentiary rule granting a limited privileged status to offers of compromise (i.e. plea bargaining) was originally limited to civil litigation on the theory that compromises of criminal charges should not be encouraged.168 Consequently, plea negotiations were admissible as evidence of a defendant's guilt. While courts have historically viewed any offer to compromise by the

161. See, e.g., Pipefitters Local 208 v. Mechanical Contractors Ass'n, 90 Lab. Cas. (CCH) ¶ 12,647 (D. Colo. 1980). The court noted that "the rationale . . . [of preventing federal labor mediators from testifying] is that Labor and management must . . . have the assurance and confidence that information disclosed to mediators will not subsequently be divulged." Id.

162. FED. R. EVID. 408 advisory committee note. "As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim." Id.

163. See Order, Charles v. Charles, No. 79-9164 (Fla. 11th Cir. Ct. Oct. 23, 1980) (accepting argument that mediation statements should be privileged as offers of compromise under the common law, and quashing a subpoena for disposition).

164. Id. at 3. The argument used in Charles v. Charles to quash the subpoena was based in part on a broad interpretation of Federal Rule of Evidence 408.

165. Freedman, supra note 8, at 75. Freedman indicates "under the rule, as at common law, such statements at negotiations may be admissible for some other purpose, such as to show bias, prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal proceeding." Professor Paul Rice reports that "[a] number of jurisdictions have provided by statute or rule that statements made in the course of pretrial diversion are inadmissible as evidence." See Rice, supra note 12, at 73 n.254 (statutes and rules refer to diversion programs generally, not mediation and arbitration specifically).

166. See, e.g., Burns v. City of Des Peres, 534 F.2d 103, 112 n.9 (8th Cir. 1976).

167. FED. R. CRIM. P. 11(e)(6)(D).

168. See Friedman, supra note 7, at 205.
accused as an attempt to sway the state,\textsuperscript{169} the flood of litigation in recent years has made plea bargaining an acceptable method for relieving swollen dockets.\textsuperscript{170}

Initially, the rule excluded only evidence of a guilty plea after the court had granted a withdrawal of the plea. The rule only prohibited the introduction of the withdrawn plea as an admission of guilt at the subsequent trial resulting from the changed plea.\textsuperscript{171} Later the rule was expanded to encompass offers of a guilty plea, whether or not accepted. Finally, the rule was expanded to exclude statements made during negotiations.\textsuperscript{172}

While exclusion of negotiations from evidence may protect the mediator's confidentiality from subpoena, these proposals assume that litigation will be initiated by disgruntled former negotiating parties, or third parties, who bring suit and force the mediator to testify. The secondary issue of mediators who have an affirmative duty to disclose what they hear is not addressed by such procedural solutions.

Presumably, the majority of duty-to-disclose cases will result from spontaneous declarations by one or more of the disputants regarding past or future criminal activities. The duty would exist in those jurisdictions where prior case law has found professionals liable for failing to report such activity, or where reporting statutes have been implemented. The scope of the mediator's liability is dependent on how the courts construe the duty.\textsuperscript{173}

In order to move beyond a defensive posture and into a more affirmative role, it may be necessary for the mediator to define himself and his duties concretely, so that the courts, as well as potential participants, are made aware of the mediator's growing role in legitimate dispute resolution. Besides defending himself from outside attack, the mediator must confront his own duty to disclose at the conceptual level. To supplement the confidentiality of negotiations under rules 408 and 11(e)(6)(D), the mediator should claim a professional privilege under rule 501.

\section{Professional Privileges Under Rule 501}

Many commentators have examined the feasibility of extending the privilege of immunity from all discovery techniques to the mediator-client rela-

\textsuperscript{170} See generally J. Bond, \textit{Plea Bargaining and Guilty Pleas} § 1.9 (2d ed. 1982).
\textsuperscript{171} See Kercheval \textit{v.} United States, 274 U.S. 220 (1927).
\textsuperscript{172} See State \textit{v.} Abel, 320 Mo. 445, 8 S.W.2d 55 (1928); State \textit{v.} McGunn, 208 Minn. 349, 294 N.W. 208 (1940); State \textit{v.} Byrd, 203 Kan. 45, 453 P.2d 22 (1969).
\textsuperscript{173} For example, the \textit{Tarasoff} court limited the duty under a foreseeable victim doctrine. \textit{Thompson}, 27 Cal. 3d at 756, 614 P.2d at 738, 167 Cal. Rptr at 78.
such privileges are currently enjoyed in varying degrees at common law by doctors and patients, priests and penitents, and attorneys and clients. 

Classic legal doctrine has established four standards for a claim of privilege under rule 501. First, the communication must originate in an environment where the client believes it will not be disclosed. This is a belief that many mediation programs seek to foster. Second, confidentiality must be an essential element to the full and satisfactory maintenance of the relationship between the parties. Mediators strongly believe that parties must expect, and be assured of, confidentiality if their programs are to be successful. Third, the relationship must be one that the community seeks to diligently foster. This point goes to the relative value of mediation. The primary question is not whether privileged communication is necessary to the professional relationship, but whether the relationship is necessary to society. Finally, the injury to the professional relationship caused by a disclosure of the communication must be greater than the benefit to be derived from a more complete record in a given case.

The confidentiality issue is essentially a balancing of interests. The Federal Rules of Evidence recognize statutory and common law privileges. Rule 501 gives federal courts discretion to “interpret” privileges in

174. See, e.g., Greenawalt, supra note 117. The author maintains that New York State has created a de facto privilege for mediators “by requiring an agreement providing, among other things, that no matters discussed in the mediation may be testified to in court.” Id. at 40. The New York State Bar Association supports the barring of mediators from testifying in pretrial or trial proceedings. Id. at 41.


176. United States v. Funk, 84 F. Supp. 967 (E.D. Ky. 1949). “[c]ommunications must have their root in relation or contemplated relation of client and attorney and this fact must be manifest.” Id. at 968.

177. Id. at 968.

178. Freedman, supra note 8, at 70.

179. Marceau v. Orange Realty Co., 97 N.H. 497, 92 A.2d 656 (1952). The constitutional obligation of every member of the community to disclose information required in administration of justice should not be limited without a clear legislative mandate. Id.

180. E. Baach, supra note 8, at 4. “The balancing of this case against the greater public issues [favoring confidentiality] . . . far outweighs the individual matters in [a] particular case.” Id. This argument correctly stated the balancing test as being between the need of society for mediation against the needs of an individual action for disclosure. It is a different test than the one sometimes applied by critics of confidentiality. See, e.g., Wiesberg & Wald, supra note 78, at 194.

181. See 8 WIGMORE ON EVIDENCE § 2285, at 527 (McNaughton rev. 1961).

182. Id. at 528.

183. Freedman, supra note 8, at 76.
"the light of reason and experience." The four elements necessary to establish a privilege under rule 501 are key criteria in a court's balancing test.

Establishing a privilege for practicing mediators requires an analysis of the mediator's duties under the concept of professionalism. Traditionally the rules of privilege postulate three conditions before a professional relationship arises. First, there must be one who is legally a doctor, lawyer, or minister. Second, he must be acting in his professional capacity at the time the communication was made. Finally, provided the communicator is in possession of his faculties, he must regard the professional as his doctor, lawyer, or minister.

Of the three privileged relationships at common law, that of attorney-client is most adaptable to mediator-client needs. As a professionally induced duty, the privilege only applies when the attorney is consulted for legal assistance, not when he is consulted as an agent. Therefore, the attorney operating as a mediator would not be able to claim the privilege while in that capacity. Indeed, the ability of mediators to address a multiplicity of interrelated issues would almost certainly preclude an attorney-client privilege at common law. Even in ideal situations, mediators could not be fully protected.

184. FED. R. EVID. 501.
185. This thinking has also been demonstrated by state legislatures. See, e.g., CAL. CIV. PROC. CODE § 1747 (West 1982) (privilege in domestic reconciliation subject to case-by-case balancing under CAL. EVID. CODE § 1040).
187. Id.
188. Id.
189. For a conflicting view, see Greenawalt, supra note 117, at 40. The author argues that an attorney acting as mediator in a domestic law case could not invoke the privilege when he is questioned in court regarding statements made by the husband or wife, because the mediator did not "represent" the spouse. Id. Greenawalt adds that New York State solved this problem by requiring an absolute confidentiality agreement. Id.
190. See Note, supra note 186, at 542-43. The concept that a professional must be operating in an official capacity to be liable appears to be reflected in the New York Attorney General's opinion. See supra note 67.
191. A "free flow of discussion" is one characteristic of mediation. Snyder, supra note 81 and accompanying text.
192. See Note supra note 186, at 542-43.
193. See Rees, The Work Product Doctrine: Protection, Not Privilege, 17 GEO. L. REV. 917 (1983). The American Bar Association's Code of Professional Responsibility, which governs attorney conduct in many jurisdictions, instructs attorneys that they may not report past crimes committed by their clients. However, an attorney can report a crime that a client intends to commit in the future. Even so, the lawyer must decide when he takes a case whether it is a suitable one for him to undertake and after this decision is made, he is not justified in turning against his
Nevertheless, a mediator, like a lawyer, receives confidential information in order to render professional assistance\textsuperscript{194} and rule 501 may recognize privileges under such circumstances.\textsuperscript{195} However, a "privileged" profession under case law may not claim such privileges in the face of specific statutory directives to the contrary.\textsuperscript{196} Therefore, while a privilege for the mediator modeled on the attorney-client relationship is conceptually appealing, in practice this privilege never wholly cloaked the attorney, and could hardly be expected to protect the mediator to a greater degree.

\section*{D. Statutory Reform}

Articles that address the broader issue of confidentiality in the mediation process have tended to emphasize the dangers inherent in allowing disputants to subpoena the mediator and his records in a subsequent court action.\textsuperscript{197} Therefore, many of the suggested "remedies" to the confidentiality problem have focused upon record keeping procedures that reduce or eliminate evidence of what is said during negotiations.\textsuperscript{198} By reducing the amount of written records and imposing moratoriums on the length of time records are preserved, mediation programs attempt to frustrate subpoenas from courts seeking information.\textsuperscript{199}

\textsuperscript{194} See Thode, \textit{The Ethical Standard for the Advocate}, 39 \textit{TEX. L. REV.} 575, 587 (1961) (quoting S. WILLISTON, \textit{LIFE AND LAW} 271 (1940)).


\textsuperscript{196} Besharov, supra note 9, at 477.

\textsuperscript{197} See generally Note, supra note 97, at 442-43, 457 (addressing mediation of civil disputes); Friedman, supra note 7; Rice, supra note 12. Each addresses the need for confidentiality during negotiations, but not the duty to disclose potential criminal activity.

\textsuperscript{198} Friedman, supra note 7, at 202-09. These remedies included (1) intentional recording of little or no information; (2) agreements with local prosecutors not to seek information; (3) private mediator reliance by analogy upon the confidentiality given mediators in the Federal Mediation and Conciliation Service (FMCS); (4) exclusion of offers of compromise under Federal Rule of Evidence 408; (5) protection based on privileged communications under Federal Rule of Evidence 501. This Comment maintains that only the fourth and fifth solutions, employed as a broad model for state statutes, can provide a long-term solution to the duty to disclose.

\textsuperscript{199} See Order, Dean v. Louisville & Nashville R.R., No. C81-2190A (N.D. Ga. Apr. 3, 1984) (quashing a subpoena duces tecum of the director of the Neighborhood Justice Center of
Programs that attempt to obviate the situations that induce a duty to disclose through prescreening of parties or creation of contractual obligations before commencement of negotiations can expect only partial success. More importantly, such solutions jeopardize the integrity of the programs without necessarily providing any effective immunity from liability. The weight of authority makes it clear that no private arrangement can prevent evidence from being introduced in court so long as the court considers it discoverable.

To dissuade courts from seeking to admit evidence gleaned at mediation, informal understandings between mediation programs and local courts and prosecutors have been employed in lieu of statutory reform. The principle weakness of these arrangements is that they are almost certainly unenforceable.

A court rule for all divisions of a superior court granting a privileged status to all statements made by parties during mediation negotiations could bestow complete confidentiality upon negotiators. However, such rules do not provide the precedents necessary for a state legislature to formulate long-term policy justifications for protection of statements made during negotiations.

State statutes that recognize the confidentiality of all statements made

Atlanta); Order, Charles v. Charles, No. 79-9164 (Fla. 11th Cir. Ct. Oct. 23, 1979) (quashing subpoena of records by a family court in a divorce proceeding); Francis v. Abben, No. 78-0008-46 (Fla. 6th Cir. Ct. Mar. 6, 1978) (quashing subpoena of records and personnel in a small claims court).

200. See generally Snyder, supra note 81.

201. See supra note 107.

202. See Evans, Program and Panel Discussion, in ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND THE LAW: WILL REASON PREVAIL? 47 (1983) (compiled by ABA Special Comm. on Dispute Resolution). Frank G. Evans, Chief Justice, First District Court of Appeals, Houston, Texas, who supports informal agreements over new legislation, observed that in Houston an “assistant DA wanted to subpoena one of the persons on the Neighborhood Justice Center staff, but our staff was able to convince him that this would open a Pandora’s Box, and he backed off.” Id.

203. The Columbus Night Prosecutor’s Program has relied upon “court cooperation to prevent compelled testimony by the program director or hearing officers.” See Friedman, supra note 7, at 200.

204. ABA Special Comm. on Resolution of Minor Disputes, Legal Issues Involved in the Operation of a Neighborhood Justice Center, supra note 8, at 4. The author maintains that: An agreement with the chief of a court or with an individual judge cannot bind other judges of that same court on a question of what is admissible as evidence. While as a matter of courtesy, judges of concurrent jurisdiction frequently follow the opinions and rulings of their peers, they are not compelled to do so and it is not unusual for a judge simply to ignore the actions of another judge of the same court. Only a higher court or the legislature can restrict a judge on the question of admissible evidence.

205. FAYETTE DIST. CT. R. OF P. III(c), reprinted in L. FREEDMAN, LEGISLATION ON DISPUTE RESOLUTION 225 (1984) (compiled by ABA Special Comm. on Dispute Resolution).
during negotiations, as a matter of public policy, could form the basis of a new judicial policy. This public policy would recognize the value of mediation per se, and reflect that recognition by allowing a privilege for statements made during negotiations and for the mediator as a professional. These privileges could be expanded under the same justifications of expediency used to justify plea bargaining when it became an accepted and necessary practice.\textsuperscript{206} Thus, a broad interpretation of Federal Rule of Evidence 408 would be required, along with state adoption of equally broad interpretations.

Several local courts have used the offer-of-compromise rationale to protect the confidentiality of settlement negotiations.\textsuperscript{207} However, in order to fully immunize the mediator from a duty to disclose, state legislatures must be willing to grant a statutory privilege to mediation programs after recognizing the valid benefits now jeopardized by reporting statutes and some case law.\textsuperscript{208}

Understanding the issues involved in mediation can strongly influence the way laws are written by state legislatures. For example, a bill submitted to the Oklahoma state legislature contained a provision expressly holding mediators liable for the consequences of their activities. After consultations, the drafters of this bill reversed their position completely and changed the provision to hold expressly that mediators are \textit{not} liable for the consequences of their actions.\textsuperscript{209} Such an awareness on the part of state legislatures would help develop the coherent public policy necessary to avoid contradictions typified by the New York statutes.\textsuperscript{210}

The ideal statute would protect communications made during mediation from compulsory disclosure during subsequent litigation.\textsuperscript{211} The mediator would have a specific privilege from being forced to testify.\textsuperscript{212} The mediation proceedings would be regarded as settlement negotiations,\textsuperscript{213} and the definition of "negotiations" would be interpreted broadly, in order to avoid

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\textsuperscript{206} See Friedman, \textit{supra} note 7, at 205.  \\
\textsuperscript{207} See generally L. FREEDMAN, \textit{supra} note 205.  \\
\textsuperscript{208} Frederick Snyder, citing Francis v. Abben, argued that legislation should be adopted in appropriate jurisdictions "to cloak proceedings of this nature with an evidentiary privilege of confidentiality" as the Florida court had done in that case for the St. Petersburg Citizens Dispute Settlement Program. Snyder, \textit{supra} note 81, at 787-88, 788 n.226.  \\
\textsuperscript{209} L. FREEDMAN & J. ANTON, \textit{supra} note 63, at 1. See also \textit{Okla. Stat. tit. 12, § 1805(E) (Supp. 1985)} (requiring "gross negligence with malicious purpose" before a mediator will be held liable for civil damages).  \\
\textsuperscript{210} See \textit{supra} note 57.  \\
\textsuperscript{212} 29 C.F.R. 1401.2(b) (1984) (granting a privilege to a federal labor mediator); \textit{Okla. Stat. tit. 12, § 1805(A)} (Supp. 1985) (recognizing a mediator's privilege).  \\
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legal distinctions that lay disputants would neither recognize nor appreciate. Thus, the ideal statute would not attempt to limit protection to “[a]ny communications relating to the subject matter.”214 Rather, it would disallow disclosure of “any matters discussed” in mediation,215 with the important qualifier that mediation negotiations could not be used to cloak discovery of what was otherwise discoverable.216 In recognition of the broad reporting statutes instituted in many states, protection would be extended not only to statements made to the mediator,217 but also to “communications between the parties in the presence of the mediator.”218 Thus, those disputants desiring to settle their problems through peaceful negotiation would not have to fear giving full vent to their grievances.

Finally, the statute should recognize legitimate societal interests in the prevention of criminal activity by allowing the disclosure of information, but only under the most compelling circumstances. The legislature could set the standard of review to be used by the judiciary when determining what evidence to admit. For example, evidence could be admissible for the purpose of saving a life or preventing drastic psychological or physical harm. Because the public must perceive mediation as a safe and legitimate resource, the burden required to overcome the presumption against disclosure should be high, so that in the vast majority of cases, the confidentiality of negotiations will not be threatened. In this way, legislators could provide the necessary exceptions to the confidentiality of mediation in order to accommodate the legitimate needs of society while ensuring the favored status of mediation as an alternative method of dispute resolution.219

IV. CONCLUSION

In the course of mediating a dispute, the mediator will acquire sensitive information regarding the disputants. Under current statutory and case law, mediators may have a duty to disclose this information when it involves criminal activity. Where such disclosures are made, they can damage the viability of mediation as a legitimate alternative to litigation by demonstrating that the court will not respect the confidentiality of the negotiations and will instead exploit information revealed therein.

In recognition of this problem, mediation programs have attempted to

217. CAL. CIV. PROC. CODE § 1747 (West 1982).
219. See Weisberg & Wald, supra note 78, at 208 n.210. These authors suggest a low standard of review because they value disclosure over confidentiality.
construct informal and formal agreements with potential negotiators regarding what information may be revealed. Some programs guarantee absolute confidentiality to participants while others offer a more limited version, but all programs are damaged when courts disregard or circumvent the need for confidentiality during negotiation.

For mediation to retain its legitimacy, courts should broadly construe the evidentiary statutes that recognize the privileged status of negotiations. This recognition would be facilitated greatly where evidentiary statutes reflect legislative support for mediation as an alternative to litigation. Ultimately, it is the legislatures, as representatives of popular values, that will decide which is valued more; the short-term gains from the duty to disclose, or the long-term benefits of mediation as a viable method of dispute resolution.

John R. Murphy III