ARTICLES

CONFIDENTIALITY, COMPETENCY AND CONFUSION: THE UNCERTAIN PROMISE OF THE MEDIATION PRIVILEGE IN MINNESOTA

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I. INTRODUCTION

Mediators in Minnesota regularly assure parties that the mediation process is a confidential process and that what is discussed in the mediation sessions will remain confidential. Although there is a widely held belief that the mediator's assurance of confidentiality is based on sound authority, careful mediators take additional precautions and ask that the parties enter into a contract expressly agreeing to maintain the confidentiality of the proceedings. Even when the parties sign such a contract, however, the extent to which the proceedings will be kept confidential remains uncertain.

To some extent the uncertainty stems from ambiguity in the concept of confidentiality. At its core, the assurance of confidentiality found in statutes, court rules, and contracts includes a prohibition against evidentiary use of statements made during the mediation offered as a party admission at a subsequent trial of the mediated dispute. It remains less clear whether the assurance of confidentiality extends to preclude statements disclosed in mediations if offered for impeachment purposes, offered in different cases, disclosed pursuant to pre-trial discovery processes, or made pursuant to mandatory disclosure laws.

1. © Peter N. Thompson, Professor of Law, Hamline University School of Law. I am in debt to Timothy P. Griffin, a third year student at Hamline University School of Law, for his tireless and helpful assistance in the preparation of this article. I also thank my colleagues and friends James Coben and Barbara McAdoo for their comments and wonderful insights into the ADR process.

2. See, e.g., Sample: Acknowledgment of Ground Rules, MEDIATION TRAINING MANUAL 108 (Mediation Center & The Dispute Resolution Institute, Hamline University School of Law, 1995).

3. Michael Prigoff, Toward Candor or Chaos: The Case of Confidentiality in Mediation, 12 SETON HALL LEGIS. J. 1, 7 (1988) ("[C]ourts do not uniformly uphold such agreements").
The uncertainty in the concept of confidentiality is compounded by the vast array of overlapping common law decisions, statutes, court rules and professional standards that address these issues with broad, over inclusive language. The over inclusive language tends to promise complete and total confidentiality without accommodating conflicting policies, statutes, rules, and principles of justice that require limited exceptions to the general rule of confidentiality in mediation sessions. For example, the statutes and rules, on their face, preclude parties to a mediation from offering evidence to enforce a settlement agreement arrived at during a mediation.\textsuperscript{4} The rules appear to prohibit the mediator or the parties from testifying about criminal acts that take place during the mediation,\textsuperscript{5} from complying with mandatory reporting requirements about evidence of abuse of children or vulnerable adults, or from offering evidence from a mediation in actions by the mediator to enforce fee agreements or actions against the mediator asserting misconduct by the mediator.\textsuperscript{6}

While it is possible, and perhaps likely, that the courts in Minnesota will ignore the over inclusive language and provide reasonable exceptions to the rule of confidentiality, the mediation process should not present traps for unwary citizens. Courts, mediators and participants need a clear understanding of the scope of confidentiality in mediation proceedings without having to rely on the litigation process to sort out the applicable, from the inapplicable, statutory language.

This article will discuss the scope of and conflict among the various rules, statutes, and case decisions governing mediations in Minnesota and ultimately propose comprehensive legislation to reconcile and provide clarity.\textsuperscript{7} Comprehensive legislation is necessary to assure that the legitimate needs of confidentiality in mediation are protected with-


\textsuperscript{6} See, e.g., Schaffer v. Agribank, No. C7-96-1273, 1997 WL 40739 (Minn. Ct. App. Feb. 4, 1997). In Schaffer, the mediator was sued for negligence for failure to reduce a settlement agreement to writing as required by the Minnesota Farmer-Lender Mediation Act, Minn. Stat. § 583.26 (1996). The court concluded that the mediator was immune under Minn. Stat. § 583.26(7) (1996). \textit{Id.} at *2-3. The court suggested, however, that a mediator might be liable for fraud, citing L. & H. Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372 (Minn. 1989), in which the Minnesota Supreme Court indicated that an arbitrator could be liable for fraud. \textit{Id.} at *2.
out infringing on other important societal interests. New legislation is necessary so that participants in mediations can easily understand the extent to which their communications in mediations will remain confidential.

II. EVIDENTIARY RULES PRECLUDING EVIDENCE OF OFFERS OF COMPROMISE

A. Common Law decisions provided a limited prohibition against evidentiary use of offers of compromise

The traditional justification for maintaining the confidentiality of mediated settlement discussions is found in common law evidentiary rules. Minnesota courts followed the common law approach by excluding as evidence offers of compromise made during settlement negotiations.\(^8\) Initially the courts emphasized principles of relevancy\(^9\) as the primary justification for excluding offers of compromise, arguing that settlement offers may be attempts at buying peace and should not be treated as a party admission. The modern rationale focuses more on a policy of encouraging settlement negotiations by providing a protective cloak of confidentiality.\(^10\)

The Minnesota courts construed this protection of confidentiality for settlement negotiations narrowly, which is consistent with the strong public policy in Minnesota of providing the jury with all the relevant evidence. For example, at common law, offers of settlement were excluded, but admissions of fact made within the context of compro-

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7. An overlapping issue, not addressed in this article has been raised by the recent action of the Minnesota State Bar Association House of Delegates, which endorsed legislation allowing public bodies to engage in private mediations as an exception to the Minnesota Open Meetings Law, MINN. STAT. § 471.705 (1996). See Should Law Let Public Bodies Mediate Disputes in Private?: Robert Langford, Yes: Cost-effective Method Needs Privacy; Lucy Dalgiass, No: Democracy Needs Open Public Business, ST. PAUL PIONEER PRESS, Feb. 13, 1997, at 10A.

8. Esser v. Brophrey, 3 N.W.2d 3, 4-5 (Minn. 1942); Gauthier v. West, 47 N.W. 656, 657 (Minn. 1891).

9. Defendants may enter into settlement negotiations and make offers to compromise to buy peace or for other reasons unrelated to the defendant’s belief about liability. Gauthier, 47 N.W. at 657 (stating an offer of compromise is inadmissible because it is “nothing more than an assertion of the demand finally sued upon, and an offer to discount it to avoid litigation”).

10. See generally 11 PETER N. THOMPSON, MINNESOTA PRACTICE: EVIDENCE § 408.01 (West, 2d ed. 1992).
misse negotiations could be admitted at a subsequent trial.\footnote{11} Consequently, the common law protection against disclosure of statements in settlement negotiations was limited.

**B. Minnesota Rule of Evidence 408 expanded the protection of statements made during settlement discussions, but numerous exceptions remain**

In 1977, the Minnesota Supreme Court adopted the Minnesota Rules of Evidence, including Rule 408,\footnote{12} which substantially broadened the protection for compromise discussions and offers to compromise. Rule 408 protects offers of compromise, which include the actual offers, as well as evidence of conduct or statements made in compromise negotiations, thus expanding the common law protection. Even under this broadened evidentiary rule, however, the promise of confidentiality in settlement negotiations is limited.

Rule 408 is an evidentiary rule, and as such, it is not directly applicable in either administrative proceedings or discovery processes. Further, before the rule is applicable, the proponent must establish that the statements were made in an attempt to compromise and that there was a dispute as to either the validity or the amount of the claim.\footnote{13} For example, if a debtor candidly admits owing the entire amount of the claim, but attempts to encourage the creditor to accept less than the full amount, the debtor’s statements are not protected under Rule 408.\footnote{14}

Other exceptions limit the reach of Rule 408. To qualify for exclusion under Rule 408, the evidence must be offered to prove liability for, or invalidity of, the claim or its amount.\footnote{15} If the evidence is offered for another purpose, such as “proving bias or prejudice of a witness, [or] negating a contention of undue delay,”\footnote{16} the rule is not implicated.\footnote{17}

\footnote{11} Esser, 3 N.W.2d at 4-5; Jackson v. Buesgens, 186 N.W.2d 184, 186 (Minn. 1971) (admitting defendant’s admission in settlement negotiation that he had made mistakes).

\footnote{12} MINN. R. EVID. 408 [hereinafter Rule 408]; see generally THOMPSON, supra note 10, at § 408.01. Minnesota’s Rule 408 is taken from the FEDERAL RULES OF EVIDENCE 408.

\footnote{13} Compare with MINN. R. EVID. 409 which precludes offers to pay and payment of medical expenses (but not discussions about liability) without regard to a dispute as to validity or amount of the claim. See also MINN. STAT. § 604.01(4) (1996) (providing that evidence of settlement or payment for an injured person or property is inadmissible in all actions, for any purpose, except in an action where “settlement and release” is pled as a defense).
For example, if a witness enters into a settlement agreement with the defendant, and the witness subsequently testifies against the plaintiff, the plaintiff may ask the witness about the settlement agreement in order to establish potential bias.\textsuperscript{18} Rule 408 does not exclude evidence if offered to enforce a settlement or compromise agreement and not offered to prove "validity or amount of a disputed claim."\textsuperscript{19} Finally, Rule 408 does not prohibit admitting pre-existing documents or statements that would otherwise be discoverable, even if these matters were used in settlement discussions or were made known to the other party in compromise negotiations.\textsuperscript{20}

Mediations involve attempts at settlement and compromise, and Rule 408 is applicable to preclude the evidentiary admission of statements made during a mediation to prove liability or amount of a claim.

\textsuperscript{14} The Minnesota courts have interpreted Rule 408 narrowly to maximize the scope of admissible evidence at trial. In \textit{In re Commodore Hotel Fire and Explosion Cases}, 324 N.W.2d 245 (Minn. 1982), the Minnesota Supreme Court affirmed the trial judge's admission of statements in settlement negotiations between a fire insurance company and the owners of the destroyed hotel. The total damages were greater than the insurance coverage. \textit{Id.} at 247 n.2. In calculating its liability, the insurance company relied upon the coinsurance clause in the insurance contract. \textit{Id.} Additional negotiations were necessary to arrive at a precise dollar amount owed under the policy. \textit{Id.} at 248. Nonetheless, because the insurance company agreed to settle based on the policy limits as later determined under the coinsurance policy, the supreme court concluded that these discussions did not involve a dispute as to the validity or the amount of the claim and consequently admitted the settlement discussions. \textit{Id.} at 247.

\textsuperscript{15} \textit{Peter N. Thompson & David F. Herr}, 11A \textit{MINNESOTA PRACTICE, COURTROOM HANDBOOK OF MINNESOTA EVIDENCE} 95-96 (West 1996).

\textsuperscript{16} \textit{MINN. R. EVID.} 408.

\textsuperscript{17} In \textit{State v. O'Hagan}, 474 N.W.2d 613, 619 (Minn. Ct. App. 1991), the court of appeals, citing \textit{MINN. R. EVID.} 408, allowed the admission of financial statements that were prepared for settlement negotiations with the SEC in a related case. The court concluded that these statements were admissible because they were not offered to prove the validity or invalidity of any claim with the SEC, but to prove defendant's financial condition. \textit{Id.} at 619-20.


\textsuperscript{19} \textit{Jack B. Weinstein & Margaret A. Berger}, \textit{WEINSTEIN'S EVIDENCE} § 408.04 (1996). Perhaps as an additional exception, the Minnesota Court of Appeals in \textit{Tagtow v. Carlton Bloomington Dinner Theater, Inc.}, 379 N.W.2d 557, 562 (Minn. Ct. App. 1985), suggested that a retracted offer of compromise could be admitted in the subsequent trial on the issue of validity or the amount of the claim. The court in \textit{Tagtow} relied on \textit{Daltec, Inc. v. Western Oil and Fuel Co.}, 148 N.W.2d 377 (Minn. 1967), which was decided prior to the promulgation of the Minnesota Rules of Evidence. \textit{Tagtow}, 379 N.W.2d at 561.

\textsuperscript{20} United States v. Reserve Mining Co., 412 F. Supp. 705, 711-12 (D. Minn. 1976) (materials setting forth an alternative disposal site were not protected from admission under Rule 408 simply on the basis that they had formed a part of the defendant's settlement position).
While some have argued that the protections afforded to settlement discussion under Rule 408 adequately protect the interests involved in maintaining the confidentiality of mediations, most commentators, and more than forty state legislatures, have found it necessary to provide additional requirements of confidentiality in mediation sessions because of the numerous exceptions to the evidentiary rule.

III. MINNESOTA LEGISLATIVE RESPONSE

The Minnesota legislature and courts have enthusiastically joined the nationwide trend of protecting confidentiality in mediations. This enthusiasm, however, has resulted in layers of overlapping and conflicting requirements geared toward protecting confidentiality. In their efforts to protect confidentiality in mediations, the legislature and courts have failed to take into account conflicting duties and responsibilities created by other statutes and rules as well as legitimate concerns about other important public policies, such as protecting innocent third parties, enforcing criminal laws and providing simple fairness to the participants in the dispute resolution processes.

A. The Mediation Privilege Statute: Minnesota Statute Section 595.02(1)(l) (1996)

In an attempt to regulate and formalize mediation practices, the Minnesota Legislature passed the Civil Mediation Act in 1984. As part

21. Eric Green, A Heretical View of the Mediation Privilege, 2 Ohio St. J. on Disp. Resol. 1 (1986) (a minor amendment to Rule 408 precluding statements in mediation offered for impeachment, along with carefully drafted agreements would provide adequate protection).


of this Act, the legislature passed a statute creating broad protection against admissibility of communications or documents relating to mediations "pursuant to an agreement to mediate."25 The mediation privilege statute was placed in Chapter 595 where other privilege and competency provisions are located.26 Section 595.02(1)(l)27 provides:

Subdivision 1. Competency of witnesses. Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

* * *

(l) A person cannot be examined as to any communication or document, including work notes, 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.28

1. The Statute Creates A Privilege, Not A Rule Of Competency

As with the other privileges included in Chapter 595, the language of this provision is framed in terms of "competency" and not in terms of privilege.29 In context, however, the statute creates a privilege much

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24. 1984 Minn. Laws ch. 646. Although enacted as part of the Civil Mediation Act (Minn. Stat. §§ 572.31-40) the mediation privilege section was codified in Minn. Stat. § 595.02(1)(k) (1984), later redesignated as Minn. Stat. § 595.02(1)(l). For a history of the development of alternative dispute resolution in Minnesota including the consideration of the Civil Mediation Act see Barbara McAdoo, The Minnesota Experience: Exploration to Institutionalization, 12 Hamline J. Pub. L. & Pol'y 65 (1991).


26. McAdoo, supra note 24, at 77.

27. Hereinafter mediation privilege statute.

like the marital privileges,\textsuperscript{30} the attorney-client privilege,\textsuperscript{31} and the physician-patient privilege,\textsuperscript{32} which are also found in this chapter.\textsuperscript{33}

The distinction as to whether the statute is a competency provision or a privilege statute is important for several reasons. Initially, privileged materials are not discoverable, while evidence precluded by competency rules might be discoverable. Minnesota Rule of Civil Procedure 26.02(a) prohibits the discovery of privileged materials, but does not exclude information that would be inadmissible because of a competency provision. Parties can discover nonprivileged materials that may be inadmissible at trial if the materials are “relevant to the subject matter” and “reasonably calculated to lead to the discovery of admissible evidence.”\textsuperscript{34} A competency statute would preclude testimony from witnesses about mediations but would not necessarily preclude discovery of the documents or statements made by the incompetent parties.

Furthermore, if the statute creates a privilege, the privilege can be waived by the holders of the privilege or by other means such as by voluntary disclosure, by failure to object, or by placing matters in controversy during litigation. Although it is not always easy to determine who holds a privilege,\textsuperscript{35} in this context the parties to the mediation, and not the mediator, should hold this privilege.\textsuperscript{36} Although the mediator may have some interest in protecting confidentiality,\textsuperscript{37} the primary interest in assuring confidentiality is to benefit the parties so that settlement can be reached. Thus, if the statute creates a privilege, this privilege can be waived, at least by agreement of the parties, or by agreement of some


\textsuperscript{30} Minn. Stat. \S 595.02(1)(a); see also Thompson, supra note 10, at \$ 501.03 n.1.

\textsuperscript{31} Minn. Stat. \S 595.02(1)(b).

\textsuperscript{32} Minn. Stat. \S 595.02(1)(d).

\textsuperscript{33} Minn. Stat. \S 595.02(1)(c); see also Thompson, supra note 10, at \$ 501.03 n.1.

\textsuperscript{34} Minn. R. Civ. P. 26.02(a). Out-of-court statements from incompetent witnesses can be admissible into evidence in rare circumstances. See In re Welfare of Chuesberg, 233 N.W.2d 887, 889 (Minn. 1975) (incompetent child’s excited utterance is admissible).

\textsuperscript{35} See, e.g., Thompson, supra note 10, at \$\$ 501.03, .04 (discussing who holds the marital and attorney-client privileges).

\textsuperscript{36} See Rosenberg, supra note 22, at 159-60; compare with United States v. Partin, 601 F.2d 1000, 1009 (9th Cir. 1979) (attorney-client privilege is owned by the clients).

\textsuperscript{37} See infra notes 196-209 and accompanying text.
and waiver by others. If the provision is a competency statute it cannot be waived by the parties. Incompetent witnesses do not have the power to determine whether they will testify. Based on context, the legislative history and judicial construction, it is safe to conclude that this statute creates a privilege and is not a competency statute.

2. The Mediation Privilege is Applicable only to Mediations "Pursuant to an Agreement to Mediate"

a. The Statute Does Not Define Mediation

The mediation privilege statute applies to mediations only, and not to other ADR procedures. Neither this statute, nor other sections in the Civil Mediation Act, however, define mediation. The lack of definition creates a threshold issue of interpretation. For example, does the mediation privilege apply when a teacher resolves a dispute between two students, or when a supervisor "facilitates" resolution of a dispute between two workers, or when a university ombudsperson works through a grievance with interested parties?

In Vogt v. Vogt, the Minnesota Court of Appeals, interpreting a different statute, adopted the definition of mediation suggested by the Minnesota Supreme Court—Minnesota State Bar Association Task Force on Alternative Dispute Resolution, defining mediation as "a forum in which an impartial person, the mediator facilitates communication between parties to promote reconciliation, settlement or understanding among them." Applying this definition, the court in Vogt decided that when the trial judge referred the parties to Court Ser-

39. Cases referring to this statute refer to the statute as a privilege statute. See, e.g., Sonenstahl v. L.E.L.S., Inc., 372 N.W.2d 1, 6 (Minn. Ct. App. 1985); In re Parkway Manor Healthrow Center, 448 N.W.2d 116, 121 (Minn. Ct. App. 1990).
40. Without regard to the mediation privilege, a teacher has an ethical duty "in accordance with State and Federal laws...[to] disclose confidential information about individuals only when a compelling professional purpose is served or when required by law." Minn. A.D.C. Rule 8700.7500(1)(c).
41. 455 N.W.2d 471 (Minn. 1990).
42. Id. at 474-75 (the court applied Minn. Stat. § 518.619(2) (1988) which prohibited court ordered mediation in domestic disputes if there was a finding of probable cause of physical or sexual abuse).
ervices to impose, rather than to discuss, a schedule for visitation, this process was not a mediation.\footnote{Id. at 474, citing MINN. SUP. CT. - MINN. STATE BAR ASS'N. TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION, FINAL REPORT, Appendix D, July 1989. By court rule, the Minnesota Supreme Court has adopted a slightly different definition in court-annexed mediation under MINN. GEN. R. PRAC. 114. 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 judgment on the issues for that of the parties.” MINN. GEN. R. PRAC. 114.02(a)(7).}

Although the Civil Mediation Act does not define mediation, it does define a mediator as a “third party with no formal coercive power whose function is to promote and facilitate a voluntary settlement of a controversy identified in an agreement to mediate.”\footnote{Id. (since the decision regarding visitation was made by Court Services and “forced” on the parties, this process was not a mediation). Compare with Mechtel v. Mechtel, 528 N.W. 916 (Minn. Ct. App. 1995) (holding that a court direction to the parties to meet with a court services officer to discuss matters did constitute a mediation). See also Messeri v. Kramer v. Levandoski, No. C2-96-628, 1996 WL 453605 (Minn. Ct. App. August 13, 1996) (raising issue whether an attorney who settled a claim for another was acting as a mediator or as an attorney for the third party).} The schoolteacher, supervisor and ombudsman all qualify as mediators under the court’s definition if they are impartial, and if they facilitate, rather than impose a solution. Yet these same neutrals might not be mediators under the Civil Mediation Act’s definition depending on whether they had the ultimate power to coerce or impose a solution to the problem.

b. \textit{The Civil Mediation Act Provides a Technical, Unrealistic Definition of “Agreement to Mediate”}

The mediation privilege is applicable only if the parties are mediating pursuant to an “agreement to mediate.”\footnote{MINN. STAT. § 572.33(2) (1996).} The Civil Mediation Act provides an extremely technical definition of “agreement to mediate.”\footnote{MINN. STAT. § 595.02(1)(i) (1996).} According to the statute,

‘Agreement to mediate’ means a written agreement which identifies a controversy between the parties to the agreement, states that the parties will seek to resolve the controversy through mediation, provides for termination of mediation upon written notice from either party or the mediator delivered by certified mail or
personally to the other people who signed the agreement, is signed by the parties and mediator and is dated.\textsuperscript{48}

Thus, the teacher, ombudsperson or supervisor referred to above, could be mediators under the Minnesota Civil Mediation Act but only in the unlikely event they were mediating pursuant to a written agreement that included this technical notice of termination clause. Most teachers, ombudspersons, and supervisors, and for that matter many “so called mediators” appointed by courts or selected pursuant to other statutes do not qualify as mediators under the Minnesota Civil Mediation Act, because they have not executed a written agreement that includes the technical language required by this statute. Unless courts are willing to ignore the express language in the statute, the mediation privilege provided by the Minnesota Civil Mediation Act will not be applicable in many “mediations.”

In an unpublished opinion, the Minnesota Court of Appeals determined that the mediation privilege is applicable in a private college’s racial discrimination mediation proceeding even in the absence of a written agreement to mediate.\textsuperscript{49} Without giving any explanation, the court simply concluded that “[t]he [mediation privilege] statute does not require that an agreement to mediate be in writing.”\textsuperscript{50} The court ruled that the mediation privilege excluded evidence of an admission made by a party to the mediator that “race may have been a factor” in the decision affecting the student.\textsuperscript{51} The result of the decision is consistent with the policy of protecting the parties’ expectations of confidentiality in structured mediation proceedings. Yet in reaching its result, the court ignored the clear statutory language restricting the privilege to mediations performed pursuant to “an agreement to mediate.”

\textsuperscript{48} MINN. STAT. § 572.33(3) (1996).
\textsuperscript{50} Id. The ruling was an alternative holding since the court also concluded that the statement in the form presented was inadmissible hearsay. Id.
\textsuperscript{51} Id.
3. The Scope of Protection Under the Language of the Mediation Privilege Statute is Limited

a. The Mediation Privilege is Limited to Compelled Disclosure During Litigation

The language in the statute specifically precludes "examination of witnesses" and is applicable at trials, hearings, or at depositions. Because it is a privilege statute, it also would preclude compelled disclosure of documents, answers to interrogatories or other discovery pursuant to Minnesota Rule of Civil Procedure 26.02(a). Whether a party, or the mediator, can voluntarily disclose to the public, to judicial or to administrative officials outside of the trial process without violating the statute remains problematic. The statute is silent on this issue.

b. The Mediation Privilege Statute Does Not Address the Propriety of Voluntary Disclosures

The mediation privilege statute does not expressly preclude parties in a mediation, or for that matter the mediator, from voluntarily disclosing to the public matters discussed in mediation. It is possible a court could loosely construe the statute as implicitly imposing a requirement of confidentiality that precludes voluntary disclosure. The Minnesota Supreme Court's treatment of other privileges, however, suggests that this mediation privilege would not be construed as imposing an enforceable duty on the participants not to disclose. For example, the Minnesota Supreme Court has approved of the use of voluntary statements made to police by a defendant's spouse despite the fact that the spouse's testimony would be precluded by the marital privilege statute. While it is true that attorneys, physicians and clergy are bound to maintain the confidences of their clients, patients and penitents, this duty stems more from other statutes or established ethical codes

54. Minn. R. Prof. Conduct 1.6.
55. See Minn. Stat. § 147.09(1)(m) (1996) (physician may be disciplined for "revealing a privileged communication from or relating to a patient except when otherwise required or permitted by law").
56. See generally Thompson, supra note 10, at § 501.06.
and not from the evidentiary privilege statutes. For example, a lawyer has a well established obligation to maintain the confidences of clients. But if a lawyer is serving as mediator, this obligation of confidentiality is not present because the other parties are not the lawyer/mediator's clients.

If the parties enter an agreement that the matters discussed will be held confidential, this agreement can be enforced against the parties, at least with regard to voluntary disclosure. Furthermore, statutes setting up various types of mediation programs may specifically address this issue of confidentiality. Absent an extremely liberal interpretation of the language in this privilege statute, parties must look to private contract, or other statutes, court rules, or ethical codes to find a legal obligation of the parties or the mediator not to disclose to the public matters discussed in mediations.

4. Exceptions to the Mediation Privilege

a. The Mediation Privilege is Not Applicable in Actions to Set Aside or Reform a Mediated Settlement Agreement

57. The Minnesota Supreme Court is presently considering adopting a Code of Ethics for neutrals operating under Rule 114 of the Minnesota General Rules of Practice. The proposed Rule provides "that the neutral shall maintain confidentiality to the extent provided by Rule 114.08 and 114.10 and any other agreements made with or between the parties." Order for Hearing to Consider Proposed Alternative Dispute Resolution Rules of Ethics for the Minnesota General Rules of Practice, C5-87-843 (January 29, 1997). As discussed later, Rule 114.08 provides blanket exclusion of evidence about the ADR proceeding in any subsequent proceeding involving any of the issues or parties. See infra notes 142-148 and accompanying text.

58. MINN. R. PROF. CONDUCT 1.6.


60. Id. See also Simrin v. Simrin, 43 Cal. Rptr. 376 (Cal. Ct. App. 5th Dist. 1965) (court enforced agreement between mediator and parties to a marital dispute that communication would be confidential and the parties would not call the mediator as a witness). In a different context, in Cohen v. Coules Media Co., 501 U.S. 663 (1991), the United States Supreme Court held that a journalist's promise not to disclose the identity of the source of information was enforceable against the newspaper.

It is unlikely that any such agreement would preclude third parties from seeking access to this information. See Kirtley supra note 22. See also State v. Castellano, 460 So.2d 480 (Fla. Dist. Ct. App. 1984) (mediator's assurances of confidentiality does not preclude defendant from obtaining mediator's testimony about threats made during the mediation); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1180 (6th Cir. 1983) (court not bound by parties' confidentiality agreement).

The mediation privilege statute provides an express exception that allows parties, but not the mediator, to testify in an application to the court to have a mediated settlement agreement set aside or reformed. The statute provides no express exception for an action to enforce a settlement agreement. The Civil Mediation Act outlines the grounds for setting aside or reforming a mediated settlement agreement. The Act provides:

In any action, a court of competent jurisdiction shall set aside or reform a mediated settlement agreement if appropriate under the principles of law applicable to contracts, or if there was evident partiality, corruption, or misconduct by the mediator prejudicing the rights of a party. 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.

Typical contractual grounds for setting aside a settlement agreement include duress, mutual mistake, unilateral mistake accompanied by concealment, fraud, or "unconscionable overreaching."

On its face, the mediation privilege statute precludes a party's attempt to enforce a written settlement agreement by offering the settle-

62. MINN. STAT. § 595.02(1)(h) (1996).
63. MINN. STAT. § 572.36 (1996).
64. Wallner v. Schmitz, 57 N.W.2d 821, 824 (1953) (duress can be a valid defense against the enforcement of a settlement release); Bond v. Charlson, 374 N.W.2d 423, 428 (1985) (requiring coercion by physical force or unlawful threats to invoke the defense of duress). See generally I E. ALLEN FARNsworth, Farnsworth on Contracts, § 4.16 (1990); 13 A.L.R. 4th 686, 696.
65. Doud v. Minneapolis St. Ry., 107 N.W.2d 521, 524-25 (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). See generally II E. ALLEN FARNsworth, Farnsworth on Contracts, § 9.3 (1990).
66. 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 cause by the inequitable conduct of the other contracting party); Restatement (Second) of Contracts § 153 (1981).
67. Marino v. Northern Pac. Ry., 272 N.W. 267, 268-69 (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). See generally Farnsworth, supra note 64, at § 4.12.
ment agreement as evidence. The written settlement agreements are documents made "because of mediation." The language in the statute also excludes any testimony about what was said during the mediation if a party claims that the settlement was in fact reached and wants to enforce that oral settlement agreement. By permitting parties to introduce evidence to set aside or to reform a mediated settlement agreement the legislature must have contemplated that evidence could also be admitted to enforce a mediated settlement agreement. Nonetheless, the language in the statute does not allow evidence if offered to enforce settlement agreements.

In Haghghi v. Russian-American Broadcasting Company, the Minnesota Federal District Court allowed the parties to provide evidence of a purported settlement agreement, but precluded the mediator from testifying about the purported settlement based on Minnesota Statute § 595.02(1a). While the trial judge applied the express language in the ADR neutral statute, which restricted mediator testimony, the judge did not address the language in the mediation privilege statute that on its face does not allow for the admission of evidence concerning mediation discussions.

The court in Haghghi chose to ignore other provisions in the Minnesota Civil Mediation Act as well. The Civil Mediation Act provides that a written settlement agreement stemming from a mediation is not

68. Jacobs v. Farmland Mut. Ins. Co., 377 N.W.2d 441, 444 (Minn. 1985) (invoking the doctrine of equitable rescission 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. Bunker, 114 N.W.2d 560, 566-67 (1962)). See generally Farnsworth, supra note 64, at § 4.28.


70. See generally Ryan v. Garcia, 33 Cal. Rptr. 2d 158 (Ct. App. 1994) (settlement agreement held to be confidential part of mediation); questioned in Regents of the University of California v. Sumner, 50 Cal. Rptr. 2d 200, 202 (Ct. App. 1996).


72. Id. at 1235. Minn. Stat. § 595.02(1)(a) (1996) [hereinafter referred to as the ADR neutral statute]. See infra notes 114-29 and accompanying text for a discussion of the ADR neutral statute.

73. Haghghi, 945 F.Supp. at 1235.
binding absent a provision declaring that the agreement is binding. The agreement must include a provision stating substantially that the parties were advised in writing that 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."74

The Haghighi court concluded that the technical requirements in the Civil Mediation Act were inconsistent with the practice and expectations of participants in mediations in Minnesota.75 The court expressed the concern that the provision, if applied as drafted, would be a "trap for both the unwary and the wary."76 Believing that the Minnesota legislature did not intend to trick Minnesota citizens, and noting that the practice in Minnesota is not to include these technical provisions, the court refused to follow the language in the statute.77

b. Pre-existing Documents or Materials Otherwise Subject to Disclosure are not Privileged

Pre-existing documents, or information that otherwise would be subject to discovery, are not privileged simply because the documents or information are used in mediation sessions.78 This provision is similar to the limitation found in Rule 408.79 For example, business records or documents prepared prior to the litigation are not privileged merely because these documents are part of a settlement discussion in a mediation.80 Also, the identity of witnesses disclosed in a mediation is not protected. Thus, if the mediation fails to accomplish settlement, the adverse party could depose witnesses who were identified in a mediation session.

74. MINN. STAT. § 572.35 (1996).
75. Haghighi, 945 F. Supp. at 1234-35.
76. Id. at 1234.
77. Id. at 1235.
78. MINN. STAT. § 595.02(1)(l) (1996).
79. See supra note 20 and accompanying text.
80. See United States v. Reserve Mining Co., 412 F. Supp. 705, 711-12 (D. Minn. 1976) (engineering plans for alternative dumping facility were not protected from discovery just because they were part of defendant's settlement strategy).
c. The Mediation Privilege Statute Does Not Affect the "Common Law" Mediation Privilege

Finally, the statute does not purport to limit what is referred to as a "common law mediation privilege." The language preserving the common law privilege of communications during mediation is peculiar. In Minnesota, and for that matter in the United States, there is very little common law authority relating to privilege in mediations, aside from the common law decisions addressing the evidentiary rule excluding offers to compromise. The broad privilege provided by the mediation privilege statute reaches much more than the matters protected under the broadest interpretation of the common law evidence rule and Rule 408.

The language preserving common law privileges might be an invitation to the courts to develop a mediation privilege on a common law basis. The first application of a "mediation privilege" in Minnesota was not directly based on statutory authority but was an exercise of judicial common law authority. In Sonenstahl v. L.E.L.S., Inc., the court of appeals upheld the trial court's decision to quash a subpoena which sought testimony from a mediator. The mediator was willing to testify on the issue of whether the union negotiator breached the duty of fair representation. Although the trial occurred before the effective date of the mediation privilege statute, the court applied a mediation privilege based on the reasoning and policy behind the newly enacted statute.

81. Minn. Stat. § 595.02(1)(l).
82. In Minnesota, privileges are primarily the domain of the legislature, although the courts have from time to time developed principles of privilege. See, e.g., In re Parkway Manor Healthrow Center, 448 N.W.2d 116 (Minn. Ct. App. 1990); Sonenstahl v. L.E.L.S., Inc., 372 N.W.2d 1 (Minn. Ct. App. 1985) (court applies mediation privilege based on policy and reasoning of enacted but not yet applicable statute). See also Thompson & Herr supra note 15, at 119-20.
83. Kirtley, supra note 22, at 14; Perino, supra note 22, at 10 n.57.
84. See supra notes 8-11 and accompanying text.
85. Minn. Stat. § 595.02(1)(l).
86. Perhaps the legislature intended only to ensure that Rule 408 would continue to be applicable in mediations that do not qualify for protection under the mediation privilege statute because the mediations are not conducted pursuant to an "agreement to mediate" as defined in the act. See supra notes 46-51 and accompanying text.
88. Id. at 6.
Trial courts traditionally have exercised power to protect privacy interests in appropriate cases. Minnesota Rule of Civil Procedure 26.03 permits the court, upon a showing of good cause, to enter a protective order limiting discovery if justice requires. In *Minneapolis Star & Tribune Co. v. Schumacher*, the supreme court applied a common law balancing test to preclude a news organization from discovering settlement documents that had been sealed by the trial judge. The court recognized that there was a common law right of access that created a "presumption in favor of access." This right of access, however, was not absolute and was outweighed by the long-standing public interest in promoting settlements. According to the court:

To allow public access to settlement documents filed with a court may circumvent this policy. One of the reasons parties agree to settle is that they do not wish to go to trial and expose their disputes to the public. It would therefore be inconsistent with our public policy encouraging settlement to allow the settlement document in this case to be made public. Such reasoning would tend to discourage settlements rather than encourage them.

Thus, the courts have common law power to protect the confidentiality of settlement proceedings. Perhaps the court’s cavalier treatment of the statutory language in *Gant* and *Haghighi* can be explained by the exercise of common law authority. It is unlikely, however, that the legislature’s oblique reference to the common law privilege was an invitation to the courts to ignore statutory language.

89. *Id.* at 6-7 (the statute became effective August 1, 1984).
90. MINN. R. CIV. P. 26.03.
91. 392 N.W.2d 197 (Minn. 1986).
92. *Id.* (the documents involved wrongful death actions against Galaxy Airlines involving an air crash that had received a great deal of publicity).
93. *Id.* at 205.
94. *Id.* at 204-05.
95. *Minneapolis Star & Trib.*, 392 N.W.2d at 205.
5. The Mediation Privilege Statute Does Not Provide Exceptions Accommodating Conflicting Policy and Statutory Requirements

The mediation privilege statute makes no accommodation or exception for information that is required by law to be reported to appropriate agencies, for actions by or against a mediator, or for matters giving rise to, threatening, or evidencing criminal activity. Nor does the privilege statute allow disclosure in other circumstances where the evidence is crucial to important issues in related and unrelated cases.

Many professionals\textsuperscript{98} have specific reporting obligations that may squarely conflict with concerns for confidentiality of statements made or conduct occurring in mediated negotiations.\textsuperscript{99} For example, lawyers have a duty to report professional malpractice,\textsuperscript{100} and medical personnel, law enforcement and teachers have a duty to report maltreatment of minors\textsuperscript{101} and vulnerable adults.\textsuperscript{102}

If a nurse participates in a mediation where child abuse is disclosed, the nurse may have a statutory duty to report the abuse to the appropriate agency.\textsuperscript{103} Failure to report could result in the criminal prosecution of the nurse.\textsuperscript{104} It would be unlikely that a court would find that a nurse’s criminal act of non-disclosure could be excused by a private agreement to maintain the confidentiality of the mediation.\textsuperscript{105} It is less clear whether the statutory mediation privilege excuses or requires nondisclosure as an exception to the mandatory reporting statutes. Any construction of this statute as creating an obligation of confidentiality conflicting with mandatory reporting obligations must reconcile the concern for confidentiality with the legal and moral duty to make re-

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98. The reporting statutes impose the duty to report on “a professional engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric, treatment, child care, education or law enforcement.” Minn. Stat. § 626.556(3) (1996); see also Minn. Stat. § 626.557(3) (1996). The description of mandatory reporters is extremely broad and arguably could include mediators. Cohen, supra note 59, at 398.

99. See discussion in Cohen, supra note 59, at 394-400.

100. Minn. R. Prof. Conduct 8.3


103. Minn. Stat. § 626.556.

104. Minn. Stat. § 626.556(6).

105. See In re Waller, 573 A.2d 780 (D.C. 1990) (court imposed confidentiality requirement did not preclude mediator from disclosing to judge a possible conflict of interest of one of the attorneys).
ports for the protection of innocent parties.\textsuperscript{106}

The statute that sets up the mandatory reporting of maltreatment of minors specifically provides that evidence of neglect or abuse of a child should not be excluded from a hearing based on privileges set forth in Minnesota Statute § 595.02 (1)(a) [marital privileges], (b) [doctor-patient privilege] or (g) [nurse, psychologist, social worker privilege].\textsuperscript{107} The statute does not refer to the mediation privilege statute. The statute mandating reporting of maltreatment of vulnerable adults is different and provides that "no evidence regarding the maltreatment of the vulnerable adult shall be excluded in any proceeding arising out of the alleged maltreatment on the grounds of lack of competency under section 595.02."\textsuperscript{108}

Evidence of mediator misconduct in actions against the mediator for negligence, breach of duty or in professional misconduct proceedings are not excepted from the mediation privilege.\textsuperscript{109} Nor does the statute allow a mediator to introduce evidence of the mediator's activities to enforce a mediator's claim for compensation or to recover for defamation if one of the parties later becomes disgruntled and libels the mediator.

The mediation privilege statute does not permit testimony about conduct or statements during a mediation that constitutes a crime or might be evidence of a crime. Thus, assaultive behavior during the mediation, statements evidencing a past crime, or statements indicating an intent to commit a future crime are all protected by the mediation privilege statute. It is possible, however, that by judicial construction the courts would read an exception into the statute permitting testimony,

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  \item \textsuperscript{106} Some mediation statutes or rules specifically address this concern. For example, mediations conducted pursuant to the community dispute resolution program are subject to mandatory reporting requirements for maltreatment of children and vulnerable adults. \textit{Minn. Stat.} § 13.88 (1996). Rule 6x (d)(5) of \textit{Minnesota Rules on Lawyers Professional Responsibility} provides that a lawyer appointed to mediate a complaint of unprofessional conduct of another lawyer is "not bound by the mandatory reporting rules of Minnesota Rules of Professional Conduct 8-3." \textit{Minn. Gen. R. Prac.} 114.08(e) allows a mediator to disclose "notes, records, and recollections" if required by law or professional code.
  \item \textsuperscript{107} \textit{Minn. Stat.} § 626.556(8) (1996).
  \item \textsuperscript{108} \textit{Minn. Stat.} § 626.557(8) (1996).
  \item \textsuperscript{109} \textit{Minn. Stat.} § 595.02(1)(b) (1996). \textit{But cf.} \textit{Minn. Stat.} § 595.02(1a) (mediator is competent to testify in professional misconduct or disqualification proceeding about what went on during the mediation proceeding).
\end{itemize}
\end{flushright}
at least by the parties, for conduct or statements made during a mediation that are in furtherance of an ongoing crime or fraudulent act. Minnesota courts\(^{110}\) have read a similar exception into the attorney-client privilege statute.\(^{111}\)

The parties could not testify about conduct during the mediation to establish a claim of bad faith negotiation.\(^{112}\) Nor does the language in the statute allow a party to ask a witness about a settlement the witness entered into with the adverse party to establish bias, if the settlement was the product of a mediation.\(^{113}\)

**B. The ADR Neutral Statute: Minnesota Statute Section 595.02(1a) (1996)**

In 1996, the Minnesota Legislature passed an additional statute entitled "Alternative Dispute Resolution Privilege."\(^{114}\) Although the title of the statute refers to a privilege, the text of the statute is framed in terms of competency and provides as follows:

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:

\(^{110}\) Kahl v. Minnesota Wood Speciality, Inc., 277 N.W.2d 395, 399 (Minn. 1979) (attorney-client privilege “does not extend to any deliberate plan to defy the law and oust another person of his rights”) (citing 8 WICMORE, EVIDENCE (McNaughten Rev.) § 2298(1a)).

\(^{111}\) See THOMPSON & HERR, supra note 15, at 113 (discussion of a possible crime exception to the marital privilege).

\(^{112}\) Under the Farmer-Lender Mediation Act if parties negotiate in bad faith the mediator is expected to file an affidavit with the court. MINN. STAT. § 583.27(2). See Obermoller v. Federal Land Bank of Saint Paul, 409 N.W.2d 229 (Minn. Ct. App. 1987). Author’s note: The Farmer-Lender Mediation Act is presently scheduled for repeal as of July 1, 1997. 1995 MINN. LAWS ch. 212, art. 2 § 11. At the time of publication of this article, the Minnesota Legislature was considering extending the repeal date. H.F. 1686, 80th Legis. (Minn. 1997); S.F. 1292, 80th Legis. (Minn. 1997).

\(^{113}\) But cf. Dornberg v. St. Paul City Ry. Co., 91 N.W.2d 178, 184-85 (Minn. 1958) (plaintiff may ask a defense witness about a settlement the witness entered into with defendant to show bias).

\(^{114}\) MINN. STAT. § 595.02(1a) (1996).
(1) constitute a crime;

(2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or

(3) constitute professional misconduct.\textsuperscript{115}

Unlike the mediation privilege statute discussed above, this statute might be a competency statute.\textsuperscript{116} Judges\textsuperscript{117} and jurors\textsuperscript{118} are incompetent to testify in cases they are trying, and jurors are also incompetent to testify to impeach a verdict except in limited circumstances.\textsuperscript{119} Similarly, ADR neutrals, be they arbitrators, special magistrates, fact finders or mediators, might be incompetent to testify under this ADR neutral statute.

If this statute is a competency statute and not a privilege statute, ADR neutrals could not testify, but could be subject to discovery, and perhaps could be free to disclose informally information about matters which occurred during the process, absent some other prohibition.\textsuperscript{120} Finally, if the statute is a competency statute, the parties and the mediator could not waive the prohibition.\textsuperscript{121}

The ADR neutral statute is applicable in any alternative dispute resolution proceeding established pursuant to law, court rule, or by “agreement to mediate.” Any of the procedures authorized by statutes, pursuant to Minnesota General Rule of Practice 114,\textsuperscript{122} or mediations conducted pursuant to an “agreement to mediate” qualify for protection under the ADR neutral statute. For example, the university ombuds-person who is facilitating the resolution of a dispute on campus, or a

\textsuperscript{115} Id.
\textsuperscript{116} The court raises this issue in Haghtight, 945 F. Supp. at 1235, but does not resolve whether it is a privilege or competency statute. See supra notes 29-39 and accompanying text for further discussion about the differences between competency and privilege.
\textsuperscript{117} Minn. R. Evid. 605.
\textsuperscript{118} Minn. R. Evid. 606(a).
\textsuperscript{119} Minn. R. Evid. 606(b) (jurors can testify about improper influences, extreme prejudicial information and threats of violence or violent acts). See generally Thompson, supra note 10, at 284-292.
\textsuperscript{120} See supra notes 29-39 and accompanying text.
\textsuperscript{121} See Sonenstahl v. L.E.L.S., Inc., 372 N.W.2d 1 (Minn. Ct. App. 1985) (decided before this statute was passed) (mediator was willing to testify, but the court precluded the testimony).
supervisor or teacher without power to coerce a decision, could be incompetent under this statute if acting pursuant to an "agreement to mediate."

The neutral is incompetent to testify in civil proceedings or administrative hearings, but is not prohibited by this statute from testifying in a criminal matter. Although the ADR neutral statute does not prohibit a mediator from testifying in a criminal case, the mediation privilege statute\(^{123}\) likely would be applicable to preclude the testimony, unless a court finds an exception to the mediation privilege statute for criminal matters.\(^{124}\)

The ADR neutral statute provides express exceptions making the neutral competent to testify in certain cases.\(^{125}\) The neutral is not incompetent to testify in a civil or administrative proceeding about conduct that constitutes a crime.\(^{126}\) For example, if a party engages in assaultive behavior during a mediation, or the parties' conversations about a settlement violate the criminal antitrust provisions, the mediator would not be precluded from giving testimony. But again, under the mediation privilege statute these matters would be privileged. The ADR neutral could testify about statements or conduct that relate to disqualification proceedings under the Rules of Professional Conduct for at-

\(^{122}\) Rule 114 recognizes the following types of ADR procedures:
- Adjudicative Processes:
  - 1) Arbitration;
  - 2) Consensual Special Magistrate;
  - 3) Moderated Settlement Conference;
  - 4) Summary Jury Trial;
- Evaluative Processes
  - 5) Early Neutral Evaluation;
  - 6) Neutral Fact Finding;
  - Facilitative Processes
  - 7) Mediation;
  - Hybrid Processes
  - 8) Mini-Trial
  - 9) Mediation-Arbitration
  - 10) Other. Parties may by agreement create an ADR process. They shall explain their process in the Informational Statement.

\(^{123}\) See supra notes 24-113 and accompanying text.
\(^{124}\) See supra notes 110-11 and accompanying text.
\(^{125}\) Minn. Stat. § 595.02(1a).
\(^{126}\) Id.
tories, or about statements or conduct which constitutes professional misconduct. All of this testimony would be privileged, however, under the mediation privilege statute.

Because of the mediation privilege statute, the ADR neutral statute adds little to the law regulating confidentiality of mediation proceedings, unless the legislature in passing the ADR neutral statute intended to create exceptions to the blanket privilege provided in the mediation privilege statute. Based on the Minnesota House and Senate committee hearings of the ADR neutral statute, it is certain that the legislators intended that mediators would testify in the circumstances set out in the exceptions.\textsuperscript{127} Yet the language in the ADR neutral statute makes no reference to the pre-existing mediation privilege statute.\textsuperscript{128} Thus, not only the courts, but also the legislature is guilty of ignoring existing statutory language.\textsuperscript{129} Furthermore, if the exceptions in the ADR neutral statute, which make the neutral competent to testify about crimes or professional misconduct, are to be read into the mediation privilege statute, this exception would permit the neutral to testify, but the mediation privilege statute would still preclude the parties from testifying on these issues.

The ADR neutral statute is not limited to mediations. The statute applies to all ADR proceedings established pursuant to law, court rule or by agreement to mediate. Unlike the mediation privilege statute, the ADR neutral statute provides no exception for actions to set aside or reform a mediated settlement agreement, and on its face would preclude the neutral from testifying that settlement was reached.

\textsuperscript{127} Third Reading H.F. 2385 before the Minnesota House of Representatives, 79th Legis. (Minn. Feb. 8, 1996); Hearings on H.F. 2385 before the Minnesota House Judiciary Committee, 79th Legis. (Minn. Feb. 4, 1996). An audio tape recording of these hearings is available from the author.

\textsuperscript{128} MINN. STAT. § 595.02(1a).

\textsuperscript{129} Oddly enough, based on the testimony and questioning at the hearing neither the advocates of this bill (which includes the Minnesota State Bar Association's Section on Alternative Dispute Resolution) nor the legislators recognized that the mediation privilege statute had been in force for twelve years. See Hearings on H.F. 2385 Before the Minnesota House Judiciary Committee, (Minn. Feb. 4, 1996) (statements by Representative Carruthers, sponsor of H.F. 2385, and Robert Langford, Commander of the Alternative Dispute Resolution section of the Minnesota State Bar Association, failed to mention the existence of a mediation privilege under MINN. STAT. § 595.02(1)(l).
C. Other Legislation Addressing Confidentiality in Mediations Adds to the Confusion

The language in the mediation privilege statute and the ADR neutral statute makes no attempt to reconcile conflicting requirements. Nor does either statute make reference to, incorporate or otherwise attempt to accommodate the numerous other statutes adopted to protect confidentiality in ADR proceedings in Minnesota. For example:

1. Data received or maintained in labor mediations by the bureau of mediation services is protected as “nonpublic data with regard to data not on individuals” and as “confidential data on individuals” under the Data Privacy Act. This designation of the data precludes dissemination.

2. In mediations under the landfill clean up program, “any settlement offer or any proposal, statement, or view expressed or document prepared in the course of negotiation under this section shall not be considered an admission by any party and shall not be admissible in evidence in any judicial proceeding affecting matters subject to settlement negotiation.”

3. The protection for confidentiality in mediations in the Community Dispute Resolution Program is extremely broad: “Any communication relating to the subject matter of the dispute by any participant during dispute resolution should not be used as evidence against a participant in a judicial or administrative proceeding. This shall not preclude the use of evidence obtained by other independent investigation.” Minnesota Statute § 13.88 provides an express exception for matters subject to the mandatory reporting statutes.

4. Custody and visitation mediations “shall be conducted in private. All records of a mediation proceeding shall be private and not

130. MINN. STAT. chapter 179 (1996).
135. MINN. STAT. § 494.02 (1996).
available as evidence in an action for marriage dissolution and related proceedings on any issue in controversy in the dissolution.”

5. Mediators conducting proceedings pursuant to the Farmer-Lender Mediation Act cannot testify about communications or documents made or used in the course of or because of mediation. The Act provides an exception allowing the parties to testify in an action to set aside or reform a mediated settlement agreement. In addition, financial data, collected and maintained pursuant to a mediation is “private data on individuals” or “non-public data” under the Data Privacy Act. This statute provides further that the mediator can testify, but is not required to testify, on the issue of a party’s good faith in participation in the mediation. This testimony, of course would conflict with the mediation privilege statute and the ADR neutral statute.

IV. COURT RULES PROTECTING CONFIDENTIALITY IN MEDIATION

Rule 114 of the Minnesota General Rules of Practice provides for an ADR process in most civil cases filed in Minnesota courts. To protect confidentiality, the rule creates an extremely broad privilege mak-


Rule 114.08 Confidentiality
(a) 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.
(b) Inadmissibility. Statements made and documents produced in non-binding ADR processes which are not otherwise discoverable are not subject to discovery or other disclosure and are not admissible into evidence for any purpose at the trial, including impeachment, except as provided in paragraph (d).

See also Minn. Gen. R. Prac. 310.05 (“mediation proceedings under these rules [in family court] are privileged, not subject to discovery, and inadmissible as evidence in family court proceedings without the written consent of both parties. Mediators and lawyers for the parties, to the extent of their participation in the mediation process cannot be called as witnesses in the family court proceedings”).
ing essentially all statements or documents relating to mediations non-
discoverable and inadmissible (for any purpose) in the subsequent tri-
al\(^{144}\) and in "any subsequent proceeding involving any of the issues or
parties to the proceeding."\(^{145}\) For example, evidence offered to reform
a mediated settlement agreement, permitted under the mediation privi-
lege statute\(^{146}\) is excluded by Rule 114.08, as would be evidence that a
party to the mediation committed a criminal act or engaged in profes-
sional misconduct.\(^ {147}\) As an extra measure of protection Rule
114.08(e)\(^ {148}\) precludes the mediator from disclosing notes, records, and
recollections.

The blanket privilege provided in Rule 114.08 is an overenthusias-
tic response to the legitimate concern for confidentiality in the medi-
ation process. The blanket protection is far in excess of the needs of
parties to efficiently and effectively reach mediated settlements, and
makes no attempt to reconcile the needs of confidentiality with other
statutory requirements or principles of fairness in the litigation pro-
cess.

V. ANALYSIS AND PROPOSALS

One of the promised advantages of mediation as a means of dispu-
te resolution is that it provides the parties with a private, informal,
user-friendly approach to resolving disputes, free from negative, tech-
nical, adversarial procedures. The present legislative and judicial scheme
addressing the issue of confidentiality in mediations, however, fails to
deliver on this promise by presenting layers with overlapping and con-

\(^{144}\) MINN. GEN. R. PRAC. 114.08(b).

\(^{145}\) MINN. GEN. R. PRAC. 114.08(a). The only exception provided in the rule applicable in media-
tions is if all parties consent to disclosure AND a court orders the disclosure.

\(^{146}\) MINN. STAT. § 595.02(1)(l) (1996). See supra notes 62-77 and accompanying text.

\(^{147}\) Under the ADR neutral statute the mediator could testify on these issues. See supra notes
125-26 and accompanying text.

\(^{148}\) MINN. GEN. R. PRAC. 114.08(e) (effective July 1, 1997) provides:
Records of Neutral. Notes, records, and recollections of the neutral are confiden-
tial, which means that they shall not be disclosed to the parties, the public, or any-
one 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.
flicting statutes and rules. Some of the provisions are expressed in narrow terms, only to be swallowed by other provisions expressed in broad, over-inclusive language leaving it to the courts to decide the proper scope of confidentiality on a case-by-case basis. In reaching decisions, the courts are left with the choice of whether to make a decision consistent with sound principles, or follow the poorly conceived language in the statute or rule. If the over inclusive language in these provisions is enforced, the statutes and rules create not only an atmosphere where law-abiding citizens can privately resolve disputes, but also a process of dispute resolution that allows the lawless citizens to lie, cheat, and abuse with absolute impunity.

Furthermore, the legislative scheme puts professionals at risk in cases involving the interests of vulnerable third parties. The statutes and rules create confusion about whether professionals involved in mediations should follow the obligation to uphold confidentiality as mandated by the mediation statutes and rules, or to follow other ethical, or legal requirements requiring disclosure of certain facts. The current scheme provides numerous traps for the unwary. The legislature and courts should address this problem, reconciling the conflicting statutes and court rules and addressing the needs for confidentiality in the mediation process.

Two guiding principles should govern this process:

First, the provisions governing confidentiality must be accessible, comprehensive and expressed in language that is understandable, not only to lawyers but also to the many non-lawyers who serve as mediators and who participate as parties to mediations. The mediation process must not pose a trap for the unwary in Minnesota. Secondly, the scope of confidentiality must not be broader than is necessary to protect the legitimate needs for confidentiality in the mediation process and should not impinge on other more crucial societal interests that require limited disclosure.

A. Avoiding "Traps for the Unwary"

The process of mediation should not create traps for the unwary. At present, a lawyer making a good faith attempt to understand the full extent of confidentiality in a mediation session must research numerous statutes, court rules and common law decisions (published and unpublished), only to determine that the scope of confidentiality in mediation sessions is not certain.

The extent to which the statements made in mediation might be voluntarily disclosed outside of trial, disclosed pursuant to a statutory duty, compelled through a pre-trial discovery process, offered for impeachment or be disclosed in a different proceeding, such as a criminal matter, or action for breach of professional duty, remains unclear in many mediations. If the mediation is conducted pursuant to Rule 114, the language of the rule suggests complete protection against disclosure. The express exceptions found in the mediation privilege statute, the ADR neutral statute and the mandatory disclosure statutes, however, indicate potential hidden exceptions to the court rule. A lay person who did not have access to computer research of legal authorities would be at a loss to discover the extent that mediation discussions will remain confidential.

Recommendation 1: Repeal the Traps for the Unwary Presented in the Civil Mediation Act.

The characterization of the Civil Mediation Act in Haghigi as a "trap for the wary and unwary" might be a charitable description. Since the mediation privilege is applicable only to mediations pursuant to an "agreement to mediate" the technical definition of "agreement to mediate" in the Civil Mediation Act could make the privilege inapplicable to many mediations in Minnesota. Experienced lawyers, or ex-

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150. MINN. GEN. R. PRAC. 114.08.
151. MINN. STAT. § 595.02(1)(l) (1996).
152. MINN. STAT. § 595.02(1a).
153. MINN. STAT. §§ 626.556(8); 626.557(8); and MINN. R. PROF. CONDUCT 8.3.
tremely knowledgeable lay persons, who have researched the maze of statutes to understand this issue, may not be tricked; but, many lawyers and lay persons alike participating in mediations may be relying on the confidentiality provided by the statute, without written agreements containing the overly technical clauses required by the Civil Mediation Act.

The Civil Mediation Act provides additional traps which, although not specifically related to confidentiality, ought to be noted. Section 572.35 of the Act invalidates fair, signed settlement agreements, unless the agreements include unnecessary clauses stating that the parties intend the agreement to be binding, informing the parties that the mediator has no duty to protect the rights of the parties, that the signed agreement may adversely affect the parties rights and that the parties should consult with an attorney if unsure of their rights.\textsuperscript{156} These provisions reflect a misguided attempt by the legislature to protect against sophisticated negotiators taking advantage of powerless citizens in the mediation process. This overregulation is more likely to serve as a shield for the unscrupulous who breach their agreements, than as protection for the powerless.

While good practice requires a mediator at the outset of a mediation session to inform the parties of the limited role of the mediator, failure to include this language in the written settlement agreement, after agreement is reached, has no bearing on the fairness of the process or on the fairness of the agreement. Furthermore, all competent parties in Minnesota know that signing written settlement agreements might affect their rights. If parties are interested in and unsure of their rights, Minnesota citizens also know they could and likely should see a lawyer before the mediation, not after the mediation produces a settlement. Lawyers, and others who are sophisticated in these technical laws, will draft appropriate clauses. Unsophisticated parties will sign settlement agreements that would be valid in non-mediated settlements, only to find that the Civil Mediation Act purports to invalidate the mediated settlement without regard to whether there was fraud, mistake, duress, misconduct by the mediator or unfairness of any sort. This provision

\textsuperscript{155} See discussion \textit{supra} notes 46-51 and accompanying text.
\textsuperscript{156} MINN. STAT. § 572.35 (1996).
should be repealed.

The other trap in the Civil Mediation Act is the provision that makes it a petty misdemeanor for a mediator to act for compensation pursuant to the Act without first providing a written statement of qualifications. 157 Again, good practice might require a mediator to send a statement of qualifications to the parties prior to the mediation, if the parties are not aware of the qualifications. Lawyers and those sophisticated in mediations send the biographical information out as a matter of course. For others, this statute is a trap. 158 The criminal justice system should not be used to chase down citizens who in good faith have used their skills to help resolve a dispute, but who have failed to first send out a written statement of qualifications. This provision should be repealed, or at the very least, the sanction changed from a petty misdemeanor to a forfeiture of fees.

Recommenda tion 2: Repeal the current mediation privilege statute and provide a new comprehensive statute which addresses informal and mandatory disclosures, pre-trial discovery, and admissibility of statements, conduct, and documents relating to mediations with appropriate exceptions.

The new statute should reference the many other mediation confidentiality statutes and rules, either specifically or generally, and indicate in case of conflict which should prevail. The statute should create a privilege for the parties and should not be framed in terms of competency. As a privilege it can be waived by agreement of the parties. The privilege should be applicable in any mediation ordered by a court, pursuant to a statute or where parties and a mediator, agree that the matters discussed should remain confidential. In defining the privilege the


158. See Cohen, supra note 59, in which the author points out that "at least 12 of the 300" mediators who included a "Who's Who in ADR" listing in the February 1995 volume of the Minnesota Journal of Law and Politics may have committed a petty misdemeanor under the Civil Mediation Act by misrepresenting their qualifications by claiming they were "certified" mediators. Id. at 375. The author explains that in Minnesota, training programs are "certified" and mediators are "qualified." Id. Therefore, the mediators who claimed they were "certified" may be guilty of a petty misdemeanor by misrepresenting their qualifications. Id. at 375 n.4.
statute should specifically address the issue of voluntary disclosure, disclosure in discovery, evidentiary use in the trial of the mediated dispute, and use in other proceedings. Finally, the statute should clearly indicate any exceptions to the rule of privilege.

**B. Protecting Legitimate Needs of Confidentiality**

Evidentiary privileges suppress the truth, and as such, should be narrowly drawn so as not to suppress more than is necessary to carry out the policy justifying the protection.159 While most agree that encouraging the process of mediation is a sound policy160 the underlying justifications vary among constituents. The legislature and courts favor mediation because mediations "resolve" cases, saving court time and client money.161 Others advocate mediation as a means to empower citizens to resolve their own disputes,162 as a process to help restore and strengthen strained relationships163 or as a means to reform the civil

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159. Cf. Leer v. Chicago, Milwaukee St. Paul & Pacific Ry. Co., 308 N.W.2d 305, 309 (Minn. 1981); Clark v. United States, 289 U.S. 1, 13 (1933) ("[T]he recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of the Court to mediate between them. . .").


161. See A.M. Keith, ADR Symposium, Commentary, 12 Hamline J. Pub. L. & Pol'y 1, 2 (1991) (the goal of the original Hennepin County pilot project implementing ADR was to reduce judicial time, the number of cases awaiting trial, litigation costs and to increase litigant satisfaction); see also Chief Justice Burger's dissent in Barrentine v. Arkansas Best Freight System, Inc., 450 U.S. 728, 748 (1981): The policy of favoring extrajudicial methods of resolving disputes is reflected in other areas as well. With federal courts flooded by litigation increasing in volume, in length, and in a variety of novel forms, the National Institute of Justice, under the leadership of Attorney General Griffin Bell, in 1979 launched a multimillion-dollar program of field studies to test whether mediation at a neighborhood level could resolve small disputes out of courts in a fashion satisfactory to the parties. Neighborhood Justice Centers Field Test: Final Evaluation Report 7-8 (1980). The results of this study--and other similar studies financed by private sources confirmed what many had long suspected: small disputes may be resolved more swiftly and to the satisfaction of the parties without employing the cumber-some, time-consuming, and expensive processes of litigation.

justice system.\textsuperscript{164} Whatever the justification, the success of mediation as a process for resolving disputes is recognized by the Minnesota courts and legislature as an important public policy. It is further recognized that confidentiality is crucial to successful mediations.\textsuperscript{165} Encouraging full and frank discussions is necessary to assist the mediator and the parties to identify interests, develop solutions and reach agreement.\textsuperscript{166} These important policy concerns, however, do not justify a cloak of absolute confidentiality.

In evaluating whether the policy underlying the need for confidentiality in mediation justifies absolute confidentiality a comparison with other privileges is instructive. There are few, if any, evidentiary privileges that provide absolute confidentiality.\textsuperscript{167} Even the executive privilege protecting the confidences of the President of the United States must give way to the legitimate interests of the criminal justice system.\textsuperscript{168} Medical personnel and lawyers play key societal roles in healing the...
sick, protecting rights, and in assisting citizens to bring their conduct into compliance with the laws. Further, medical personnel and lawyers also must rely on the assurances of confidentiality to ensure that their clients will provide full and frank disclosures of necessary information. If the medical personnel or lawyers do not receive candid and accurate information, citizens will not receive necessary health care, may die unnecessarily, or may not receive advice or advocacy essential to protect rights or comply with the law. Yet, neither the lawyer-client privilege nor medical privilege is absolute. There are numerous exceptions to the doctor-patient privilege and to the attorney-client privilege.

While the role of mediation is important to society, with the exception perhaps of labor mediations, where industrial peace may hang in the balance, most mediations do not carry with them the same dramatic implications. If a mediation fails to reach settlement the result in most cases is that the parties will have their dispute resolved at a trial or other proceeding. Although going to trial is sometimes seen as a last resort, an expensive consequence of failed pre-trial or informal dispute resolution, civil trials in the United States are a highly refined and historically valued public exercise of government power. The failure of a mediation does not result in damage to the rights of parties. Furthermore, even if a mediation fails to achieve settlement, if the parties want to avoid the "dreaded" trial, they remain free to settle their dispute in the time honored way of settling disputes through private negotiation.

That is not to say that the success of mediation as a process for resolving citizen disputes is not important, only that the societal inter-

169. The physician-patient privilege is inapplicable to firearm or serious burn injuries, Minn. Stat. § 626.52, (1996) or cases involving maltreatment of minors, Minn. Stat. § 626.556 or vulnerable adults, Minn. Stat. § 626.557, actions against health care providers, Minn. Stat. § 595.02(5) or claims for crime victim reparation, Minn. Stat. § 611A.62. See also Minn. Stat. § 148.975 (1996) (public health licensee's duty to warn of a "specific serious threat of physical violence against a specific, clearly identified or identifiable potential victim"); and Minn. Stat. § 147.091(1)(m) (grounds for disciplinary action against a physician include "[r]eveling a privileged communication from or relating to a patient except when otherwise required or permitted by law").

170. See Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395, 399 (Minn. 1979) (the attorney-client privilege is inapplicable if the communication is in furtherance of a crime or fraud); Melrose Floor Co., Inc. v. Lechner, 435 N.W.2d 90, 91 (Minn. Ct. App. 1989) (attorney-client privilege inapplicable in action against the attorney for malpractice); Baskerville v. Baskerville, 75 N.W.2d 762, 767 (1956) (no attorney-client privilege in a fee dispute).
est in this process does not justify total confidentiality in light of competing concerns that require limited disclosure. To determine the appropriate level of protection, perhaps the place to begin is to assess why the mediation process justifies a broader scope of confidentiality than does the traditional privilege protecting private non-mediated settlement negotiations. In one sense mediation is nothing more than a supervised negotiation.\textsuperscript{171}

When considered as an alternative dispute resolution process, mediation frequently is viewed as an alternative to trial. But court-annexed mediation has not replaced the trial as a dispute resolution process. Despite popular belief, there is little evidence to indicate that court-annexed mediation results in more settlements or in cheaper and earlier settlements than does private negotiation.\textsuperscript{172} Civil cases, even those where mediation is used, go to trial at about the same rate as in the past, prior to the widespread use of mediation and other "ADR" procedures.\textsuperscript{173} Where court-annexed mediation is used, this process an alternative to private negotiation and court settlement conferences, not an alternative to trial as a procedure for resolving disputes.\textsuperscript{174}

Thus, an argument can be made that there is no justification for treating a mediated settlement discussion any differently from a private negotiation process.\textsuperscript{175} The many exceptions to confidentiality of private settlement negotiations found in Rule 408\textsuperscript{176} have not impeded the

\begin{footnotes}
\item 171. Protecting Confidentiality, supra note 22, at 443 ("mediation is essentially a form of negotiation").
\item 173. Bush supra note 172, at 56.
\item 174. Id.
\item 175. See generally Green, supra note 21.
\item 176. \textit{See} discussion at supra notes 12-23 and accompanying text.
\end{footnotes}
effectiveness of private settlement negotiation and therefore should provide sufficient protection of confidentiality in mediated settlement negotiations.

A comparison of private negotiation and mediation, however, reveals substantial differences in the processes and in the parties' expectations, justifying more stringent confidentiality protections in mediation sessions than in private negotiations. Private negotiations are conducted within the framework and spirit of the adversary system. Although Rule 408 is designed to encourage candor, parties are at all times aware that they are communicating with the adverse party.

In a mediation the neutral attempts to defuse the adversarial nature of the dispute to facilitate communication and, to the extent possible, assist the parties in moving toward a solution. The mediator will encourage full disclosure relying heavily on ex-parte communications in caucuses.\textsuperscript{177} If the parties "buy in" to the process they will be emboldened to speak with more candor, particularly when speaking privately to the mediator. If the parties do not "buy in" to the process the effectiveness of the mediator will be limited.

The parties' expectations, and the process of a mediated settlement agreement justify different treatment and greater protection for confidentiality than is currently provided for in private negotiated settlement sessions. Nonetheless, the legitimate expectations of confidentiality must give way where compelling reasons justify disclosure.

Recommendation 3: The mediation privilege statute must provide exceptions for: 1) evidence of crimes; 2) mandatory reporting statutes and rules; 3) actions to interpret, reform, or enforce a settlement agreement; 4) actions by or against the mediator; or 5) where the fact of settlement or the terms of settlement are relevant and admissible to prove bias or other consequential fact.\textsuperscript{178}

\textsuperscript{177} See Bush, supra note 172 for a discussion of how a settlement discussion mediated by an impartial neutral differs from private non-mediated settlement negotiations.
a. Evidence of Crimes

The mediation process should not be a safe haven for criminal activity.\textsuperscript{179} The interest in encouraging dispute resolution through mediation does not justify thwarting the strong policy of enforcing criminal laws. Certainly with regard to criminal activity, conduct, or threatening statements\textsuperscript{180} during a mediation session no privilege should attach. For example, assaultive conduct in a mediation session should not be privileged. Likewise conduct or negotiations in furtherance of a crime or fraud should not be privileged, similar to the exception to the attorney client privilege.\textsuperscript{181}

Statements reflecting an admission of past criminal activity, or expressing an intent to engage in criminal activity in the future, raise more difficult issues. Based on the strong policy surrounding enforcement of the criminal laws, however, the interest in privacy in mediations should give way to the legitimate interest of law enforcement.\textsuperscript{182} If a party discloses past criminal activity in a mediation, the statements should not be privileged.

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\textsuperscript{178} Some have argued that the mediation privilege should include an exception to litigate claims of bad faith negotiation during a mediation. See, e.g., Note, \textit{Protecting Confidentiality}, supra note 22, at 452-53. In Farmer Lender mediations the parties are bound by a statutory duty to negotiate in good faith and in fact the statute permits the mediator to testify on this issue. See \textsc{Minn. Stat.} § 583.27(6)(c) (1996); \textit{see also supra} notes 138-41 and accompanying text. Under Rule 114 mediations the parties have a duty to attend, but no express duty to participate in good faith. See \textsc{Minn. Gen. R. Prac.} 114. To provide express exceptions to the mediation privilege on the issue of which party failed to negotiate in good faith may embroil the courts in numerous side issues unrelated to the issues in the case and not be conducive to prompt, efficient resolution of the cases. "Negotiating in bad faith is often in the eyes of the beholder." Kirtley, \textit{supra} note 22, at 17.

\textsuperscript{179} The ADR neutral statute, \textsc{Minn. Stat.} § 595.02(1a) (1996), provides that the neutral is competent to testify in criminal cases and in civil and administrative cases about statements or conduct that constitute a crime. However, the Mediation Privilege Statute, \textsc{Minn. Stat.} § 595.02(1)(l) (1996) and Rule 114 would make the testimony privileged.

Many states specifically provide an exception to the mediation privilege for evidence relating to criminal conduct. See, e.g., \textsc{Colo. Rev. Stat. Ann.} § 13-22-307(2)(b) (West 1996)(not privileged if communication reveals the "intent to commit a felony, inflict bodily harm or threaten the safety of a child under the age of eighteen"); \textsc{Kansas Stat. Ann.} § 23-606(a) (West 1995) (commission of crime during mediation process and expressed intent to commit a crime in the future not privileged); \textsc{N.J. Stat. Ann.} § 34: 13A - 16(h) (West 1996) (information relating to the commission of a crime not privileged).


\textsuperscript{181} \textit{See supra} notes 110-11 and 123-24 and accompanying text.

\textsuperscript{182} \textit{See generally} \textsc{United States v. Nixon}, 418 U.S. 683 (1974).
Statements reflecting an intent to engage in future crimes raise the most difficult issue. When mediations fail to reach settlement, adverse parties may too readily construe various negotiation statements or ploys as evidence of an intent to commit future perjury. To encourage litigation on issues of alleged “perjury” would needlessly extend litigation on side issues and impair the expectation of confidentiality in mediations. Statements, however, reflecting imminent threats to engage in physical harm to identified targets raise different concerns. These threats should not be protected but should be reported to appropriate authorities and should be the subject of testimony in subsequent litigation. ¹⁸³

b. Mandatory Disclosure

Statements or conduct that are the subject of mandatory disclosure laws¹⁸⁴ should not be privileged. Mandatory disclosure laws are rare and reflect strong policy regarding the protection of innocent third parties.¹⁸⁵ If a blanket mediation privilege fails to allow disclosure pursuant to mandatory reporting regulation the privilege creates an impossible conflict for the professional with a legal and moral obligation to report and defeats the strong policy mandating the reporting. The interest in preserving the confidences of the mediation should give way to the interest of protection of third parties as expressed in the reporting statutes.

¹⁸³. See Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (psychotherapist has a duty to warn of death threats made by client in confidential treatment). See also Minn. Stat. § 148.975 (1996) (public health licensee’s duty to warn of a “specific, serious, threat of physical violence against a specific, clearly identified or identifiable potential victim); Minn. R. Prof. Conduct 1.6.

¹⁸⁴. E.g., Minn. Stat. § 626.556 (1996) (maltreatment of minor); Minn. Stat. § 626.557 (maltreatment of vulnerable adult); Minn. R. Prof. Conduct 8.3 (lawyers duty to report professional misconduct of another lawyer).

¹⁸⁵. Neither the mediation privilege statute nor the ADR neutral statute permit party or a mediator to disclose pursuant to mandatory disclosure laws. The recent amendment to Rule 114.08(e), supra note 148, likely permits the mediator to disclose “recollections” of statements or evidence subject to mandatory reporting laws or codes. Other statutes specifically exempt mandatory reporting laws from the privilege of confidentiality. See, e.g., Minn. Stat. § 13.88 (1966) (in community dispute resolution proceedings there is no privilege for neglect or physical or sexual abuse subject to mandatory reporting requirements). See also Uhl v. Uhl, 395 N.W.2d 106 (Minn. Ct. App. 1986) (visitation mediator reported physical and verbal abuse of child).
c. Enforce, Interpret or Reform Settlement Agreement

The mediation privilege should not exclude evidence about issues relating to grounds for reform, or to interpret or to set aside a mediated settlement agreement. A mediated settlement agreement is a contractual agreement. To the extent that extrinsic evidence is permitted under the parole evidence rule to reform, set aside or interpret the contractual agreement, the privilege must not exclude this evidence. In addition, the privilege should not preclude evidence, written or oral, proving that the parties entered into a settlement. The mediation privilege is designed to encourage settlement; it makes little sense to conclude that in the interests of encouraging settlements, the privilege will not permit parties to enforce mediated settlement agreements by offering the written agreement or other evidence of agreement.

d. Actions By or Against the Mediator

The privilege should not prohibit the mediator, or the parties, from introducing evidence of conduct or statements made in the mediation relevant to an action brought by the mediator against the parties for fees, or for other matters stemming from the mediation. Minnesota General Rule of Practice 114.11(c) specifically authorizes a mediator to move the court to order a recalcitrant party to pay the mediator's fee. Implicit in this rule is the assumption that the evidence supporting the mediator's fee claim is not privileged. Nor should a mediation privilege preclude the parties or the mediator from testifying in civil, crimi-

186. The mediation privilege statute allows evidence offered to set aside or reform but not to enforce a settlement agreement. The Farmer Lender statute allows testimony on the issue of whether the settlement should be set aside. The ADR neutral statute, Rule 114, and the privilege in Community Dispute Resolution mediations do not expressly permit such evidence to be admitted.


188. In Cant v. Gaffney, No. C2-90-938, 1990 WL 157443 (Minn. Ct. App. Oct. 23, 1990), the court allowed the parties to testify on the issue of whether a settlement was reached but precluded the mediator from testifying applying the ADR neutral statute and ignoring the mediation privilege. But see Royal Caribbean Corp. v. Modesto, 614 So. 2d 517, 519-20 (3d Dist. Fla. 1992) (statements in mediation session offered to prove settlement were precluded by privilege).

189. Cohen, supra note 59, at 401. See also MINN. R. PROF. CONDUCT 1.6(b)(5) (permitting lawyers to disclose confidences to collect a fee or to defend against an accusation of misconduct).
nal, or administrative proceedings brought against the mediator. The courts recognize a similar exception to the attorney-client privilege. To exclude all evidence relating to the mediation provides a total immunity for any misconduct of a mediator and the parties. As a substantive matter the courts or legislature might want to provide some limited immunity for mediators, but the current blanket privilege reaches far beyond legitimate interests.

e. Evidence of Settlement Offered to Prove Bias or For Other Legitimate Purpose

In most cases private settlements can remain confidential between the parties. Settlements, however, might be admissible and subject to disclosure in litigation to prove bias of a witness who settled with the adverse party, or for other valid reasons. A settlement entered into through the process of mediation should be entitled to no more confidentiality protection than a settlement entered into by means of private negotiation. Thus, if one co-defendant settles with a plaintiff, the settlement must be disclosed whether it was obtained pursuant to private negotiation or through mediation.

Recommendation 4: The mediator should be incompetent to provide testimony on the mediator’s or the parties’ thought processes or mental impressions except as may be relevant in actions or proceedings for or against the mediator. The mediator should be competent to testify on objective facts such as statements made, conduct of the parties and documents signed relevant to the exceptions to the

190. The ADR neutral statute allows the neutral to testify in cases involving professional misconduct and attorney disqualification proceedings, but the mediation privilege and Rule 114 would preclude this testimony, as would the community dispute resolution privilege and farmer-lender privilege.

191. See Thompson, supra note 10, at § 501. See also Minn. R. Prof. Conduct 1.6(b)(5).


193. See generally Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986).

194. See generally supra notes 18 and 113.

195. See Frye v. Snellgrove, 269 N.W.2d 918, 923 (Minn. 1978). Rule 114.10 (d) authorizes the neutral, at the conclusion of the ADR process to inform the court if no agreement is reached, without any additional comment.
mediation privilege, but only after an appropriate showing by the proponent.

f. Mediator Competency

In addition to the privilege protecting the parties’ interests, there is authority supporting protection of the mediator’s interests in maintaining confidentiality through a mediator privilege or competency rule.\textsuperscript{196} It is argued that requiring testimony from mediators destroys impartiality of the mediator and may unduly burden the mediator, or mediation program.

Although there is some merit to the arguments, a blanket restriction prohibiting all potential testimony by a mediator is not warranted. The concern for mediator impartiality is similar to the interests in maintaining impartiality of judges and jurors. Judges\textsuperscript{197} and jurors\textsuperscript{198} cannot testify about a matter in a case in which they are sitting. The judge and juror cannot be both an impartial participant and a sworn witness. Without destroying the concern for impartiality both the judge and the juror, however, are competent to testify in related proceedings on limited matters, such as criminal activity they observed as judges or jurors.

If the mediator observes conduct or statements relevant to the specified exceptions to the mediation privilege, the mediator, like any other fact witness, should provide the testimony so that the issues can be fairly decided. For example, if the mediator observes criminal activity or becomes a witness to statements evidencing criminal activity, the mediator, like the judge or juror or other citizens,\textsuperscript{199} should provide that testimony. Furthermore the mediator, as discussed above, should be bound by applicable mandatory disclosure laws. A mediator should not be incompetent to testify in defense of a claim of mediator misconduct or in support of a fee claim. Mediator testimony after termination of the mediation, limited to factual matters observed by the mediator will not necessarily call into question the impartiality of the mediator in the in-

\textsuperscript{196} NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 53-56 (9th Cir. 1980); Kirtley, supra note 22, at 30-32.
\textsuperscript{197} MINN. R. EVID. 605.
\textsuperscript{198} MINN. R. EVID. 606(a).
stant case or in subsequent cases.

Perhaps the origin of the modern concern for damaging impartiality stems from the case *NLRB v. Macaluso* in which the court ruled, among other matters, that the mediator in a federal labor mediation, could not testify on the issue whether the parties reached agreement because it would impinge on the impartiality of the mediator. The court concluded that, "the public interest in maintaining the actual or perceived impartiality of federal mediators outweighs the benefits of relevant and decisive testimony on the issue at hand."201

The court in *Macaluso* was concerned with maintaining nationwide industrial peace by preserving confidence in the federal mediation conciliation services. At the time of the decision there were more than twenty thousand labor disputes and only three hundred and twenty-five federal mediators.202 The court explained: "The complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation, and that labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence."203

Most mediations outside of the collective bargaining arena do not present these weighty concerns. For example, Rule 114 mediations do not risk industrial peace, only whether a matter will be resolved through agreement or by public trial. Further, there are large numbers of trained and qualified mediators under Rule 114 who rarely if ever are asked to mediate a dispute.204 Even if objective testimony in a case about what a mediator observed could taint that particular mediator as impartial, the implications as to the remaining mediators and the implications on the process of mediation is negligible.205

Furthermore, after the termination of a mediation if one party misrepresents what occurred, falsely claiming, or falsely denying, that an agreement was reached, the innocent party should not be left in the sit-

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200. 618 F.2d 51 (9th Cir. 1980); see also Tomlinson of High Point, Inc., 74 N.L.R.B. 681 (1947).
201. *Macaluso*, 618 F.2d at 54.
202. *Id.* at 55.
203. *Id.* at 56.
204. Nancy Welsh and Bobbi McAdoo, *Introduction: Minnesota’s Alternative Dispute Resolution Provider Organizations*, 16 HAMLINE J. PUB. L. & POL’Y 313 (1995) (reporting that there were over 1600 individuals qualified under Rule 114 and 100 mediation providers in Minnesota).
ulation where it is his or her word against the wrongdoer's word. Such a rule provides protection and support for misuse of the mediation process. Parties to a mediation should not be exposed to this type of risk. Citizens should not come out of a court-annexed mediation with a valid agreement made in the presence of a court-qualified mediator, or worse not agree, and have the adverse party fabricate what happened at the mediation, without allowing the mediator to provide the neutral testimony to avoid a miscarriage of justice.\textsuperscript{206}

In terms of the inconvenience of testifying, mediators are no different from any other witness. Few citizens want to testify in court. To avoid being called as a witness to a settlement agreement, or as a witness that no settlement was reached, mediators can take a more active role at the end of the mediation session. Mediators can ask the parties to sign off on a written or dictated settlement agreement or a written statement indicating that no settlement had been reached.\textsuperscript{207}

The scope of mediator testimony should not be open-ended, however. The mediator testimony should not include subjective interpretations or opinions about the intent of the parties or testimony about the mediator's opinions or thought processes. When jurors are required to testify on motions for new trial, in the interest of finality and preserving confidentiality, their testimony is limited. Jurors can testify about objective matters such as extraneous prejudicial information, outside influences or threats of violence but not subjective thought processes.\textsuperscript{208}

\textsuperscript{205} The concern that if the public sees a mediator testify, parties will be discouraged from candid disclosure in subsequent mediations is based on pure speculation. See Kevin Gibson Confidentiality in Mediation: A Moral Reassessment, 1992 J. Disp. Resol. 25, 46-48 (1992). The same argument could be raised that the attorney-client privilege or doctor-patient privilege should have no exceptions as well. Some have also argued that if mediators are forced to testify it will be difficult to find qualified people to serve as mediators. Maine Cent. R.R. Co. v. Brotherhood of Maintenance of Way Employees, 117 F.R.D. 485, 486-87 (D. Maine 1987), but see Smith v. Smith, 154 F.R.D. 661, 667 (D. Tex. N.D. 1994) ("[o]ne can arguably question the validity of predictions of a shortage of mediators.") The Smith court cites Louis J. Weber Jr., Court-Referral ADR and the Lawyer Mediator: In Service of Whom, 46 SMU L. Rev. 2113, 2114-15 (1993), an article pointing out the large number of lawyers who began advertising their services as mediators after court-annexed mediations became routine. 154 F.R.D. at 675.

\textsuperscript{206} The public might lose confidence in a mediation process supervised by a court qualified mediator where one party is permitted to misrepresent what occurred free from any contradiction by the mediator.

\textsuperscript{207} See, e.g., MINN. STAT. § 583.26(9) (1996) (mediator in farmer-lender mediation required to witness and sign written settlement agreements and have the agreement signed by the debtor and creditor).

\textsuperscript{208} MINN. R. EVID. 606(b); see generally THOMPSON, supra note 10, at § 606.02.
Based on similar concerns, a mediator should not be asked to testify about the mediator’s thought processes, or the mediator’s opinion about the parties’ thought processes.\textsuperscript{209} Such a broad based inquiry into the mediator’s mental impressions may unnecessarily implicate concerns of impartiality. Such an inquiry into the subjective views of the mediator would not be probative of relevant facts in most cases any event.\textsuperscript{210}

The mediator should be allowed to testify only about objective facts, statements made, or documents signed by the parties. Further, in order to limit the potential of far ranging discovery efforts into a mediator’s thought processes and subjective views about a mediation, a mediator should be subject to discovery only after a showing is made to the court that there is cause to believe that the mediator has information that would be relevant to one of the exceptions to the mediation privilege. The court in ordering mediator testimony or discovery can fashion a protective order under Minnesota Rule of Civil Procedure 26.03 to accommodate concerns about improper disclosure and expense.

**Recommendation 5:** I suggest consideration of the proposed bill in an effort to reconcile conflicting statutes, court rules, and policies and to continue to protect the legitimate interests in confidentiality in mediation.

**A PROPOSED BILL**

A bill for an act replacing Minn. Stat. § 595.02, subd. 1(l) (1996) amending Minn. Stat. § 595.02 subd. (1a) (1996), amending the Civil

\textsuperscript{209} See Drukker Communications Inc. v. NLRB, 700 F.2d 727, 732 (D.C. Cir. 1983) (court allowed NLRB agent who worked out an agreement with the parties to testify to oral agreement made during discussions); Bliznik v. International Harvester Company, 87 F.A.D. 490 (N.D. Ill. E.D. 1980) (arbitrator may not be asked about thought processes or reasoning of award but could be asked about relevant factual issues such as what counsel did or did not do). This approach was rejected in *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980). The court in *Macaluso* expressed a concern not only with the “line drawing” problems associated with defining “objective facts” but also whether allowing testimony on any fact that favors one side or the other would jeopardize the perceived impartiality of federal mediators to the detriment of industrial peace. Id. at 56.

\textsuperscript{210} Perhaps in a professional misconduct proceeding against a mediator, the mediator’s thought processes would be relevant to the issues.
Mediation Act, Minn. Stat. §§ 572.31-40 (1996), and creating a privilege for the parties to mediations and a limited competency rule for mediator testimony.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA

Section 1. Mediation Privilege. (a) The parties to a mediation conducted pursuant to court rule or order, statutory authority, or pursuant to a private agreement in which the parties have agreed with the mediator to maintain the confidentiality of the mediation, shall have a privilege not to disclose and the right to preclude the mediator from disclosing informally, pursuant to pretrial discovery or at trial or at an administrative proceeding, statements, conduct, or documents relating to the mediation session unless excepted under Section 4.

A mediation under this statute is defined as a forum in which a neutral third party, who lacks the power or authority to impose a settlement, facilitates communication between parties to promote settlement.

Section 2. Waiver. The parties may waive the privilege if all parties agree. The privilege may also be waived by prior disclosure by or conduct manifesting waiver engaged in by the party asserting the privilege.

Section 3. Materials otherwise subject to discovery. Statements, documents, communications or conduct that would otherwise not be privileged, such as pre-existing documents, business records, or the identity of fact witness, do not become privileged merely because they are used or disclosed in mediated settlement discussions.

Section 4. Exceptions. (a) The following statements, documents or conduct are not privileged under Section 1 and are subject to disclosure unless specifically privileged by another statute. Statements, documents, or conduct that are:

1. Evidence of past or present felonious actions, or evidence of the intent to commit a felony in the near future;
2. The subject of mandatory reporting requirements by other statutes or rules;
3. Relevant to an action to enforce, set aside, reform or interpret a settlement agreement; or
4. Relevant to civil or criminal actions brought by or against the
mediator or relevant to professional misconduct proceedings relating to the conduct of the mediation.

(b) Where the settlement of a dispute is relevant and admissible to prove bias or other consequential fact in litigation the evidence of settlement and the terms of the settlement is not privileged under this statute.

Section 5. Competency of the mediator. (a) The mediator shall be incompetent to testify at a hearing, deposition, or trial about the mediator's thought processes or mental impressions or about the parties' thought processes except as may be relevant and admissible in a civil or criminal action or administrative or professional misconduct proceeding by or against the mediator. The mediator is competent to testify to objective matters perceived by the mediator during the mediation including statements made, conduct of the parties, conduct of the mediator, and documents produced or signed to the extent that such testimony is offered for and is relevant to one of the exceptions to the mediation privilege set forth in Section 4.

(b) The mediator shall not testify or provide any discovery to parties in litigation unless
1. ordered to disclose by a court; or
2. all parties and the mediator have agreed to the mediator's disclosure.

The court shall not direct a mediator to testify or provide discovery unless a party has first made a motion and established that there is cause to believe that the mediator will be able to provide relevant, non-privileged testimony. The mediator and all parties to the mediation shall be given notice of any such motion and be provided an opportunity to appear and be heard at the hearing. In granting any motion for mediator testimony or discovery, the court may make any order limiting the testimony or discovery as justice requires and may order that fees and expenses incurred by the mediator be paid by the moving party.

(c) In an action or proceeding by or against the mediator the mediator may testify or provide discovery about non-privileged matters without party agreement or court order.

Section 6. Repeal Mediation Privilege Statute. This statute is intended to replace Minn. Stat. § 595.02, subd. 1(l).
Section 7. **Amendment of ADR neutral statute.** Minn. Stat. § 595.02 subd. (1a) shall be amended to include the following:

This section shall not govern the competency or privilege relating to testimony by mediators.

Section 8. **Repeal of portions of the Civil Mediation Act.**

Minn. Stat. §§ 572.33 subd. 3, “Agreement to mediate” Minn. Stat. § 572.35 subd. 1, “Effect of mediated settlement agreement” and 572.37 “Presentation of mediator to public” is repealed.

Section 9. **Applicable in Mediations Pursuant to the Community Dispute Resolution Program.** This statute is applicable in mediations pursuant to the Community Dispute Resolution Program. To the extent inconsistent, Minn. Stat. § 494.02 (1996) is repealed.

Section 10. **Minnesota Rule General Practice 114.08 Superseded.** This statute supersedes Minnesota General Rule of Practice 114.08 (a)(b) and (e).

Section 11. **Statute Inapplicable to Labor Mediations and Farmer Lender Mediations.** This statute is not intended to affect the scope of permissible testimony or confidentiality in labor mediations conducted by the Bureau of Mediation Services pursuant to authority under Chapter 179 or in Farmer Lender mediations conducted under Chapter 583.

**VI. Conclusion**

Absent comprehensive new legislation reconciling conflicting statutes, rules and policy, the scope of confidentiality accorded mediations in Minnesota will remain confused, and uncertain. Minnesota citizens should know prior to entering a mediation the extent to which their statements will remain confidential. Mediations should not present traps for the unwary. The proposed bill addresses most of the issues raised and attempts to provide a common point of reference for mediators and parties in Minnesota.