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# Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota

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# CONFIDENTIALITY PROTECTION IN MEDIATION: METHODS AND POTENTIAL PROBLEMS IN NORTH DAKOTA

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## I. INTRODUCTION

The overcrowding of court dockets and the time consuming process of litigation have led to the increased popularity of alternative methods of dispute resolution. One such alternative method is mediation. Mediation differs greatly from litigation in that the parties themselves structure a way to settle their dispute with the aid of a "mediator," a neutral third party who guides the disputants through their own settlement negotiations.[1] Mediation has generally proven to be more cost effective and less time consuming than litigation.[2]

One problem that has plagued the movement toward the use of mediation is the scope of the confidentiality in mediation proceedings.[3] Although most would agree that some form of confidentiality is necessary and desirable in mediation proceedings, there is little agreement on the scope of confidentiality that should be provided.[4] It is clear, however, that for mediation to be successful, there must be a free flow of information between the parties.[5] By assuring that information disclosed

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1. *See, e.g.*, Kent L. Brown, Comment, *Confidentiality in Mediation: Status and Implications*, 1991 J. DISP. RESOL. 307, 308-09 (1991). One commentator referred to the mediation process as one of "hash[ing] it out" with each other rather than "thrash[ing] it out" against each other. *See* Christopher H. Macturk, Note, *Confidentiality in Mediation: The Best Protection Has Exceptions*, 19 AM. J. TRIAL ADVOC. 411, 434 (1995).

2. *See, e.g.*, Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986).

3. *See, e.g.*, Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25 (1992) (discussing the problem of confidentiality in mediation and the arguments for and against an absolute privilege); *see also* Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota*, 18 HAMLINE J. PUB. L. & POL'Y 329 (1997).

4. *See* Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1, 1 (1988); Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17, 30 (1988).

5. *See* Macturk, *supra* note 1, at 415 (citing Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979); People v. Snyder, 492 N.Y.S.2d 890, 891 (N.Y. App. Div. 1985)); *see also* Michael A. Perino, *Drafting Mediation Privileges: Lessons From the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1, 6 (1995) (citing Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235, 248 (1993)). Because mediation requires parties to come to their own settlement under the guidance of a neutral third party, the mediator has no decision making power and cannot coerce parties into being open and forthright. *See* Local 808, Bldg. Maintenance, Serv. & R.R. Workers v. National Mediation Bd., 888 F.2d 1428, 1436 (D.C. Cir. 1989) (noting that mediation is an art form that relies heavily on powers of persuasion rather than coercion and adjudication). Unless the parties to a mediation are assured of some form of

during a mediation session will remain confidential and will not be used later against the parties, the flow of information will be enhanced.[6] Furthermore, guarantees of confidentiality facilitate an atmosphere of fairness and trust between the parties and the mediator, which is essential to an effective mediation.[7]

This article will provide an overview of the different methods that have been utilized to insure that some form of confidentiality exists in mediation proceedings. This article will then discuss these various types of protection under North Dakota law, focusing primarily on the protection offered by section 31-04-11 of the North Dakota Century Code.[8]

## II. METHODS OF ASSURING CONFIDENTIALITY IN MEDIATION SESSIONS

Because some level of confidentiality is necessary for mediation to be successful, various methods of protecting confidentiality in mediation have developed. Those forms include: private contracts, common law rules of privilege, evidentiary rules, and mediation confidentiality statutes.

### A. CONFIDENTIALITY CONTRACTS

The first method by which parties have tried to assure that mediation proceedings will remain confidential is by contract. The contracts are intended to prevent the parties from disclosing certain information

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confidentiality, they will not have the motivation to fully participate in the process and make open and frank disclosures to other disputants and the mediator. *Lake Utopia Paper*, 608 F.2d at 930. As one commentator noted:

> [F]or the process to work, it is essential for the mediator to encourage the parties to discuss candidly with her all of the relevant issues, especially those that may be impeding settlement. To help the parties resolve their dispute, the mediator must be able to evaluate the parties' real motives and interests. The mediation process involves drawing out of the parties a list of all relevant issues and encouraging compromise and accommodation. The mediator's ability to assure that facts conveyed to her will remain confidential aids this process. Indeed, . . . mediation becomes 'impossible if the parties [are] constantly looking over their shoulders.'

Perino, *supra*, at 6 (citing Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. DISP. RESOL. 37, 38 (1986)); *see also* Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, The Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 8-10 (1995).

6. *See, e.g.*, Brown, *supra* note 1, at 310.

7. *See* N.L.R.B. v. Joseph Macaluso, Inc., 618 F.2d 51, 54 (9th Cir. 1980); Royal Caribbean Corp. v. Modesto, 614 So. 2d 517, 519 (Fla. Dist. Ct. App. 1992). In *Macaluso*, the court noted that the parties involved in mediation sessions must have the confidence that information disclosed will not subsequently be divulged, voluntarily or by compulsion. *Macaluso*, 618 F.2d at 53-56. The court went on to note that: "[T]he complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation, and . . . labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence." *Id.* at 56.

8. N.D. CENT. CODE § 31-04-11 (1996).

discovered during the mediation.[9] However, enforcement of confidentiality contracts can be problematic.[10] For instance, when evidence is sought by a nonparty to the agreement, the agreement is generally not binding on the nonparty, and can be viewed as an attempt to suppress evidence.[11] The agreement is normally held to be against public policy in those cases and void.[12] Thus, contractual agreements in mediation proceedings to protect confidentiality are generally not very effective because they do not apply to non-parties to the contract.

Private agreements may also be problematic when enforcement is sought between parties to the agreement. The agreements may not serve as an effective deterrent because the remedy is defined by contract law, and actual damages may be difficult to prove.[13] Furthermore, courts may find that without legislation supporting the use of confidentiality agreements, such agreements are void as against public policy even when it is the parties of the contract seeking enforcement.[14] Therefore, private agreements do not appear to be the most effective method of protecting confidentiality in mediation.

### B. EVIDENTIARY RULES

Other possible sources of confidentiality protection for parties in mediation are federal and state rules of evidence.[15] At a minimum, mediation discussions receive the same amount of confidentiality protection in subsequent litigation as traditional settlement negotiations.[16] The protection is derived from Rule 408 of the Federal Rules of Evidence or its state equivalent even though Rule 408 does not expressly state that mediated settlements are covered.[17] Rule 408 of the Federal Rules of Evidence states:

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9. *See* Macturk, *supra* note 1, at 417-18; Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws,* 10 OHIO ST. J. ON DISP. RESOL. 157, 165 (1994); Eric R. Max, *Confidentiality in Environmental Mediation,* 2 N.Y.U. ENVTL. L.J. 210, 215-16 (1993).

10. *See* Macturk, *supra* note 1, at 417-18.

11. *See* Rosenberg, *supra* note 9, at 166; *see also* Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84, 87-88 (E.D.N.Y. 1981). In *Grumman,* the court held that parties should not be permitted to contract privately for confidentiality of documents, which would prohibit others from obtaining relevant materials in the course of litigation. *Id.* The court therefore held that a party to a confidentiality agreement had to comply with a discovery request made by a nonparty to the agreement. *Id.*

12. Rosenberg, *supra* note 9, at 166; *see also* Macturk, *supra* note 1, at 417-18 (citing United States v. Kentucky Util. Co., 927 F.2d 252 (6th Cir. 1991)).

13. *See* Rosenberg, *supra* note 9, at 166.

14. *See* Macturk, *supra* note 1, at 417 (citing Brown, *supra* note 1, at 318; Freedman & Prigoff, *supra* note 2, at 41; OKLA. STAT. ANN. tit. 12, Ch. 37, App. C (West 1990) (pertaining to confidentiality contracts)).

15. *See* FED. R. EVID. 408; N.D. R. EVID. 408.

16. Max, *supra* note 9, at 214.

17. *See* FED. R. EVID. 408; *see also* N.D. R. EVID. 408.

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.[18]

"At common law, *only* offers of compromise or settlement were inadmissible to prove liability or amount of the claim in subsequent litigation."[19] Statements other than the offer could be admitted.[20] Furthermore, the offer itself could be admitted to prove bias or to impeach a witness.[21] Rule 408 broadens the common law protection by making inadmissible the conduct and statements surrounding the settlement.[22] Rule 408 was passed to encourage settlement and exclude evidence related to a compromise because that evidence is normally of low probative value.[23]

Rule 408 is subject to some key exceptions. First, the rule does not protect evidence related to the mediation if it is to be used for "another purpose," such as proving bias.[24] Second, Rule 408 does not address the discoverability of such negotiations. [25] Thus, a mediation may be vulnerable to a discovery request in later litigation even if the information could not be used during trial under Rule 408.[26] Third, Rule 408 only addresses issues that are in dispute; therefore, items not in dispute, such as the payment schedule, may be admissible.[27] Finally, Rule 408 attaches to the information rather than the people involved in a mediation. Hence, a mediator who is subpoenaed to appear in subsequent litigation cannot use Rule 408 as protection to quash the subpoena.[28] Therefore, Rule 408 and its state equivalents do not appear to provide adequate confidentiality protection for mediation sessions by themselves.

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18. FED. R. EVID. 408.
19. Macturk, *supra* note 1, at 418; *see also* Brown, *supra* note 1, at 312.
20. Macturk, *supra* note 1, at 418.
21. *Id.*
22. FED. R. EVID. 408.
23. Macturk, *supra* note 1, at 418 (noting that evidence of settlements is normally not probative because the parties may be motivated by achieving peace rather than admitting liability).
24. FED. R. EVID. 408; *see also* Freidus v. First Nat'l. Bank of Council Bluffs, 928 F.2d 793, 794-95 (8th Cir. 1991); Max, *supra* note 9, at 215.
25. *See* FED. R. EVID. 408.
26. Max, *supra* note 9, at 215.
27. *Id.*
28. *See id.*

### C. COMMON LAW PRIVILEGE

Courts on occasion have found, absent a statutory privilege, that information brought out during mediation is privileged under common law.[29] A privilege is different from Rule 408 protection because the right to claim a privilege belongs to the parties to the mediation, and thus can be raised even if the parties to the mediation are not parties in the subsequent litigation.[30] Furthermore, the privilege not only protects the information from being brought out in litigation, but it may also protect the information from discovery requests.[31] Courts generally apply a four-part test when confronted with the issue of common law privilege:

> (1) The communications must originate in *confidence* that they will not be disclosed. (2) This element *of confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.* (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater. than the benefit* thereby gained for the correct disposal of litigation.[32]

This four-part Wigmore test, as it is often called, was cited favorably by the court in *N.L.R.B. v. Joseph Macaluso, Inc.*[33] In *Macaluso*, the court held that exclusion of testimony by a mediator "is necessary to the preservation of an effective system of labor mediation," which in turn is vitally important to the economic health of the nation.[34] Therefore, the court found that the mediation was entitled to a privilege under the Wigmore balancing test.[35] However, the common law privilege is not the most effective method of keeping mediation confidential because courts are not always willing to recognize it, thereby making confidentiality uncertain when parties enter mediation.[36]

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29. *See* Rosenberg, *supra* note 9, at 161-62; Macturk, *supra* note 1, at 420; Brown, *supra* note 1, at 315.

30. *See* Macturk, *supra* note 1, at 420. Macturk notes that "'[t]he privilege may be raised by or on behalf of anyone who holds it,' as opposed to an evidentiary objection, like Rule 408, which must be raised by a party to the litigation." *Id.* (quoting NANCY H. ROGERS & CRAIG A MCEWEN, MEDIATION: LAW, POLICY, PRACTICE § 9:04 (2d ed. 1994)).

31. *See id.*; *see also* FED. R. CIV. P. 26(b).

32. J. WIGMORE, WIGMORE ON EVIDENCE § 2285 (1961) (emphasis original); United States v. Nixon, 418 U.S. 683, 710-13 (1974) (dealing with executive privilege and balancing the general privilege of confidential presidential communications against the specific need for evidence in a pending criminal trial); United States v. Gullo, 672 F. Supp. 99, 103-04 (W.D.N.Y. 1987) (applying a similar four part test in federal courts).

33. 618 F.2d 51, 54 (9th Cir. 1980).

34. N.L.R.B. v. Joseph Macaluso Inc., 618 F.2d 51, 56 (9th Cir. 1980).

35. *See id.*

36. *See* State v. Castellano, 460 So. 2d 480, 481 (Fla. Dist. Ct. App. 1984) (holding that privileges

The Eighth Circuit Court of Appeals recently addressed the issue of an "ombudsman privilege" in workplace mediation sessions.[37] The Eighth Circuit refused to recognize a common law privilege over mediation sessions conducted by ombudsman in the workplace.[38] The court reasoned that the proponent of the privilege failed to overcome the significant burden of showing that the proposed privilege served a public good that outweighed the principle of ascertaining the truth by all rational means.[39] The conservative approach taken by the Eighth Circuit exemplifies the uncertainty associated with common law privileges.

### D. STATUTORY PROTECTION

Most states provide some statutory or evidentiary protection for confidentiality of events that transpire during mediation sessions.[40] These jurisdictions have concluded that public policy requires the encouragement of confidential communications within the special mediation

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are not creatures of judicial decisions); People v. Sanders, 457 N.E.2d 1241, 1245 (Ill. 1983) (holding that expansion and creation of privileges should be left to the legislature); *In re* Parkway Manor Healthcare Ctr., 448 N.W.2d 116, 121 (Minn. Ct. App. 1989) (noting that there is a longstanding judicial hostility toward evidentiary privileges).

37. *See* Carman v. McDonnell Douglas Corp., 114 F.3d 790, 792 (8th Cir. 1997). An "ombudsman" in that case referred to "an employee outside of the corporate chain of command whose job is to investigate and mediate workplace disputes . . . . [T]he corporate ombudsman purports to be an independent and neutral party who promises strict confidentiality to all employees and is bound by the Code of Ethics of the Corporate Ombudsman Association." *Id.* at 792-93.

38. *Id.* at 794-95.

39. *Id.* at 793. The court noted that new common law privileges are not created lightly. *Id.* Further, the court held that a corporate ombudsman is able to promise confidentiality and maintain neutrality without the existence of a privilege. *Id.* at 793-94. The possibility of later use of the information brought out in a mediated settlement in later civil litigation was not enough to justify the creation of a new privilege. *See id.* at 793.

40. *See* Kirtley, *supra* note 5, at 2-4; *see also* ROGERS & MCEWEN, *supra* note 30, at 204 (listing, by scope and jurisdiction, selected confidentiality legislation).

State statutes dealing generally with mediation proceedings include the following: ARIZ. REV. STAT. ANN. § 12-2238 (1994); CAL. EVID. CODE §§ 1115-28 (West Supp. 1998); COLO. REV. STAT. § 13-22-307 (1997); FLA. STAT. ANN. § 44.102 (West Supp. 1996) (court ordered mediation), § 90.501 (West 1988) (the general privilege rule of evidence), and § 455.2235 (West Supp. 1998) (establishing rules governing mediation); 710 ILL. COMP. ANN. STAT. 20/6 (West 1992); IOWA CODE ANN. § 679.12 (West 1987); MASS. GEN. LAWS ANN. ch. 233, § 23C (West 1985); MINN. STAT. ANN. § 595.02 (West 1988 & Supp. 1998); MO. ANN. STAT. § 435.014 (West 1992); MONT. CODE ANN. § 26-1-811 (1997); NEB. REV. STAT. § 25-2914 (1995); NEV. REV. STAT. § 48.109 (1996); N.D. CENT. CODE § 31-04-11 (1996); OHIO REV. CODE ANN. § 2317.02(H) (Anderson 1995); OKLA. STAT. ANN. tit. 12, § 1805 (West 1993); OR. REV. STAT. § 36.220 (1997); R.I. GEN. LAWS § 9-19-44 (1997); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West. 1996); UTAH CODE ANN. § 78-31b-7 (1996); VA. CODE ANN. § 8.01-581.22 (Michie 1992); WASH. REV. CODE ANN. § 5.60.070 (West 1995); WIS. STAT. ANN. § 904.085 (West Supp. 1997); WYO. STAT. § 1-43-103 (Michie 1997). Furthermore, many states have promulgated privilege statutes for specific areas such as divorce or child custody mediation. *See, e.g.*, MINN. STAT. ANN. § 583.26 (West 1988 & Supp. 1998) (farm mediation); N.D. CENT. CODE § 14-09.1-06 (1997) (child custody).

Several model statutes have been proposed as well. *See* Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17, 71-73 (1988). Also, the American Bar Association Standing Committee on Dispute Resolution drafted a model provision for presentation to the ABA House of Delegates, but it has never been adopted. *Id.* at 65-70. *See also* Thompson, *supra* note 3, at 372-75 (outlining a proposed statute for Minnesota).

relationship, without which the relationship would be ineffective.[41] The mediation relationship is viewed as having sufficient social importance to justify some incidental sacrifice of sources of facts needed in the litigation of claims.[42]

Although the goal of each of the states in promulgating a confidentiality statute or evidentiary rule for mediation was likely similar, the resulting provisions are dramatically different in scope, content, and operation.[43] These differences reflect the "difficulty of creating a rule which strikes the proper balance between mediation's need for confidentiality and the public's interest in access to certain types of information."[44] Some of the differences include: 1) protection only for mediations that take place in certain mediation facilities, such as statutorily created community dispute resolution centers;[45] 2) protection only for those subjects relating to or arising out of the "matter in dispute;"[46] and 3) evidentiary protection in subsequent litigation only, with no protection from discovery.[47] Some states, however, have promulgated statutes which provide a blanket protection by stating that anything that transpires during mediation will be deemed confidential and will be suppressed.[48] Confidentiality statutes appear to be the soundest method of protecting confidentiality in mediation sessions because of the predictable protection a thorough statute can provide.[49]

## III. CONFIDENTIALITY PROTECTION IN NORTH DAKOTA

In North Dakota, there are basically three methods by which confidentiality in mediation may be protected. Those methods include: private confidentiality agreements; Rule 408 of the North Dakota Rules

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41. *See* Ryan v. Garcia, 33 Cal. Rptr. 2d 158, 160-61 (Cal. Ct. App. 1994) (noting that public policy is to promote mediation as a preferable alternative to litigation by providing confidentiality); *see also* Kirtley, *supra* note 5, at 15.

42. Kirtley, *supra* note 5, at 15.

43. *See supra* note 40.

44. Kirtley, *supra* note 5, at 4.

45. *See* 710 ILL. COMP. ANN. STAT. 20/6 (West 1993); IOWA CODE ANN. § 679.12 (West 1987); N.Y. JUD. LAW § 849-b (McKinney 1992).

46. *See, e.g.*, MASS. GEN. ANN. LAWS ANN. ch. 233, § 23C (West 1986); MICH. COMP. LAWS ANN. § 691.1557 (West Supp. 1997); N.Y. JUD. LAW § 849-b(6) (McKinney 1992); OR. REV. STAT. § 36.220 (1996); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(b) (West 1997); VA. CODE ANN. § 8.01-581.22 (Michie 1992).

47. *See, e.g.*, OHIO REV. CODE ANN. § 2317.02 (Anderson 1995).

48. *See, e.g.*, NEV. REV. STAT. ANN. § 48.109 (Michie 1993) (containing an exception for otherwise discoverable and admissible evidence).

49. However, statutory protection is not without its problems, especially in multi-state litigation, due to the disparity between states' confidentiality provisions. *See, e.g.*, Max, *supra* note 9 (discussing the problems associated with confidentiality in multi-state, multi-party environmental litigation); Rosenberg, *supra* note 9 (discussing the problems with state confidentiality statutes and multi-state litigation).

of Evidence;[50] and section 31-04-11 of the North Dakota Century Code.[51]

### A. CONFIDENTIALITY CONTRACTS

There is no case law in North Dakota discussing the validity of private confidentiality contracts. However, there is evidence of the use of confidentiality contracts, as well as an indication that remedies for breach are governed by the principles of contract law.[52] In his testimony before the House Judiciary Committee on S.B. 2308, Michael Liffrig, a practicing mediator, stated that he "has all clients sign a form at the beginning of services which states that they will not subpoena him or will not compel any writings or documents during mediation to any civil action."[53] Liffrig went on to state that statutory protection would make confidentiality more certain than the use of private agreements because a breach would no longer be solely an issue of contract law.[54] Because the courts have yet to address the validity of confidentiality contracts in North Dakota, parties to mediation proceedings would be wise to be leery of their effectiveness.

### B. RULE 408

Under Rule 408 of the North Dakota Rules of Evidence, offers of compromise are generally not admissible to prove "liability, nonliability, or the amount of a claim."[55] Rule 408 of the North Dakota Rules of Evidence was patterned after its federal equivalent, and "extends the exclusionary treatment not only to offers of compromise, but also to completed compromises when offered against the compromiser."[56] Furthermore, Rule 408 extends to evidence of settlements between litigants and third parties.[57] The objective of Rule 408 is to encourage out-of-court compromise and settlement of disputes so as to "obviate

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50. N.D. R. EVID. 408.

51. N.D. CENT. CODE § 31-04-11 (1996).

52. *See Hearings on S. 2308 Before the North Dakota House Judiciary Comm.*, 51st Legis. Sess., Mar. 15, 1989 (testimony of Michael Liffrig) (codified as N.D. CENT. CODE § 31-04-11 (1989)).

53. *Id.*

54. *Id.*

55. Thomas v. Stickland, 500 N.W.2d 598, 600 (N.D. 1993) (citing Zimprich v. North Dakota Harvestore Sys., Inc., 461 N.W.2d 425 (N.D. 1990)); *see also* Reiger v. Wiedmer, 531 N.W.2d 308, 311 (N.D. 1995).

56. *Thomas*, 500 N.W.2d at 600 (citing 2 WEINSTEIN'S EVIDENCE ¶ 408[04] (1989)).

57. *Id.* (citing McInnis v. A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985)).

the need for costly and time-consuming litigation."[58] However, while Rule 408 does exclude evidence of settlement if offered to prove liability or nonliability or the amount of the claim, it does not protect settlement evidence for other purposes such as proving bias or prejudice of a witness.[59] Additionally, the question of whether to allow in evidence of settlement is within the discretion of the trial court.[60]

As a safeguard of confidentiality, Rule 408 of the North Dakota Rules of Evidence suffers. Although it serves well in protecting a mediating party in subsequent litigation when another party attempts to bring into evidence the mediation discussions to prove liability or nonliability, it is useless when the information is used for other purposes. Furthermore, Rule 408 does not protect parties who have mediated their dispute from discovery requests in subsequent litigation. Additionally, whether a litigating party is attempting to bring in information about mediation discussions for "another purpose" is a hazy area subject to the discretion of the trial court. Because it is uncertain how a court would rule in a given instance, parties should be insecure about confidentiality when entering mediation with only Rule 408 on their side.

### C. STATUTORY PROTECTION

Because of the uncertain protection offered by private confidentiality agreements and Rule 408, the North Dakota Legislature, in 1989, promulgated section 31-04-11 of the North Dakota Century Code to protect the confidentiality of mediation sessions. Section 31-04-11 states:

> When persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute, evidence of anything said or of any admission made in the course of the mediation is inadmissible as evidence and disclosure may not be compelled in any subsequent civil proceeding except as provided in this section. This section does not limit the compulsion nor the admissibility of evidence if:
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> 1. The evidence relates to a crime, civil fraud, or a violation under the Uniform Juvenile Court Act;
> 2. The evidence relates to a breach of duty by the mediator;
> 3. The validity of the mediated agreement is in issue; or

58. *Id.* (noting that "[t]he spectre of subsequent use [of a settlement] to prejudice a separate and discrete claim is a disincentive which Rule 408 seeks to prevent" (quoting Branch v. Fidelity & Cas. Co. of New York, 783 F.2d 1289, 1294 (5th Cir. 1986))). *See also Reiger*, 531 N.W.2d at 311 (noting that Rule 408 reflects the policy of encouraging negotiations and settlements without judicial intervention).

59. *Thomas*, 500 N.W.2d at 600.

60. *Id.*

4. All persons who conducted or otherwise participated in the mediation consent to disclosure.[61]

Section 31-04-11 was patterned after California law as it stood in 1989, and was passed to "take [the] fear out of the mediation process."[62]

Currently, there is no case law in North Dakota interpreting the scope of the protection provided by section 31-04-11. Recently, however, the North Dakota Supreme Court analyzed the scope of protection offered by a similar statute in *Holum v. Trinity Medical Center*.[63] In *Holum*, the court analyzed the scope of the medical peer review privilege statute.[64] In doing so, the court indicated how it might interpret other statutory evidentiary restrictions such as section 31-04-11.[65]

In *Holum*, the court initially noted that under Rule 501 of the North Dakota Rules of Evidence, no privilege may exist unless it is provided for by constitution, statute, or rule.[66] The court also noted that "[e]videntiary privileges must be narrowly construed because they are in

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61. N.D. CENT. CODE § 31-04-11 (1996).

62. *See Hearings on S. 2308 Before the North Dakota House Judiciary Comm.*, 51st Legis. Sess. Mar. 15, 1989 (statement of Senator Jack Ingstad, sponsor of the bill). The California law in 1989 read almost exactly the same as section 31-04-11. It read in part: "(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given." *See Historical and Statutory Notes*, CAL. EVID. CODE § 1119 (1997) (noting the text of the statute, CAL. EVID. CODE § 1152, before the 1993 and 1997 amendments).

As well as being patterned after California law, section 31-04-11 also resembles the confidentiality statutes of several other states. *See Hearing on S. 2308 Before the House Comm. on the Judiciary*, 51st Legis. Sess. (N.D. 1985) (letter to the Honorable Jack Ingstad, State Senator, from Jim Ganje of the North Dakota Legislative Counsel, Mar. 15, 1989). Those states referenced by Mr. Ganje in 1989 as resembling the proposed North Dakota statute included: Colorado, Michigan, New York, Oklahoma, and Oregon. *Id.*; *see also supra* note 40.

63. 544 N.W.2d 148 (N.D. 1996); N.D. CENT. CODE § 23-01-02.1 (1991) (repealed 1997). Although section 23-01-02.1 was repealed in 1997, *Holum* is still illustrative of the position of the North Dakota Supreme Court with regard to statutory privileges.

64. Holum v. Trinity Med. Ctr., 544 N.W.2d 148, 152 (N.D. 1996). Section 23-01-02.1 made medical peer review proceedings, which follow complaints about the service provided by physicians, privileged. Section 23-01-02.1 stated in part:

> The proceedings and records of such a committee are not subject to subpoena or discovery or introduction into evidence in any civil action arising out of any matter which is the subject of consideration by the committee. Information, documents, or records otherwise available from original sources are not immune from discovery or use in any civil action merely because they were presented during the proceedings of such a committee, nor may any person who testified before such a committee or who is a member of it be prevented from testifying as to matters within that person's knowledge, but a witness cannot be asked about that witness' testimony before the committee.

*Id.*

65. *See id.*

66. *Id.*; N.D. R. EVID. 501; *see also* State v. Red Paint, 311 N.W.2d 182, 185 (N.D. 1991).

derogation of the search for truth."[67] However, according to the court, the rule of narrow construction is to be balanced against the "cardinal rule of statutory construction, which requires that the interpretation must be consistent with the legislative intent and done in a manner which will accomplish the policy goals and objectives of the statute."[68] The court found that policy arguments in favor of a broad privilege were unpersuasive and noted that policy arguments are for the legislature.[69] Instead, the court held that the intent of the legislature must be determined from a strict reading of the statutory language and a court should not "disregard the letter of the statute under the pretext of pursuing its spirit."[70] The court further noted that even though most states had enacted similar peer review statutes and had case law broadly interpreting the privilege, those decisions were of little persuasive authority because of the lack of uniformity in the wording of the different state provisions.[71]

The court's analysis in *Holum* provides a good example of how a North Dakota court would likely interpret section 31-04-11.[72] Like peer review privilege statutes, mediation privilege and confidentiality statutes lack uniformity among the states.[73] Because of the lack of uniformity, court decisions interpreting these types of statutes in other states provide little guidance.[74] Therefore, a strict reading of the language of section 31-04-11 is the key to determining the scope of its protection.

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67. *Holum*, 544 N.W.2d at 152 (citing State v. Schroeder, 524 N.W.2d 837, 840 (N.D. 1994)). The court went on to note that statutory privileges "will be strictly construed to protect only those relationships which have been deemed to engender a public good which outweighs the principle that all rational means should be employed to ascertain the truth." *Id.* (citing *Red Paint*, 311 N.W.2d at 185).

68. *Holum*, 544 N.W.2d at 152 (citing Olson v. University of North Dakota, 488 N.W.2d 386, 390 (N.D. 1992)).

69. *Id.* at 154. The court noted that "[t]he legislature has sifted through the competing policy concerns and adopted a statutory privilege. Our function is not to reevaluate those policy arguments, but to ascertain the legislature's intent from the language of the statute." *Id.* (citing State v. Pippin, 496 N.W.2d 50, 52 (N.D. 1993)).

70. *Id.* The court noted that it "must be particularly vigilant against extending the scope of the privilege beyond that warranted by the purpose expressed in the language of the statute." *Id.*

71. *Id.* at 153. In 1997, the legislature enacted a new medical peer review privilege. *See* N.D. CENT. CODE § 23-34-01 to 06 (Supp. 1997). The new statutes more clearly define the scope of the privilege and provide separate confidentiality and evidentiary privilege provisions. *See id.*

72. *See Holum*, 544 N.W.2d at 152-57.

73. *See* Rosenberg, *supra* note 9, at 179 (calling for uniformity in state confidentiality statutes to avoid problems in multi-state litigation).

74. Although the mediation confidentiality statutes in North Dakota and California are similar, there appears to be very little helpful case law in California defining the scope of the California statute. *But see* Regents of the University of California v. Sumner, 50 Cal. Rptr. 2d 200, 203 (Cal. Ct. App. 1996) (certified for partial publication) (noting that the California statute does not make privileged a dictated oral transcript of a settlement made after the mediation discussions were over); Garstang v. Superior Court, 46 Cal. Rptr. 2d 84, 87 (Cal. Ct. App. 1995) (noting that the mediation privilege does not attach to mediation discussions if the statutory requirements are not strictly followed).

The language of section 31-04-11 reveals a lot about its scope and the potential problems which could arise with its application. The first potential problem is defining what type of statute was intended when the legislature passed section 31-04-11. Specifically, it is not clear from the language, or the legislative history, whether section 31-04-11 creates a rule of privilege or merely a statutory rule of inadmissibility.[75] The difference is significant. If a privilege was intended, then presumably, statements falling within the scope of the statute's protection are not discoverable.[76] Conversely, if section 31-04-11 is merely an evidentiary rule, then information within the scope of section 31-04-11 may be discoverable.

The placement of section 31-04-11 in chapter 31-04 outlining the general rules on judicial proof, rather than in chapter 31-01, pertaining to witness rights and privileges, supports the proposition that section 31-04-11 was not intended to create a privilege. On the other hand, an argument could be made that the language of section 31-04-11 preventing compelled disclosure of anything said in a mediation session in subsequent civil proceedings prevents discovery, thus creating a privilege. However, given the approach of the court in *Holum*, it is quite possible that a court would narrowly construe that language to restrict subpoena power only, and not find a privilege.[77] This potential problem would be best dealt with by specifically stating in the statute that information which is not admissible is likewise not discoverable.[78] Clarification of this potential problem in section 31-04-11 would no doubt add more certainty to the question of confidentiality in mediation sessions in North Dakota.[79]

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75. *See* Minutes of Committee hearings for S.B. 2308, 1989 N.D. Laws ch. 408, § 1.

76. Rule 26(b) of the North Dakota Rules of Civil Procedure provides that: "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." N.D. R. CIV. PRO. 26(b); *see also* Thompson, *supra* note 3, at 340-41 (discussing the effect of information being privileged).

77. *Holum*, 544 N.W.2d at 152-57.

78. Section 1119 of the California Evidence Code, after which section 31-04-11 of the North Dakota Century Code was patterned, was amended in 1993 to include a prohibition against discovery of the mediation information. CAL. EVID. CODE § 1119 (West Supp. 1998). The current version of Section 1119 reads in part: "Except as otherwise provided in this section, evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence or subject to discovery." *See id.*

Furthermore, North Dakota's current medical peer review privilege specifically provides for protection from discovery. N.D. CENT. CODE § 23-34-03 (Supp. 1997). Section 23-34-03 provides: "Peer review records are privileged and are not subject to subpoena or discovery or introduction into evidence in any civil or administrative action." N.D. CENT. CODE § 23-34-03; *see also* N.D. CENT. CODE § 14-09.1-06 (1997) (pertaining to mediation in contested child custody proceedings).

79. It is interesting to note that the appeal in *Holum* resulted from a conflict over this issue. *Holum*, 544 N.W.2d at 151-52. Specifically, the parties disagreed over whether section 23-02.1-08 made certain items privileged, thereby protecting those items from discovery requests. *Id.*

A second potential problem with the application of section 31-04-11 pertains to the definitions of key terms. For instance, it is unclear whether the term "mediation" includes all formal and informal methods of dispute resolution, or merely includes formal mediation sessions with certified mediators or judges.[80] Another definition problem arises from the phrase "evidence of anything said or of any admission made in the course of the mediation."[81] First, it is unclear whether statements made leading up to the actual mediation session are covered. In light of the court's analysis in *Holum*, it is likely that such statements are not protected.[82] Second, the statute does not have an exception for otherwise admissible items of evidence which are discussed during the mediation session.[83] Yet another potential definition problem arises from the phrase "subsequent civil proceeding."[84] It is not clear from this language whether administrative proceedings are covered.[85] Although a statute can never be free from ambiguity, no matter how thorough, clear definitions of these key concepts would be beneficial in promoting the use of mediation in North Dakota.

A third potential problem with the application of section 31-04-11 is that it does not provide a rule of confidentiality.[86] Although the legislative history seems to indicate that confidentiality was on the minds of the legislators during committee hearings, nowhere in the statute is confidentiality mentioned.[87] Based on the court's analysis in *Holum*, a duty on the part of the mediation participants and the mediator to refrain from disclosing information obtained during the mediation session to

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80. N.D. CENT. CODE § 31-04-11. *See Hearings on S. 2308 Before the North Dakota Senate Judiciary Comm.*, Mar. 15, 1989 (noting concern over the definition of "mediation"). *See also* CAL. EVID. CODE § 1115 (1997) (defining mediation and mediator).

81. N.D. CENT. CODE § 31-04-11.

82. *See Holum*, 544 N.W.2d at 152-57. This potential problem has been cured in California by legislative amendment. Section 1119 of the California Evidence Code amended section 1152 in 1997 to provide that "evidence of anything said or any admission made for the purpose of or, in the course of, or pursuant to, a mediation or mediation consultation is [not] admissible." *See Law Revision Commission Comments*, CAL. EVID. CODE § 1119 (1997).

83. *See* N.D. CENT. CODE § 31-04-11. This potential problem has also been remedied in California by legislative amendment. *See* CAL. EVID. CODE § 1120 (West Supp. 1998). Section 1120 of the California Evidence Code specifically addresses the problem of otherwise admissible evidence. *Id.*

84. N.D. CENT. CODE § 31-04-11.

85. North Dakota's medical peer review privilege statute specifically provides for protection in administrative proceedings. N.D. CENT. CODE § 23-34-03. California has also remedied this potential problem through legislative amendment. Section 1119 of the California Evidence Code provides that information obtained during a mediation session shall not be admissible or subject to discovery "in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given." CAL. EVID. CODE § 1119.

86. *See* N.D. CENT CODE § 31-04-11.

87. *See* Minutes of Committee hearings for S.B. 2308, 1989 N.D. Laws ch. 408, § 1.

third parties would be difficult to find in section 31-04-11.[88] If the legislature intended that information disclosed during mediation be confidential as well as inadmissible, then a separate provision regarding confidentiality should be added.[89]

A fourth potential problem with the application of section 31-04-11 is the lack of a rule prohibiting the mediator from giving testimony. Rule 605 of the North Dakota Rules of Evidence provides that a judge is not competent to testify in cases over which he or she is presiding.[90] Such a rule with regard to mediators would promote the mediator's neutrality and give a greater sense of security to the mediating parties.[91]

A final potential problem, which was raised in the committee hearings prior to the passage of section 31-04-11, is that no matter what type of protection the State of North Dakota erects over mediation proceedings, the federal government is not prevented from administratively subpoenaing mediation records or transcripts.[92] Because that is the case, disputants who enter mediation may have a false sense of security concerning the confidentiality of the proceedings if the Internal Revenue Service or another federal agency comes knocking.[93]

## IV. CONCLUSION

Alternative dispute resolution, and especially mediation, has become one of the fastest growing areas of the law. Mediation has been uniformly recognized as a litigation alternative that not only saves disputants time and money, but also permits them to work together to settle

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88. *See* Holum v. Trinity Med. Ctr., 544 N.W.2d 148, 152-57 (N.D. 1996). In *Holum*, the court took time to define the difference between information that is privileged versus information which is confidential. *Id.* at 156-57. The court noted that the two are not synonymous, even though they are compatible. *Id.* at 156. The court went on to note that privilege "addresses a person's right not to have another testify as to certain matters as part of a judicial process while confidentiality addresses the obligation to refrain from disclosing information to third parties other than as part of legal process." *Id.*

89. *See* N.D. CENT. CODE § 23-34-02 (Supp. 1997) (providing a rule of confidentiality over medical peer review records separately from the rule of privilege); N.D. CENT. CODE § 14-09.1-06 (Supp. 1997) (specifically providing that information derived from mediation sessions in contested child cases is confidential); *see also* CAL. EVID. CODE § 1119(c) (providing that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or mediation consultation shall remain confidential").

90. N.D. R. EVID. 605.

91. *See* CAL. EVID. CODE. § 703.5 (1995) (providing that "[n]o arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding"). The California witness rule is subject to exception much like the rule of inadmissibility in section 1119. *See id.*; N.L.R.B. v. Joseph Macaluso, Inc., 618 F.2d 51, 56 (9th Cir. 1980).

92. *Hearing on S. 2308 Before the House Comm. on the Judiciary*, 51st Legis. Sess. (N.D. 1985) (letter to Janet Wentz, Chair of House Judiciary Committee, from Michael J. Ahlen, Professor of Law at the University of North Dakota, Mar. 14, 1989).

93. *Id.*

disputes and remain amicable afterward. North Dakota, like many other states, has taken affirmative steps to promote the use of mediation. Overall, section 31-04-11 of the North Dakota Century Code is an example of a decent mediation confidentiality statute which provides some protection to mediation participants. However, as section 31-04-11 approaches its tenth year in existence, its flaws have yet to be fleshed out by the courts. Based upon case law and legislative actions in other states, such as California, and the actions of our own legislation with regard to other statutory privileges, it would appear that section 31-04-11 is not flawless. Therefore, if motivating disputants to utilize mediation is the policy objective of section 31-04-11, then the legislature should address its potential problems before the courts get a hold of it.