Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality

Ellen E. Deason[*]

TABLE OF CONTENTS

---

[*] Associate Professor, University of Illinois College of Law. This article is dedicated to the memory of Stephen O. Kinnard, whose persistent questioning about the relationship of confidentiality and state contract law stimulated my research. The work grew out of a project I conducted as a visiting scholar at the Nancy H. Rogers Research Institute on Courts and Dispute Resolution of The Ohio State University College of Law. I gratefully acknowledge the support of the Institute as well as ongoing support from the University of Illinois College of Law. I benefited from comments on an earlier draft by Kit Kinports, Jim Pfander, and Charles Tabb and from valuable research assistance by Erin Haldorson-Kartheiser.

INTRODUCTION

One of the fundamental axioms of mediation is the importance of confidentiality. It is deemed necessary to foster the neutrality of the mediator and essential if parties are to participate fully in the process. It is also a rapidly developing area of law, with a national effort toward uniformity in mediation confidentiality led by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association through a draft Uniform Mediation Act.[1] This article concerns the development of the law governing disputes over enforcing settlement agreements (and purported settlement agreements) reached during mediation, which are a frequent source of risk for confidentiality. Courts often apply traditional contract law principles that recognize oral agreements to such disputes, leading to the admission of evidence of what transpired during the mediation and thus undermining the confidentiality of the process. This article examines the competing interests at this intersection between the law of contracts and confidentiality requirements for mediation or, more broadly speaking, at a key point of tension between the goals of enforcing mediated agreements and fostering an effective process for reaching those agreements.

The potential threats to confidentiality in the context of enforcing mediated settlement agreements arise primarily in two areas of disagreement. First, parties may dispute the existence (or content) of an agreement they allegedly reached during mediation and second, they may acknowledge an agreement but dispute its validity and enforceability by virtue of a contract defense such as duress or fraud.[2] The issues in these settings have been brought to the forefront by several recent provocative court decisions that exposed supposedly confidential

---

[1] *See* Michael B. Getty, Thomas J. Moyer & Roberta Cooper Ramo, *Preface to Symposium on Drafting a Uniform/Model Mediation Act*, 13 OHIO ST. J. ON DISP. RESOL. 787 (1998). One of the primary goals of the drafters is to establish comprehensive confidentiality protections for mediation. UNIF. MEDIATION ACT, Prefatory Note (Proposed Official Draft 2001) ("The primary focus of this Act is . . . to provide a privilege that assures confidentiality in legal proceedings."). The text of the final Act, but not the notes, became available as this article was going to press. The notes are, therefore, cited as they appeared in the draft submitted to NCCUSL for approval.

[2] From a theoretical viewpoint of contracts, these two categories may be part of a continuum in that raising a defense can be thought of as an attack on the existence of a valid contract. Certainly both categories of cases arise from attempts at contract enforcement. They are separated here for purposes of analysis because most of the cases concerning mediation confidentiality in the context of contract enforcement tend to involve either a disputed agreement or defenses to an agreement, but not both.

mediation communications.

In North Carolina (where parties in civil suits are required to attend a pretrial mediation conference), one party's claim that mediation resulted in a settlement shown by an unsigned agreement drafted by the mediator led a state court to hold a hearing with testimony from the mediator. It did so in spite of statutory confidentiality protections and a signature requirement for mediated settlements. In the court's view, those safeguards were trumped by state contract law, which permits enforcement of oral settlement agreements.[3]

In California, a federal court applying state mediation law found that the statute was not absolute and went beyond its enumerated exceptions to confidentiality. It created a new exception by requiring testimony from a mediator when a plaintiff alleged duress, only to conclude that there was no evidence she had been subjected to anything even approaching undue pressure to sign the agreement.[4]

A Texas federal court "released" the parties from their confidentiality obligations when one of the parties repudiated a settlement agreement, alleging that the mediator had forced them to settle. The controversy was aired in the newspapers as well as in court, reaching a nadir when a local mediator was quoted defending "a little bullying" as part of effective mediation.[5] These cases raise the question of what courts *should* do when confronted with a disputed or allegedly unenforceable mediated settlement agreement.

Effective participation in mediation depends on the parties' expectation that what they say during the process will remain confidential. As the Second Circuit explained:

> If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tightlipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of [the appellate mediation] program . . . .[6]

If confidentiality is to serve this purpose fully, the parties must have confidence in an adequate level of confidentiality when they engage in

---

[3] Few v. Hammack Enter., Inc., 511 S.E.2d 665, 669 (N.C. Ct. App. 1999).

[4] Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1133, 1139 (N.D. Cal. 1999).

[5] Allen v. Leal, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998).

[6] Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979).

the mediation. This argues for a degree of certainty in parties' expectations for confidentiality.

Confidentiality also serves a second very important function. It is central to the role of the mediator as a neutral, nonaligned participant, which is a crucial part of effective mediation. Requiring a mediator to testify poses a danger of undermining the parties' confidence in the mediator's impartiality for the same reasons originally expressed in the context of labor conciliation:

> To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality . . . . If conciliators were permitted or required to testify about their activities, or if the production of notes, or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of [mediation] in the settlement of future disputes would be seriously impaired, if not destroyed. The resultant injury to the public interest would clearly outweigh the benefit to be derived from making their testimony available in particular cases.[7]

At the same time, a goal of mediation (especially when incorporated into court procedures) is to resolve the dispute and agree on a settlement.[8] When a court enforces a valid mediated settlement, it is in a sense affirming the effectiveness of mediation as a settlement process and reenforcing parties' incentives to mediate. Appropriate enforcement "also would encourage parties in the future to take mediations seriously, to understand that they represent real opportunities to reach closure and avoid trial, and to attend carefully to terms of agreements proposed in mediations."[9] If instead, in the name of confidentiality, a party can later ignore its obligations under the settlement, or parties can be held to agreements obtained improperly or not obtained at all, this will eventually create disincentives to mediate. Thus traditional contract law, which provides a framework for enforcing properly reached agreements

---

[7] Tomlinson of High Point, Inc., 74 N.L.R.B. 681, 688 (1947), *quoted in* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 55-56 (9th Cir. 1980).

[8] I do not mean to imply that settlement is the only goal for mediation. Approaches to mediation that focus on settlement and solving problems can be contrasted with a transformative approach that emphasizes human potential and relationships. *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).

[9] *Olam*, 68 F. Supp. 2d at 1137.

and refusing to enforce invalid agreements, distills important interests that apply in the context of mediation as well as in other contract settings. The evidence necessary to apply this framework, however, may necessitate invading the confidentiality of the mediation.

Another value that may compete with confidentiality in the context of settlement enforcement is the fundamental understanding of mediation as a consensual process.[10] When a party to a mediation alleges that she did not agree to a settlement, or challenges the mediated agreement for fraud, duress, or lack of authority, she essentially claims that her consent was not genuine as understood in contract law. To the extent contract principles embody society's view of appropriate consent, applying them to avoid unjust enforcement of agreements can be crucial to maintaining party autonomy and keeping informed consent at the heart of mediation.

The conflict between maintaining mediation confidentiality and setting it aside in favor of admitting evidence is not unique to settlement enforcement. Competing needs for confidentiality and evidence create an overarching tension that accompanies mediation in general. Scholars have extensively debated the appropriate balance between mediation confidentiality and evidentiary principles in two interrelated contexts: the most appropriate legal form of confidentiality protection for mediation[11] and which competing needs for disclosure justify exceptions

---

[10] *See generally* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999); Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 944 (1998) (concluding that fairness in mediation requires "the most robust possible conception of party choice and autonomy").

[11] There is strong scholarly support for a confidentiality privilege for mediation. *See, e.g.*, Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RES. 37 (1986); Eileen P. Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U. L. REV. 181 (1981); Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17 (1988); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1 (1995); Michael Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988); *see also* Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 350 (1989) (proposing rule that neutral shall not disclose or testify concerning settlements).

There are also dissenting views. *See, e.g.*, Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 102 (1999) (arguing that Federal Rule of Evidence 408 provides adequate confidentiality protection for mediation); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RES. 1, 2, 32 (1986) (recognizing that confidentiality is "important, necessary, and appropriate" in "core cases" but arguing that privilege is unnecessary to protect confidentiality); Scott H. Hughes, *A Closer Look: The Case for a Mediation Privilege Has Still*

to that protection.[12] The legislative policy choices on these two important topics represent several decades of experimentation and are, if anything, even more varied than the scholarly positions. As a result, mediation confidentiality in the context of settlement enforcement is currently entangled in the complexity created by a general lack of uniformity among the jurisdictions.

In the states, almost all jurisdictions recognize the importance of confidentiality for mediation, even though it is protected to varying degrees. About half have mediation statutes or other provisions with confidentiality protections that apply to mediation generally.[13] Some of

---

Not Been Made, 5 DISP. RESOL. MAG., Winter 1998, at 14 (urging that it is important to remember that there exists "no empirical work to demonstrate a connection between privileges and the ultimate success of mediation").

[12] *See, e.g.*, Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RES. 25, 49-53 (1992) (arguing that it is appropriate to breach confidentiality when necessary for accountability or to report threats, crime, or abuse); Mori Irvine, *Serving Two Masters: The Moral Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L.J. 155 (1994) (advocating exception for mediator to report attorney misconduct); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715 (1997) (proposing exception to confidentiality statutes to allow mediators to report attorney misconduct); Alan Kirtley, *Best of Both Worlds: Uniform Mediation Privilege Should Draw From Both Absolute and Qualified Privileges*, 5 DISP. RESOL. MAG., Winter 1998, at 5 (proposing approach for codifying exceptions to mediation privilege in Uniform Act); Kirtley, *supra* note 11, at 39-52 (surveying statutory confidentiality exceptions); Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1 (1995) (arguing for combination of absolute and qualified privilege); Lynne H. Rambo, *Impeaching Lying Parties with Their Statements During Negotiation: Demysticizing the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes*, 75 WASH. L. REV. 1037 (2000) (arguing for exception allowing impeachment by prior inconsistent statements made in negotiation and mediation); Perrin Rynders, *Confidentiality in Mediation: A Conflict Between Two Value Systems*, 72 MICH. B.J. 1016, 1017 (1993) (pointing out that Michigan "Child Protection Law unambiguously requires at least some mediators to disclose confidences regarding child abuse"); Brian D. Shannon, *Confidentiality in Texas Mediations: Ruminations on Some Thorny Problems*, 32 TEX. TECH. L. REV. 77 (2000) (comparing exceptions to confidentiality in draft Uniform Mediation Act to outcomes under Texas law); Dennis Sharp, *The Many Faces of Mediation Confidentiality*, 53 DISP. RES. J., Nov. 1998, at 56 (discussing state variations in confidentiality exceptions); Jeffrey C. Sun, *University Officials as Administrators & Mediators: The Dual Role Conflict & Confidentiality Problems*, 1999 BYU EDUC. & L.J. 19 (1999) (discussing disclosure requirements that may trump university policies of mediation confidentiality); Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota*, 18 HAMLINE J. PUB. L. & POL'Y 329, 365-69 (1997) (recommending exceptions to mediation privilege).

[13] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (West 1994); ARK. CODE ANN. §16-7-206 (Michie 1999); CAL. EVID. CODE §§ 1115-1128; IOWA CODE ANN. §§ 679C.1-679C.5 (West Supp. 2000); KAN. STAT. ANN. § 60-452a (Supp. 1999); LA. REV. STAT. ANN. § 9:4112 (West Supp. 2001); MASS. GEN. LAWS ANN. ch. 233, § 23C (West, LEXIS through 2000 Sess.); ME.

these protections are incorporated into state evidentiary rules; others are found in statutes that govern mediation. There is also an abundance of state rules and statutes limited to court-annexed mediation[14] or designed for particular mediation programs[15] that protect confidentiality within these specific contexts. When all these sources are tallied, they indicate that most states recognize the importance of mediation confidentiality and have enacted some form of protection, although a significant number do not have comprehensive provisions that cover all mediations.[16]

At the federal level, in the Alternative Dispute Resolution Act of 1998, Congress directed all district courts to adopt court-sponsored ADR programs and singled out confidentiality protection as a required element in these programs.[17] Thus all district court mediation programs must now include a provision to protect confidentiality. At the appellate level, the federal circuits also offer mediation programs, all of which provide for confidentiality.[18] In the executive branch, the Administrative

---

R. EVID. § 408; MINN. STAT. ANN. § 595.02(1a) (West 2000); MO. ANN. STAT. § 435.014 (West 1992); MONT. CODE ANN. § 26-1-813 (1999); NEB. REV. STAT. §§ 25-2901 to 25-2920 (1995); NEV. REV. STAT. ANN. § 48.109 (Michie 1996); N.J. STAT. ANN. § 2A:23A-9(c) (West 2000); N.D. CENT. CODE § 31-04-11 (1997); OHIO REV. CODE ANN. § 2317.023 (Anderson 1998); OKLA. STAT. ANN. tit. 12, §§ 1801-1813 (West 1993 & Supp. 2001); OR. REV. STAT. §§ 36.100-36.245 (1999); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (Michie Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001-154.073 (Vernon 1997 & Supp. 2001);VA. CODE ANN. §§ 8.01-581.21 to 8.01-581.23 (Michie, LEXIS through 2000 Sess.); WASH. REV. CODE ANN. § 5.60.070 (West 1995); WIS. STAT. ANN. § 904.085 (West 2000); WYO. STAT. ANN. §§ 1-43-101 to 1-43-104 (Michie, LEXIS through 2000 Sess.).

[14] *See, e.g.*, COLO. REV. STAT. ANN. §§ 13-22-301 to 13-22-313 (West 1997); CONN. GEN. STAT. § 52-235d(b) (Supp. 2000); FLA. STAT. ANN. § 44.102 (West Supp. 2001); N.C. GEN. STAT. § 7A-38.1 (1999); UTAH CODE ANN. §§ 78-31b-2 to 78-31b-9 (LEXIS through 2001 Sess.); VA. CODE ANN. §§ 8.01-576.4 to -576.12 (LEXIS through 2001 Sess.).

[15] Special mediation programs established by the states cover a multitude of subjects. *See, e.g.*, COLO. REV. STAT. ANN. § 22-25-104.5 (West Supp. 2000) (gang-related disputes); DEL. CODE ANN. tit. 19, § 712(c) (1995) (employment discrimination); GA. CODE ANN. § 8-3-209(c) (1997) (housing discrimination); 775 ILL. COMP. STAT. ANN. § 5/7A-102 (West 1996) (human rights); IND. CODE ANN. § 4-6-9-4 (West Supp. 2000) (Consumer Protection Division); ME. REV. STAT. ANN. tit. 5, § 3341 (West Supp. 2000) (land use); ME. REV. STAT. ANN. tit. 19-A, § 251 (West 1998) (child custody disputes); MONT. CODE ANN. § 40-4-303 (1999) (family law mediation).

[16] *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE app. A (2d ed. 1994 & SARAH R. COLE, et al. Supp. 1998); Kentra, *supra* note 12, at 733, app. at 757.

[17] The ADR Act of 1998 requires that, until a national rule is adopted under the Rules Enabling Act, each district court "shall, by local rule . . . provide for the confidentiality of the alternative dispute resolution processes and [to] . . . prohibit disclosure of confidential dispute resolution communications." 28 U.S.C. § 652(d) (Supp. IV 1998).

[18] *See generally* ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE

Dispute Resolution Act of 1996 requires each federal agency to promote the use of ADR and sets forth a confidentiality rule for such proceedings.[19]

These state and federal statutes and rules designate the scope of confidentiality for mediation and establish exceptions that permit disclosure of mediation communications under certain circumstances. But only a few take account of the fact that confidentiality can be determined independently by contract law doctrine. First, parties to a mediation occasionally disagree on what they settled. Such disagreements may broadly question the existence of any agreement or more narrowly debate the meaning of particular elements of an agreement. Contract law that enforces oral agreements leaves mediations open to scrutiny to determine the existence of an agreement or its content from the course of the negotiations. Second, even if the parties acknowledge that they reached a settlement, one party may challenge its validity by raising a contract defense such as fraud, duress, or lack of authority on the part of the person who made the agreement. Establishing or refuting such a defense will also typically require scrutiny of the mediation, contrary to the expectation of confidentiality.

In exploring the extent to which contract law collides with mediation confidentiality,[20] Parts I and II of this article examine state policy and practice for maintaining confidentiality in the context of settlement enforcement. The policy choices range widely—from attempting to protect confidentiality completely to opening mediation to scrutiny whenever settlement enforcement is at issue. State legal mechanisms to effect these policy choices include a variety of evidentiary provisions for mediated agreements, several forms of writing requirements and mediation enforcement provisions. Part I considers access to mediation communications when the parties do not agree that they reached an agreement in mediation. Part II analyzes confidentiality when a party alleges a contract defense to a mediated settlement.

FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS (Federal Judicial Center 1997).

[19] 5 U.S.C. § 574 (Supp. IV 1998). The Federal Alternative Dispute Resolution Council recently published guidance on confidentiality in agency ADR programs. 65 Fed. Reg. 83085 (Dec. 29, 2000).

[20] This article is concerned with the confidentiality of the mediation process, not the confidentiality of agreements that result from mediation. That issue is part of a broader debate on the appropriate role of protective orders, sealed records, and confidentiality orders in litigation. *See, e.g.*, Laurie Kratky Dore, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

Drawing from the state experience in these contexts, Part III then considers the appropriate balance between enforcing mediation settlements and protecting mediation confidentiality. When the existence of a disputed settlement is in question, I conclude that mediation confidentiality should be protected with a "bright-line" requirement for written and signed agreements that would preclude parties from exposing mediation communications to prove a settlement. In contrast, when the issues concern the validity of an acknowledged agreement, I conclude that confidentiality may sometimes need to give way. If a court is unable to decide validity based on threshold issues, the most appropriate approach is to weigh the need for the evidence regarding coercion or fraud against the harm to confidence in confidentiality, using procedures to minimize the intrusion on confidentiality caused by the weighing process itself. Although I question the Act's treatment of mediator testimony, these recommendations are otherwise consistent with the approach of the Uniform Mediation Act.

I. CONFIDENTIALITY AND DISPUTES ABOUT THE EXISTENCE OR CONTENT OF MEDIATED SETTLEMENTS

To resolve a disputed claim that an oral agreement constitutes or defines a settlement, a court typically investigates the negotiation process in order to explore the existence and nature of the alleged agreement. In the absence of evidentiary limitations, this probing is likely to infringe the parties' expectations of confidentiality.[21] The relevant evidence can include documents prepared for the mediation and/or testimony about communications or events that took place during the mediation by the parties or the mediator. As stated in the commentary to the draft Uniform Mediation Act, the problem "is that nearly everything said during a mediation session could bear on either whether the parties came to an agreement or the content of the agreement."[22] In other words, permitting courts to examine the genesis of a settlement in mediation has the potential to undermine confidentiality completely.

---

[21] *See, e.g.*, Thomsen v. Aqua Massage Int'l, Inc., 721 A.2d 137, 139 (Conn. App. Ct. 1998) (describing testimony "concerning issues discussed at mediation session" at hearing on dispute whether parties reached settlement agreement).

[22] UNIF. MEDIATION ACT § 7(a)(1) reporter's working notes (Proposed Official Draft 2001).

In enforcing a mediated agreement, the goals of confidentiality often run headlong into the wall of state black-letter contract law, under which oral settlement agreements can be enforced, so long as they meet the basic requirements for a contract.[23] As discussed below, there are also states that do require a signed writing for litigated settlement agreements, or at least those reached in mediation.[24] But even here the acceptability of oral contracts can run deep: in spite of such requirements some courts have been willing to enforce unsigned agreements on the theory that the parties reached an enforceable oral agreement even if their written agreement is unenforceable.[25]

In contrast to the well-developed state law, at the federal level there is little law on the recognition of settlement agreements. Contract enforcement falls within the realm traditionally regarded as the province of the states and when federal courts do rely on federal common law, they often borrow from state contract law rules.[26] Nonetheless, some federal courts do turn to a uniform federal common law to govern settlements and releases, particularly in civil rights claims and the

---

[23] *See, e.g.*, Lampe v. O'Toole, 685 N.E.2d 423 (Ill. App. Ct. 1997) (holding properly proved oral settlement is enforceable even without signed release); Kaiser Found. Health Plan of the Northwest v. Doe, 903 P.2d 375, 378 (Or. Ct. App. 1995) (holding mediated settlement agreement need not be in writing to be binding); *modified on other grounds.*, 908 P.2d 850 (Or. Ct. App. 1996); John Deere Co. v. A & H Equip., Inc., 876 P.2d 880 (Utah Ct. App. 1994) (holding settlement agreement enforceable even though not reduced to writing, signed by parties, or entered on minutes of court); *see also* Ashley Furniture Indus., Inc. v. Sangiacomo N.A. Ltd., 187 F.3d 363, 378 (4th Cir. 1999) (holding mediated settlement agreement on trade dress issues need not be written to be enforceable under North Carolina law); Sheng v. Starkey Lab., Inc., 117 F.3d 1081 (8th Cir. 1997) (enforcing oral mediated agreement under Minnesota principles of contract law); New York Air Brake Corp. v. Gen. Signal Corp., 873 F. Supp. 747 (N.D.N.Y. 1995) (enforcing oral employment settlement under New York law).

[24] *See infra* notes 52-57 and accompanying text.

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

[26] *See, e.g.*, Pohl v. United Airlines, Inc., 110 F. Supp. 2d 829, 836-37 (S.D. Ind. 1999) (adopting state law recognizing oral settlement agreements as federal rule in federal statutory case); Sears, Roebuck & Co. v. Sears Realty Co., Inc., 932 F. Supp. 392, 397-401 (N.D.N.Y. 1996) (deciding that circumstances did not justify creating federal common law rule); *In re* Lady Madonna Indus., Inc., 76 B.R. 281 (S.D.N.Y. 1987) (adopting state rule requiring writing for binding settlement agreement as standard for settlement in bankruptcy case).

employment context.[27] In most contexts, this federal common law permits enforcement of oral agreements.[28]

When courts admit testimony to prove oral mediated agreements they create a conflict with the need for confidentiality in mediation. Section A examines the extent to which states limit intrusion on mediation confidentiality by restricting the enforceability of oral agreements. Section B considers the application of these restrictions, with varying degrees of faithfulness, by state and federal courts.

A. Legal Rules that Affect Confidentiality and Alleged Agreements

The conflict between maintaining mediation confidentiality and contract rules that recognize oral agreements can be resolved directly, through special evidentiary provisions for mediation communications, or influenced indirectly, through a jurisdiction's writing requirements for settlement agreements or court stipulations. This section explores each approach in turn.

1. Evidentiary Rules

General mediation statutes protect confidentiality by relying on privileges, evidentiary exclusions, testimonial incapacity, or some combination of these or other legal mechanisms to prevent testimony

---

[27] *See, e.g.*, Maynard v. Durham & S. Ry. Co., 365 U.S. 160, 161 (1961) (stating that federal law governs validity of releases under Federal Employers' Liability Act); Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981) (holding that federal law governs validity of settlement of Title VII actions); Valle v. Johnson Controls World Serv., 957 F. Supp. 1404, 1423 (S.D. Miss. 1996) (stating federal common law governs enforcement of oral settlement agreement made by private parties during pendency of employment discrimination lawsuit); Hisel v. Upchurch, 797 F. Supp. 1509, 1518 (D. Ariz. 1992) (applying federal law to validity of release of 42 U.S.C. § 1983 claims); DiMartino v. City of Hartford, 636 F. Supp. 1241, 1249 (D. Conn. 1986) (evaluating validity of settlement under Age Discrimination in Employment Act using federal common law). Federal courts have also held that federal law governs attorneys' authority to settle cases in federal question cases. *See, e.g.*, Fennell v. TLB Kent Co., 865 F.2d 498, 501 (2d Cir. 1989); Mid S. Towing, Co. v. Har-Win, Inc., 733 F.2d 386, 386 (5th Cir. 1984).

[28] *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 734 (1961) (noting "established rule of ancient respectability that oral contracts are generally regarded as valid by maritime law" and refusing to apply New York statute of frauds); Taylor v. Gordon Flesch Co., 793 F.2d 858, 862 (7th Cir. 1986) (holding oral settlement binding in Title VII claim notwithstanding state law requirement that settlements be in writing); *Fulgence*, 662 F.2d at 1209 (holding that federal law governing Title VII settlement agreements requires that they be entered into "voluntarily and knowingly," but not that they be written); Strange v. Gulf & S. Am. S.S. Co., 495 F.2d 1235, 1236 (5th Cir. 1974) (finding that federal law governs validity of oral settlement agreements within admiralty and maritime jurisdiction); Wise v. Riley, 106 F. Supp. 2d 35, 39 (D.D.C. 2000) (enforcing oral settlement of Title VII case).

regarding mediation communications in legal proceedings. The evidentiary limitations in many mediation statutes are broad enough to prevent a party from supporting a claim that an agreement was reached by introducing evidence about what transpired during the mediation. The scope of statutory coverage does vary, however, thus affecting the extent of protection. For example, many statutes protect "mediation communications," but this term is variously defined to include statements, documents, actions and/or agreements reached as a result of mediation.

Moreover, a statute's protection for mediation depends not only on what is encompassed by its definitions, but just as importantly on its exceptions. These exceptions to confidentiality also vary greatly in content and scope, and hence create significant differences among the states in the manner and extent to which they permit proof of mediated agreements. Evidentiary statutes can, however, be grouped according to five major approaches legislatures have taken to confidentiality when the parties dispute the existence of a mediated settlement. These are considered below, moving from the most to the least protective of confidentiality.

a. "Complete Confidentiality"

First, there are statutes written in absolute terms that make no exception to their confidentiality protections for the purpose of enforcing a mediated settlement agreement. They can be read to make an agreement that comes out of mediation as confidential as the mediation process. Some of these statutes protect mediation communications and documents with comprehensive evidentiary exclusions that do not contemplate exceptions.[29] Others establish privileges, provide for waivers by the parties and/or the mediator, and enumerate some exceptions to confidentiality, but fail to make any type of exception for evidence to establish a settlement.[30] Under the terms of these statutes, this evidence is admissible only if the relevant mediation participants consent to waive their privilege. It is hard to know whether a

---

[29] *See, e.g.*, ARK. CODE ANN. §16-7-206 (Michie 1999); ME. R. EVID. § 408; MASS. GEN. LAWS ANN. ch. 233, §23C (West, LEXIS through 2000 Sess.); MO. ANN. STAT. § 435.014 (West 1992); NEV. REV. STAT. ANN. § 48.109 (Michie 1996); R.I. GEN. LAWS § 9-19-44 (1997).

[30] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (West 1994); KAN. STAT. ANN. § 60-452a (Supp. 1999); MINN. STAT. ANN.. § 595.02(1a) (West 2000); N.J. STAT. ANN. § 2A:23A-9 (West 2000); OKLA. STAT. ANN. tit. 12, § 1805 (West 1993); S.D. CODIFIED LAWS § 19-13-32 (Michie Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053(c), 154.073 (Vernon Supp. 2000); UTAH CODE ANN. § 78-31b-8 (LEXIS through 2000 Sess.) (court-annexed ADR).

jurisdiction with evidentiary exclusions or a privilege of this type really intends to preclude mediation disclosures completely whenever an agreement is challenged or has instead overlooked the issue.

Many states have probably overlooked the issue. Texas, for example, makes confidential, among other things, "any record made at an alternative dispute resolution procedure."[31] The statute makes no exception when the record is a written agreement that resulted from mediation. Thus, if taken literally, the statute means that any mediated agreement between the parties, whether written or oral, must remain confidential. But if all settlements resulting from mediation were completely confidential, there would be no avenue available to enforce them, creating tension with the purpose of the Texas Act to use ADR to help bring litigation to a close. As Dean Edward Sherman has observed, given the stated purpose of the Act to encourage the use of ADR, "it would be anomalous to believe that the Act really intended to prevent the agreement from being disclosed."[32]

b. Narrow Exception for Memorialized Settlements

Second, there is a group of statutes that anticipate the possible need for evidence that the parties reached an agreement, but are structured to place evidence of confidential mediation communications and documents off limits. These statutes typically establish a mechanism to exclude evidence of the mediation (such as a privilege) but create an exception for documented settlements. Usually they mandate that the agreement must be written and signed by the parties,[33] although

---

[31] TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(b).

[32] Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience*, 38 S. TEX. L. REV. 541, 545 (1997); *see also* Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 969 (2000).

[33] *See, e.g.*, COLO. REV. STAT. ANN. § 13-22-302(2.5) (West 1997) (court-annexed ADR) (stating that "mediation communication" is covered by privilege defined to exclude written, executed settlement agreements); CONN. GEN. STAT. § 52-235d(b)(2) (Supp. 2000) (court-annexed mediation) (permitting disclosure if "necessary to enforce a written agreement that came out of mediation"); FLA. STAT. ANN. § 44.102(3) (West Supp. 2001) (court-ordered mediation) (creating exception to privilege limited to executed settlement agreements); MONT. CODE ANN. § 26-1-813 (3) (1999) (allowing exception to confidentiality for signed, written agreement); N.C. GEN. STAT. § 7A-38.1 (*l*) (1999) (court mediation program) (creating exception to evidentiary exclusion of mediation statements and conduct for proceedings to enforce settlement, but specifying that only written, signed settlements shall be enforceable); OHIO REV. CODE ANN. § 2317.023 (Anderson 1998) (providing that mediation provisions do not affect admissibility of written, signed settlement agreement); 42 PA. CONS. STAT. ANN. § 5949(b)(1), (c) (West 2000) (permitting admission of written and signed settlement to enforce agreement unless agreement specifies it is unenforceable or

California also requires language that the parties intend the agreement to be enforceable.[34] Some permit an alternative record of the agreement so long as the parties' assent is made plain. These alternatives to a writing foster flexibility at the mediation table and can include tape recording or other means that allow the parties to retrieve the specifics of the agreement.[35] But the key for admissibility of the mediated settlement is usually some form of memorialization.

By combining a privilege for mediation with an exception for memorialized settlements, these statutes protect the details of mediation from disclosure (unless the parties consent to that disclosure) whether or not the parties entered into a written agreement. When there is no documented settlement, there is no exception to the privilege that would allow a party to prove the existence of an agreement. When there is a documented settlement it can be introduced but, absent other exceptions or consent, the privilege prevents a party from invading the confidentiality of the mediation to argue that there was no agreement in spite of the document.

The Uniform Mediation Act, recently approved by NCCUSL, falls within this group of statutes. It establishes a mediation privilege subject to an exception for "an agreement evidenced by a record" that is "signed by all parties to the agreement."[36] The drafters remark that this exception is notable for what it does not include—that is, oral agreements.[37] Thus,

---

not intended to be binding); VA. CODE § 8.01-576.10 (Michie, LEXIS through 2000 Sess.) (court ADR program) (providing that written settlement agreement is not confidential unless parties agree otherwise in writing); WASH. REV. CODE ANN. § 5.60.070(1)(e) (West 1995) (creating exception to mediation privilege for written agreement signed by parties resulting from mediation proceeding); WIS. STAT. ANN. § 904.085(4)(a) (West, LEXIS through 1999 Sess.) (making inadmissibility provisions inapplicable to any written agreement, stipulation, or settlement made during or pursuant to mediation).

[34] *See, e.g.*, CAL. EVID. CODE § 1123 (permitting admission of written and signed settlement agreement reached pursuant to mediation if it states that it is admissible or enforceable).

[35] *See, e.g.*, CAL. EVID. CODE §§ 1118, 1124 (making oral agreement admissible if recorded by court reporter or sound recording, reduced to writing, and signed within 72 hours); FLA. R. CIV. P. 1.730 (permitting agreement to be electronically or stenographically recorded by stipulation of parties); N.C. SUPER. CT. MEDIATED SETTLEMENT CONF. R. 4(C) (same); *see also* Carr v. Runyon, 89 F.3d 327, 330 (7th Cir. 1996) (recognizing agreement that mediator dictated and all parties affirmed on tape); Regents of Univ. Cal. v. Sumner, 42 Cal. App. 4th 1209 (Cal. App. Dist. Ct. 1996) (recognizing tape recorded agreement); Plum Creek Timber Co. v. Hillman, No. 41278-7-1, 1999 WL 350830 (Wash. Ct. App. June 1, 1999) (enforcing tape recorded agreement stipulated to in writing).

[36] UNIF. MEDIATION ACT § 6(a)(1) (2001). A "record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." UNIF. MEDIATION ACT § 2(8).

[37] UNIF. MEDIATION ACT § 7(a)(1) reporter's working notes (Proposed Official Draft

a mediated settlement agreement would need to be memorialized as a prerequisite to enforcement because the privilege would prevent a party from relying on mediation communications to demonstrate an agreement. I argue below that this is the most appropriate balance between confidentiality and settlement enforcement when the existence of an agreement is in dispute.

c. Case-by-case Approach

Third, rather than making an across-the-board judgment that only written and signed documents are admissible to establish a mediated settlement, some legislatures leave this to a case-by-case determination by the courts. In its mediation statute, Louisiana authorizes a judge to admit testimony on mediation communications in order to interpret or enforce a settlement agreement, but only if the judge first decides that the evidence is necessary to prevent fraud or manifest injustice.[38] Ohio and Wisconsin also grant similar discretion to their courts but do not limit the context to settlement enforcement. In these states the provision is intended to cover circumstances not anticipated or not resolved by the legislature: courts may make exceptions to mediation confidentiality in situations not covered by their confidentiality statutes.[39] This case-by-case approach opens the door for a court to pierce the confidentiality of mediation even when contract formalities have not been observed. But the standard for disclosures is high: as construed by the Ohio Supreme Court, the statutory requirement of "manifest injustice" requires a "clear or openly unjust act."[40]

This case-by-case approach gives the courts flexibility, but limits mediation disclosures in order to keep them rare. The disadvantage is that the court's judgment on confidentiality cannot be determined in advance, at the time of the mediation, when the parties to the mediation need the assurance. Moreover, because a court, rather than a bright-line rule, is the gatekeeper for confidentiality, the very possibility of an

---

2001).

[38] *See* LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (West Supp. 2000).

[39] *See, e.g.*, OHIO REV. CODE ANN. § 2317.023(C)(4) (Anderson 1998); WIS. STAT. ANN. § 904.085(4)(e) (West 2000) (creating exception to prevent manifest injustice limited to proceedings distinct from dispute that was mediated). The "manifest injustice" language originated in the Administrative Dispute Resolution Act of 1990, 5 U.S.C. § 574(a)(4)(A), (b)(5)(A) (1994 & Supp. IV 1998).

[40] *See* Schneider v. Kreiner, 699 N.E.2d 83, 86 (Ohio 1998) (refusing to create confidentiality exception to protect party from potential criminal charges for failing to comply with mediated agreement).

exception may stimulate unnecessary litigation.

d. Broad Exception for Settlement Enforcement

Fourth, a few legislatures have decided that when the enforceability of a mediated settlement is at issue, confidentiality must give way to the extent necessary to determine if an agreement was reached. Presumably this represents a policy determination to elevate enforceability of settlements over the risks potential disclosures pose for the mediation process. These jurisdictions make a full exception to their mediation confidentiality protections, without regard to whether the disputed agreement is written or oral.

For example, mediation communications and documents are admissible in Iowa under an exception to the parties' mediation privilege that applies whenever the information is relevant to determining the existence of an agreement that resulted from mediation or to enforcing such an agreement.[41] Wyoming, which also has a mediation privilege, makes an exception any time one of the parties seeks judicial enforcement of a mediated settlement agreement.[42] Oregon's statute similarly provides an exception to confidentiality in a proceeding to enforce an agreement, but only to the extent "necessary to prosecute or defend the matter."[43] The confidentiality provision in the federal Administrative Dispute Resolution Act makes an exception to mediation confidentiality that permits parties to disclose communications relevant to determining the existence or meaning of a mediated agreement or to the enforcement of such an agreement.[44]

Although these statutes create broad exceptions, there are also signs of compromise to protect confidentiality to some degree. Iowa is more protective of the mediator's privilege than the parties' privilege, requiring the consent of all parties before the mediator can testify about mediation communications relevant to a claimed settlement.[45] This consent requirement lessens the likelihood that a mediator will be

---

[41] IOWA CODE § 679C.2(7) (West Supp. 2000).

[42] WYO. STAT. ANN. § 1-43-103(c)(v) (LEXIS 1999); *see also* General Order Governing the Appellate Conference Program ¶ 8 (5th Cir. Mar. 27, 2000) (creating exception to privilege in proceeding to enforce settlement agreement).

[43] OR. REV. STAT. § 36.222(4) (1999).

[44] 5 U.S.C. § 574(b)(6). At least one federal district court's local mediation rule makes a similar exception. In the District of Idaho, parties cannot use mediation communications in any pending or future proceeding, except in a separate legal action brought to enforce a mediated settlement. D. IDAHO R., Order 130(r).

[45] IOWA CODE § 679C.3(6).

required to testify, thus limiting the potential damage to the mediation process. The Administrative Dispute Resolution Act also differentiates between party and mediator testimony. While permitting disclosures to enforce a settlement as an exception to the parties' confidentiality obligations, it does not contain a parallel exception to the provisions that govern mediator confidentiality.[46] Finally, Oregon attempts to mitigate the threat its broad exception poses to confidentiality by permitting courts to seal the records of enforcement proceedings to prevent further disclosure of mediation communications.[47] In spite of these safeguards, however, this approach to settlement enforcement, like a case-by-case analysis, casts doubt on the promise of confidentiality for mediation through the possibility that one party will allege an oral agreement.

e. No Statutory Coverage

Finally, many mediations take place without any explicit statutory protection for confidentiality. Approximately half the states lack a comprehensive mediation statute and thus cannot be included in any of the four categories described above. Instead, state statutes that establish particular mediation programs may include separate confidentiality provisions, creating a patchwork of protections made up of one or more of these approaches. Mediations that fall outside the scope of this patchwork[48] are covered, at most, by the inadequate evidentiary exclusion of Federal Rule of Evidence 408 and its widely-adopted state equivalents, which do not apply to discovery or administrative proceedings and which exclude statements made in mediations from evidence only in limited circumstances.[49] By default, settlement

---

[46] 5 U.S.C. § 574(a), (b).

[47] OR. REV. STAT. § 36.222(4).

[48] In many states the holes in statutory coverage may allow a substantial number of mediations to slip through. In Illinois, for example, there are statutory protections for confidentiality when a mediation concerns human rights issues, 775 ILL. COMP. STAT. 5/7A-102(B-1) (West 1996), or when a mediation is conducted through a dispute resolution center authorized by the Not-For Profit Dispute Resolution Center Act, 710 ILL. COMP. STAT. 20/6 (West 1999). In addition, court rules provide for mediation confidentiality in judicial circuits that have established court-annexed mediation programs pursuant to Illinois Supreme Court Rule 99.

[49] For opposing views on the sufficiency of Rule 408 for mediation confidentiality, compare Kirtley, *supra* note 11, with Ehrhardt, *supra* note 11. Rule 408 of the Federal Rules of Evidence provides in relevant part:

> RULE 408. COMPROMISE AND OFFERS TO COMPROMISE. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to

agreements from mediations without confidentiality protection are subject to the jurisdiction's normal contract rules for proving settlements unless they are covered by a special writing requirement as described in the next section.

2. Writing Requirements

There are also writing requirements that operate independently of mediation evidentiary provisions. While black letter contract rules typically acknowledge oral agreements, there are longstanding exceptions for contracts governed by the statute of frauds, which requires a signed writing as a prerequisite to court enforcement.[50] Although courts have become hostile to the statute of frauds as applied to many of the categories it traditionally covered, other writing "requirements are proliferating" in many contexts.[51] One of these

---

> compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . . This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. § 408. Indiana has interpreted its version of the rule to strengthen the protection for mediation communications. *See infra* text accompanying note 84. In Maine, Rule 408 protections are stronger for court-sponsored domestic relations mediation: conduct or statements by a party are not admissible for any purpose. ME. R. EVID. 408(b); *see also* MO. ANN. STAT. § 435.014 (West 1992); NEV. REV. STAT. § 49.109(3) (Michie 1996); S.D. CODIFIED LAWS § 19-13-32 (Michie Supp. 2000) (labeling mediation as settlement negotiation, but conferring protection more consistent with evidentiary exclusion than with Rule 408).

[50] As described in Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM. L. REV. 39, 39-45 (1974), the English statute of frauds was enacted more than 300 years ago and has roots in ancient Babylonia and the Roman Empire. An Act for Prevention of Frauds & Perjuries, 1677, 29 Car. 2, c.3, § 4 (Eng.), provided that contracts in certain categories could not be enforced without a signed writing. These categories included: suretyships, agreements made upon consideration of marriage, contracts for sale of an interest in land, and agreements not to be performed within a year of the contract. Perillo, *supra*, at 39 n.2. For the modern equivalent of the statute of frauds, see RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981).

[51] E. ALLAN FARNSWORTH, 2 FARNSWORTH ON CONTRACTS § 6.2, at 102-03 (2d ed. 1998). The Uniform Commercial Code established a writing requirement for sales of goods priced at or above $500. U.C.C. § 2-201 (1998) Other common examples of writing requirements include arbitration agreements, 9 U.S.C. § 2 (1999); CAL. CIV. PROC. CODE § 1281, promises not to invoke a statute of limitation, FARNSWORTH, *supra* § 6.2 at 102, and contracts to revive a debt barred by bankruptcy, *id.* In addition to these widespread provisions, many states refuse to enforce other types of contracts without a signed writing. *See, e.g.*, Ashley Furniture Indus., Inc. v. Sangiacomo N.A. Ltd., 187 F.3d 363, 378 (4th Cir. 1999) (describing

contexts is mediated settlement agreements. First, as an alternative (or supplement) to confidentiality statutes limiting evidence of agreements, some states impose an independent writing requirement for settlement agreements reached in mediation. Second, when the dispute is a filed court case, in many states general court rules that govern stipulations or other party agreements require a writing. States with procedural rules for stipulations frequently apply them to settlements, including mediated agreements. When courts require parties to observe these writing formalities, they protect mediation confidentiality indirectly by displacing attempts to enforce oral agreements.

a. Mediation Agreement Documentation

A number of legislatures and courts have established writing and signature requirements specifically for mediated settlement agreements. Some of these provisions specify that a writing is necessary for court enforcement;[52] others simply state that mediated settlement agreements must be in writing.[53] In most states, these writing requirements provide that the mediated settlement agreement must be both written and signed by the parties.[54] Some states include a requirement that the document state it is intended to be enforceable.[55] Other states require the signatures

---

North Carolina statute that establishes writing requirement for agreements that limit party's right to do business in state).

[52] *See, e.g.*, COLO. REV. STAT. ANN. § 13-22-308(1) (West 1997) (court-annexed ADR) (requiring signed writing for enforcement as order of court); NEB. REV. STAT. § 25-2914 (1995) (agreement resulting from mediation is confidential, but enforceable as order of court if written, signed, and approved by court); TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (Vernon Supp. 2001) (providing that agreement reached in ADR that settles dispute is enforceable as any other agreement if written and executed); UTAH CODE ANN. § 78-31b-7 (LEXIS through 2000 Sess.) (court ADR program) (making mediated settlement agreement executed in writing and filed with court enforceable as court judgment).

[53] *See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. § 1415(e)(2)(G) (Supp. IV 1998); 3D CIR. R. 33.5(d); W.D. WASH. CT. R. 39.1; DEL. R. CH. CT. 174(g); FLA. R. CIV. P. 1.730; IND. CT. ADR R. 2.7(E)(2); MINN. STAT. ANN. § 572.35 (West 2000); N.C. SUPER. CT. MEDIATED SETTLEMENT CONF. R. 4(C); N.Y. JUD. CT ACTS § 849-b(4)(d) (McKinney 1992) (community dispute resolution centers program); UTAH CT. R. 101(e).

[54] *See, e.g.*, MINN. STAT. ANN.. § 572.33 (West 2000) (defining "mediated settlement agreement" as one that is written, signed by parties, and dated); UTAH CT. R. 101(e) (requiring parties in court-connected mediation program to execute written settlement agreement). Some statutes also require notarization. *See, e.g.*, N.M. STAT. ANN. § 40-2-4 (Michie 1999) (requiring that settlements terminating marriage must be in writing, executed, and acknowledged).

[55] *See, e.g.*, CAL. EVID. CODE § 1123. Until a 1999 amendment, Minnesota supplemented its basic writing provision by requiring certain recitations in the settlement. MINN. STAT. ANN. § 572.35 (West 2000). A mediated settlement agreement had to state that it was intended to be binding and state substantially that:

of the attorneys in addition to those of the parties, presumably to ensure that an attorney has reviewed the agreement.[56]

The impetus for these mediation writing requirements seems to spring in some states from a concern for protecting unrepresented parties who may not realize the seriousness of an agreement they reach in mediation. For example, the Minnesota Court of Appeals noted that "the aim of the [Minnesota provision] is to protect a party from entering into a stipulation without knowledge or understanding of their rights and the effects of the agreement."[57] This is the same cautionary rationale that supports requirements for formalities in the making of wills. Like a will, settlement of a court case is arguably a significant action that needs to be considered carefully. The formality of a writing underscores the consequences of the agreement, which is particularly important in mediation given the relative informality of the process.

In criticisms of the statute of frauds, this cautionary rationale is often described as an insufficient reason to prevent enforcement of an oral agreement that the parties really did reach. In the context of mediation, however, the argument for requiring the formality of a written settlement is greatly bolstered by its indirect effect in preserving mediation confidentiality.[58]

> [T]he parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights.

§ 572.35(1). The statute now provides an alternative. The mediated agreement may be binding if "the parties were otherwise advised of [these] conditions." § 572.35(1).

[56] *See, e.g.*, FLA. R. CIV. P. 1.730 (requiring that mediated agreement be reduced to writing and signed by parties and their counsel); IND. CT. ADR R. 2.7(E)(2) (same); N.C. SUPER. CT. MEDIATED SETTLEMENT CONF. R. 4(C) (same).

[57] Vo v. Honeywell, Inc., No. C3-97-1393, 1998 WL 15909 (Minn. Ct. App. Jan. 20, 1998).

[58] Requirements for mediated agreements that go beyond writing and signatures to mandate certain recitations in the agreement, however, do not enhance the protection of confidentiality and hence are on much weaker ground. If a settlement agreement must include language to the effect that the mediator informed the parties that he has no duty to protect their rights, then parties and attorneys experienced in mediation will know to insert this boilerplate. But the additional requirement may create a trap for the unwary and undermine the desired goal of protecting the unsophisticated in mediation, who may find that they are unable to enforce an agreement that omits this language. *See* Thompson, *supra* note 12, at 358.

b. Procedures for Litigation Stipulations

A second form of writing requirement is found in general rules of court procedure that are not tailored for mediation or even for settlements, but govern stipulations and agreements made during litigation. In Texas, for example, a state rule of civil procedure quaintly provides that no "agreement between attorneys or parties touching any suit pending" will be enforced unless it is 1) in writing, signed and filed, or 2) made in open court and entered of record.[59] Both Texas and federal courts have held oral settlement agreements unenforceable for failure to satisfy this rule.[60] In other states, the language is modern but the stipulation rule is typically to the same effect: if the agreement relating to a court action is not made in open court or entered as an order, it is not binding on a party unless it is in writing.[61] Courts in some states regard these provisions as the equivalent of a statute of frauds for settlements and hence routinely refuse to enforce oral settlement agreements.[62]

Courts reading similar procedural rules in other states, however, have deemed them inapplicable to alleged oral settlement agreements. In Kansas, for example, court procedural rules require a written stipulation before a case can be dismissed and, additionally, that all stipulations

---

[59] TEX. R. CIV. P. 11.

[60] *See, e.g.*, Kennedy v. Hyde, 682 S.W.2d 525 (Tex. 1984) (holding settlement unenforceable when one party refused to sign documents); Lefevre v. Keaty, 191 F.3d 596 (5th Cir. 1999) (holding agreement reached during settlement conference did not satisfy state requirement because it was not dictated into record with parties' assent, or announced by court as its judgment, or filed as written order with clerk); Andregg v. High Standard, Inc., 825 F.2d 77 (5th Cir. 1987) (holding oral settlement unenforceable when did not satisfy Texas Rule of Civil Procedure 11 requirements).

[61] *See, e.g.*, ALASKA R. CIV. P. 81(e); ARIZ. R. CIV. P. 80(d); MICH. CT. R. 2.507(H); NEV. R. DIST. CT. 16; N.Y. C.P.L.R.. § 2104; S.C. R. CIV. P. 43(k); WASH. SUPER. CIV. R. 2A.

In a variation on this theme, similar provisions in other states apply specifically to settlements. The Louisiana Civil Code, for example, requires all settlement agreements to be written or recited on the record in open court. LA. CIV. CODE ANN. art. 3071 (West 1994) (governing compromises "for preventing or putting an end to a lawsuit"). In New Mexico, any settlement terminating a marriage must be in writing, executed, and acknowledged. N.M. STAT. ANN. § 40-2-4 (Michie 1999).

[62] *See, e.g.*, Sears, Roebuck & Co. v. Sears Realty Co., 932 F. Supp. 392, 402-03 (N.D.N.Y. 1996) (denying motion to enforce alleged oral settlement agreement and listing New York cases); Canyon Contracting Co. v. Tohono O'Odham Hous. Auth., 837 P.2d 750 (Ariz. Ct. App. 1992) (holding writing requirement applies to settlement agreements); Sullivan v. Sullivan, 671 So. 2d 315 (La. 1996) (refusing to enforce settlement agreement when party withdrew consent before signing document); Humana, Inc. v. Nguyen, 728 P.2d 816, 817 (Nev. 1986) (refusing to consider alleged oral partial settlement); Ashfort Corp. v. Palmetto Constr. Group, 485 S.E.2d 533 (S.C. 1995) (holding that court rule requiring written stipulations applies to settlements).

must be in writing.[63] Kansas courts have held that these writing requirements do not extend to settlement agreements, citing the specific language of the Kansas rules.[64] Utah courts have also held that their rule requiring written stipulations does not establish a prerequisite for enforcing settlement agreements.[65] In fact, Utah amended its rule to clarify that it was not intended to limit courts' power to enforce oral settlement agreements.[66]

There are also other potential sources of writing requirements for mediated settlement agreements. Parties need to consult local court rules governing mediation and the court's order referring the case to mediation. They may also choose to sign a confidentiality agreement prior to the mediation. Such an agreement might include a writing requirement for a settlement agreement or might specify how a dispute over the existence of an agreement will affect the confidentiality of the process.

B. Courts' Treatment of Disputes About the Existence or Content of Mediated Settlements

The effectiveness of evidentiary rules or writing requirements depends ultimately on their application by the courts. Given the range of legislative policies, courts have not surprisingly also struck differing balances between the goals of maintaining mediation confidentiality and probing mediations to demonstrate settlement agreements. Many courts have observed the evidentiary prohibitions dictated by confidentiality statutes, even in the face of allegations that oral agreements were reached in mediation. For instance, in the interest of safeguarding confidentiality courts in California, Florida, Missouri and Texas have all interpreted their mediation privilege or exclusion statutes to preclude inquiries into alleged oral agreements.[67]

---

[63] KAN. CIV. PRO. CODE ANN. § 60-241 (dismissal of actions); KAN. CT. R. 163 (ineffective stipulations).

[64] *See, e.g.*, Lewis v. Gilbert, 785 P.2d 1367 (Kan. Ct. App. 1990).

[65] *See* John Deere Co. v. A & H Equip., Inc., 876 P.2d 880, 887 (Utah Ct. App. 1994) (holding oral settlement agreement enforceable).

[66] *See id.*; UTAH CODE OF JUDICIAL ADMIN. R. 4-504(9).

[67] *See, e.g.*, Ryan v. Garcia, 33 Cal. Rptr. 2d 158 (Cal. Ct. App. 1994) (interpreting state evidence code making mediation statements inadmissible to preclude evidence of oral agreements); Gordon v. Royal Caribbean Cruises, Ltd., 641 So. 2d 515, 517 (Fla. Dist. Ct. App. 1994); Royal Caribbean Corp. v. Modesto, 614 So. 2d 517, 519 (Fla. Dist. Ct. App. 1992); Cohen v. Cohen, 609 So. 2d 785 (Fla. Dist. Ct. App. 1992) (finding that exception for written agreements in state privilege statute precluded evidence of oral mediated agreement); Kenney v. Emge, 972 S.W.2d 616 (Mo. Ct. App. 1998) (holding trial court erred

Many courts have also enforced stand-alone mediation writing requirements found in both court rules[68] and state mediation statutes.[69] And courts that apply state procedural rules requiring written stipulations to litigation settlements have, in general, similarly enforced them for mediated settlement agreements.[70] Often mediation confidentiality appears to be an unintended beneficiary of these writing rules, although there are instances where a court may recognize the link to confidentiality. For example, when the Minnesota Supreme Court strictly interpreted the state's writing requirements for mediated agreements, it opined that by requiring the settlement document to state that it was intended to be a binding agreement,[71] the legislature could have intended "to encourage parties to participate fully in a mediation

---

in requiring mediator to testify about interim agreement under statute that establishes general evidentiary exclusion for mediation communications and exempts mediators from testifying but is silent on enforcement of mediation agreements); Zidell v. Zidell, No. 05-96-00052-CV, 1997 WL 424429 (Tex. App. July 30, 1997) (applying statutory privilege for mediation communications to allegation of oral settlement agreement).

[68] *See, e.g.*, Barnett v. Sea Land Serv., Inc. 875 F.2d 741, 743-44 (9th Cir. 1989) (holding alleged oral agreement inadmissible under local rule requiring that mediated settlements "shall be reduced to writing"); Spencer v. Spencer, 752 N.E.2d 661, 663-64 (Ind. Ct. App. July 30, 2001) (rejecting enforcement of alleged oral property settlement required to be written by court rule).

[69] *See, e.g.*, Schwartz v. Adamson, No. C8-98-1416, 1999 WL 170676, at *2 (Minn. App. Mar. 30, 1999) (stating "execution of the document is a key component to binding the parties"). Florida courts have also enforced the state's rule of civil procedure requiring the parties' signatures on mediated settlement agreements, *see, e.g.*, Hanna v. Schmidt, 707 So. 2d 966 (Fla. Dist. Ct. App. 1998) (reversing order to enforce oral mediated agreement because it was never written or signed); City of Delray Beach v. Keiser, 699 So. 2d 855, 856 (Fla. Dist. Ct. App. 1997) (holding mediated settlement agreement without parties' signatures unenforceable); Gordon v. Royal Caribbean Cruises, Ltd., 641 So. 2d 515, 516 (Fla. Dist. Ct. App. 1994) (refusing to enforce mediated settlement signed by attorneys in presence of party, but not signed by party), although they have been less concerned with the additional requirement for counsels' signatures, *see* Jordan v. Adventist Health System/Sunbelt, Inc., 656 So. 2d 200 (Fla. Dist. Ct. App. 1995) (enforcing preliminary mediated agreement signed by parties and ratified by their actions, although not signed by counsel).

[70] *See, e.g.*, Bartley v. Fed. Express Corp., 683 N.Y.S.2d 737 (N.Y. Sup. Ct. 1998) (refusing to enforce mediated settlement agreement; stipulation made orally before mediator is not "in open court"); Galloway v. Regis Corp., 481 S.E.2d 714 (S.C. Ct. App. 1997) (reversing enforcement of oral mediated settlement). *But see* Plamondon v. Plamondon, 583 N.W.2d 245, 246 (Mich. Ct. App. 1998) (holding court rule that requires agreements to be in writing or on record in open court did not apply to enforcement of settlement agreement mediated in community dispute resolution program on referral from court).

[71] *See* Haghighi v. Russian-American Broad. Co., 577 N.W.2d 927 (Minn. 1998). Minnesota has since amended its statute. *See supra* note 55.

session without the concern that anything written down could later be used against them."[72] More usually, however, courts do not cite confidentiality as a reason for strictly following these mediation and stipulation writing requirements,[73] and the rules do not typically express this rationale on their face.

Mediation confidentiality evidentiary provisions and general writing requirements do not always, however, fare this well in the courts when they are inconsistent with traditional contract law.[74] For example, a North Carolina court undercut both evidentiary and writing requirements for mediated agreements by deciding that these rules did not overturn the state contract rule permitting enforcement of settlements reached by oral agreement.[75] All parties to civil actions in North Carolina are statutorily required to attend a pretrial mediated settlement conference. In *Few v. Hammock Enterprises, Inc.*, the parties to this mediation had dual protection from disclosure of their statements by a statutory evidentiary exclusion and a prohibition on mediator testimony, both enacted without exceptions and hence providing for "complete confidentiality."[76] Additionally, North Carolina court rules required settlements reached as a result of this mediation conference to

---

[72] *Id.* at 930. I would argue, however, that the extensive Minnesota requirements are unnecessary to this goal, for parties will be encouraged to participate in mediation when a writing and signature requirement removes the concern that anything they say could later be used against them in an attempt to prove an agreement.

[73] *But see* Wilmington Hospitality, L.L.C. v. New Castle County, Civ. A No. 18436, 2001 WL 291948, at *5 (Del. Ch. Mar. 12, 2001) (recognizing that settlement writing requirement protects mediation confidentiality).

[74] The fault may lie with the parties. In Virginia, communications that relate to controversies discussed in state court-sponsored mediations are privileged, with no exception for settlement enforcement. VA. CODE ANN. § 8.01-576.10 (Michie 2000) (court-annexed ADR). The Virginia Supreme Court, however, affirmed a trial court's holding that the parties had reached an agreement based on testimony about the mediation. It found that plaintiff's objections to evidence of mediation communications were procedurally barred because she had not raised the mediation privilege as a basis for her objections in the trial court. Snyder-Falkinham v. Stockburger, 457 S.E.2d 36, 39 (Va. 1995); *see also* James M. Assey, Jr., Comment, *Mum's the Word on Mediation: Confidentiality and* Snyder-Falkinham v. Stockburger, 9 GEO. J. LEGAL ETHICS 991 (1996).

[75] *See* Few v. Hammack Enter., Inc., 511 S.E.2d 665, 671 (N.C. Ct. App. 1999); *see also* Laing v. Lewis, 515 S.E.2d 40, 43 (N.C. Ct. App. 1999) (enforcing oral mediated agreement when statute of frauds not pleaded and no dispute on terms of the agreement).

[76] N.C. GEN. STAT. § 7A-38.1(*l*) (1995) (court mediation program) (quoted in Few v. Hammack Enter., Inc., 511 S.E.2d 665, 669-70 (N.C. Ct. App. 1999)). The only limitation on the exclusion of evidence concerning the mediation was the common caveat that evidence otherwise discoverable does not become inadmissible merely because it is presented or discussed in mediation. § 7A-38.1(*l*).

be reduced to an executed writing.[77] Yet the state court of appeals decided that none of these provisions applied when oral evidence of mediation statements was presented for the purpose of determining whether or not a settlement had been reached during the mediation conference.[78]

In contrast to this use of common-law contract law to invade mediation confidentiality, courts in some states have used the common-law process to develop statutory glosses that protect it. Indiana courts have actually exhibited both tendencies in interpreting the relevant state rules. They first undermined and then later shored up the state's confidentiality protections for mediation. Although an Indiana state ADR rule requires a writing and signature for all agreements reached in ADR,[79] intermediate courts discounted this protection by holding that the requirement did not prevent enforcement of an oral mediated agreement.[80] The Indiana Supreme Court, however, subsequently fashioned a common-law exception that provides even stronger protection for mediation confidentiality in the face of an alleged oral settlement agreement.[81]

Indiana, like many states, has an evidentiary rule that parallels Federal Rule of Evidence 408, which partially protects the confidentiality of settlement discussions.[82] Both the federal and Indiana rules prohibit admission of settlement discussions to prove liability or the amount of a claim, but permit such testimony for "other purposes."[83] Through a unique interpretation of its rule, the Indiana Court in essence created a writing requirement for mediated agreements. The court declared that

---

[77] N.C. SUPER. CT. MEDIATED SETTLEMENT CONF. R. 4(C).

[78] *Few*, 511 S.E.2d at 670 (affirming finding that parties reached settlement, based on testimony describing mediation). This holding sparked an immediate reaction in North Carolina's legislature, which amended the evidentiary exclusion of mediation communications. The statute now explicitly permits disclosures in proceedings to enforce a settlement, but those disclosures are limited by an accompanying directive that mediated settlement agreements are unenforceable unless written and signed by the parties. N.C. GEN. STAT. § 7A-38.1(*l*) (1999) (court mediation program). This amendment effectively precludes testimony on oral agreements and leaves little room for alternative judicial interpretations.

[79] IND. CT. ADR R. 2.7(E)(2).

[80] *See* Silkey v. Investors Diversified Serv., Inc., 690 N.E.2d 329, 332-33 (Ind. Ct. App. 1997); *see also* Natare Corp. v. Aquatic Renovation Sys., Inc., 987 F. Supp. 695 (S.D. Ind. 1997) (enforcing settlement assented to by letter of acceptance when party refused to sign final documents).

[81] Vernon v. Acton, 732 N.E.2d. 805, 808-08 (Ind. 2000) (reversing enforcement of alleged oral settlement agreement).

[82] IND. R. EVID. 408.

[83] *See supra* note 49.

settlement agreements will be regarded as part of mediation compromise negotiations and hence subject to the evidentiary exclusion until reduced to a signed writing.[84] Enforcing an oral mediated agreement now falls outside the Rule 408 exception that permits admission of evidence offered for a purpose other than proving liability or the amount of the claim.

There are also other common-law rules that limit the enforceability of oral settlements to a lesser extent. In Georgia, for example, the general rule is that courts enforce unambiguous oral settlement agreements when the parties do not deny that they reached an agreement.[85] But if disputed, an oral settlement agreement is enforceable only if it is established by a writing.[86] Georgia courts are lenient, however, about what can qualify as a writing. A letter prepared by an attorney that memorialized a purported agreement was held sufficient even though it was not reviewed or signed by either party.[87] Under Georgia law, any writing is adequate so long as it provides certainty as to the terms of the agreement.[88]

Some courts are particularly vigilant in protecting the confidentiality of their court-sponsored mediation programs. The Southern District of West Virginia categorically denied a motion to enforce a "reputed" settlement and issued a vigorous statement refusing to involve itself in any way "in sorting out disagreements among parties emanating from the mediation process."[89] The court felt that this bright-line approach was appropriate under its local rule governing mediation, which not only establishes a privilege and guards against revelations to the assigned judge, but also requires that any agreement to settle must be written and signed.[90] As another example, a Utah appellate court also took a protective stance toward confidentiality in its mediation program. In a case referred to Utah's appellate pre-hearing mediation program, the court recently refused to entertain an attempt to enforce an oral

---

[84] *Vernon*, 732 N.E.2d. at 809-10.

[85] *E.g.*, Herndon v. Herndon, 183 S.E.2d 386 (Ga. 1971).

[86] *E.g.*, Scott v. Carter, 521 S.E.2d 835, 837 (Ga. Ct. App. 1999) (holding writing is necessary to establish mediated settlement when party disputed agreement); LeCroy v. Massey, 366 S.E.2d 215, 216 (Ga. Ct. App. 1988) (holding absence of writing prevents enforcement of settlement agreement when its existence is contested). This approach is similar to that of the Uniform Commercial Code statute of frauds. UCC § 2-201 (2001).

[87] *See, e.g., Scott*, 521 S.E.2d at 837-38.

[88] *See, e.g.*, Tranakos v. Miller, 470 S.E.2d 440, 444 (Ga. Ct. App. 1996) (holding transcripts of recorded telephone conversations satisfy writing requirement for settlement).

[89] Willis v. McGraw, 177 F.R.D. 632, 633 (S.D.W.V. 1998).

[90] *See id.*; S.D.W.V. CT. R. 16.6(f).

agreement purportedly reached in the mediation.[91] The court remanded the matter to the trial court to consider enforcement of the settlement, admonished the attorney for including details of the mediation in his affidavit, ordered the parties to refrain from any discussion of the mediation on remand, sealed the offending moving papers and, finally, recused the judges who had reviewed them from any further proceedings in the case.[92]

It is apparent that as matters currently stand parties face great variation among the jurisdictions in the extent to which they protect mediation confidentiality when one party alleges an oral settlement. They may also face somewhat uncertain application of these protections by the courts. Settlement enforcement when a party claims a contract defense raises even more difficult confidentiality issues, which are explored in the following section.

II. CONFIDENTIALITY AND CONTRACT DEFENSES TO MEDIATED SETTLEMENT AGREEMENTS

Confidentiality is threatened in a second context when one of the parties to a mediated agreement challenges its validity by raising a contract defense such as duress, fraud or lack of authority to enter the agreement. In my view, these are claims that may sometimes justify breaching mediation confidentiality. A dramatic incident is recounted in a Texas case in which the defendant claimed he had requested to leave the mediation session because he was experiencing acute chest pains and had a history of heart problems, but by his account the mediator refused to excuse him until he agreed to a settlement.[93] He later pleaded the defense of duress in answer to an action to enforce the mediated settlement agreement. These circumstances demonstrate vividly the need for some mechanism to evaluate the validity of mediated agreements when necessary. Yet should such claims automatically trigger an exception to confidentiality?

---

[91] *See* Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999). Although Utah rejected a general writing requirement for settlement agreements, *see supra* text accompanying notes 65-66, its court-annexed ADR rules now mandate a signed, written agreement for mediated settlements, *see* UTAH CT. R. 101 (governing conduct of mediation proceedings in court-annexed mediation program); *Lyons*, 982 P.2d at 1143 (describing writing requirement in appellate mediation program).

[92] *Lyons*, 982 P.2d at 1143-44.

[93] Randle v. Mid Gulf, Inc., No. 14-95-01292, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996).

The problems that claims of duress or fraud can create for confidentiality have a somewhat different source than the difficulties that are raised when the parties dispute the existence or content of an agreement. Most of the cases involve a written and signed agreement, although this document may be a preliminary version that the parties anticipate will be reduced to a more detailed final form. In this setting, testimony is more likely to revolve around the participants' actions and their statements that allegedly tainted the process, rather than focusing on the exchanges that demonstrate an agreement. Nonetheless, a claim that an agreement is void or invalid because of coercion or fraud usually cannot be evaluated without examining the course of the mediation in detail in order to assess the legitimacy of the process.[94]

A. Legal Rules that Affect Confidentiality and Contract Defenses

As with the issue of providing evidentiary support for the existence of a mediated settlement, jurisdictions differ extensively as to how they balance the competing interests when a party threatens mediation confidentiality by raising contract defenses. When they address the issue at all, legislatures rely primarily on evidentiary rules with various treatments for confidentiality, which are classified below. In addition, provisions to encourage the enforcement of mediated agreements may also be relevant to how contract defenses are treated in relation to confidentiality.

1. Evidentiary Rules

Mediation evidentiary rules for issues involving contract defenses can be grouped into the same categories that apply to questions about the existence of an agreement, plus an additional approach designed specifically for instances of fraud or duress. Functionally, however, some of these groups merge in the context of contract defenses. While several types of statutes are facially distinct, they yield only three different approaches in practice.

---

[94] Perhaps some claims of lack of authority can be resolved with evidence from outside the mediation, although courts have often found it necessary to probe mediation communications in cases that revolve around the issue of authority to enter the settlement agreement. *See, e.g.*, Carr v. Runyon, 89 F.3d 327, 331 (7th Cir. 1996) (describing evidence of mediation communications presented at hearing after mediated agreement challenged for lack of authority).

a. "Complete Confidentiality"

As with the first group of statutes discussed above in the context of recognizing an agreement,[95] there are jurisdictions that protect mediation confidentiality without any exception for considering defenses to enforcement of agreements.[96] These states have either taken a stand that favors confidentiality completely or have overlooked contract defenses as a potential justification for creating an exception to confidentiality. The effect is the same. Under the terms of these statutes, a party may not rely on testimony regarding the mediation to show that the agreement should be set aside.

The statutes in the second group, with narrowly defined exceptions for written settlement agreements,[97] also fail completely to address the problem of confidentiality and contract defenses unless they contain special provisions allowing evidence to prove or refute those defenses. Without more than a writing requirement, these statutes can also be categorized as providing for "completely confidential" mediations when it comes to proving or refuting a contract defense.[98] When a party raises a contract defense, the form of the agreement is at most a secondary issue. Although a writing requirement may be an important prerequisite to considering contract defenses,[99] it does not by itself address the confidentiality issues in this context. Even with a written agreement in evidence, a court faced with a claim of fraud or duress needs to look behind the mediated settlement to determine enforceability. These statutes thus have the same effect as those that recognize no exceptions at all. Assuming that confidentiality protections apply to the case and the parties have not waived them, neither form of statute permits the participants to provide evidence of an allegedly defective mediation process.

---

[95] *See supra* text accompanying notes 29-30.

[96] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (West 1994); KAN. STAT. ANN. § 60-452a (Supp. 1999); ME. R. EVID. § 408; MASS. GEN. LAWS ANN. ch. 233, § 23C (West, LEXIS through 2000 Sess.); MONT. CODE. ANN. § 435.014 (1992); NEV. REV. STAT. § 48.109 (Michie 1996); N.J. STAT. ANN. § 2A:23A-9 (West 2000); OKLA. STAT. ANN. tit. 12, § 1805 (West 1993); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (Michie Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053(c), 154.073 (Vernon Supp. 2001); UTAH CODE ANN. § 78-31b-8 (LEXIS through 2000 Sess.) (court-annexed ADR).

[97] *See supra* text accompanying notes 33-37.

[98] *See, e.g.*, CAL. EVID. CODE § 1123; FLA. STAT. ANN. § 44.102(3) (West Supp. 2000); MONT. CODE ANN. § 26-1-813 (1999); N.C. GEN. STAT. § 7A-38.1 (*l*) (1999); OHIO REV. CODE ANN. § 2317.023(B) (Anderson 1998); WASH. REV. CODE ANN. § 5.60.070(1)(e) (West 1995); WIS. STAT. ANN. § 904.085(4)(a) (West 2000).

[99] *See infra* section III.B.3.b.

A somewhat more flexible statutory structure permits testimony by parties to a mediation, but retains the categorical prohibition for mediators.[100] The Uniform Mediation Act takes a similar approach. While it provides that a court may find that party testimony regarding a defense to a mediated agreement is justified, a mediator may not be compelled to provide evidence on this issue.[101] This distinction presumably recognizes the importance of confidentiality to the integrity of the mediator's neutrality as a distinct and independent reason for preventing disclosures by mediators.[102]

When faced with claims of duress or fraud in mediation, however, courts have not always adhered to legislative prohibitions.[103] First, sometimes they have interpreted statutes that are iron-clad on their face as permitting them to examine the need for disclosures on a case-by-case basis, as in the following group of statutes. This may mean creating an exception to a comprehensive evidentiary exclusion or treating an absolute privilege as a qualified one. Second, other courts have bypassed any analysis of confidentiality and simply thrown open the door to disclosures of mediation communications, as if a claim of duress automatically justifies disclosures. This judicial choice approximates state policies that create broad exceptions to confidentiality for certain contract defenses, as legislatures have done in my final category of statutes.

b. Case-by-case Approach

Louisiana, Ohio, and Wisconsin have statutes in the third group described above,[104] which permit courts to make an individualized decision to breach mediation confidentiality in order to avoid "manifest injustice."[105] Louisiana's provision applies explicitly to both settlement enforcement and interpretation. Ohio's and Wisconsin's provisions apply to mediation issues in general and their courts could presumably admit evidence in enforcement cases that meet the manifest injustice standard.

---

[100] MINN. STAT. ANN. § 595.02(1)(*l*) (West 2000).

[101] UNIF. MEDIATION ACT § 6(b)(2), (c) (2001).

[102] *See supra* text accompanying note 7.

[103] *See infra* text accompanying notes 139-162.

[104] *See supra* text accompanying notes 38-40.

[105] *See, e.g.*, LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (West Supp. 2000); OHIO REV. CODE ANN. § 2317.023(C)(4) (Anderson 1998); WIS. STAT. ANN. § 904.085(4)(e) (West 2000).

The Uniform Mediation Act also falls into this case-by-case category for disclosures by the parties to mediation. Like Louisiana's mediation statute, it applies this approach specifically to particular situations rather than granting Ohio's and Wisconsin's more open-ended discretion to the courts. Under the Act a court may make an exception to the mediation privilege to consider claims that fraud, duress, or incapacity invalidate the mediated settlement. The exception is possible for mediation communications sought in discovery or offered as evidence in "a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation."[106] But the application of this exception to confidentiality is limited strictly. The agreement must be evidenced by a record and the standard for disclosure is high. A court must find, after an *in camera* hearing, both that the evidence is not otherwise available and that the need for this evidence "substantially outweighs the interest in protecting confidentiality."[107]

c. Broad Exception for Contract Defenses

Finally, there are two groups of statutes that set aside confidentiality in order to evaluate defenses of fraud or duress. There are those that bypass confidentiality for any attempt to enforce a settlement, described as the fourth category in the context of proving the existence of an agreement.[108] These statutes are found in jurisdictions that have chosen to emphasize accurate enforcement decisions, even at what may be great cost to mediation confidentiality. They make no distinction between evaluating the existence of an agreement as a prerequisite to enforcement and evaluating contract defenses to enforcement.

There is also a fifth category of statutory provisions that make exceptions to their confidentiality protections for certain contract defenses, even though they do not permit parties to endanger confidentiality merely to demonstrate an agreement or its content. North Carolina permits evidence of mediation communications in enforcement actions, although only for written and executed agreements.[109] Pennsylvania excludes fraudulent statements from its privilege in actions to set aside an agreement on the ground of fraud.[110] Minnesota permits parties, but not mediators, to testify in a proceeding

---

[106] UNIF. MEDIATION ACT § 6(b)(2) (2001).

[107] UNIF. MEDIATION ACT § 6(b).

[108] *See supra* text accompanying notes 41-47.

[109] N.C. GEN. STAT. § 7A-38.1(*l*) (1999) (court mediation program); *see supra* note 78.

[110] 42 PA. CONS. STAT. ANN. § 5949(B)(3) (West 2000).

to have a mediated settlement agreement set aside or reformed.[111] Virginia's statute for court mediations singles out agreements that are procured by fraud or duress, or are unconscionable, and provides that the court shall vacate such agreements.[112] North Dakota, somewhat more vaguely, does not apply its limits on admissibility of mediation evidence when the "validity" of a mediated agreement is at issue.[113]

2. Enforcement of Mediated Agreements

Another clause found in some state mediation provisions also bears on the balance between enforcement and confidentiality. Statutes and rules occasionally declare that when the parties execute a written mediated agreement, it "is enforceable in the same manner as any other written contract."[114] This provision is often accompanied by a statement stressing that just because an agreement includes relief that could not be granted by a court, this does not create grounds to set aside the settlement.[115] The juxtaposition of the two statements implies that setting mediated agreements on the same footing with ordinary contracts was meant to affirm their validity. But, because strictly equating enforcement of mediated settlements with that of other contracts overlooks the special confidential nature of mediation, these enforceability provisions may have an unintended effect. The clause arguably implies that courts may admit all relevant evidence, as they would in any other contract enforcement proceeding.[116] It may therefore open the door to testimony

---

[111] MINN. STAT. ANN. § 595.02(1)(*l*) (West 2000).

[112] VA. CODE ANN. § 8.01-576.12 (Michie, LEXIS through 2000 Sess.) (court-annexed ADR). Although this directive does not include any evidentiary instructions, presumably the relevant mediation communications can be disclosed if necessary to prove fraud, duress, or unconscionability.

[113] N.D. CENT. CODE § 31-04-11 (1997).

[114] MICH. COMP. LAWS ANN. § 691.1556a (West 2000) (community dispute resolution); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (Vernon Supp. 2001); VA. CODE ANN. § 8.01-576.11 (Michie, LEXIS through 2000 Sess.) (court-annexed ADR); W.V. TR. CT. R. 25.14.

[115] *See, e.g.*, MINN. STAT. ANN. § 572.36 (West 2000) ("That the relief could not or would not be granted by a court of law or equity is not ground for setting aside or reforming the mediated settlement agreement unless it violates public policy.").

[116] In Texas, most of the appellate courts have interpreted this enforcement clause to mean that parties must use the same procedures they would follow when suing for breach of contract. Thus a motion to enforce a mediated settlement does not suffice. The parties must provide the court with the full panoply of pleadings for a separate cause of action in contract. *See, e.g.*, Davis v. Wickham, 917 S.W.2d 414, 416 (Tex. App. 1996) (holding that party seeking enforcement of a settlement agreement must bring suit based upon contract law); Cadle Co. v. Castle, 913 S.W.2d 627, 634 (Tex. App. 1995)(same). As a result, any parties left holding a repudiated agreement face delay and additional procedural

relating to the meaning of the agreement,[117] or to defenses to enforcing the agreement, without regard to the need for confidentiality in mediation.[118]

The draft Uniform Mediation Act contained a section providing for summary enforcement of mediated settlement agreements, but it was omitted from the Act as approved by NCCUSL.[119] It would have allowed parties to move jointly for a court judgment in accordance with the settlement, if the settlement was in writing, signed by the parties and their attorneys, and contained a statement that all the parties desired to seek summary enforcement. According to the Reporter's Notes, "[t]his provision expedites [enforcement] by dispensing with the need to prove the validity of the agreement."[120] It appears that this enforcement provision could have prevented a party from raising a contract defense if the party became aware of that defense after joining in an enforcement motion. The provision did provide some protection for less sophisticated parties by limiting its application to mediations and enforcement requests where parties have attorney representation. If it had been included in the final Act, it would have operated along with the absence of an exception to the mediator's privilege to disfavor a party who wanted to raise a contract defense.

B. Courts' Treatment of Contract Defenses to Mediated Settlements

Given the wide range of statutory responses to the question of confidentiality and contract defenses, it is not surprising that there is also a good deal of variation in the way the courts have reacted to the dilemma of maintaining mediation confidentiality while determining the validity and enforceability of a settlement. At one end of the confidentiality spectrum, there are courts that consider only contract

---

requirements if they decide to pursue enforcement. It can be argued that these barriers to enforcement detract from the ADR goal of efficient settlement. *See* George B. Murr, *In the Matter of Marriage of Ames and the Enforceability of Alternative Dispute Resolution Agreements: A Case for Reform*, 28 TEX. TECH. L. REV. 31 (1997).

[117] *See* Sherman, *supra* note 32, at 554.

[118] Confidentiality would be especially endangered if the door were opened to testimony under a principle of equivalent enforcement in the context of oral settlement agreements. *Cf.* Sheng v. Starkey Labs., Inc., 117 F.3d 1081, 1083 (8th Cir. 1997) (holding evidentiary hearing to decide whether parties' oral mediated agreement covered all material terms).

[119] UNIF. MEDIATION ACT § 11 (Proposed Official Draft 2001). This provision was drafted in response to a request by NCCUSL, but the Drafting Committees recommended against its adoption.

[120] UNIF. MEDIATION ACT § 11 reporter's working notes (Proposed Official Draft 2001).

doctrine and do not seem to have even noticed the issue of confidentiality.[121] At the other end of the spectrum, some courts have created careful procedures to ensure that confidentiality is violated only to the extent necessary.[122] The role that statutes play and courts' attitudes towards them also run a gamut when courts decide in favor of disclosure in the context of settlement enforcement. At one extreme, mediation communications are disclosed routinely because the statutory protection for confidentiality is inadequate.[123] At the other extreme, confidentiality protections are facially so strong that courts have created their own exceptions in order to evaluate claims of fraud or duress.[124]

1. What Confidentiality?

An amazing number of opinions concerning settlement agreements to which a party has raised a contract defense come from courts that seemingly do not recognize the problem of maintaining mediation confidentiality. These courts describe evidentiary hearings that probed mediation sessions and party submissions that revealed mediation details without even mentioning the effect on mediation confidentiality. The cases include challenges to the authority of the person who entered into the agreement[125] as well as allegations of coercion or misrepresentation.[126] In some of these cases, the mediation may not have

---

[121] *See infra* Part II.B.1.

[122] *See, e.g.*, Olam v. Cong. Mortgage Corp., 68 F. Supp. 2d 1110, 1119-24 (N.D. Cal. 1999).

[123] *See infra* Part III.B.2.

[124] *See infra* Part III.B.3.

[125] *See, e.g.*, Smith v. Columbia Gas Transmission Corp., 176 F.3d 475 (4th Cir. 1999) (describing testimony given at hearing on motion to enforce agreement when party claimed attorney accepted terms without authority); Carr v. Runyon, 89 F.3d 327, 331 (7th Cir. 1996) (describing evidentiary hearing with evidence of mediation communications after agreement challenged for lack of authority); Koval v. Simon-Telelect, Inc., 979 F. Supp. 1222, 1225 (N.D. Ind. 1997) (adopting parties' stipulated facts including account of mediation); Morrow v. Vineville United Methodist Church, 489 S.E.2d 310, 317-18 (Ga. Ct. App. 1997) (describing testimony by attorney detailing mediation to show circumstances of authority to settle); Scott v. Randle, 697 N.E.2d 60, 63 (Ind. Ct. App. 1998) (describing trial testimony on settlement authority that included events during mediation); Hur v. City of Mesquite, 893 S.W.2d 227, 233-34 (Tex. App. 1995) (detailing mediation communications regarding claim of breach of implied warranty of authority of agent to settle).

[126] *See, e.g.*, McEnany v. W. Del. Co. Cmty. Sch. Dist., 844 F. Supp. 523, 531-33 (N.D. Iowa 1994) (relying on testimony of mediation communications to uphold oral mediated settlement against party's claim of coercion by attorney); *In re* Evanhoff, No. CO-95-794, 1995 WL 747939, at *5 (Minn. Ct. App. Dec. 19, 1995) (considering settlement discussions on defense of duress and contract interpretation); Vela v. Hope Lumber & Supply Co., 966 P.2d 1196, 1197-98 & n.2 (Okla. Ct. App. 1998) (enforcing mediated agreement after hearing

been protected by a confidentiality provision. If so, the disclosures were perhaps permissible. Or perhaps the parties waived confidentiality protections,[127] or failed to bring the issue to the court's attention with an objection on grounds of mediation confidentiality.[128] But one would have more confidence in these silent decisions if the courts had included a confidentiality analysis, if not from the point of view of the parties' expectations, at least as to the effect of the disclosures on the integrity of the mediation process. As the opinions stand, these courts have overlooked the significance of mediation as a catalyst for the settlement process.

2. Disclosures Permitted

When courts do analyze confidentiality in the context of challenged or repudiated settlements, they often conclude that no confidentiality protections apply. Only a few courts have recognized a federal common law privilege for mediation communications.[129] Therefore when federal law applies, litigants must consider the possibility that a court may reject arguments for a federal mediation privilege and hear testimony on mediation communications.[130] A court may even find that its local rule

---

held on claims of economic duress, coercion, unconscionability, and undue influence); Golden v. Hood, No. E1999-02443-COA-MR3-CV, 2000 WL 122195, at *1-2 (Tenn. Ct. App. Jan. 26, 2000) (describing affidavit in which party recounted mediation communications to support claim of duress); Lerer v. Lerer, No. 05-99-00474-CV, 2000 WL 567020, at *2 (Tex. App. May 3, 2000) (noting affidavits describing mediation communications in support of defense of insufficient mental capacity); Brinkerhoff v. Campbell, 994 P.2d 911, 916 (Wash. Ct. App. 2000) (remanding for evidentiary hearing on what was said on day of mediation to resolve factual dispute regarding misrepresentation); Patterson v. Taylor, 969 P.2d 1106, 1110 (Wash. Ct. App. 1999) (quoting party's declaration that described mediator's alleged coercion to sign agreement).

[127] *See, e.g.*, Moore v. Lieberman, No. CV980087620, 2001 WL 490777, at *1 n.1 (Conn. Super. Ct. Apr. 23, 2001) (holding that party waived confidentiality protections by submitting mediation documents with opposition to motion to enforce); McKinlay v. McKinlay, 648 So. 2d 806, 810 (Fla. Dist. Ct. App. 1995) (holding that party seeking to enforce agreement waived confidentiality objections); Randle v. Mid Gulf, Inc., No.14-95-01292, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996) (same).

[128] *Cf.* Snyder-Falkinham v. Stockburger, 457 S.E.2d 36, 39 (Va. 1995) (objections to evidence of existence of mediated agreement procedurally barred); *see supra* note 74.

[129] *See* Sheldone v. Pa. Tpk. Comm'n, 104 F. Supp. 2d 511 (W.D. Pa. 2000); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 2000).

[130] *See, e.g.*, Fed. Deposit Ins. Corp. v. White, 76 F. Supp. 2d 736, 737 (N.D. Tex. 1999) (hearing mediation testimony when party to mediated settlement claimed coercion through threats of criminal prosecution); *see also In re* Grand Jury Subpoena dated Dec. 17, 1996, 148 F.3d 487, 493 (5th Cir. 1998) (permitting disclosure to federal grand jury investigating agricultural loan program); *In re* March, 1994 Special Grand Jury, 897 F. Supp. 1170, 1171,

governing mediation offers no protection, either because it determines that the rule does not apply at all[131] or because it concludes the rule's protection is not strong enough.[132]

A number of courts have distinguished the promise of "confidentiality" in their rules from a full-fledged evidentiary privilege.[133] For example, one court reasoned that a local rule promising "[a]ll communications made during ADR procedures are confidential and protected from disclosure" did not establish an evidentiary privilege and therefore it allowed the introduction of testimony detailing mediation communications to resolve allegations of coercion.[134] In addition, the courts that have considered the question have concluded that the federal Alternative Dispute Resolution Act's requirement that district courts establish a "confidentiality" requirement for their dispute resolution programs does not establish a federal privilege.[135]

Sometimes there are unquestionably confidentiality protections in place, but their limited coverage is inadequate to prevent disclosures. In Florida, for example, the mediation statute gives parties a privilege to prevent disclosures of mediation communications,[136] but there is no comparable privilege or testimonial incapacity for the mediator.[137] Thus, when one party waives the privilege by alleging duress or intimidation,

---

1173 (S.D. Ind. 1995) (finding no mediator's privilege in federal law and refusing to recognize state law privilege as matter of comity).

[131] *See, e.g.*, Olam v. Cong. Mortgage Corp., 68 F. Supp. 2d 1110, 1124-25 (N.D. Cal. 1999); *see also* Ford Motor Credit v. Shockley, Reid & Tyson, No. 93-1037-CV-W-6, 1996 WL 9689 (W.D. Mo. Jan. 4, 1996) (stating that state bar disciplinary proceeding would not be affected by local federal court mediation rule except as matter of comity). *But see* Barnett v. Land Sea Serv., Inc., 875 F.2d 741, 744 (9th Cir. 1989) (finding evidence inadmissible under Western District of Washington local rules).

[132] *See, e.g., Folb*, 16 F. Supp. 2d at 1175 & n.7 (stating that confidentiality provision in local rule has no effect on necessity for disclosure in third-party discovery), *aff'd* 216 F.3d 1082 (9th Cir. 2000); Datapoint Corp. v. Picturetel Corp., No. Civ.A.3:93-CV-2381D, 1998 WL 25536 (N.D. Tex. Jan 14, 1998).

[133] *Cf.* Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 72 (1999) (distinguishing between "confidentiality" as expressed by professional rules for client confidences and attorney-client privilege applicable in lawsuits).

[134] *White*, 76 F. Supp. 2d at 737 (quoting N.D. TEX. CIV. JUSTICE EXPENSE & DELAY REDUCTION PLAN § 3(f)); *see also Picturetel Corp.*, 1998 WL 25536.

[135] *See, e.g., White*, 76 F. Supp. 2d at 738; *Folb*, 16 F. Supp. 2d at 1176.

[136] FLA. STAT. ANN. § 44.102 (3) (West. Supp. 2001).

[137] The Florida rules of civil procedure do indicate that when the parties do not reach an agreement in mediation, the mediator "shall report the lack of an agreement to the court without comment or recommendation." FLA. R. CIV. P. 1.730. One could infer from this provision a principle that limits the ability of a mediator to disclose mediation communications, but not necessarily one that would extend to efforts by mediation participants or third parties to obtain testimony from a mediator.

the other party is permitted not only to testify, but also to subpoena the mediator's testimony.[138]

3. Judicially-created Confidentiality Exceptions

In other cases, in spite of a statute that seems ironclad in protecting mediation confidentiality, courts have opened the door to testimony on mediation communications when faced with allegations of fraud or duress. For example, the Texas ADR statute on its face is absolute with regard to confidentiality: "a communication [in an ADR proceeding] is not subject to disclosure and may not be used as evidence against the participant in any judicial or administrative proceeding."[139] There are some exceptions to this prohibition, but none for enforcing settlements or for challenging their validity. Yet in a case involving a claim that fraud had tainted a mediation held in a previous state court action, a federal magistrate judge treated this Texas privilege as qualified.[140] He weighed the public policy reasons for the privilege against the defendants' interest in the mediator's testimony and records.[141] Although he ultimately decided to quash the subpoena issued to the mediator and thus maintain the confidentiality of the mediation, his analysis may have threatened confidentiality more generally by creating new limits to the protection afforded by the statute.[142]

Following another Texas mediation, this one held in a federal case under the ADR rules of the Southern District of Texas, a plaintiff told the

---

[138] McKinlay v. McKinlay, 648 So. 2d 806 (Fla. Dist. Ct. App. 1995) (holding privilege waived by wife's testimony regarding duress); *see also* Taylor v. Taylor, 650 So. 2d 662 (Fla. Dist. Ct. App. 1995) (holding mediation privilege waived when party who seeks modification places intent at issue).

The limited scope of a confidentiality provision may also have been a factor in the Fourth Circuit's seeming approval of testimony detailing the content of a mediation conducted in the Northern District of West Virginia. *See* Smith v. Columbia Gas Transmission Corp., 176 F.3d 475 (4th Cir. 1999) (appeal from N.D.W.V.). The local rule providing for mediation in that district prohibits the mediator from testifying about the mediation proceeding, but the parties are subject only to Federal Rule of Evidence 408's limited restrictions on testimony. N.D.W.V. CT. R. CIV. PRO., art. 5(e); *see supra* note 49 and accompanying text on Federal Rule of Evidence 408. Although the court of appeals gave no indication of its reasoning, it may have assumed that allegations of coercion or the absence of settlement authority fell within the broad exceptions to FRE 408's narrow evidentiary exclusion.

[139] TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Vernon Supp. 2001) .

[140] Smith v. Smith, 154 F.R.D. 661, 664 (N.D. Tex. 1994).

[141] *Id.*

[142] *See* Sherman, *supra* note 32, at 556-57; *see also* Randle v. Mid Gulf, Inc., No. 14-95-01292, 1996 WL 447954 (Tex. App. Aug. 8, 1996).

court at a status hearing that she did not wish to be bound by the settlement agreement because "the mediator had 'forced' her and her husband into settling the case and also misled them."[143] The relevant local rule provides that "[a]ll communications made during ADR procedures are confidential and protected from disclosure,"[144] yet the judge "released" the parties from these confidentiality requirements so the plaintiff could "discuss her concerns with the Court and in order for the court to evaluate the validity of the settlement agreement."[145] The court also "relieved" the mediator from his duty of confidentiality so that he could defend his professional reputation.[146] While noting the "importance and gravity" of the confidentiality rules for mediation, the court felt "compelled" to breach these rules because the plaintiffs had attacked the mediator and the mediation process.[147]

In *Olam v. Congress Mortgage Company,* a third case in which a court fashioned an exception to confidentiality rules in order to cope with a defense of duress, the judge similarly decided in favor of disclosure, but his analysis differed greatly.[148] The court applied California confidentiality provisions, which permit the introduction of a mediated settlement agreement into evidence if it is written and signed and states that it is admissible or enforceable.[149] The California provisions also allow courts to admit testimony describing mediation communications if the participants have waived the statute's protection,[150] which both parties did in this case.[151] In addition, however, there is a statutory bar on mediator testimony that does not provide for any form of waiver: judges, arbitrators and mediators are all declared incompetent to testify about statements or conduct that occurred during a proceeding.[152] The statute establishes certain exceptions,[153] but unlike some other states,

---

[143] Allen v. Leal, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998).

[144] S.D. TEX. CT. R. 20I.

[145] *Leal,* 27 F. Supp. 2d at 947.

[146] *Id.*

[147] *Id.* at n.4.

[148] Olam v. Cong. Mortgage, Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

[149] CAL. EVID. CODE § 1123. The Code also makes oral settlement agreements admissible, but only if they are recorded by a sound recorder or court reporter and reduced to writing and signed within 72 hours. §§ 1118, 1124.

[150] CAL. EVID. CODE § 1122.

[151] *Olam,* 68 F. Supp. 2d at 1118-19 & n.13. It is not clear, however, that the parties' waivers are effective without a waiver from the mediator and other participants. *Compare* Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 468 n.3 (Cal. Ct. App. 1998) *with Olam,* 68 F. Supp. 2d at 1129 n.23.

[152] CAL. EVID. CODE § 703.5.

[153] A mediator is permitted to testify if the statement or conduct at issue could lead to a

California does not authorize courts to create exceptions by weighing the importance of the disclosure under the circumstances of the case.

The *Olam* court, however, did create its own exception, relying on *Rinaker v. Superior Court*, a California decision that previously held a mediator could be compelled to testify.[154] Because *Rinaker* found that mediation confidentiality could give way under certain circumstances, the *Olam* court concluded that the confidentiality provisions of the California statute are not absolute.[155] In the view of the *Olam* court, the competency provisions of the California statute create an independent privilege held by the mediator and therefore "require courts, on their own initiative, to determine whether it would be lawful to compel or permit a mediator to testify about matters occurring within a mediation."[156]

In *Olam*, the parties had signed a memorandum of understanding at the end of the mediation, but the plaintiff, Mrs. Olam, later failed to sign the final document and did not comply with the agreement.[157] Mrs. Olam then opposed the defendants' motion to enforce the settlement, claiming that she had been subject to undue influence when she gave her agreement.[158] With both parties indicating that they wanted the court to hear testimony from the mediator about the conduct of the mediation,[159] the judge undertook a careful two-step balancing analysis to determine whether or not the circumstances justified piercing the confidentiality of

---

finding of contempt, constitute a crime, be investigated by the California bar, or give rise to a disqualification proceeding. CAL. EVID. CODE § 703.5. None of these exceptions were relevant in the *Olam* case.

[154] *Rinaker*, 74 Cal. Rptr. 2d at 472-73. In *Rinaker*, a juvenile defendant in a delinquency proceeding who had participated in mediation with the prosecution's complaining witness wanted to call the mediator to impeach the witness's testimony. The defendant claimed that during the mediation the witness had made admissions that undermined the credibility of his testimony. *Id.* at 467. Citing the public interest in preventing perjury and the defendant's due process right to effective cross-examination and impeachment of an adverse witness, the *Rinaker* court set forth a procedure for the trial court to use in deciding whether or not to compel the mediator's testimony. *Id.* at 469-70, 472-73.

[155] *Olam*, 68 F. Supp. 2d at 1130 n.26. The *Olam* court's reliance on *Rinaker* is not without problems. First, *Rinaker* concerned fundamental rights at stake in a quasi-criminal proceeding. Second, the *Rinaker* court considered only the confidentiality protections in California Evidence Code § 1119, which the statute provides can be waived, *see* CAL. EVID. CODE § 1122, even if the requirements for waiver are not entirely clear. The *Olam* court recognized, however, that § 703.5, which provides that no mediator is a competent witness, is also relevant to mediator testimony.

[156] *Olam*, 68 F. Supp. 26. at 1131.

[157] *Id.* at 1117.

[158] *Id.* at 1118.

[159] *Id.* at 1129.

the mediation at the request of the parties. Ultimately, the court decided that the mediator's testimony was "essential" to doing justice and thus, in this case, justified the harms to the interests underlying the mediation privilege that would result from disclosure.[160] The court ordered the memorandum of understanding enforced, finding that the plaintiff had understood and participated in the process[161] and that she was not subjected to undue pressure.[162]

The approaches to claims of duress or fraud differ among these cases, but nonetheless illustrate courts' tendencies to find ways to satisfy themselves that a mediation process was legitimate. Whether or not permitted by the applicable statute, courts have made, and will likely continue to make, case-by-case exceptions to confidentiality to preserve contract defenses that would be unavailable if the confidentiality of mediation communications were strictly maintained.

III. TOWARD APPROPRIATE TREATMENT OF CONFIDENTIALITY IN THE ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS

Both legislatures and courts have taken widely differing stances toward issues of settlement enforcement and mediation confidentiality. Because of uncertainties in choice of law, a more consistent approach among jurisdictions would increase predictability and confidence in the mediation process. But, given the extent to which evaluating enforceability and maintaining confidentiality may be in conflict, what confidentiality policies are best suited for settlements? I take a pragmatic approach and argue below in Part A that when the issue is whether or not the parties reached a settlement or what constitutes that settlement, the confidentiality of mediation communications should be preserved. In contrast, I conclude in Part B that when the issue is whether or not the settlement is a valid, enforceable agreement, confidentiality may need to be compromised. But an across-the-board rule either favoring or prohibiting disclosure is inappropriate.

A. Determining the Existence or Content of an Agreement

The key to safeguarding confidentiality in mediation when the existence of a settlement is in question is to limit evidence of agreements or their content to written documents or some other verifiable record of

---

[160] *Id.* at 1139.

[161] *Id.* at 1146.

[162] *Id.* at 1150.

an agreement. I maintain, first, that the arguments traditionally raised against the formality of a writing are overcome when mediation confidentiality is at stake. Second, safeguarding confidentiality can be accomplished to some degree through a writing requirement that functions like a statute of frauds, but the most effective way to impose this limit is through a comprehensive mediation privilege with carefully defined exceptions that preclude testimony on oral mediated agreements. Such a privilege would forestall litigation by establishing a threshold requirement for a writing that would prevent parties from attempting to invade the privacy of mediation to enforce an oral settlement. And third, in practical terms, entering into an enforceable memorandum of understanding at the close of a mediation would be an effective way to safeguard an agreement and ensure that it is admissible if a dispute arises.

1. Requiring a Record

The benefits attributed to the statute of frauds are equally applicable to a writing requirement for mediated settlements. The most obvious rationale for a signed writing is its evidentiary force.[163] In the event of a dispute, a writing conveys the existence and content of the agreement to the court, easing the judicial task and increasing confidence in the outcome. Writing also helps clarify an agreement, uncovering points of disagreement that can be resolved before the agreement is finalized.[164] Formalities such as written documents and signatures also serve a cautionary function, warning parties that signing a document creates an agreement with consequences.[165] And, in Professor Lon Fuller's words, formalities serve a "channeling" function.[166] A signature, or the seal it replaced, marks an agreement as enforceable. It provides a signal that courts can rely on and thus reduce the time they spend sorting out disputes about the existence of a settlement.[167] It also provides parties to

---

[163] The Restatement notes that "the primary purpose of the Statute of Frauds is assumed to be evidentiary." RESTATEMENT (SECOND) OF CONTRACTS ch. 5, statutory note (1981). A writing provides reliable evidence of the existence and terms of a contract. *Id.* Many court rules on stipulations and agreements accept substitute methods that fulfill the evidentiary requirement, such as reciting the terms of the agreement on the record in open court. *See supra* notes 59-62 and accompanying text.

[164] *See* Perillo, *supra* note 50, at 56-57.

[165] *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941); Perillo, *supra* note 50, at 53.

[166] Fuller, *supra* note 165, at 801.

[167] *Id.*

an agreement with a simple way to indicate their intention to be bound or, in other words, to channel their agreement into a legally effective form of expression.[168]

One could argue that the importance of settlement agreements – whether mediated or not – warrants these procedural safeguards that flow from a writing requirement.[169] Settling a lawsuit involves releasing rights that would otherwise be pursued in court. This is a decision of significance, and a court's determination that such an agreement was actually reached should be based on more than who wins the credibility contest in a swearing match. The cautionary function is important for similar reasons: a settlement precludes the plaintiff from pursuing the legal remedies to which she would otherwise be entitled and thus deserves careful consideration.

Additionally, settlements are different from many other contracts in that they involve parties who are currently embroiled in a dispute. A bright-line rule requiring a signed writing could help prevent further disputes about the settlement of the parties' primary dispute through the clarifying and channeling effects of a writing requirement. The act of writing can smoke out areas of continuing disagreement that need clarification.[170] When the dispute involves a court, the act of signing signals to courts, as well as to the parties, their intent to be bound. There are perhaps psychological advantages to this formality as well. Signing a document serves as a symbol of commitment that can help cement the agreement and reduce the chance of defections.

Although the acceptance of writing formalities in contracts is reportedly on the upswing as part of a resurgence in conceptualism,[171] the well-known complaint about writing requirements is that they cause more fraud than they prevent. The claim is that the statutes of frauds provide those who really did enter into an agreement with an easy way

---

[168] *Id.*

[169] As discussed above, some states have a writing requirement that applies to *all* settlements. *See supra* notes 59-62 and accompanying text.

[170] *See* Vernon v. Acton, 732 N.E.2d 805, 810 (Ind. 2000) (noting that writing aids settlement goal of "producing clear understandings that the parties are less likely to dispute or challenge").

[171] *See, e.g.*, Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 882 (1999) ("recent reported decisions demonstrate an incremental enhancement of rules that favor the enforcement of written contracts over alleged oral, less formal representations or agreements"); Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 254 (1995) ("consensus extracted from this Symposium is that . . . conceptualism has indeed been reborn (if it ever died) in the guise of a new formalism").

to avoid their obligations if the agreement was not recorded.[172] Moreover, if real agreements are left unenforced in significant numbers there could be systemic costs as well as individual injustices. At some point parties may conclude that the problems of enforcement are so severe that they become discouraged from attempting settlement—or more specifically, from participation in mediation. There is a counterbalance, however, to any incremental disincentive created by unenforceable oral agreements: mediation and settlement would also be discouraged if alleged agreements were enforced when they had not "really" been reached.[173] This "boils down to an empirical question of whether one approach or the other better deters fraud and opportunism" – a question that is not easily resolved on an empirical basis.[174]

But even though this empirical question is unresolved in the context of mediated settlements, preventing fraud is not the only function served by requiring a writing. Mediation has attributes that give a writing requirement particular significance. For example, the clarifying and cautionary functions of a writing are particularly important for mediation. The process is designed to foster give and take. The parties are often encouraged to consider hypothetical solutions to their dispute. They release trial balloons, not all of which fly.[175] With many tentative advances and withdrawals, parties need to be sure of the content of their agreement. Thus the clarifying function of a writing is particularly important for mediation. Perhaps even more significantly, in the informal atmosphere of mediation parties need to be reminded of the

---

[172] *See generally* FARNSWORTH, *supra* note 51, § 6.1 at 97-98 (citing various commentators' opinions on statute of frauds).

[173] *Cf.* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 861 (1998) (expressing skepticism that greater enforcement of mediated agreements would substantially increase use of mediation and commenting that sanctions would be attractive to some parties but deter others). As stated by Professor Hillman:

> A judicial preference for rules that favor written contracts . . . does not necessarily mean that courts are less likely to enforce real agreements between parties. After all, if the parties' agreement is indefinite on important terms and the parties disagree about the content of those terms, or if the parties debate whether they even entered into an enforceable agreement, it is not self-evident why enforcement of a contract more often than not supports the real agreement between the parties.

Hillman, *supra* note 171, at 882.

[174] *See id.*, Hillman, *supra* note 171, at 882-83.

[175] *See generally* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 167-72 (2d ed. 2000) (emphasizing need to generate multiple options and alternative resolutions to dispute).

import of their final nods of assent. Signing a writing is a simple formality that most people understand as a binding act. It sends a cautionary signal that a settlement should not be entered into lightly or without thorough consideration of the consequences and alternatives. [176]

The added assurances embodied in a writing are also important for maintaining the consensual nature of mediation. A fundamental tenet of mediation is that the parties are in charge of their own agreement, which is an expression of party choice and autonomy.[177] It would be especially damaging to the mediation process if courts were to hold parties to alleged settlements in the absence of willing consent. If an actual agreement remains unenforced because of a writing requirement, the worst consequence would be that litigation would proceed to a judicial resolution of the parties' claims and defenses with the parties incurring the associated transaction costs. If, however, a court errs in the other direction and enforces an agreement the parties did not reach, a litigant would unfairly lose her claim or defense without resolution by the parties or the court. Thus, if courts are to err in settlement enforcement, it would be better to forgo enforcement of agreements that were actually reached, but not written, than to enforce disputed agreements on oral evidence.

It is the value of respecting confidentiality in mediation, however, that provides the strongest justification for requiring settlements to be in writing and signed. A writing requirement is a straightforward way to prevent the threat oral agreements pose for maintaining confidentiality. If a mediated settlement must be written before a court may consider it, this removes the temptation to explore the content of the mediation in order to establish an oral agreement.[178] The parties' need for certainty in their expectation of confidentiality is best served by the formality of a bright-line rule requiring a writing.[179] Such a rule not only safeguards against unjustified enforcement, but at the same time protects mediation confidentiality.

Jurisdictions that do not require a written, signed agreement (or its electronic equivalent) as a prerequisite for settlement enforcement are ignoring an easy mechanism to avoid the risks for confidentiality that accompany recognition of oral agreements. If a policy requiring a

---

[176] *See* Perillo, *supra* note 50, at 53-56.

[177] *See supra* text accompanying note 10.

[178] An evidentiary privilege with an exception for a written agreement is more effective than a simple writing requirement, as explained below in Part III.A.2.

[179] *See, e.g.*, Wilmington Hospitality, L.L.C. v. New Castle County, No. Civ. A. 18436, 2001 WL 291948, at *5 (Del. Ch. Mar. 7, 2001).

writing is clearly established, parties can easily avoid enforcement problems by taking the simple step of signing a document.[180] Moreover, unfairness can be minimized because, even if some parties would be unaware of a writing requirement, the presence of the neutral distinguishes mediation from many other contract settings. Mediators could reasonably be expected to tell parties of the advantages of recording their agreement and warn them of the consequences of failing to create a written or other record. They typically describe confidentiality along with the other mediation procedures they convey to parties and a writing requirement could be explained as a means to further that desired confidentiality.

Finally, I believe that the importance of protecting confidentiality is heightened when parties enter mediation at the behest or encouragement of a court. A party that participates in mediation under a court's confidentiality rules is very likely to feel betrayed by the court if the mediation is later probed in search of an alleged agreement. The public's view of courts' motivations and authority can only be diminished if parties feel that courts are ignoring their own emphasis on the importance of confidentiality. A court rule proclaiming that mediation is confidential is meaningless if a party can trigger testimony about the proceeding by merely alleging that an oral agreement was reached.

2. Mechanisms for Requiring a Record

What legal mechanisms for requiring settlements to be evidenced by a record are the most effective? None are fail-safe for, as discussed above, courts faced with an alleged agreement have opened the mediation process up to scrutiny in jurisdictions where confidentiality is protected by privilege as well as in those that rely on a writing requirement.[181] There are advantages, however, to protecting confidentiality in evidentiary terms, rather than merely specifying that settlements must

---

[180] The argument that parties can adjust to legal requirements is most valid when, as here, it does not differ substantially from the behavior the parties would expect. Signed writings are not an unusual requirement for legal documents. In fact, they are the norm. A rule that departs further from parties' expectations, however, can be unfair to unsophisticated parties who are unaware of the requirements. For example, Minnesota's (now relaxed) requirement that mediated agreements must state that they are enforceable and that the mediator gave the parties certain warnings about the mediation process, *see supra* note 55, would, if enforced, have the potential to create unfair surprise and put unrepresented parties at a disadvantage, *see supra* note 58.

[181] *See supra* text accompanying notes 74-78.

be written and signed.

A privilege statute that prevents disclosure of oral agreements allegedly reached in mediation responds directly to the evidentiary issue with an evidentiary solution. In contrast, writing requirements standing alone are not necessarily linked directly to the protection of confidentiality. Ironically, confidentiality may be at risk in the very process of evaluating compliance with a writing requirement. As part of their scrutiny, courts may invade the confidentiality of notes or documents connected to a mediation to determine whether they satisfy the need for a writing.[182] This is because, as stated in the Restatement (Second) of Contracts, a statute of frauds is not a rule of evidence, even though it functions to further evidentiary goals.[183] The Restatement illustrates this point with the example of a signed settlement that is lost or destroyed. When governed by a stand-alone writing requirement such as a statute of frauds, rather than an evidentiary rule, the lost settlement can be established by testimony, once again raising a threat to confidentiality.[184] The evidentiary protection of a writing requirement is thus incomplete.

More fundamentally, there is a danger that if a writing is lacking a court will adopt a substitute approach to prove the legitimacy of an agreement, and will choose that substitute without regard to its consequences for mediation confidentiality. A common attitude toward writing requirements may be summed up as: "[t]he purpose of the statute of frauds is to prevent fraud and perjury."[185] Unfortunately, an alternative way to prevent fraud and perjury when there is no writing may be through testimony that invades mediation confidentiality. Indeed, courts have relied on testimony about the circumstances of contract formation to excuse strict compliance with writing and signature requirements for mediated settlements.[186]

---

[182] *See, e.g.*, Galloway v. Regis Corp., 481 S.E.2d 714, 716 (S.C. Ct. App. 1997) (reviewing attorney's mediation notes in deciding that requirement for written stipulation of settlement was not satisfied).

[183] RESTATEMENT (SECOND) OF CONTRACTS § 137 cmt. a (1981).

[184] *See, e.g.*, McDermont v. McDermont, No. 95-3-00757-4, 1998 WL 892098 (Wash. Ct. App. Dec. 21, 1998) (describing mediator's testimony used to establish that signatures had been placed on lost mediated agreement in order to satisfy state requirement for signed writing); RESTATEMENT (SECOND) OF CONTRACTS § 137 cmt. a (1981).

[185] Herrera v. Herrera, 974 P.2d 675, 679 (N.M. Ct. App. 1999) (holding that strict compliance with signature requirement not necessary when agreement proved by mediator's and party's testimony).

[186] *See, e.g., id.* at 680.

Simple writing requirements also lack the protective scope of an evidentiary rule. The statute of frauds prevents a party from attempting to prove unwritten agreements, but does not conversely prevent disclosure of mediations in attempts to enforce written agreements.[187] If a party alleges an unmet condition precedent, for example, a statute of frauds writing requirement would not prevent an inquiry into mediation communications to evaluate the allegation.[188] In contrast, a privilege with a narrow exception for written and signed agreements protects mediation communications when the agreement is written as well as when it is unwritten. The baseline evidentiary rule is exclusion of all mediation communications (modified by exceptions), while a statute of frauds instead acts as only a partial evidentiary exclusion. The function of a privilege can be analogized to that of the parol evidence rule: it limits judicial consideration to the writing alone.[189] Thus a privilege prevents litigation more thoroughly than a simple threshold writing requirement or statute of frauds.

A privilege may also carry some advantage in terms of its applicability in federal court. When the source of the writing requirement for mediated settlements is a state court rule governing stipulations and litigation agreements, its recognition in federal court depends on the notoriously difficult differentiation between procedural and substantive rules. To the extent these state rules are characterized as "procedural" they do not govern federal court settlements in diversity cases; under the Erie doctrine, even when federal courts apply state substantive law they apply federal procedures. Indeed, federal court decisions on writing requirements demonstrate the indeterminacy of this characterization: while some state rules requiring written stipulations have been labeled

---

[187] *See* FARNSWORTH, *supra* note 51, § 7.2, at 210 n.1 (distinguishing function of statute of frauds, "which may make a contract unenforceable if there is no writing," from that of parol evidence rule, "which may bar extrinsic evidence if there is a writing"); *see also* Graham v. New York City Hous. Auth., 688 N.Y.S.2d 591, 591 (N.Y. App. Div. 1999) (stating that mediated settlement agreement entered as stipulation is binding *unless* fraud, collusion, mistake, or accident provides cause to invalidate contract).

[188] *See, e.g., In re* Hudgins, 188 B.R. 938, 942 (Bankr. E.D. Tex. 1995) (examining "what the parties said and did" to determine that allegation of condition precedent did not prevent mediated settlement from binding parties).

[189] *See generally* Morris G. Shanker, *In Defense of the Sales Statute of Frauds and Parole Evidence Rule: A Fair Price for Admission to the Courts*, 100 COM. L.J. 259, 265-66 (1995) (discussing role of parole evidence rule in discouraging litigation by limiting issues to written terms of contract). Of course, unlike a privilege, the parol evidence rule operates only with an integrated writing. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981) (stating parole evidence rule).

procedural and do not apply in federal court,[190] others are treated as substantive and hence are relied upon in federal court.[191] There are a number of examples, moreover, of federal courts applying state writing requirements rather loosely, suggesting they may take a more flexible attitude toward these rules than their state court counterparts.[192]

From the point of view of a state that wants to ensure that a party's attempt to establish an oral settlement does not swallow mediation confidentiality, the most effective mechanism is a mediation privilege with a limited exception for the disclosure of settlement agreements evidenced by a writing or modern equivalent. This privilege will govern settlement enforcement proceedings in state court and also in most federal court diversity cases,[193] for when state law provides the rule of decision, federal courts are required by Federal Rule of Evidence 501 to apply state law privileges.[194]

---

[190] *See, e.g.*, Rheault v. Luftansa German Airlines, 899 F. Supp. 325, 328 (E.D. Mich. 1995) (refusing to apply Michigan court rule that sets requirements for binding settlement agreements because rule is procedural, not substantive).

[191] *See, e.g.*, Lefevre v. Keaty, 191 F.3d 596, 598 (5th Cir. 1999); Anderegg v. High Standard, Inc., 825 F.2d 77, 80 (5th Cir. 1987); Monaghan v. SZS 33 Assocs., L.P., 875 F. Supp. 1037, 1042 (S.D.N.Y. 1995).

[192] *See, e.g.*, Sorensen v. Consol. Rail Corp., 992 F. Supp. 146, 150-51 (N.D.N.Y. 1998) (treating New York rule requiring written agreements as merely one relevant factor in determining whether to enforce oral settlement agreement; concluding that simplicity of agreement counterbalanced rule's requirements); Kreher v. Orleans Parish Sch. Bd., No. Civ. A. 95-1076, 1996 WL 715506, at *2 (E.D. La. Dec. 10, 1996) (enforcing agreement reached in conference before magistrate judge even though unsigned).

[193] *See, e.g., Lefevre*, 191 F.3d at 598 (determining enforcement of settlement in diversity case under state law); *cf.* Barry v. Barry, 172 F.3d 1011, 1013 (8th Cir. 1999) (construing settlement contract in diversity case according to state law). For a more detailed analysis of the law applicable to mediation privileges, see Ellen E. Deason, *The Quest For Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Coordination?* 85 MARQ. L. REV. 79 (2001); Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 Ohio St. J. on Disp. Resol. (forthcoming 2002).

[194] The rule provides:

> RULE 501. GENERAL RULE. Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. § 501. Federal Rule of Evidence 601, which governs competency, similarly directs federal courts to rely on state law in most diversity cases. *See, e.g.*, Haghighi v.

The state privilege may not, however, govern in federal court when federal law supplies the rule of decision in the case because in that circumstance Federal Rule of Evidence 501 directs courts to the federal law of privilege. But there are two avenues of analysis that may nonetheless lead a court back to the state law privilege. First, it is not uncommon for federal courts applying federal common law to adopt state law as federal common law.[195] Second, according to the reasoning of one federal court, enforcement issues regarding *any* mediated settlement agreement fall under state privilege law. When a party sought to enforce a mediated settlement in the *Olam* case, the court analytically separated that motion from the underlying claims in the case.[196] The settled suit included federal statutory causes of action, so Rule 501 would clearly dictate federal law if privilege were relevant to deciding those claims. But the *Olam* court treated the motion to enforce the settlement agreement as the relevant "claim" for purposes of determining the applicable law of privilege.[197] It concluded that because contracts are governed by state law, Rule 501 mandates the state privilege as the applicable law in settlement disputes.[198] Determining the applicable law for enforcing settlements is an extremely unsettled area of law, however, and the *Olam* court's approach is by no means generally accepted.[199]

Unfortunately, the uncertainty of the potential effect of settlement enforcement on confidentiality is, if anything, greater with federal mediations, even when the mediation is held under the auspices of a federal court dispute resolution program. Among the problems is that while Rule 501 often points to the state law of mediation privilege, as

---

Russian-American Broad. Co., 945 F. Supp. 1233, 1235 (D. Minn. 1996) (applying Minnesota competency statute in refusing to permit mediator to testify at evidentiary hearing on motion to enforce settlement agreement), *rev'd on other grounds*, 173 F.3d 1086 (8th Cir. 1999).

[195] *See, e.g.*, United States v. Gullo, 672 F. Supp. 99, 103-04 (W.D.N.Y. 1987) (adopting state privilege for mediation communications at community ADR centers as matter of federal law); *see also* Sheng v. Starkey Labs., Inc., 117 F.3d 1081, 1083 n.1 (8th Cir. 1997) (applying state law without deciding question of applicable law when parties assumed state law controlled and outcome did not differ).

[196] Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1119 (N.D. Cal. 1999).

[197] *Id.*

[198] *Id.* at 1120-25.

[199] *See generally* Heuser v. Kephart, 215 F.3d 1186, 1190 n.4 (10th Cir. 2000) (noting general divergence of views on application of state or federal law to enforcement and interpretation of settlement agreements); Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295, 318-30 (1988) (detailing courts' lack of unanimity on whether federal common law or state law govern settlements of civil rights actions and noting absence of reasoned analysis).

discussed above only about half the states have general mediation statutes that protect confidentiality.[200] Moreover, even if a court finds that Rule 501 dictates federal privilege law, that does not ensure mediation confidentiality. Although court rules in a number of federal jurisdictions declare mediation communications in their court-annexed programs to be "privileged,"[201] Rule 501 contemplates that the federal law of privilege will develop as common law and thus far only a few federal jurisdictions have recognized a common-law mediation privilege for parties.[202] Finally, the application of a federal rule at the state level is also problematic. It may be that it can influence confidentiality in the state system only as a matter of comity.[203]

Despite the uncertain effect, federal court programs that wish to protect mediation confidentiality from allegations of oral settlements may wish to add a privilege and/or a writing requirement to their local rules. Some courts faced with a settlement enforcement dispute arising out of mediation have looked to the local federal court rule. The Ninth Circuit, for example, excluded evidence of an alleged oral agreement when the local district court rule required that mediated settlements "shall be reduced to writing."[204] Moreover, judicial pronouncements on the need for confidentiality are one of the factors courts consider when evaluating the merits of adopting a common law privilege,[205] and circuit or local district court rules mandating confidentiality could carry weight in this analysis.

Even if court rules do not provide a full-fledged mediation privilege, the prospects for maintaining confidentiality could be strengthened by

---

[200] *See supra* text accompanying notes 48-49.

[201] *See, e.g.*, D.C. Cir. Order Establishing Appellate Mediation Program (1998); S.D. FLA. CIV. R. 16.2.G.2; S.D.W.V. CIV. R. 5.01(f).

[202] *See* Sheldone v. Pa. Tpk. Comm'n, 104 F. Supp. 2d 511 (W.D. Pa. 2000); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd* 216 F.3d 1082 (9th Cir. 2000). In addition, a few courts have recognized something analogous to a mediator's privilege against testifying in order to maintain the mediator's neutrality and the integrity of the mediation program. *See* Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985); NLRB v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980).

[203] *See, e.g.*, Ford Motor Credit v. Shockley, Reid & Tyson, No. 93-1037-CV-W-6, 1996 WL 9689, at *1 (W.D. Mo. Jan. 4, 1996) (deciding that confidentiality requirements in federal local rule affected state courts and governmental bodies only as matter of comity and did not prevent participant in ADR from testifying at state bar disciplinary hearing).

[204] Barnett v. Sea Land Serv., Inc., 875 F.2d 741, 743-44 (9th Cir. 1989); *see also* Ashley Furniture Indus., Inc. v. Sangiacomo N.A. Ltd., 187 F.3d 363, 378 (4th Cir. 1999) (raising question for determination on remand whether enforcement of oral settlement would be inconsistent with local court rules, which required parties to reduce mediated agreements to writing).

[205] *See, e.g., Folb*, 16 F. Supp. 2d at 1171-72.

linking writing requirements to the local rule's confidentiality provisions. Currently, the typical format is a flat command for a written agreement, which provides no policy rationale or context for the requirement. If rules were modified to indicate that maintaining mediation confidentiality is one of the reasons for the writing provision, then courts inclined to follow permissive state contract law would at least need to confront the confidentiality issue before admitting oral testimony of mediation communications.

Another possible way to bolster the likelihood that courts—both federal and state—will observe writing requirements for mediated settlements despite unfavorable state contract law is through an agreement between the parties on the terms of confidentiality for their mediation. If parties affirmatively agree to abide by the mediation program rules, their agreement provides an independent contractual basis for the writing requirement.[206] In general, contracts for mediation confidentiality that exceed normal legal protections are likely to be unenforceable against non-parties to the agreement.[207] But an agreement in advance that any settlement must be written and signed would need to be binding only on the parties to the mediation in order to protect confidentiality when one alleges an oral settlement.

3. Memoranda of Understanding

How practical is it to link enforcement of mediated settlements to a writing requirement? Preparing a fully memorialized agreement may be inconsistent with the informality of the mediation process. Often lawyers may not be present at the mediation, and the parties would need to consult them before an agreement could be finalized. Or, if lawyers are present, the end of a long day of negotiating is not the time to be dotting i's, crossing t's, and working out the minutia of the memorialization. The danger, however, is that parties may change their minds before a final document can be prepared.

While it may be tempting to go home from a mediation with the assurance of a handshake, preparing a written agreement and obtaining signatures can eliminate doubt about the longevity of the agreement.

---

[206] *See* Thomsen v. Aqua Massage Int'l, Inc., 721 A.2d 137, 140-41 & n.5 (Conn. App. Ct. 1998) (applying American Arbitration Association Commercial Mediation Rules prohibition on mediator testimony to quash subpoena on rationale that parties subjected themselves to those particular mediation rules and that ban on mediator testimony helps maintain effectiveness of mediation).

[207] *See generally* ROGERS & MCEWEN, *supra* note 16 at § 9:24.

Traditional contract law can help here, because typically the agreement need not be in final form to be enforceable.[208] Usually a simple memorandum of understanding will be sufficient, so long as it unambiguously resolves the key issues in dispute. The basic requirements are that the terms must be definite enough to be enforced,[209] and all crucial issues must be resolved.[210] If these requirements are met, then a court need not resort to evidence from the mediation in order to complete the terms of the agreement.

In many states, the fact that the parties anticipate future refinement and a further writing does not stand in the way of enforcing a memorandum of understanding.[211] If in doubt, parties can safeguard

---

[208] According to the Restatement, a memorandum is sufficient for purposes of statutes of frauds if the writing "states with reasonable certainty the essential terms of the unperformed promises in the contract." RESTATEMENT (SECOND) OF CONTRACTS § 131 (1981).

[209] *See, e.g.*, Moore v. Lieberman, No. CV980087620, 2001 WL 490777, at *3 (Conn. Super. Ct. Apr. 23, 2001) (refusing to enforce mediated settlement when lacking unambiguous agreement on many terms); Reno v. Haler, 734 N.E.2d 1095, 1099 (Ind. Ct. App. 2000) (enforcing mediator's handwritten notes of agreement signed by parties when words "joint custody" at top of page indicated terms of agreement); Soliman v. Goltz, No. 05-93-00008-CV, 1993 WL 402740, at *7 (Tex. App. Oct. 6, 1993) (finding written mediation memorandum not definite enough to constitute binding contract).

[210] *See, e.g.*, Weddington Prod., Inc. v. Flick, 71 Cal. Rptr. 2d 265, 267-68 (Cal. Ct. App. 1998) (refusing to enforce agreement prepared by private mediation judge when one-page signed document did not include all material terms); Asten, Inc. v. Wangner Sys. Corp., No. C.A. 15617, 1999 WL 803965, at *1 (Del. Ch. Sept. 23, 1999) (finding that agreement contained all necessary material terms for enforcement in spite of lack of detail on logistical issues); DeGarmo v. DeGarmo, 499 S.E.2d 317, 318 (Ga. 1998) (rejecting trial court's version of draft settlement agreement signed in mediation session that left important matters for later resolution); Hardman v. Dault, 2 S.W.3d 378, 380 (Tex. App. 1999) (enforcing signed memorandum setting out essential terms of mediated agreement); Montanaro v. Montanaro, 946 S.W.2d 428, 431 (Tex. App. 1997) (enforcing agreement on essential terms of mediated settlement in signed document although parties did not subsequently agree on details of promissory note); Soliman v. Goltz, No. 05-93-00008-CV, 1993 WL 402740, at *8 (Tex. App. Oct. 6, 1993) (finding that parties to written and initialed agreement did not reach meeting of minds on scope of releases and confidentiality provisions, which were essential elements of agreement).

[211] *See, e.g.*, Drayton v. Assocs., No. 3:97-CV-2924-BC, 2000 WL 49189, *2 (N.D. Tex. Jan. 21, 2000) (enforcing signed "preliminary" mediated agreement although plaintiff repudiated it before signing finalized documents); *In re* Hudgins, 188 B.R. 938, 942 (E.D. Tex. Bankr. 1995) (citing Texas cases for proposition that provision for more formal documentation in future does not establish that no agreement was reached); Reno v. Haler, 734 N.E.2d 1095, 1099 (Ind. Ct. App. 2000) (upholding enforcement of agreement terms contained in mediator's handwritten notes signed by parties); Jordan v. Adventist Health System/Sunbelt, Inc., 656 So. 2d 200 (Fla. Dist. Ct. App. 1995) (enforcing preliminary mediated agreement signed by parties); Walk Haydel & Assoc., Inc. v. Coastal Power Prod. Co., 720 So. 2d 372, 374 (La. Ct. App. 1998) (enforcing terms of handwritten memorandum of mediated settlement signed by parties although no agreement on later documents);

their agreement by including language indicating that the settlement is intended to be an enforceable agreement.[212] Conversely, language stating that the writing is not intended to be enforceable can protect parties from unintended enforcement.[213]

Modern doctrines that permit less laborious forms of memorializing an agreement also help with the process of preparing a memorandum of understanding. An actual signed writing is virtually impossible for mediations conducted by telephone and may be impractical even when parties meet face to face. It should be a sufficient substitute if someone states the agreed terms into a tape recorder and then records the assent of all the parties.[214] The Uniform Mediation Act adopts this approach, using the term "record of an agreement." It accommodates the possibility of technological innovations by defining "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."[215]

* * * * *

In sum, testimony that explores a mediation to prove that the parties reached a settlement has the potential to severely undermine confidentiality provisions. This threat justifies a bright-line rule that permits evidence of mediated settlements only in the form of written, signed agreements or a modern equivalent. Parties can easily comply

---

Howard v. Ramsey, No. C-000503, 2001 WL 228015, at *1 (Ohio Ct. App. Mar. 9, 2001) (upholding enforcement of memorialized mediation settlement "certain as to all material terms" although attorneys were still "fine tuning" agreement); Synder-Flakinham v. Stockburger, 457 S.E.2d 36, 41 (Va. 1995) (enforcing mediated agreement even though parties contemplated later formal writing when parties agreed on terms and intended to be bound); Plum Creek Timber Co. v. W.E. Hillman, No. 41278-7-I, 1999 WL 350830 (Wash. Ct. App. June 1, 1999) (enforcing stipulation signed at mediation where terms of settlement agreement were clear; execution of other documents within 30 days was not condition precedent to agreement).

[212] *See, e.g.*, Hurst v. Am. Racing Equip., Inc., 981 S.W.2d 458, 462 (Tex. App. 1998) (enforcing handwritten memorandum of mediated settlement that stated it "may be enforced as any other contract").

[213] *See, e.g.*, Winston v. Mediafare Entm't Corp., 777 F.2d 78, 80 (2d Cir. 1986) (stating that no binding contract is formed if either party "communicates an intent not to be bound until he achieves a fully executed document."). This intent is best expressed in unambiguous language. *See, e.g.*, Martin v. Black, 909 S.W.2d 192, 196-97 (Tex. Crim. App. 1995) (finding factual issue regarding intent to be bound by mediated memorandum of understanding that contemplated "satisfactory" documentation).

[214] *See, e.g., Plum Creek Timber Co.*, 1999 WL 350830, at *1 (enforcing settlement dictated by mediator and stipulated to in writing by all parties and counsel).

[215] UNIF. MEDIATION ACT § 2(8) (2001).

with this rule by preparing a memorandum of understanding at the close of successful mediations. The most effective way to establish this requirement is through legislation that creates an evidentiary privilege to protect mediation confidentiality, with a narrow exception for settlements evidenced by a writing.

B. Evaluating Contract Defenses to an Agreement

This bright-line rule approach is inadequate, however, when a party challenges the validity of a mediated agreement due to fraud or duress. In this part, I first argue that attempts to maintain confidentiality without exception in this context are likely to fail. Second, allegations of fraud or duress warrant an individualized balancing of the need for the evidence against the harm the evidence would do to mediation confidentiality. Third, I contend that this approach need not open the floodgates to disclosures of mediation communications because the reported cases suggest that many claims of contract defenses could be resolved on threshold issues. Fourth, even under a balancing test, the standards can be articulated so that courts have discretion to grant exceptions to confidentiality protections only in very limited circumstances. And finally, *in camera* proceedings should be used to minimize the danger to confidentiality posed by the need to gather enough information to perform the balancing.

1. The Failure of "Complete Confidentiality"

An absolute prohibition on evidence of mediation communications that applies when a party raises an objection of fraud or duress[216] has not proved to be an effective means to protect mediation confidentiality. The cases to date suggest that an ironclad approach to protecting confidentiality is unworkable as a practical matter: when a party alleges a credible defense, courts have found ways to take testimony about the mediation in spite of confidentiality rules that do not allow exceptions for this purpose.[217] Courts evidently take these claims so seriously that, whatever the terms of the applicable statute, they do not simply dismiss them out of hand on grounds of confidentiality.[218]

---

[216] *See* statutes cited *supra* notes 96 and 98.

[217] *See supra* text accompanying notes 139-62.

[218] *Cf.* Korangy v. Comm'r of Internal Revenue, 893 F.2d 69, 73 (4th Cir. 1990) ("federal courts must not be stripped of their inherent equitable power by the dictates of a strict and inflexible rule requiring them to enforce a settlement mistakenly entered into which is unconscionable and oppressive in its consequences").

The importance of airing claims of fraud or duress is a value incorporated into contract law. The parol evidence rule normally gives special effect to writings adopted as a final expression of an agreement by preventing litigants from invoking extrinsic evidence regarding the bargaining behind the final document. The parol evidence rule makes an exception, however, permitting evidence about negotiations to establish "illegality, fraud, duress, mistake, lack of consideration or other invalidating cause."[219] It may well be that judges are reflecting the same values that support this exception in the law of contracts when they find a similar exception to a mediation privilege, which can be analogized to the operation of a parol evidence rule in that it also prevents the introduction of evidence of the negotiations that took place during mediation.

Because the equities exert such pull, courts are likely to continue to create exceptions for claims of duress and fraud, even when statutes are silent or mandate an absolute privilege.[220] In my view, it is preferable to authorize courts to make exceptions to mediation confidentiality under defined standards than to leave them without any guidance. Leaving courts without guidance risks that they will undermine the policy reasons for confidentiality beyond what is necessary.[221] By acknowledging the need for limits on confidentiality in connection with contract defenses, legislatures can limit courts' discretion by determining the scope of the exception and standards for invoking it. I argue below that the exception should be narrow and the standards for applying it should be stringent.[222] In addition, legislatures can establish procedures for courts to follow in determining whether to apply the exception or not. This is an underutilized way to maintain confidentiality that should at least prevent courts from conclusorily "releasing" parties from their confidentiality obligations or from holding open hearing on the need for confidentiality.[223] Legislatures would do better to face these issues

---

[219] RESTATEMENT (SECOND) OF CONTRACTS § 214 (1981).

[220] *See, e.g.*, Galton & Kovach, *supra* note 32, at 967 (predicting that examination of confidentiality issues will lead to judicial exceptions to Texas statutory provisions); *see also* Christopher DeMayo, Case Comment, *The Mediation Privilege and Its Limits*, 5 HARV. NEGOT. L. REV. 383, 396-97 (2000) (describing potential interpretive arguments for avoiding strict construction of broad mediation privileges).

[221] *See* Shannon, *supra* note 12, at 89 (warning that Texas courts may create exception to confidentiality for contract defenses, which would be "a slippery slope" that could "easily eviscerate policy reasons for confidentiality").

[222] See *infra* Part III.B.4. for a discussion of standards for weighing confidentiality against disclosures relevant to duress or fraud.

[223] See *infra* Part III.B.5. for a discussion of procedures for weighing confidentiality

squarely, for their attempts to protect confidentiality absolutely are not likely to be observed by courts in the context of contract defenses.

2. The Need for a Balancing Mechanism

A more complex solution than a bright-line rule is needed when a party challenges the validity of a mediated settlement. Absent eliminating such challenges entirely, there is no simple threshold requirement that can protect the mediation communications that led up to the challenged agreement. The formality of a writing can provide some assurance that the parties reached an agreement, but does not in itself ensure that the agreement was obtained free of duress, fraud or the other infirmities that are the subjects of contract defenses. But eliminating such challenges to mediated agreements completely would come at too high a cost. At the same time, challenges to these agreements have just as much potential to undermine the promise of mediation confidentiality as claims of oral agreements. A solution is needed that can take into consideration both the seriousness of the contract defense claim and the invasiveness of the threat to mediation confidentiality.

A blanket rule—either permitting parties to raise contract defenses without restriction or prohibiting them from ever raising them—is an inadequate response to these circumstances. Both types of rules create incentives that are inconsistent with the goals of mediation. In jurisdictions with a rule that mediation confidentiality must always give way when settlement enforcement is at issue, the incentives are similar to those likely to arise in jurisdictions that do not protect confidentiality adequately as an initial matter. Parties will know that any claim of duress, no matter how weak, can throw the mediation open to scrutiny. Once they see this happen a few times, it is likely to undermine parties' confidence in confidentiality and diminish their willingness to be forthcoming in mediation.

There are equally serious problems with the opposite approach favoring absolute confidentiality. A party who actually is a rare victim of duress may have no means to prove this if all testimony concerning the mediation is precluded. Unless the fraud or coercion occurred outside the mediation process, a strict rule of confidentiality would thwart any attempt to challenge the validity of the agreement. In this context, other mediation values compete with confidentiality. Mediation

---

against disclosures relevant to duress or fraud.

would no longer be a consensual process if a party could be tricked or forced into an agreement and have no recourse.[224] In light of the potential consequences for the mediation process, precluding all exceptions to confidentiality is an untenable, as well as an impractical, solution.[225]

This conclusion applies to mediator disclosures as well as those of parties. In practical terms, a mediator's testimony may be crucial to evaluating the contract defense.[226] In theoretical terms, a mediator's disclosure does implicate confidentiality's importance to the integrity of the process,[227] raising threats that party disclosures do not pose. But if a judge engages in weighing the need for evidence about what transpired during a mediation and decides that the need for that evidence is great enough to justify party testimony that would otherwise be privileged, then it is altogether possible that the need for the mediator's testimony would also outweigh the interests in confidentiality and a significant contribution to a just outcome.

The Uniform Mediation Act, however, draws a line between the evidence from a party (which is possible if indicated by the court's analysis) and evidence form the mediator (which may not be compelled on a contract defense).[228] The policy justifying this distinction is not clear, although the Reporter's Working Notes mention "frequent attempts" to use mediators as tie-breaking witnesses.[229] It appears that in a hierarchy of exceptions to the Act's mediation privilege the drafters have deemed contract defenses to a settlement agreement as a special category of lesser importance. I have argued above that these defenses do not justify a bright-line rule of disclosure. But when the situation does justify disclosure in a particular case, it is not at all clear why this exception to

---

[224] *See* Nolan-Haley, *supra* note 10, at 806-09 (characterizing fraud, duress, and agent authority litigation as "thin but growing jurisprudence of 'mediation' informed consent").

[225] The court in *Olam* raised another objection to foreclosing mediation testimony completely, predicting that an unscrupulous party could escape her settlement commitment. She would be free to block enforcement by claiming that her apparent consent was obtained illegally because the other party could not contradict her with reference to the mediation. Nor could she be checked by a mediator's testimony under this approach. *See* Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1137 (N.D. Cal. 1999). This argument would not apply, however, if under applicable law the complaining party waives her privilege by making allegations about mediation communications. *See, e.g.*, McKinlay v. McKinlay, 648 So. 2d 806 (Fla. Dist. App. 1995).

[226] *See infra* text accompanying notes 241-46; *Olam*, 68 F. Supp. 2d at 1136-38.

[227] *See supra* text accompanying note 7.

[228] *Compare* UNIF. MEDIATION ACT § 6(b)(2) (2001), *with* § 6(c).

[229] UNIF. MEDIATION ACT § 7(b)(2) reporter's working notes (Proposed Official Draft 2001).

the privilege deserves only the partial disclosure authorized by the Act.

It should be noted that the Uniform Mediation Act does not *preclude* mediator testimony when a party raises a defense to a settlement agreement, but rather prohibits *compelling* a mediator to provide that testimony. This is a curious policy choice, for one would think that mediator testimony has the potential to undermine faith in confidentiality just as much, if not even more, when it is voluntary. The provision does preserve some possibility of mediator testimony in extreme cases and one can only hope that mediators will be willing to provide evidence when necessary to avoid injustice in contract enforcement.

Rather than restricting the law's normal processes of compelling testimony to set a rich source of information off limits, a better approach would be to recognize that the balancing process should be nuanced enough to consider the special problems created by mediator testimony. A judge who conducts a hearing *in camera* may find that the need for the evidence substantially outweighs the interest in protecting confidentiality for the parties' evidence but not for the mediator's evidence. The consequences of mediator testimony for confidence in confidentiality can be more significant to attitudes toward mediation than those of party testimony and should be weighed accordingly, but not treated as categorically separate.

In sum, statutes that limit courts to a "one-size-fits-all" treatment of contract defenses create the risk of either an unjust outcome or an unjustified breach of confidentiality. The alternative to these absolutist approaches is to place case-by case balancing in the hands of the courts. This mechanism is best suited to the dilemma of maintaining confidentiality whenever possible while preserving the principle of party consent to settlement by permitting meritorious contract defenses. The uncertainty balancing introduces for confidentiality is, however, a serious cost to this approach, as emphasized in this article's discussion of writing requirements.[230] Hence courts should seize every opportunity to avoid the need for a balancing analysis and legislatures should take action to circumscribe the balancing process by providing standards and procedures that limit its application.

---

[230] *See also* Aaron J. Lodge, *Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells*, 41 SANTA CLARA L. REV. 1093, 1119 (2001) (arguing against balancing approach because of uncertainty it creates for mediation and enforcement of settlements).

3. Minimizing the Need to Consider a Confidentiality Exception

There are preliminary steps and analyses that can reduce the need to consider breaching confidentiality in order to evaluate the validity of a mediated settlement. First, in court-annexed mediation programs, courts can avoid issues of authority to enter settlements through their mediation attendance requirements. Second, contract defenses should not be considered unless the parties signed a written document or recorded an equivalent memorialization. Third, courts may be able to resolve the dispute "on the pleadings" without probing the mediation if the defense fails as a matter of law or if the allegations fail to meet the necessary burden.

a. Settlement Authority

With appropriate rules, one whole category of contract defenses—claims of lack of authority to enter an agreement—can largely be eliminated as a defense to a mediated settlement. Many dispute resolution programs require that someone with full settlement authority attend the mediation session or, at a minimum, be available by telephone.[231] A jurisdiction with this attendance requirement would be justified in establishing a presumption that whoever attends the mediation on behalf of a party has settlement authority.[232]

If a party is represented by an attorney but does not herself attend the mediation, under a rule that requires mediation participants to carry settlement authority other participants may reasonably assume that her attorney carries her authorization to settle. If this assumption is treated as a presumption, the absent party would then have the burden to counter the attorney's apparent authority. Otherwise an objection to an agreement on this ground would be precluded. Similarly, a corporation could not claim after entering into an agreement that its representative at the mediation lacked authority to reach the settlement.

A party or representative could avoid this presumption by making an express reservation of authority. A reservation would be appropriate,

---

[231] *See, e.g.*, IND. CT. A.D.R. R. 2.7(B)(2) (2001).

[232] *See, e.g.*, Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1301, 1307 (Ind. 1998) (holding attorney has power to bind party to settlement when parties are ordered, required by rule, or agree to appear at mediation or provide authorized representative); Stoll v. Port Auth. N.Y. & N.J., 701 N.Y.S.2d 430 (N.Y. App. Div. 2000) (holding attorney who participated in mediation had authority to settle claim given that mediator had instructed him to come with full settlement authority); *see also* W. Waste Indus., Inc. v. Achord, 632 So. 2d 680 (Fla. Dist. Ct. App. 1994) (holding plaintiff could not avoid mediated settlement by claiming defendant's representative did not have full authority).

for example, in mediations with public entities where approval for any settlement must be obtained from a body such as a city council after the close of the mediation session. If there were only two possibilities—a presumption of authority or a clear statement of the limits of that authority—courts could avoid delving into the mediation in order to unravel the uncertainties of actual and apparent authority.

b. Memorialized Settlement

Second, by establishing a written, signed agreement (or its electronic equivalent) as a prerequisite to enforcing any mediated agreement, legislatures would limit the universe of cases in which defenses could be raised. For a settlement without these formalities, enforcement would be precluded and there would be no need to consider objections to that enforcement. Moreover, the reasons discussed above for requiring the certainty of a writing to prove a mediated agreement apply with equal force when the issue is the validity of the agreement. A party who alleges duress should not have the burden of defending against enforcement if, in addition, the existence of the agreement is itself in doubt due to the lack of a signed writing.

Courts occasionally find what amounts to a waiver of confidentiality by a party who seeks to enforce a mediated agreement, precluding that party from claiming confidentiality for the communications relative to any defenses to that enforcement.[233] This concept of waiver makes sense when an attempt to enforce a settlement requires that confidentiality be set aside in order to prove that there was an agreement. But when the agreement can be demonstrated by an executed document, the effort to enforce it does not by itself threaten confidentiality and should not create a waiver. Having a writing requirement as a prerequisite to enforcement permits courts to treat confidentiality issues relating to a contract defense as a separate matter. An effort to enforce a settlement should not automatically mean that confidentiality must be set aside if the other party alleges a defense.

---

[233] *See, e.g.*, Randle v. Mid Gulf, Inc., No. 14-95-01292, 1996 WL 447954 (Tex. App. Aug. 8, 1996) ("Appellee . . . cannot argue that the mediation communications are confidential as to appellant's duress defense while, at the same time, sue for specific performance of the mediation agreement."); *cf.* Smith v. Smith, 154 F.R.D. 661, 669 (N.D. Tex. 1994) (rejecting argument that fraud action based on written mediated settlement agreement opens the door to mediator testimony to refute claim).

c. Threshold Resolution

Third, courts should also be alert to the possibility that settlement enforcement issues may be resolved without probing the mediation process. One possibility is that a contract defense may fail as a matter of law based on the allegation alone. In some jurisdictions, for example, duress or undue influence will suffice to set aside a contract only if the duress was exerted by another party to the contract. When this law applies, a party's allegations that his attorney or the mediator coerced him to agree to a settlement should fail as a threshold matter, without any need to gather evidence or examine the mediation session.[234]

Insufficiency of the evidence may also provide a mechanism to decide a claim as a matter of law and thus avoid mediation disclosures.[235] For example, under California law in the *Olam* case, Mrs. Olam needed to prove two elements to show that she was unduly influenced to sign the mediated agreement: that she was unduly susceptible and that she was subjected to excessive pressure.[236] The court conducted a full hearing on her claim with sealed testimony from the mediator, which the court later unsealed because it "was essential to doing justice."[237] On the first element of proof, the court relied heavily on the mediator's testimony to find that Mrs. Olam participated fully in the mediation session and understood the terms of the agreement she signed. But Mrs. Olam's own testimony was inadequate to carry her burden on the second element of her claim. The court concluded that she presented no evidence to show that she "was subjected to anything remotely close to undue pressure."[238] Thus it appears that the court had an independent ground to enforce the settlement without hearing anything more than the plaintiff's evidence.

---

[234] *See, e.g.*, Graf v. Sholes, No. C1-97-1893, 1998 WL 297519, at *2 (Minn. Ct. App. June 9, 1998) (enforcing mediated settlement when party's mistake was due to misrepresentation by own attorney); Lype v. Watkins, No. 01-98-00051-CV, 1998 WL 734429, at *3 (Tex. App. Oct. 22, 1998) (finding claim of coercion by former attorney immaterial in suit to enforce mediated settlement agreement).

[235] *See, e.g., In re* Tidewater Inc., No. Civ. A. 96-3743, 1997 WL 660626, at *2 & n.1 (E.D. La. Oct. 23, 1997) (finding that conclusory allegations of lack of capacity were insufficient to avoid summary judgment enforcing mediated settlement and excluding mediator's affidavit from record as unnecessary to decision); E.I. Du Pont De Nemours & Co. v. Custom Blending Int'l, Inc., No. C.A. 16295-NC, 1998 WL 842289, at *4 (Del. Ch. Nov. 24, 1998) (rejecting as matter of law defense to mediated settlement of economic duress when not supported by evidence).

[236] Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1141 (N.D. Cal. 1999).

[237] *Id.* at 1139.

[238] *Id.* at 1150.

Another possibility is that non-mediation evidence (or lack of it) may be sufficient to dispense with claims of coercion or fraud. The party who alleged heart problems during a mediation[239] could, for example, be expected to substantiate his heart disease and show that following the mediation he behaved consistently with his claim of chest pains. Without some corroborating evidence in these circumstances, a court could decide, without exploring the conduct of the mediation session, that the party had not carried his burden to present evidence to support his claim of duress.

Finally, a judge hearing a motion will usually hear from both parties to the dispute before making a decision, even if the party with the burden presents weak allegations or evidence. But when mediation confidentiality is at stake, it may be appropriate to rest a decision solely on the insufficiency of the allegations or the evidence without exploring the mediation any further. This would be analogous to a judgment on the pleadings or a judgment as a matter of law entered at the close of the plaintiff's case in a full-fledged trial proceeding.

4. Standards for Balancing the Desirability of a Confidentiality Exception

If a contract defense survives this preliminary scrutiny, then a court should consider whether the need for evidence from the mediation justifies breaching confidentiality. The *Olam* court provides an example of this balancing approach, first in deciding whether to hear the mediator's testimony under seal as an initial matter, and second in deciding whether to then unseal the testimony so that it could be used in ruling on the claim of duress.[240] While I argue that the court need not have reached this step, and my evaluation of the appropriate balance differs from that of the court, the case demonstrates the seriousness with which decisions to disclose mediation communications should be treated. Even more significantly, it provides a method of analysis for making the decision that other courts would do well to emulate.

First, the judge considered a threshold question: whether to require the mediator to appear at an *in camera* or sealed hearing in order to learn what his testimony would be.[241] The court recognized that ordering a mediator to testify, even *in camera*, creates a threat to the effectiveness of

---

[239] Randle v. Mid Gulf, Inc., No. 14-95-01292, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996); *see supra* text accompanying note 93.

[240] *Olam*, 68 F. Supp. 2d at 1131-32.

[241] *Id.* at 1131-39.

mediation.[242] He weighed this threat against the prospect that the mediator's testimony might make a "singular and substantial contribution" to advancing the important interest in a correct, just decision.[243] In this case, the judge found that the threat to mediation carried less weight than it would in other circumstances, in part because the parties had both waived their privilege and desired the testimony.[244] On the other side of the balance sheet, the judge concluded that the mediator's testimony was likely to advance the interest in "doing justice" and providing healthy incentives for adhering to commitments agreed to in mediation.[245] The mediator's testimony was especially important in this case because he was the only source of "presumptively disinterested neutral evidence," in part because the relationship between Mrs. Olam and the lawyer who represented her at the mediation had deteriorated.[246] This analysis convinced the judge that he should hear the mediator's testimony under seal. After hearing the mediator's testimony, the court was then in a position to consider factors to determine admissibility.[247] On one side of the balance the court placed the importance of the interest in confidentiality that would be harmed if the evidence regarding fraud or duress is admitted, coupled with the magnitude of the harm that would occur under the circumstances. On the other side of the balance the court weighed the importance of the rights or interests that would be endangered if the mediation evidence in question was not disclosed and the importance of the evidence to those rights or interests.[248]

What was missing in the *Olam* case was a standard for finding the balance point on that scale. Because the California legislature did not credit the force of contract defenses, it did not provide for the possibility of sacrificing confidentiality to examine such defenses. In contrast, the legislatures that permit a case-by-case determination of exceptions to confidentiality for settlement enforcement have set high standards for disclosure. An exception to mediation confidentiality to enforce a settlement (in Louisiana) or for a purpose not enumerated in the statute (which includes settlement enforcement in Ohio and Wisconsin) is unavailable unless it is necessary in order to avoid "manifest injustice."[249]

---

[242] *Id.* at 1133.

[243] *Id.* at 1132 & n.30.

[244] *Id.* at 1133-36.

[245] *Id.* at 1136.

[246] *Id.* at 1138.

[247] *Id.* at 1138-39.

[248] *Id.* at 1132.

[249] *See supra* notes 38-40, 104-07 and accompanying text.

The Uniform Mediation Act also sets a high standard for making an exception to the mediation privilege: the court must find that the evidence is otherwise unavailable and "that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality."[250]

The value of mediation confidentiality is at the center of the balancing analysis. It is crucial to both the parties' participation and the neutrality of the mediator. The harm to this value may, however, vary in degree with the circumstances. If the parties have both waived their privileges and wish to testify about their mediation communications or submit working documents, these disclosures advance party autonomy and do not harm the principle of confidentiality. If only one party has waived the privilege, then the court must examine the extent to which the evidence would invade confidences of the other party. When the parties seek the mediator's testimony there is a harm to the mediator, who, as observed in *Olam*, is "likely to feel violated by being compelled to give evidence that could be used against a party with whom [the mediator] tried to establish a relationship of trust during a mediation."[251] The most serious harm from compelling a mediator to testify, however, is directed at the mediation process rather than to one individual's interests. This is a harm to the environment of trust necessary for mediation and to the degree of confidence that parties and their attorneys are justified in placing in that environment. It is a harm that should not be underestimated on the ground that mediator testimony is a rare event.[252] As the cases cited in this paper demonstrate, attempts to obtain mediator testimony may not be routine, but they are growing with the growth in mediation. Moreover, a few dramatic cases in which a mediator is compelled to testify may be sufficient to cast general doubt on the ability of mediators as a group to avoid being called as witnesses.[253]

---

[250] UNIF. MEDIATION ACT § 6(b) (2001).

[251] *Olam*, 68 F. Supp. 2d at 1133-34.

[252] The *Olam* court thought that California's policy of requiring a written and signed mediated agreement greatly reduced the likelihood that mediators would be compelled to testify about contested settlements. *Id.* Unfortunately, however, not all jurisdictions observe this limitation and many courts have faced efforts to enforce unwritten or unsigned agreements.

[253] Nor is mediator testimony less harmful when it is directed at evaluating a contract defense. The *Olam* court was more concerned with a mediator serving as a source of evidence about a party's statements or admissions than about the party's actions in participating in the mediation. *See id.* at 1134-35. Indeed, the party's statements on the merits are a particularly damaging form of evidence. *See id.* at 1135. But it is important to note that in providing evidence about the parties' actions, their involvement in the mediation, or their capacity, a mediator is drawing conclusions that may come

On the other side of the balance, preserving the confidentiality of the mediation risks the injustice of enforcing an agreement obtained by fraud or coercion. The decision on the validity of the mediated agreement will be less accurate without all the available information. The magnitude of this harm will depend in part on how important the mediation evidence at issue is to the court's determination. The parties often regard mediator testimony as crucial to their case. The mediator carries authority both because she is a neutral party and because she is probably the only person who was present throughout the entire mediation, including the caucuses. Indeed, the mediator's testimony may be particularly important when, as in *Olam*, there are potential questions about the reliability of the testimony of a party's attorney.[254] Otherwise, however, the mediator's testimony, while undoubtedly helpful, may not be crucial to deciding the validity of the mediated agreement.

For this weighing process to be effective, the court will need to consider questions such as the probative value of the mediation evidence, a question that in the normal course can not be answered while preserving confidentiality. Therefore, a court must take steps to protect confidentiality during this inquiry.

5. Procedures to Maintain Confidentiality While Deciding on Confidentiality

If the goal is to maintain confidentiality unless its value is outweighed by injustice, it is crucial to determine the balance without disclosing the confidential communications. The law is still in its infancy when it comes to developing a process for deciding if it is necessary to invade the promised confidentiality of the mediation process. Balancing processes have been little used. In part this is because many statutes have attempted to erect absolute barriers to disclosure and thereby eliminate the uncertainty of a judicial determination. In part it is also because, at the other extreme, some courts still show a willingness to hear evidence regarding the content of mediation without engaging in any consideration of confidentiality at all.[255] When they permit disclosures

---

uncomfortably close to judging the merits of the defense. In my view, this is equally inconsistent with the neutrality of the mediator's role.

[254] *See id.* at 1138 (citing possible contention that lawyer had been source of pressure and potential conflict of interest for lawyer when malpractice suit against her was under discussion).

[255] *See, e.g.*, Smith v. Columbia Gas Transmission Corp., 176 F.3d 475 (Table), No. 97-2786, 1999 WL 198799, at *2-3 (4th Cir. Apr. 9, 1999) (holding evidentiary hearing on motion

without discussion of possible justifications for breaching mediation confidentiality, they need not worry about the process they use to evaluate the strength of those justifications. Nonetheless, confidential balancing procedures are a subject worthy of consideration for those gray areas where a bright-line rule is unacceptable, such as agreements allegedly obtained by fraud or coercion. Here, courts have shown a willingness to balance the equities, whatever the statutory provisions, and the "use of an insensitive procedure to determine the probative significance of the protected communications could cause severe damage to the substantive . . . privilege rights."[256]

In a very few states, the mediation statute provides a mechanism for evaluating the wisdom of disclosure in circumstances not covered by the statute. In Texas, for example, the state's mediation confidentiality provision anticipates that conflicts might arise with other legal requirements that mandate disclosures. In this event, the court is "to determine *in camera*, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure."[257] The *in camera* process serves to protect confidentiality while this determination is being made.[258] This procedure is authorized only, however, in cases involving conflicting legal requirements for disclosure. It does not apply in some of the settings where it might be most useful, such as attempts to seek the testimony of the mediator with regard to a defense of fraud or duress.[259]

In instituting a case-by-case balancing process for deciding on disclosure in the context of contract defenses, the Uniform Mediation Act

---

to enforce settlement agreement reached in mediation); Carr v. Runyon, 89 F.3d 327, 331 (7th Cir. 1996) (affirming district court's enforcement of mediated agreement following hearing that delved into course of mediation); Massey v. Beagle, 754 So. 2d 146, 146-47 (Fla. Dist. Ct. App. 2000) (affirming without comment court's failure to sanction party for revealing privileged mediation communications in motion); McEnany v. W. Del. Co. Cmty. Sch. Dist., 844 F. Supp. 523, 526-28 (N.D. Iowa 1994) (discussing mediator's testimony at evidentiary hearing on motion to enforce settlement agreement); Gregory v. Gregory, 408 N.W.2d 695, 697 (Minn. Ct. App. 1987) (discussing testimony about statements in divorce mediation without any mention of confidentiality).

[256] *Olam*, 68 F. Supp. 2d at 1126.

[257] TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(e) (Vernon 2001).

[258] *See also* ARK. CODE ANN. § 16-7-206(c) (Michie 1999) (providing *in camera* procedure for resolving any conflicts between confidentiality requirements and other statutes requiring disclosure); LA. REV. STAT. ANN. § 9:4112(D) (West Supp. 2000) (same); NEB. REV. STAT. § 43-2908 (1998) (providing that in mediation under Parenting Act, certain disclosures of abuse or neglect shall be reported to judge for *in camera* hearing on whether to make report to state Department of Health and Human Services).

[259] *See, e.g.*, Smith v. Smith, 154 F.R.D. 661, 670 (N.D. Tex. 1994).

in contrast responds to the growing awareness of the process problem inherent in determining if the need for evidence outweighs the interest in maintaining mediation. It incorporates a provision that requires an *in camera* hearing as part of the balancing process.

Courts have also invented procedures to maintain confidentiality when the state mediation statute is silent. In *Rinaker v. Superior Court*, two minors charged with vandalism had participated in a mediation, attempting to resolve a civil claim brought by the victim of the vandalism.[260] In a California juvenile delinquency proceeding, the minors sought testimony from the mediator, whom they claimed could impeach the victim based on his admissions during the mediation. While stressing the important public purpose of the California confidentiality provision, the appellate court held it must yield if it conflicted with the minors' rights to effective impeachment of an adverse witness.[261] But before allowing the minors to question the mediator, the juvenile court was required to conduct an *in camera* hearing "to weigh the 'constitutionally based claim of need against the statutory privilege' and determine whether the minors have established that [the mediator's] testimony is necessary to 'vindicate their rights of confrontation.'"[262] The *in camera* procedure allowed the court to maintain the confidentiality of the mediation while considering if the importance of the mediator's testimony to a fair process compelled its breach.[263]

The *Olam* court invented a different procedure tailored to the circumstances in that case.[264] It decided rather than call the mediator to the witness stand at the end of the hearing on enforcement of the settlement agreement, the court would take the testimony in closed proceedings, under seal.[265] The judge felt that hearing the mediator's

---

[260] Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 467 (Cal. Ct. App. 1998).

[261] *Id.* at 469.

[262] *Id.* at 472 (citations omitted).

[263] *See also* Gordon v. Caribbean Cruises, Ltd., 641 So. 2d 515, 517 (Fla. Dist. Ct. App. 1994) (disapproving *in camera* hearing held by trial court on whether parties to mediation had reached agreement because statute controlled by requiring signed writing).

[264] Having decided that the California law of privilege governed the mediator's testimony, the court considered whether it was bound by either Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and its progeny or Federal Rule of Evidence 501 to apply the same procedure used by the state court in *Rinaker*. Although acknowledging the difficulty of the characterization, the court decided that this was a "procedural" issue for Erie purposes and hence a federal court could deviate from the steps taken by the California court so long as it crafted procedures "designed to invade as little as possible the interests that support the state privilege law." Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1126 (N.D. Cal. 1999).

[265] *Id.* at 1128.

testimony in the context of the testimony from all the witnesses was the best way to evaluate whether "overriding fairness interests" required him to rely on (and accordingly disclose publicly) the mediator's testimony in determining the enforceability of the parties' memorandum of understanding.[266]

It is also possible to preview a mediator's testimony more informally. One judge examined the mediator on the phone before determining that his testimony would be cumulative and unnecessary.[267] In addition, techniques might be used after the fact to lessen the effect of disclosing mediation communications, including redacting or sealing the record.[268]

Not all commentators view the idea of a preliminary *in camera* examination favorably. In a related context, scholars have criticized the Supreme Court's authorization for trial courts to examine *in camera* communications that allegedly fall into the crime-fraud exception to the attorney client privilege.[269] They argue that by allowing *in camera* review before an exception is established, the Court has undermined clients' trust that their privileged information will go no further than their attorney.[270] The Court permits this review, however, on a weak standard that requires only that it "may reveal" evidence to substantiate the claim for an exception to the privilege.[271] Following the *Olam* example, the *in camera* review suggested here would occur only after a preliminary balancing has determined the benefit of lifting confidentiality from the evidence.

* * * * *

Unlike proving the existence of a settlement agreement, where a written document provides an easy method that eliminates the need for

---

[266] *Id.*

[267] *See* Wilson v. Attaway, 757 F.2d 1227, 1245 (11th Cir. 1985) (upholding trial court's refusal to admit bystander testimony from Community Relations Service mediator). Unfortunately, the opinion does not indicate whether counsel participated in the telephone call. If not, this approach veers too closely toward ex parte contact, and risks raising questions of the judge's own impartiality.

[268] *See, e.g.*, FLA. STAT. ANN. § 44.102(4) (West Supp. 2001) (court-ordered mediation) (requiring redaction of mediation communications revealed in disciplinary proceedings against mediator before file is made public); OR. REV. STAT. § 36.222(4) (1999) (permitting court to seal record when mediation communications are disclosed in proceeding to enforce mediated agreement).

[269] *See* United States v. Zolin, 491 U.S. 554, 565, 568-69 (1989).

[270] *See, e.g.*, Zacharias, *supra* note 133, at 80-81.

[271] *Zolin*, 491 U.S. at 572.

testimony on mediation communications, there is no simple substitute for such evidence when evaluating claims that an agreement is invalid. Given the importance of both confidentiality and full consent to mediated settlements, an inflexible rule in favor of ensuring one but not the other of these values is inappropriate. Instead, the best approach is to give courts guidance on the most important factors and trust their integrity to balance those factors in the circumstances of the individual case.

CONCLUSION

Proceedings to enforce or invalidate mediated settlements are an important setting in which mediation confidentiality may come under pressure. Parties are currently hampered in predicting confidentiality by huge variations among jurisdictions in the form and scope of both protections for mediation confidentiality and contract doctrine for settlement enforcement. As legislatures and courts in both the state and federal systems ponder confidentiality protection for mediation, they need to consider the complexities introduced by contract law.

The most appropriate balance between confidentiality and other values such as enforcement and autonomy differs depending on the nature of the claim. When the issue is whether or not the parties reached agreement, predictable confidentiality is a value that justifies requiring that mediated settlements be evidenced by a record — either a signed writing or a modern substitute — to preclude the need for testimony on the course of the mediation. Of the alternative methods for implementing this requirement, an evidentiary privilege that excepts only written settlements is the most effective.

When the issue is whether or not a mediated settlement is valid, confidentiality is but one very important value. It does not justify a uniform preclusion of mediation evidence that might prevent enforcement of a fraudulent or coerced agreement. This result would be inconsistent not only with a just outcome, but also with the consensual nature of mediation. Therefore a bright-line rule is inappropriate in this situation, and courts should instead balance the need for mediation evidence in the specific case against the harm that disclosure would cause to the purposes served by confidentiality. Legislatures need to acknowledge the need for individualized decisions on confidentiality in the context of contract defenses and set an appropriately strict standard for disclosure. They should also mandate *in camera* methods, which can protect confidentiality while a court evaluates the need for mediation confidentiality in the world of contract doctrine.