THE HAGHIGHI TRILOGY AND THE MINNESOTA CIVIL MEDIATION ACT: EXPOSING A PHANTOM MENACE CASTING A PALL OVER THE DEVELOPMENT OF ADR IN MINNESOTA

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I. INTRODUCTION

For movie buffs, the 1999 summer’s phantom menace was Episode I, a “prequel” to the popular Star Wars Trilogy which opened on movie screens in 1977. In 1983, the Minnesota legislature enacted the Minnesota Civil Mediation Act. For Minnesota lawyers and their clients, it is the Act, not George Lucas’ latest summer blockbuster, that may be the real phantom menace.

Certainly, the drafters of the Minnesota Civil Mediation Act were concerned about the fairness of the mediation process. Unfortunately, the Act suffers from inconsistent policy choices, lack of integration with other statutes and rules, and ambiguous and incomplete language. The technical provisions of the Act jeopardize the finality of mediated settlements inviting extended litigation to bring peace and end the conflict. Participants in mediations, parties and lawyers alike, may be at risk in terms of fulfilling their expectations and obligations under Minnesota’s statutory scheme.

Mediation in Minnesota is supposed to be an open process, one in which parties can freely participate without the guidance and expense of trained legal experts. Parties in mediations may have varying skills in negotiation, access to information, and

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ability to understand the "legal" implications of their situation. To "protect" the parties in mediations, the Act creates a series of technical and formalistic "rights" reminiscent of earlier days in the development of classical contract doctrine when formality and technicality prevailed over parties' expectations and reasonableness.\(^3\) With such a clear link to the distant past, it is particularly fitting that the Minnesota Civil Mediation Act, just like this summer's hit movie, is the "prequel" to its own unique trilogy, Haghghi v. Russian-American Broadcasting Co.\(^4\)

II. THE HAGHGHHI TRILOGY

The Haghghi trilogy begins innocently enough in 1995 as a breach of contract dispute between Ali Haghghi, an international distributor of foreign language radio programming, and Russian-American Broadcasting Company (hereinafter RAB), which provides ethnic radio and cable programming in Minnesota and other areas.\(^5\) RAB denied the breach and counterclaimed for alleged overdue payments.\(^6\) In an attempt to find peace, the parties agreed to mediate the dispute, and signed a written mediation agreement\(^7\) aimed at complying with the Minnesota Civil Mediation Act.\(^8\)

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5 Haghghi II, 577 N.W.2d at 928.

6 Id.

7 The Mediation Agreement provided in part:

Minnesota Civil Mediation Act. Pursuant to the requirements of the Minnesota Civil Mediation Act, the mediator hereby
After a day of mediation on Valentine’s day in 1996, the parties reached agreement. Both parties were represented by counsel who drafted a handwritten three-page settlement document incorporating the terms of the agreement. Because of a shortage of time, the settlement agreement was not typed. The attorneys initialed each of the terms, and the principals signed each page. The agreement included a clause that stated that it was a “Full and Final Mutual Release of all Claims,” but did not have a clause that specifically said it was a “binding agreement.”

Haghighi subsequently moved for an order “declaring” that the settlement agreement was valid and the defendant was in breach. The trial judge construed the motion as a motion to enforce a settlement agreement and ordered an evidentiary hearing. In opposing the enforcement action, RAB relied on the Minnesota Civil Mediation Act, which provided:

advises the parties that: (a) the mediator has no duty to protect the parties’ interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect the parties’ legal rights; (c) the parties should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; and (d) a written mediated settlement agreement is not binding unless it contains a provision that it is binding and a provision stating substantially that the parties were advised in writing of (a) through (c) above.

Haghighi II, 577 N.W.2d at 928.

9 Haghighi II, 577 N.W.2d at 928.
10 Id. at 929-30.
11 Id. at 928.
12 Id. at 929.
13 Haghighi III, 173 F.3d at 1088.
14 Haghighi II, 577 N.W.2d at 929.
15 Haghighi I, 945 F. Supp. at 1234.
16 Id. According to the Eighth Circuit precedent, a court must hold a hearing when parties move to enforce a settlement agreement. See Sheng v. Starkey Laboratories, Inc., 53 F.3d 192 (8th Cir. 1995).
A mediated settlement agreement is not binding unless it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights. ¹⁷

RAB’s argument was a short and airtight syllogism. The statute provides that mediated settlement agreements are not binding unless there is a clause that says they are binding. This mediated settlement agreement did not say it was binding; therefore, it is not binding. Much like the Jedi Knight Qui-Gon Jinn, who early in Episode I wisely notes, “things are not as they seem,” the trial judge, Federal District Court Judge Donald Alsop also took a step back.

Before him stood sophisticated parties who signed a settlement agreement drafted by counsel that said it is a “Full and Final Mutual Release of All Claims.” If the parties believed at the time they signed the agreement that it was a valid agreement, surely, Judge Alsop reasoned, the agreement is not unenforceable simply because it lacks a formalistic recitation that would be meaningless in this context. ¹⁸ Judge Alsop concluded the Minnesota legislature would not have intended such a result. ¹⁹ To have a rule so dramatically different from custom and practice

¹⁸ Haghighi I, 945 F. Supp. at 1234.
¹⁹ Id.
would create a “trap for both the unwaried and the wary” participants in mediations in Minnesota.\textsuperscript{20}  
Judge Alsop appears to make an alternative ruling based on waiver. Because counsel for RAB drafted a proposed settlement document without the specific clause “that the agreement would be binding,” RAB waived any claim that the statute or the mediation agreement preclude enforcement of the agreement.\textsuperscript{21} Since Judge Alsop did not reassert waiver as a grounds for granting summary judgment in his post-hearing order or in the question certified to the Court of Appeals for the Eighth Circuit, the Appellate court characterized the waiver language as \textit{dicta} and concluded “[t]here is no waiver.”\textsuperscript{22}  
After an evidentiary hearing, Judge Alsop decided that the parties intended the document to be enforceable, that the agreement was enforceable, and that the defendant was in breach.\textsuperscript{23} The District Court stayed enforcement of its order pending appeal and certified the question for interlocutory appeal of whether the Minnesota Civil Mediation Act bars enforcement of the handwritten document.\textsuperscript{24} Pursuant to a motion by Haghigi, the

\textsuperscript{20} \textit{Id.} Judge Alsop noted that:

The Court suspects that the vast majority of mediated settlement documents drafted by Minnesota attorneys since 1984 do not contain the language of \textsc{Minn. Stat.} § 572.35, subd. 1. In fact, former defense counsel failed to include the language in a settlement agreement he drafted.

\textit{Id.} at 1234 n.1.

\textsuperscript{21} \textit{Id.} at 1235.

\textsuperscript{22} \textit{Haghigi III}, 173 F.3d at 1088-89. The Court of Appeals suggested that the policy behind the statutory requirement that the binding clause must be included would be thwarted by using a waiver rationale to enforce nonconforming agreements. “[A] statutory right cannot be waived if waiver would violate public policy. \textit{See Stephenson v. Martin}, 259 N.W.2d 467, 470 (Minn. 1977) \textit{(per curiam)}.” \textit{Id.} at 1088.

\textsuperscript{23} \textit{Haghigi II}, 577 N.W.2d at 929.

\textsuperscript{24} \textit{Haghigi III}, 173 F.3d at 1087. The issue on appeal was: “Whether the [Minnesota Civil Mediation] Act bars enforcement of the handwritten document as a binding settlement agreement.” \textit{Id.}
Federal Court of Appeals, in turn, certified the following question of law under the Uniform Certification of Questions of Law Act\textsuperscript{25} to be resolved by the Minnesota Supreme Court:

Whether a handwritten document prepared by the parties' attorneys at the conclusion of a mediation session conducted pursuant to the...Act and signed contemporaneously on each page by the respective parties attending the mediation session but which does not itself provide that the document is to be a binding agreement, is rendered unenforceable as a mediated settlement agreement by virtue of Minn. Stat. §§ 572.35, subd. 1\textsuperscript{26}.

The Minnesota Supreme Court answered the question in the affirmative. The Court, by limiting its decision to the issue certified, assumed that the mediation was conducted pursuant to the Minnesota Civil Mediation Act.\textsuperscript{27} The Court utilized RAB's syllogism and applied a literal interpretation of the statute. According to the Court, this is a simple case, assuming the Act is applicable. The Court found no ambiguity in the statute.\textsuperscript{28} The legislature said that the settlement

\textsuperscript{25} MINN. STAT. § 480.061 (1996). This section was repealed in 1998 when Minnesota adopted the updated Uniform Certification of Questions Act. MINN. STAT. § 480.065 (1998).

\textsuperscript{26} Haghighi II, 577 N.W.2d at 928.

\textsuperscript{27} Id. at 929. Perhaps the greatest irony in the Haghighi trilogy is that the "Agreement to Mediate" did not comply with the prerequisites in the Civil Mediation Act because it did not include a provision that the parties can terminate upon written notice from either party or the mediator delivered by certified mail or personally. Haghighi III, 173 F.3d at 1088. See infra notes 49-51 and accompanying text. Nor could the parties provide proof that the mediator had signed the agreement, which is also a prerequisite to the applicability of the Act. Respondents Brief at 15, Haghighi II, 577 N.W.2d 927 (Minn. 1998) (No. C6-97-1842). See infra notes 49-51 and accompanying text.

\textsuperscript{28} Id.
agreement had to include certain “magic words.” It was noted that these words were lacking, the settlement was not binding. Writing for the Court, Chief Justice Blatz noted that this interpretation does not necessarily produce an “absurd result.” The legislature may have intended that a settlement document must have the “magic words” so that parties can feel free to sign anything without fear that what they sign (even if it says it is a Full and Final Mutual Release of All Claims) can be used against them. Justice Blatz did not elaborate or explain what is socially desirable about encouraging people to sign documents that have no effect. Perhaps recognizing some weakness in its policy argument, the Court added “[i]f the literal language of this statute yields an unintended result, it is up to the legislature to correct it.”

Back at the Eighth Circuit, the saga continued. First, the court rejected Haghighi’s claim that the act was inapplicable because there was no proper “agreement to mediate.” This issue was already implicitly decided by the nature of the question certified to the Supreme Court. Although the “agreement to mediate” most certainly did not comply with the technical requirements of Minn. Stat. § 572.33, subd. 3, when the

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29 In its brief to the Minnesota Supreme Court, Haghighi characterized the statutory requirement that certain clauses be inserted into mediated settlement agreements as requiring certain “magic words.” Respondent’s Brief at 16, 17. As discussed below, because we believe the language requirement is more formalistic and technical and not designed to effectively provide needed information, we adopt Haghighi’s magic words characterization.

30 Haghighi II, 577 N.W.2d at 930.

31 Id.

32 Perhaps in the context of a mediation conducted by correspondence or over the internet such a rule might encourage a more frank exchange. Yet even in this type of mediation it hardly is good policy to encourage parties to sign and execute documents that purport to be a “Final” and “Full” release if they do not intend the document to be binding. In any event, written negotiations or offers to compromise or settle, as opposed to executed settlement agreements, are already inadmissible under traditional rules of evidence. Minn. R. Evid. 408.

33 Haghighi II, 577 N.W.2d at 930.

34 Haghighi III, 173 F.3d at 1088.

35 See supra note 27.
Minnesota Court of Appeals certified the case to the Supreme Court, it either assumed or concluded that the mediation was conducted pursuant to the Minnesota Civil Mediation Act. Thus, Haghigi’s first attack fell short under a “law of the case” type justification.\footnote{\textit{Haghigi III}, 173 F.3d at 1088. The Court offered a curious alternative justification. It stated that “both parties signed a mediation agreement in which they agreed to be bound by the Act,” a type of waiver argument. \textit{Id.} Apparently, the appellate court believed that the parties could waive some provisions in the Act – the provisions that set out the requirement that certain language be included in the agreement to mediate, but not other provisions that require certain language in the mediated settlement agreement. See supra note 27 and accompanying text.}

Second, the appellate court was unpersuaded by Haghigi’s argument that the Act was inapplicable because settlement was reached after conclusion of the mediation. Haghigi argued that the mediation was completed when the parties decided to put in writing the agreement reached at the mediation. The Court rejected this claim, stating “[t]he handwritten document was drafted and signed immediately after negotiations, when the mediator concluded the parties had reached an agreement and brought them together.\footnote{\textit{Id.}}

Third, with a foreshadowing of future conflict that even George Lucas would appreciate, the court declined to decide several additional arguments not raised at the trial level. Specifically, the court declined to address 1) whether the agreement’s recital that it is a “Full and Final Mutual Release of All Claims” complies with the statutory requirement that the agreement state that it is binding; and 2) whether in any event the court should reform the settlement agreement to conform to the intent of the parties.\footnote{\textit{Id.}} Finally, the court rejected Haghigi’s suggestion that RAB waived the Act’s requirements because RAB failed to include binding language in settlement proposals its counsel drafted.\footnote{\textit{Id.}} According to the Federal Court of Appeals, the
trial judge’s discussion of waiver was *dicta*, there was no direct evidence of waiver, and waiver would be counter to the public policy at the heart of the Act.⁴⁰

### III. A PHANTOM MENACE

After four years of litigation, three different courts, three published opinions, numerous hearings litigating the applicability of the Minnesota Civil Mediation Act to a mediation that does not literally fit under the Act, the matter was sent back to the trial court where it began. Perhaps in part because of the enormous expense incurred in litigating the effect of the mediated settlement, RAB is now in bankruptcy and the District Court proceedings have been stayed.⁴¹ This case, with its multiple opinions, could be cited as an example of the failure of the technical, slow and expensive litigation process and serve as further inducement to encourage ADR processes as the preferred mechanism for dispute resolution. The irony is that if the parties engaged in private negotiation, rather than mediation, this simple breach of contract case would have been settled or tried and appealed to conclusion years ago.

The case demonstrates the menace of allowing formal, technical rules to prevail in the mediation process, rather than the parties’ reasonable expectations. That menace, that phantom menace, is embodied in the Minnesota Civil Mediation Act – an Act that was designed to encourage mediation in its goal of reducing costs and empowering parties to reach reasonable accords. While the litigation process is moving away from a highly technical and formal rights-based approach to dispute resolution, the mediation process may well be going in the other direction.

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⁴⁰ *Id. See supra* note 22 and accompanying text.

⁴¹ RAB had previously argued that the value of settlement was only $35,000. The legal costs and fees incurred in the litigation over settlement enforcement must be substantially greater. Letter of September 28, 1999, to authors from Robert Gust, counsel for Haghighi.
IV. A FATALY FLAWED STATUTE

A. When is the Act Applicable?

The Minnesota Civil Mediation Act does not adequately define the scope of its coverage. While a short list of cases is expressly exempted from coverage of the Act’s enforcement provisions, other statutes governing enforcement of mediated settlements strongly suggest additional case types are also outside the Act’s scope. Moreover, the Act provides no definition for mediation and defines a mediator as “a third party with no formal coercive power.” Thus, a judge assigned to a case and perhaps a court appointed referee, presiding over settlement negotiations would not be a mediator under the Minnesota Civil Mediation Act. In contrast, under the definition of mediation in Minnesota Rule of General Practice 114.02, a mediation is “[a] forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own

42 The statutory exclusions include: “proceedings relating to the determination of criminal liability or proceedings brought under chapters 518 [marriage dissolution], 518A [child custody], 581B [domestic abuse], and 518C [child support], or proceedings relating to guardianship, conservatorship, or civil commitment.” MINN. STAT. § 572.40 (1998).

43 See e.g. Agricultural Marketing and Bargaining Act, MINN. STAT. § 17.697, subd. 11 (1998) (“[a]ny final written agreement reached during the mediation procedure is enforceable under the law and in the courts of this state”); Farmer-Lender Mediation Act, MINN. STAT. § 583.26, subd. 9b (1998) provides that:

The debtor and creditors who are parties to the approved mediation agreement and creditors who have filed claim forms and have not objected to the mediation agreement: (1) are bound by the terms of the agreement; (2) may enforce the mediation agreement as a legal contract; and (3) may use the mediation agreement as a defense against an action contrary to the mediation agreement.

Id.; see also Special Education Mediation, MINN. STAT. § 125A.43(b) (1998) (“[t]he resolution of the mediation is not binding on any party”).

44 MINN. STAT. § 572.33, subd. 2 (1998).
judgment on the issues for that of the parties.”45 Under this
definition, parties could engage in a mediation presided over by a
judge or an employer with coercive power, as long as the person
presiding is “neutral” and does not exercise any coercive power to
impose his or her “own judgment” on the agreement.46

Putting aside the type of dispute or the professional identity
of the neutral, the Act applies only when a mediator strives to
promote and facilitate a voluntary settlement of a controversy
identified in an “Agreement to Mediate.”47 An ombudsman or
neutral mediating a dispute pursuant to company policies or other
source of authority is not governed by the Act.48 Moreover,
“Agreement to Mediate” has a technical definition.49 It must:

45 MINN. R. GEN. PRAC. 114.02(a)(7).
46 This theme of self-determination is reiterated in the Rule 114 Code
of Ethics, adopted by the Minnesota Supreme Court in 1997:

A mediator shall recognize that mediation is based on the
principle of self-determination by the parties. It requires that
the mediation process rely upon the ability of the parties to
reach a voluntary, uncoerced agreement. The primary
responsibility for the resolution of a dispute and the shaping of
a settlement agreement rests with the parties. A mediator shall
not require a party to stay in the mediation against the party’s
will.

MINN. R. GEN. PRAC. 114 Appendix, Code of Ethics, Mediation Rule I.
47 See MINN. STAT. § 572.33, subd. 1 (1998).
48 Ombuds offices may be created in private and public organizations.
Several statutes create an ombuds office setting forth specific responsibilities
and authority. See e.g. MINN. STAT. § 17.95 (1998) (agriculture ombudsman);
MINN. STAT. § 116.98 (ombudsman for small business air quality compliance);
MINN. STAT. § 241.44 (1998) (ombudsman for corrections); MINN. STAT. §
245.92 (1998) (ombudsman for mental health and mental retardation); MINN.
STAT. § 256.974 (ombudsman for older Minnesotans); MINN. STAT. § 611A.72
from office to office but typically range from: counseling; investigation of
complaints (sometimes with subpoena power MINN. STAT. § 245.94, subd. 1(f));
prescribing a method of resolving complaints; making formal or private
recommendations to public agencies, officials and presenting authorities;
litigating as well as mediating disputes. Their range of duties may involve an
1. Be in writing;
2. Identify the controversy between the parties;
3. State that the parties will seek to resolve the controversy through mediation;
4. Provide for termination of mediation upon written notice from either party or the mediator delivered by certified mail or personally to the signers of the agreement;
5. Be signed by the parties and the mediator;
6. Be dated.\textsuperscript{50}

Many mediations in Minnesota, including the one at issue in \textit{Haghighi},\textsuperscript{51} are carried out without Agreements to Mediate signed by the parties and the neutral that include the mandated termination clause. That default alone arguably brings those mediations outside the Act’s purview.

Certainly, it would require a highly technical ruling from the Minnesota Supreme Court to conclude that a settlement after a fully “lawyered,” fair and complete mediation conducted pursuant

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{49} MINN. STAT. § 241.44, subd. 1(c) (ombudsman for corrections cannot be compelled to testify or produce evidence); MINN. STAT. § 256.9744 (information gathered by ombudsman for older Minnesotans must be maintained in accordance with the Minnesota Data Privacy Act).
\item \textsuperscript{50} ld.
\item \textsuperscript{51} The agreement in \textit{Haghighi} did not include the termination clause, and the parties could not produce evidence the agreement was signed by the mediator. \textit{See supra} note 27; see also Gant v. Gaffney, No. C2-90-938, 1990 WL 157443 (Minn. Ct. App. Oct. 23, 1990) (applying a mediator privilege in a mediation conducted pursuant to a school’s code of conduct and not pursuant to an agreement to mediate).
\end{itemize}
\end{footnotesize}
to a detailed written agreement to mediate was invalid simply because the agreement did not provide the seemingly unnecessary information that the parties could terminate the mediation by certified mail or personal service. But the Court in *Haghghi* refused to enforce a written settlement drafted by lawyers, intended by the parties to be binding, that included a clause that it was a "Full and Final Mutual Release of All Claims." The plain, unambiguous meaning of this statute is that without the required termination clause it is not an agreement to mediate governed by the statute.

**B. When Does a Mediation Under the Act End?**

The Act provides that mediation can be terminated by certified mail or personal notice to all parties and the mediator.\(^{52}\) Indeed, during the mediation effort, and until 20 days after proper notice of termination, the Act suspends the running of the statute of limitations.\(^{53}\) Absent the required written notification of termination, which undoubtedly is not routinely utilized in Minnesota, mediations continue indefinitely. Many disputes settle days or months after scheduled mediation sessions. Presumably, the Act's requirements, rather than normal contract principles, might govern enforcement questions in such cases.\(^{54}\) Moreover, the Act is inconsistent with Minnesota Rule of General Practice 114.10(d),\(^{55}\) which contemplates that the mediator will

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\(^{52}\) MINN. STAT. § 572.33, subd. 3 (1998).


\(^{54}\) For example, assume after remand to the district court that the parties in *Haghghi* through old-fashioned private negotiation reach a new settlement. Must the settlement agreement include the magic words in order to be binding?

\(^{55}\) Minnesota Rule of General Practice 114.10(d) provides:

**Communications to Court After ADR Process.** When the ADR process has been concluded, the court may only be informed of the following:
communicate to the court after a mediation has been concluded, but does not require certified mail or written personal notice to the parties. One question raised, but certainly not resolved, by the Haghighi trilogy, is at what point is the mediation completed and the enforceability of the settlement resolved by contract principles, not the Minnesota Civil Mediation Act?

C. Which Settlement Agreements ARE Governed by the Act?

The requirements in the Act apply only to mediated settlement agreements, which are defined as:

1. A written agreement;
2. Setting out the terms of the full or partial agreement;
3. Signed by the parties and dated.\(^{56}\)

What about oral settlement agreements? Nothing in the Act makes oral settlement agreements non-binding; thus, the literal interpretation of the statute would lead to the result that oral

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\begin{align*}
(1) & \quad \text{If the parties do not reach an agreement on any matter, the neutral should report the lack of an agreement to the court without comment or recommendations;} \\
(2) & \quad \text{If agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction's policies governing settlements in general; and} \\
(3) & \quad \text{With the written consent of the parties, the neutral's report also may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.}
\end{align*}
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\(^{56}\) \text{Minn. R. Gen. Prac. 114.10(d).} \\
\text{Minn. Stat. § 572.33, subd. 4 (1998).}
agreements need no special clauses, but written mediated settlement agreements must have certain "magic words" in order to be binding.

D. Magic Words “It Is Binding” Return to the Seal

Notwithstanding the Supreme Court’s conclusion that Minn. Stat. § 572.35, subd. 1 is not ambiguous, a fair reading of the statute on its face gives rise to numerous issues of interpretation. Initially, the statute is applicable only to "mediated settlement agreements," thus incorporating all the ambiguity in the preceding discussion. More importantly, the two sentences in subdivision 1 are literally inconsistent. The first sentence states that the effect of mediated settlement agreements is governed by principles of contract law; thus, settlements in mediations would be treated the same as settlements in non-mediated negotiations. The second sentence, however, says that a mediated settlement agreement under the Act will not be treated like a negotiated settlement or simple contract, but will be enforced only if it includes certain magic words to wit:

1. That it is binding;

2. A provision stating that the parties were advised in writing that:

   a. the mediator has no duty to protect their interests or provide them with information about their legal rights;

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58 Haghighi II, 577 N.W.2d at 929.
b. signing a mediated settlement agreement may adversely affect the parties' legal rights; and

c. the parties should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights.\textsuperscript{59}

The requirement that the agreement include the term "it is binding" might have some historical justification. A threshold and elusive issue in many contract disputes is whether parties have entered into an agreement or are still at the negotiation stage. Have they agreed to agree? This problem was obviated at early common law when rather than magic words, a magic seal, insured enforceability of agreements.\textsuperscript{60} This requirement of course made the issues of contract formation more certain, but proved unworkable in part because courts became unwilling to neglect parties' legitimate interests in fair agreements simply because of the lack of the needless formality of the seal.

In addition to providing clear evidence of the transaction and channeling judicial attention to which agreements are enforceable, contract formalities can serve to caution parties and deter "inconsiderate action" in forming agreements.\textsuperscript{61} However, in his famous article addressing the role of formality in contract enforceability Professor Fuller warned:

The need for investing a particular transaction with some legal formality will depend upon the extent to which the guarantees that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises —

\textsuperscript{59} Minn. Stat. § 572.35, subd. 1 (1998).

\textsuperscript{60} See generally Arthur L. Corbin, Corbin on Contracts § 241 (1952); Alan Farnsworth, Contracts § 2.16 (2d ed. 1990).

\textsuperscript{61} Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800-01 (1941).
including in these "forces" the habits and conception of the transacting parties.\textsuperscript{62}

The statute runs contrary to the habits and practices in Minnesota.

Moreover, there is confusion inherent in the clause requiring parties to be advised in writing about the mediator's role, the fact that signing a settlement may adversely affect the parties' legal rights, and that parties should consult an attorney before signing a settlement if they are uncertain of their rights. First, the statute does not indicate who should inform the parties in writing about these rights. If the parties are not represented by counsel, who if not the mediator has the duty to tell them in writing about these enforcement provisions of the Act. Although a mix of movie metaphors, surely this is a perfect Catch-22. The mediator is compelled to state on the one hand that s/he has no duty to protect interests or provide parties with legal information, but is also required to provide legal information if the parties are to have any chance of enforcing their agreements! Second, if the mediator informs the parties orally, or no one in writing tells represented parties that they can consult with a lawyer, why should a court refuse to enforce an otherwise valid and fair agreement that is the result of a fair mediation process?

Negotiated settlement agreements (and perhaps mediated oral settlement agreements\textsuperscript{63}) are enforceable without these magic words, and there is no good reason why otherwise fair, mediated settlement agreements should not be enforceable. In specialized contexts, treating mediated settlement agreements different from other agreements might be justified. For example, in child custody disputes courts have traditionally exercised supervision of settlements to enforce public norms and in particular to protect vulnerable third parties.\textsuperscript{64} Court review in such contexts provides

\textsuperscript{62} Id. at 805.

\textsuperscript{63} See supra note 57.

\textsuperscript{64} See e.g. MINN. STAT. § 518.619, subd. 7 (1998), which mandates that "[a]n agreement reached by the parties as a result of mediation may not be presented to the court nor made enforceable unless the parties and their counsel,
necessary quality and fairness checks. But in most mediations, and in particular court annexed mediation, there is little justification for different requirements for mediated settlement agreements as opposed to privately negotiated settlement agreements.

Having dramatically different rules for enforcing negotiated settlements as opposed to mediated settlements causes uncertainty and unfair surprise. Clients represented by experienced lawyers might be well protected, but because of the ambiguity about when the Act applies, even wise and experienced lawyers may not adequately protect their clients. Parties without lawyers or without wise and experienced lawyers will be in jeopardy.

In *Haghgighii*, the court suggested that perhaps the legislature wanted to encourage participants to exchange writings in mediation without fear that what they put in writing will be used against them. The concern is unwarranted. In the first place, there are numerous privilege rules and statutes that protect against disclosure of documents produced or communications during the mediation process. Second, it is doubtful that Minnesota citizens would feel chilled in any way if told that if they choose to sign and/or have their attorneys sign at the bottom of a document that purports to be a final and complete or partial settlement of the issues in dispute, that their signature might be taken to mean that they have agreed to settle according to the terms of the document they signed. Most Minnesotans believe that by signing documents, they are agreeing to terms on the document they signed. Further, they understand that they can consult an attorney, if they choose.

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if any, consent to its presentation to the court, and the court adopts the agreement.”

65 Nancy H. Rogers & Craig A. McEwen, Mediation: Law, Policy & Practice 4.13 (2d ed. 1994) (noting, however, that the ideal of rigorous court review often falls short to the reality of “rubber stamp” enforcement).

66 *Haghgighi II*, 577 N.W.2d at 930.

67 See e.g. Minn. R. Gen. Prac. 114.08; Minn. R. Evid. 408; Minn. Stat. § 595.02, subd. 1(l) (1998); Minn. Stat. § 595.02, subd. 1a (1998).
Although unstated by the Minnesota Supreme Court in *Haghighi*, an additional enforcement concern is the fear of coercion, especially when the mediation takes place in the shadow of litigation. There is also the possibility that parties may misconstrue the personal and informal context of mediation and mistakenly assume they are free altogether of legal norms and rules. By making enforcement an express issue in every mediation, the Minnesota Civil Mediation Act purports to “cure” this latter problem. Indeed, the Act’s affirmative requirements may assist those parties expressly wishing to “delegalize” their mediation. But at what cost? For parties who expect, and believe they bargained for, compliance and the possibility of enforcement for breach, the *Haghighi* trilogy aptly demonstrates the Act’s limitations.68

E. Reformation and Confidentiality

Minnesota Statute section 572.36 provides that a mediated settlement agreement can be set aside or reformed based on common law principles or if “there was evident partiality, corruption, or misconduct by a mediator prejudicing the rights of a party.” Typical grounds for setting aside a contract include duress,70 mutual mistake,71 unilateral mistake accompanied by

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69 With amazing prescience for an article written 13 years ago, Robert Burns noted that the wisdom of the Minnesota rule thus depends on the empirical and normative soundness of the view that making enforceability an explicit subject for the mediation contributes to an empirically identifiable result (compliance?) judged valuable. Id. at 114.

70 Waller v. Schmitz, 57 N.W.2d 821, 824 (Minn. 1953) (duress can be a valid defense against the enforcement of a settlement release); Bond v. Charlson, 374 N.W.2d 423, 428 (Minn. 1985) (requiring coercion by physical force or unlawful threats to invoke the defense of duress). See generally ARTHUR L. CORBIN, *CORBIN ON CONTRACTS*, § 228 (1952); E. ALLEN
concealment, fraud, or unconscionable overreaching. Contracts can be reformed when a mistake in integration is made and the written contract does not represent the agreement reached. In Haghighi, plaintiff raised a claim late in the process that the contract should be reformed to include a clause that it was binding to accurately reflect the underlying agreement. Since the issue was not directly raised at the trial level, the Court of Appeals and the Minnesota Supreme Court did not rule on this issue.

Although the Minnesota Civil Mediation Act contemplates that parties can seek to have the agreement set aside or reformed, the moving party may be unable to produce the necessary evidence. The general mediation privilege protecting all

Farnsworth, Farnsworth on Contracts § 4.16 (1990); 13 A.L.R. 4th 686, 696.

71 Doud v. Minneapolis St. Ry., 107 N.W.2d 521, 524-25 (Minn. 1961) (setting aside a release based on mutual mistake when the parties' settlement did not contemplate the recovery of unknown injuries). See Winter v. Skoglund, 404 N.W.2d 786, 792-93 (Minn. 1987) (recognizing that a contract may be avoided on the grounds of mutual mistake if the parties seeking to avoid the contract did not assume the risk of the mistake).

72 See C.H. Young Co. v. Springer, 129 N.W. 773, 774 (Minn. 1911) (stating that a contract may be avoided by one of the parties for his mistake of fact, when such mistake was caused by the inequitable conduct of the other contracting party); Restatement (Second) of Contracts § 153 (1981).

73 Marino v. Northern Pac. Ry., 272 N.W. 267, 268-69 (Minn. 1937) (setting aside a release for personal injury and other damages procured by false representation). See Eggleston v. Advance Thresher Co., 104 N.W. 891, 893 (Minn. 1905) (stating that fraudulent inducement can be a defense even where a party was negligent in signing a document without reading it).

74 Jacobs v. Farmland Mut. Ins. Co., 377 N.W.2d 441, 444 (Minn. 1985) (invoking the doctrine of equitable recission to set aside a settlement release where it is improvident or unconscionable and recission will prevent one party from taking unconscionable advantage of another's mistake) (citing Schoenfeld v. Bucker, 114 N.W.2d 560, 566-67 (1962)).

75 Arthur L. Corbin, Corbin on Contracts, § 614 (1952); Farnsworth, supra note 10, at § 7.5.

76 See generally Peter N. Thompson, Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota, 18 Hamline J. Pub. L. & Pol'y 329 (1997). Dramatic differences in states' legislation on this evidentiary issue, as well as other aspects of mediation
communications, and documents made or used because of a mediation pursuant to "an agreement to mediate" has an exception for matters relating to actions to reform or set aside mediated settlements.\textsuperscript{77} However, the third party neutral privilege/competency statute\textsuperscript{78} would not permit the neutral to

confidentiality, is one reason that a Uniform Mediation Act is currently being drafted by the National Conference of Commissioners of Uniform State Laws and the American Bar Association. In the most recently circulated draft of the proposed Uniform Act (June 1999), the Commissioners sought public comment on the necessity of expressly eliminating evidentiary protection for mediation communications "in a proceeding to establish the validity, invalidity, enforceability, or unenforceability of an agreement evidenced by a record and reached by the disputants as the result of mediation." Draft Uniform Mediation Act, Section 2(c)(8) (visited June 1, 1999) \textlangle http://www.stanford.edu/group.sccn/mediation/drafts/june99.htm\textrangle.

\textsuperscript{77} \textsc{Minn. Stat.} § 595.02, subd. 1(l) provides:

A person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communication during mediation by the common law.

\textsc{Minn. Stat.} § 595.02, subd. 1(l) (1998).

\textsuperscript{78} \textsc{Minn. Stat.} § 595.02, subd. 1a provides:

Alternative dispute resolution privilege. No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:

1. constitute a crime;
2. give rise to disqualification proceedings under the rules of professional conduct of attorneys; or
testify or provide evidence about the mediation process. If the mediation is court-annexed under Rule 114, absent agreement of all parties and the court, no fact concerning the mediation can be used in any proceeding involving any of the parties or issues in the mediation. 79 Further, notes, records or recollections of the neutral cannot be disclosed absent agreement of all parties and the neutral unless required by law or professional code. 80 Thus, at least in Rule 114 mediations, the opportunity to produce evidence to reform a contract is slight. 81

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(3) constitute professional misconduct.

**MINN. STAT. § 595.02, subd. 1a (1998).**

79 Minnesota Rule of General Practice 114.08 (a) provides:

**Evidence.** Without the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.

**MINN. R. GEN. PRAC. 114.08(a).**

80 Minnesota Rule of General Practice 114.08(e) provides:

**Records of Neutral.** Notes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes. No record shall be made without the agreement of both parties, except for a memorandum of issues that are resolved.

**MINN. R. GEN. PRAC. 114.08(e).**

81 The clear legislative intent in **MINN. STAT. § 595.02, subd. 1(l)** is that parties should be allowed to testify about statements made during mediations, at least on the issue of whether an agreement should be reformed or set aside. This legislative intent is frustrated in Rule 114 mediations raising the issue of a potential conflict between legislative and judicial authority over rules of privilege. **See generally Maynard Pirsig and R. Tietjen, Court Procedure and the Separation of Powers in Minnesota,** 15 WM. MITCH. L. REV. 141 (1988). As a general proposition, the legislature has purported to retain all authority to promulgate rules of privilege. **MINN. STAT. § 480.0591(6)(d)** (1998). At least in the promulgation of the Minnesota Rules of Evidence, the Minnesota Supreme
Although the issue has largely been ignored, there is no exception that would permit a party to introduce evidence of a mediated settlement agreement for the purposes of enforcing an agreement. In *Haghigi*, the court ruled that the mediator could not be subpoenaed pursuant to the ADR neutral privilege/competency statute but allowed the parties to testify freely about facts and communications that took place during the mediation session without addressing the privilege question.

**F. Legislative Response**

In response to the Supreme Court’s decision in *Haghigi*, the Minnesota legislature recently amended the Minnesota Civil Mediation Act in an attempt to change the result in similar cases. Unfortunately, the legislature’s remedy creates additional problems. The amended Act, with new text highlighted in bold, was effective August 1, 1999, and reads as follows:

The effect of a mediated settlement agreement shall be determined under principles of law applicable to contract. A mediated settlement agreement is not binding unless: (1) it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing

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82 No one raised the issue in *Haghigi* that the communications and documents, including the purported settlement agreement, are privileged. Pursuant to motion, Judge Alsop did rule that the mediator could not be subpoenaed pursuant to MINN. STAT. § 595.02, subd. 1a. 945 F. Supp. at 1235.

83 MINN. STAT. § 595.02, subd. 1a; reproduced *supra* in note 78.

that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; or (2) the parties were otherwise advised of the conditions in clause (1). 85

Literally, the amendment renders mediated settlements binding if: 1) the written settlement agreement has a provision stating that it is binding (magic words); or 2) the parties were advised that any agreement is not binding without a clause saying it is binding. This amendment makes no sense. If RAB were advised, which they were in their agreement to mediate, that mediated settlement agreements are not binding without a clause stating that they are binding, then the court would enforce the agreement without the clause in the settlement agreement itself. In other words if RAB were told that an agreement is not binding without the “magic words,” then an agreement without the “magic words” is binding.

Perhaps the legislature meant that the agreement without the magic words saying “it is binding” is enforceable if the parties were otherwise advised that the agreement was binding. 86 According to the trial judge, the parties in Haghighi believed that the agreement was binding, but there is no evidence that anyone “advised” them that it was binding. Literally, to comply with the other conditions in the clause, if a mediated settlement agreement does not have a clause stating that the parties were advised in writing about the mediator’s duties, the effect of signing, and right to consult counsel, the agreement can still be enforceable if the

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85 1999 Minn. Sess. Law Serv. Ch. 190 (West) (enacted May 21, 1999) [emphasis added].

86 In light of Justice Blatz’s opinion enforcing a strict literal interpretation of this statute, it might be risky to assume the courts will construe this statute in terms of what the legislature meant and not on what the legislature said.
parties were advised (by someone) that they had been previously so-advised in writing.

Obviously, testimony about what the parties were advised may run into privilege problems.\textsuperscript{87} If a party is represented by counsel, private confidential legal advice may be privileged.\textsuperscript{88} If a party is advised by the adverse party, the communication may be privileged under the Mediation privilege as previously discussed.\textsuperscript{89} If the parties were advised by the mediator, then in addition to other privilege sources, the advice may be unavailable for evidentiary use because of the ADR neutral privilege/competency statute.\textsuperscript{90}

V.  CONCLUSION

Like it or not, there are two more films to come in the Star Wars saga. Another good bet is that the Haghghi trilogy is not the final chapter in the interpretation of the Civil Mediation Act. One would hope that the dark shadow cast by the Act will be dissipated by legislative reform or repeal.

In certain contexts, specialized enforcement rules may be needed and appropriate. In all other settings, traditional well accepted principles of contract law should control enforcement of mediated settlements. While there may be some merit from a consumer protection perspective in encouraging certain disclosures by mediators, such as information about the mediator’s training


\textsuperscript{88} MINN. STAT. § 595.02, subd. 1(b)(1998).

\textsuperscript{89} MINN. STAT. § 595.02 subd. 1(l)(1998), or, if a Rule 114 mediation, MINN. R. GEN. PRAC. 114.08.

\textsuperscript{90} MINN. STAT. § 595.02, subd. 1a (1998).
and experience,\textsuperscript{91} or the wisdom of consulting legal counsel, any statutory scheme designed to encourage such disclosures should be uncoupled from limiting the enforceability of fairly mediated settlements. Uncertainty in enforceability of settlement agreements is a phantom menace that is casting a pall over the development of ADR in Minnesota.

\textsuperscript{91} Currently, the Act criminalizes the failure of a mediator to provide the parties in writing with a statement of educational background and relevant training and experience in the field prior to beginning mediation. MINN. STAT. § 572.37 (1998) (petty misdemeanor). The resources in the criminal justice system surely have better uses than policing good practices for mediators.