

Just Between You and Me: The Blanket Mediation Privilege in Massachusetts Unnecessarily Undermines Access to Evidence

“[Massachusetts] confers blanket confidentiality protection on the mediation process, including an explicit prohibition on disclosure in judicial proceedings, without listing any exceptions.”

–Massachusetts Appeals Court Judge Cynthia Cohen, in *Leary v. Geoghan*.¹

“As with other privileges, the mediation privilege must have limits, and nearly all existing state mediation statutes provide them.”

–Reporters of The Uniform Mediation Act²

I. INTRODUCTION

A debate over the need for mediation confidentiality and how to best provide it has accompanied the rapid growth of mediation.³ Most states have found mediation confidentiality sufficiently important to warrant creating a new evidentiary privilege by statute.⁴ Despite widespread belief that mediation confidentiality merits the protection of a privilege, most jurisdictions have refused to completely block mediation communication from use as evidence.⁵ The inclusion of exceptions to a mediation privilege reflects the longstanding doctrine that the need for evidence, at times, outweighs the rationale behind

1. No. 2002-J-0435, 2002 WL 32140255, at *3 (Mass. Super. Ct. Aug. 5, 2002) (holding mediation privilege allows no waiver or exceptions).

2. National Conference of Commissioners on Uniform State Laws, *The Uniform Mediation Act*, 22 N. ILL. U. L. REV. 165, 170 (2002) [hereinafter *Uniform Mediation Act*] (presenting model statute including privilege with exceptions).

3. See JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 1-33 (2001) (summarizing history and growth of mediation); see also *infra* notes 19-21 and accompanying text (discussing varying views on mediation confidentiality).

4. See *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998) (citing widespread enactment of mediation privilege by states); see also *Uniform Mediation Act*, *supra* note 2, at 172-75 (discussing increased state enactment of mediation statutes and variety of provisions); 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, 15 (1995) [hereinafter Kirtley, *Mediation Privilege's Transition*] (noting many states created privilege by statute). At the state level, the mediation privilege is almost entirely statutory, rarely created by courts from the common law. Kirtley, *Mediation Privilege's Transition*, *supra*, at 15.

5. See *infra* note 17 and accompanying text (noting majority of states with mediation privilege provide exceptions).

protected communications.⁶

The Massachusetts legislature has created a statutory privilege for communication during mediation, providing confidentiality in any “judicial or administrative proceeding.”⁷ The blanket of confidentiality extends to all memoranda and other work product, and to any communication made by a mediator, party participant or third parties involved in the mediation.⁸ No exceptions to this broad protection are provided by the statute.⁹

The Massachusetts statute fails to recognize that limited exceptions to mediator confidentiality may be necessary to protect mediation participants, the judicial system, and the public.¹⁰ The statute’s unbending privilege provides unnecessary weight to the need for confidentiality when balanced against the need for evidence.¹¹ Excessive protection of confidentiality may even thwart the willingness of disputants to participate in mediation.¹² At least one court has suggested that the ability to pierce the privilege in certain circumstances could increase the willingness of disputing parties to participate in mediation.¹³

Among those finding a need for the inclusion of specific exceptions to mediator confidentiality are the drafters of the proposed Uniform Mediation Act (UMA).¹⁴ The UMA recognizes the importance of confidentiality, but also gives significant consideration to the need for exceptions.¹⁵ The drafters note that the exceptions may apply to a very limited set of circumstances, but are

6. See *infra* note 23 and accompanying text (discussing recognition of need to restrict privileges to minimize interference with need for evidence).

7. MASS. GEN. LAWS ch. 233, § 23C (2000) (defining “mediator” and providing freedom from disclosure in judicial or administrative proceedings without exception). There is no legislative history on this statute. *Id.* As a result, this Note analyzes only the language of the statute, and makes no reference to legislative intent. *Id.*

8. *Id.* (extending privilege to mediator work product and all communications during mediation).

9. *Id.*; see also *Leary v. Geoghan*, No. 2002-J-0435, 2002 WL 32140255, at *3 (Mass. Super. Ct. Aug. 5, 2002) (holding no exception exists to prohibition on mediator testimony).

10. See Kirtley, *Mediation Privilege’s Transition*, *supra* note 4, at 39 (noting absence of exceptions could turn privilege into hiding place for damaging evidence); see also Lynne H. Rambo, *Impeaching Lying Parties With Their Statements During Negotiation: Demysticizing the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes*, 75 WASH. L. REV. 1037, 1090 (2000) (stressing need to maintain integrity of judicial process despite desire to promote settlements with confidentiality). Rambo argues that false statements made during mediation should be admissible for impeachment of witnesses to protect the integrity of the judicial system. Rambo, *supra*, at 1092.

11. See Rambo, *supra* note 10, at 1066-69 (arguing need for confidentiality overstated).

12. See *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1137-39 (N.D. Cal. 1999) (reasoning mediator testimony regarding settlement validity supports increased mediation and party commitment); see also Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 44-52 (2001) (analyzing *Olam* decision at length in discussion of UMA privilege exceptions).

13. *Olam*, 68 F. Supp. 2d at 1137-39 (requiring mediator testimony regarding possible coerced agreement despite privilege).

14. *Uniform Mediation Act*, *supra* note 2, at 206-23 (enumerating and commenting on extensive exceptions to privilege in model statute).

15. *Uniform Mediation Act*, *supra* note 2, at 167 (recognizing exceptions for distinct and important public policy reasons). The drafters included exceptions to the privilege in order to protect “integrity and knowing consent.” *Id.*

nonetheless important in those situations to avoid “grave injustice.”¹⁶ The UMA is consistent with most states in recognizing the need for exceptions to a statutorily provided mediation privilege.¹⁷

The debate over mediation confidentiality is largely divided between those arguing for no enumerated privilege and those who argue for it with specific exceptions, causing Massachusetts to stand out by providing an *absolute* statutory privilege.¹⁸ Belief in the need for an enumerated mediation privilege is far from universal, given the options of protecting confidentiality by contract, the rules of evidence, and rules of civil procedure.¹⁹ When arguments for statutorily protected confidentiality are made, the need for exceptions is usually articulated contemporaneously.²⁰

Compared to the UMA, other state statutes, federal law, and the varying views of the mediation community, Massachusetts’s impenetrable mediator confidentiality statute is unusual.²¹ The state’s position is also inconsistent with other Massachusetts privilege statutes that contain specific public policy exceptions.²² Further, the Massachusetts statute departs from long-established doctrine that privileged communications must, in certain circumstances, bend to the need for evidence.²³

The Massachusetts statute is problematic and should be revised to include

16. *Uniform Mediation Act*, *supra* note 2, at 170 (declaring mediation privilege should have limits).

17. *See Uniform Mediation Act*, *supra* note 2, at 170 (noting most states include exceptions to confidentiality privilege); *see also* Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 757 (1997) (comparing exceptions under various state statutes).

18. *See* MASS. GEN. LAWS ch. 233, § 23C (2000) (enumerating mediation privilege without exception); *see also infra* notes 19-21 and accompanying text (exploring various views on mediation confidentiality).

19. *See* Brad Reich, *A Call for Intellectual Honesty: A Response to the Uniform Mediation Act’s Privilege Against Disclosure*, 2001 J. DISP. RESOL. 197, 241 (2001) (advocating contractual protection instead of privilege); *see also* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 11 (1986) (arguing mediators entitled to no distinct immunity beyond currently recognized protections).

20. *See* Green, *supra* note 19, at 32 (arguing blanket privilege not essential even if one accepts need for confidentiality); Kirtley, *Mediation Privilege’s Transition*, *supra* note 4, at 10-15 (describing weaknesses in attempts to protect confidentiality without privilege but advocating exceptions); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 457-59 (1984) [hereinafter *Protecting Confidentiality in Mediation*] (suggesting need for strong privilege with exceptions).

21. *See* Alternative Dispute Resolution Act, 5 U.S.C. § 574 (2000) (providing courts with discretion to allow exceptions to confidentiality); *Uniform Mediation Act*, *supra* note 2, at 167 (recognizing public policy need for exceptions); *see also* Kentra, *supra* note 17, at 757 (explaining tendency of states to provide exceptions); Kirtley, *Mediation Privilege’s Transition*, *supra* note 4, at 39 (discussing dangers of absolute privilege).

22. *See infra* notes 84-86 and accompanying text (discussing exceptions allowed with other Massachusetts privileges).

23. *See* *United States v. Nixon*, 418 U.S. 683, 710 (1974) (noting privileges restrained because interfere with preference for finding truth); *see also* JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2291, at 554 (McNaughton rev. 1961) (calling for narrow reading of privilege to minimize interference with search for truth).

certain limited exceptions.²⁴ At a minimum, the statute must be modified to avoid arguments that it shields otherwise admissible evidence discussed in a mediation session.²⁵ The statute should include a crime-fraud exception, which Massachusetts has included in other privilege statutes.²⁶ An exception allowing admission of written agreements and evidence necessary for contractual defenses should also be added.²⁷ The statute should make clear that an action against a mediator by a party serves as waiver of the privilege.²⁸ The statute should also allow courts discretion to decide if the need for evidence outweighs the need for a privilege in specific circumstances.²⁹ Finally, explicit waiver should be allowed in order to maintain party control over the mediation process.³⁰

This Note is concerned with the impact of the Massachusetts statute on the availability of evidence and will not discuss broader issues of mediator confidentiality under the statute.³¹ The statute can be read to create a general duty of mediator confidentiality, but its true function is the creation of a privilege.³² The only practical effect of the statute's protection of mediation confidentiality is the exclusion of evidence.³³

II. HISTORY

A. *An Uncompromising Statute*

The Massachusetts statute governing confidentiality in mediation is just three sentences long.³⁴ The statute confines itself to mediation sessions

24. See *infra* Part III (arguing for statutory reform); see also Green, *supra* note 19, at 29-30 (criticizing lack of exceptions in Massachusetts statute).

25. See *infra* note 70 and accompanying text (discussing jurisdictions explicitly excluding otherwise admissible evidence from privilege).

26. See *infra* note 84 and accompanying text (discussing Massachusetts recognition of crime-fraud exception to attorney-client privilege).

27. See *infra* note 73 (discussing adverse consequences of absolute mediation privilege on establishing contract defenses).

28. See *infra* notes 111-16 and accompanying text (discussing recognition of need for mediator malpractice exception).

29. See *infra* notes 117-19, 121 119and accompanying text (describing judicial discretion privilege exception).

30. See *infra* notes 122-31 and accompanying text (discussing waiver provisions in UMA and state statutes).

31. See *infra* notes 38, 56 (noting difference between general confidentiality duty and privilege under statute).

32. See *infra* note 56 and accompanying text (discussing mediation disclosure outside legal proceeding under Massachusetts statute).

33. See *infra* notes 56-57 and accompanying text (arguing true impact of statute limited to judicial proceedings).

34. See MASS. GEN. LAWS ch. 233, § 23C (2000) (defining "mediator" and providing broad communication confidentiality).

conducted by formally trained and recognized mediators.³⁵ This restriction on those qualified as mediators limits when the statute applies, but is not a limitation on who can exercise the privilege.³⁶ The statute contains no express language designating who may invoke its privilege.³⁷

The Massachusetts statute goes beyond creating a general duty of mediator confidentiality to craft a new privilege exempting mediation communication from disclosure in judicial proceedings.³⁸ Memoranda, case files, and other mediator work product are exempt from disclosure.³⁹ All communication relevant to the underlying dispute made during mediation by the mediator, a participant, or a third party is also protected.⁴⁰ The statute does not provide for waiver or any circumstances under which the privilege does not apply.⁴¹

Though the mediation confidentiality statute became law 1985, it did not receive meaningful judicial review until a widely publicized 2002 case against the Catholic Archdiocese of Boston (Archdiocese or Church) brought by victims of pedophile priest John Geoghan.⁴² A dispute over the privilege arose after victims and the Archdiocese appeared to reach a financial settlement

35. *See id.* (restricting confidentiality provision to established mediators). To qualify as a mediator under the statute, one must have thirty hours or more of training, and must have four years of experience, be affiliated with an alternative dispute resolution organization, or be appointed by a court or government agency. *Id.*; *see also* White v. Holton, No. 927915E, 1993 WL 818800, at *4-*5 (Mass. Super. Ct. Oct. 4, 1993) (finding mediation statute inapplicable when requirements of mediator not met). The statute would not apply, for example, to communication with an informally recognized mediator, such as a student mediator at a high school. *See* Joseph B. Stulberg, *The UMA: Some Roads Not Taken*, 2003 J. DISP. RESOL. 221, 235-38 (2003) (criticizing UMA's refusal to extend privilege to student mediation).

36. *See* MASS. GEN. LAWS ch. 233, § 23C (2000) (providing confidentiality to mediator work product and communications during recognized mediation).

37. *See id.* (protecting mediation communication from disclosure but silent on who can exercise privilege). In contrast to the general mediation confidentiality statute, a separate statute governing mediation in labor disputes grants confidentiality only to the mediator. MASS. GEN. LAWS ch. 150, § 10A (2000). The general mediation confidentiality statute explicitly exempts labor disputes from its provisions. MASS. GEN. LAWS ch. 233, § 23C (2000); *see also* Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 32 n.219 (including Massachusetts as state with mediation privilege unclear as to who may exercise). Kirtley suggests that divergent judicial interpretations could result from statutes lacking clear direction on who may exercise the privilege. Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 33 nn. 224-25.

38. *See* MASS. GEN. LAWS ch. 233, § 23C (2000) (exempting mediation communication and work product from disclosure in judicial proceedings); *see also* Hughes, *supra* note 12, at 32-34 (differentiating privilege from general confidentiality duty to keep secrets). Hughes distinguishes the general duty not to disclose secrets in a confidential relationship from the right to refuse to testify that comes with a privilege. Hughes, *supra* note 12, at 32-34. The Massachusetts confidentiality statute creates a privilege, as it exempts disclosure in judicial proceedings, but its application to a mediator's duty to keep secrets in non-judicial circumstances is unclear. *See* MASS. GEN. LAWS ch. 233, § 23C (2000) (providing no enforcement requirement to confidentiality other than exclusion from evidence).

39. *See* MASS. GEN. LAWS ch. 233, § 23C (2000) (extending confidentiality to mediator work product and case files).

40. *See id.* (exempting communication during mediation from disclosure in judicial proceeding).

41. *See id.* (including no language suggesting waiver of privilege allowed).

42. *See id.* (showing 1985 enactment); Leary v. Geoghan, No. 2002-J-0435, 2002 WL 32140255, at *2 (Mass. Super. Ct. Aug. 5, 2002) (noting interpretation of statute matter of first impression).

during mediation.⁴³ Soon after the agreement was reached, the Archdiocese backed out.⁴⁴ It argued that the agreement was contingent on a review of its ability to pay, and that its finance council found the settlement amount beyond the Church's means.⁴⁵ The victims argued that the agreement made by the Archdiocese's representative, Cardinal Bernard Law, was binding and the finance council had no power to approve or reject it.⁴⁶

In June 2002, just three months after the agreement was announced, the parties were headed for court to fight over the state of the Church's finances and whether the settlement agreement was binding.⁴⁷ A Massachusetts Superior Court judge allowed the victims' attorneys to depose the mediators involved in the agreement.⁴⁸ The Massachusetts Appeals Court agreed that limited depositions of the mediators were proper.⁴⁹ When the lower court later ruled that the mediators would have to testify in open court, however, the Appeals Court disagreed.⁵⁰

In reversing the lower court's decision to allow mediator testimony in court, Appeals Court Judge Cynthia Cohen pointed to the absolute language of the Massachusetts statute.⁵¹ The victims argued that mediator Paul Finn had impliedly waived confidentiality by discussing the settlement with the local

43. See Tom Mashberg & Maggie Mulvihill, *Church OKs Settlement; Geoghan Victims Get \$20M in Deal*, BOSTON HERALD, Mar. 12, 2002, at 5 (reporting amount of settlement and noting role of mediator in reaching agreement and distributing payments).

44. See Stephen Kurkjian & Walter V. Robinson, *Archdiocese Abandons Deal in Geoghan Case*, BOSTON GLOBE, May 4, 2002, at A1 (reporting Church finance council recommendation of payments from general fund without discretion from mediator). The Church's finance council also recommended that Cardinal Bernard Law request the establishment of a new system of mediating sexual abuse cases, with a retired judge determining settlement amounts for individual victims. *Id.*

45. See *id.* (discussing finance council discretionary role); see also Michael Rezendes, *Verbal OK Could Bind Church, Law Professor Says*, BOSTON GLOBE, May 8, 2002, at A16 [hereinafter *Verbal OK Could Bind Church*] (noting statements by canon law experts on finance council authority to vote down agreement).

46. See *Verbal OK Could Bind Church*, *supra* note 45, at A16 (discussing victims' arguments on binding nature of Cardinal Law's oral agreement).

47. See Tom Mashberg, *Alleged Victims' Lawyers Will Take Church to Court*, BOSTON HERALD, June 18, 2002, at 2 (discussing victims' intensified legal approach, including push to open Church financial records).

48. See Kathleen Burge, *Mediators Ask Court to Block Depositions*, BOSTON GLOBE, July 9, 2002, at A18 (discussing decision by Massachusetts Superior Court to allow limited questioning).

49. See Tom Mashberg, *Mediators Face Questions on Geoghan Deal*, BOSTON HERALD, July 10, 2002, at 16 (noting Massachusetts Appeals Court holding allowance of limited depositions not abuse of discretion).

50. *Leary v. Geoghan*, No. 2002-J-0435, 2002 WL 32140255, at *3 (Mass. Super. Ct. Aug. 5, 2002) (holding Massachusetts statute provides no exceptions to protection of mediation confidentiality in judicial proceedings); see also Kathleen Burge, *Chancellor Details Money Crunch in Testimony, He Describes Bleak Archdiocese Picture*, BOSTON GLOBE, Aug. 6, 2002, at B2 (discussing Appeals Court interpretation of Massachusetts mediation statute); Tom Mashberg, *Lawyers to Testify in Church Money Deal*, BOSTON HERALD, Aug. 1, 2002, at 27 (noting Massachusetts lower court decision to allow mediator testimony). Allowance of mediator depositions, but not in-court testimony, demonstrates that the statute's privilege protects communication from admission but not from discovery. See *infra* note 56 and accompanying text (differentiating broad confidentiality from privilege).

51. *Leary*, 2002 WL 32140255, at *3 (noting statute's broad protection specifically applied to judicial proceedings).

press with the consent of the parties.⁵² Judge Cohen held that the confidentiality statute does not provide for waiver, express or implied.⁵³

In *Leary v. Geoghan*, the Massachusetts Court of Appeals noted the growth of mediation and the importance of mediator confidentiality, and commented that Massachusetts provides a more expansive blanket of confidentiality over mediators than other states.⁵⁴ The court decided that mediator testimony could not be compelled even if it would help resolve the issues in the case, because to do so would conflict with the statute's clear language.⁵⁵ The court's decision recognizes that the statute goes beyond the creation of a general duty of confidentiality to grant a testimonial privilege.⁵⁶ Judge Cohen wrote that regardless of whether or not the parties choose to maintain confidentiality, the statute does not permit testimony regarding mediation communication.⁵⁷

B. The Need for Confidentiality

The importance of confidentiality to mediation is widely touted.⁵⁸ Confidentiality is considered necessary to promote open dialogue, maintain mediator neutrality, and fulfill expectations of privacy.⁵⁹ The voluntary nature

52. *Id.* at *2 (referring to victims' position on waiver of privilege by mediator).

53. *Id.* at *3 (holding statute includes no waiver of confidentiality privilege).

54. *Id.* (explaining statute's broad protections).

55. See *Leary*, 2002 WL 32140255, at *3 (finding compelled testimony inconsistent with intent of statute).

56. See *Leary v. Geoghan*, No. 2002-J-0435, 2002 WL 32140255, at *3 (Mass. Super. Ct. Aug. 5, 2002) (noting statute's privilege applies even if parties do not maintain confidentiality). The court's decision suggests that courts could read the statute to allow disclosure by the parties outside of judicial proceedings. *Id.* (observing parties' choice to maintain confidentiality). The decision also indicates that disclosure by the mediator outside of court is allowed if the parties and the mediator agree to it. *Id.* at *2 (discussing consent of parties for mediator interview with press without discussion of statute violation). While the statute does not explicitly provide for waiver outside of judicial proceedings, it includes no language to prevent it. MASS. GEN. LAWS ch. 233, § 23C (2000) (including no enforcement provision other than banning admission in judicial proceeding). The statute is therefore best read as creating an evidentiary privilege for mediation communication without mandating broader mediator confidentiality. See *id.*; *Leary*, 2002 WL 32140255 at *2-*3; see also *White v. Holton*, No. 927915E, 1993 WL 818800, at *4 (Mass. Super. Ct. Oct. 4, 1993) (finding statute "serves only as an evidentiary rule"); *Uniform Mediation Act*, *supra* note 2, at 170 (noting statutory protection only needed in legal proceedings because parties can otherwise enforce secrecy obligations). Even if a court was to read the statute to create a duty of confidentiality, the *Leary* interpretation corresponds with application of confidentiality in other professional relationships, in that the duty is binding on the mediator but not the parties. See *Hughes*, *supra* note 12, at 33-34 (distinguishing privilege from duty of confidentiality because confidentiality binding on professional only).

57. See *Leary*, 2002 WL 32140255, at *2-*3 (distinguishing disclosure by party from waiver of privilege).

58. See *Kentra*, *supra* note 17, at 722 (describing confidentiality as essential to mediation process); *Kirtley*, *Mediation Privilege's Transition*, *supra* note 4, at 17 (characterizing prevalence of mediation privilege statutes as reflection of perceived need for confidentiality); *Protecting Confidentiality in Mediation*, *supra* note 20, at 444-46 (arguing legitimacy of mediators and openness of parties require confidentiality).

59. See *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55 (9th Cir. 1980) (stating protection of mediator neutrality more important than evidence from potential testimony); *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1128 (Cal. 2001) (requiring deference to legislative intent in creation of mediation

of the mediation process, which provides the mediator with no power to coerce or bind the parties, requires the fostering of trust between the parties and the mediator.⁶⁰ The perception of mediator neutrality is considered central to creating trust, and possibly harmed if parties found a mediator had previously testified in one participant's favor, or could in the future.⁶¹

Despite the sound reasoning behind calls for strong mediation confidentiality, some caution that confidentiality protections could go too far in denying important evidence.⁶² An extensive mediation privilege could obscure the true intent of one or both parties and thus undermine mediation's goal of reflecting mutual agreement.⁶³ Preventing a mediator from disclosing information necessary for one party to make an informed decision could allow agreements based on incomplete or inaccurate representations.⁶⁴

Confidentiality's utility in encouraging candid negotiation has been viewed as overstated, as parties seeking a favorable mediated agreement may be hesitant to share compromising information with the other side regardless of a ban on disclosure to outsiders.⁶⁵ Absent a sweeping statutory privilege, confidentiality could be provided by contract for parties demanding it before entering mediation.⁶⁶ In addition to having questionable utility, unyielding confidentiality provisions have raised constitutional concerns about

confidentiality statutes); Hughes, *supra* note 12, at 68 (describing three rationales requiring mediation confidentiality); Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 31 (arguing importance of confidentiality to mediator neutrality).

60. See Richard Birke & Louise Ellen Teitz, *U.S. Mediation in 2001: The Path That Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 195 (2002) (describing participant confidence in secrecy as one "pillar" of mediation); *Protecting Confidentiality in Mediation*, *supra* note 20, at 444-45 (noting mediator inability to coerce creates confidentiality need).

61. See Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 31-32 (highlighting importance of neutrality over potential utility of mediator testimony); *Protecting Confidentiality in Mediation*, *supra* note 20, at 456 (noting parties may refuse to negotiate unless believe mediator neutral).

62. See *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1137-39 (holding strict adherence to mediator privilege risks injustice); see also Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 39-40 (cautioning against mediation privilege becoming "blackhole" for damaging evidence); Rambo, *supra* note 10, at 1066 (arguing confidentiality provisions preventing witness impeachment protects dishonest participants).

63. See *Protecting Confidentiality in Mediation*, *supra* note 20, at 453 (arguing bar on parol evidence undermines truthfulness objective); see also Hughes, *supra* note 12, at 71-72 (arguing overbroad confidentiality undermines intent of parties by insulating improper agreements).

64. See Hughes, *supra* note 12, at 72 (arguing unchecked confidentiality allows deceptive negotiations eradicating apparent agreement).

65. See Green, *supra* note 19, at 32 (asserting no data supports essential need for confidentiality in mediation); Christopher Honeyman, *Confidential, More or Less*, DISP. RESOL., Winter 1998, at 12 (asserting confidentiality role in mediation overemphasized); Rambo, *supra* note 10, at 1073 (arguing admissions of liability not likely to increase with confidentiality guarantee).

66. See Reich, *supra* note 19, at 240-47 (calling for contractual mediation confidentiality to meet specific needs of participants). But see Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 10-11 (criticizing contract as method for protecting confidentiality). Kirtley notes that parties cannot contract to preclude the admission of evidence in a later trial, and that a contract between the mediating parties would not extend to third parties seeking testimony or records from mediation in discovery. *Id.*

interference with the right of defendants to confront witnesses.⁶⁷

C. *The Need for Exceptions*

1. *Justice Requires Evidence*

The mediation community has struggled to reconcile the need for confidentiality with the judicial system's demand for complete evidence.⁶⁸ All privileges represent a policy choice to exclude relevant and important evidence in favor of the perceived benefits of protecting confidential relationships.⁶⁹ To avoid the extreme of having the production of evidence completely undermined, some jurisdictions have included provisions in confidentiality statutes excepting otherwise admissible evidence from the privilege.⁷⁰ The Massachusetts statute includes no such exception.⁷¹

Putting aside the policy benefits of mediation confidentiality, there are numerous ways in which currently privileged mediation discussion and

67. See *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 471 (Cal. Ct. App. 1998) (holding right to confront witness outweighs mediation privilege); see also Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 108 (2001) (discussing UMA reporters' concern with Confrontation Clause when applying privilege to criminal cases). An additional constitutional question raised by privilege statutes is whether legislatures have infringed on the role of the judiciary in regulating the conduct of attorneys and parties in court-ordered mediation. See generally Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29 (2003) (arguing legislatively-created mediation privilege infringes on judiciary's constitutional powers).

68. See WIGMORE, *supra* note 23, § 2192, at 70 (observing public right to everyone's evidence); see also Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 15-17 (applying Wigmore's privilege test to mediation). Kirtley argues that though some evidence may be lost due to the mediation privilege, it is likely evidence of communications that would not have come into existence absent the participation of parties in mediation. Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 15-17.

69. See Hughes, *supra* note 12, at 32-33 (framing privileges as antithesis of evidence rules intended to maximize information available to courts).

70. See, e.g., Alternative Dispute Resolution Act, 5 U.S.C. § 574(f) (1996) (including explicit exception for otherwise admissible evidence); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(c) (2005) (excepting otherwise admissible material from privilege); WASH. REV. CODE ANN. § 5.60.070(1)(b) (1995) (providing privilege exception for otherwise admissible evidence arising separately from mediation). The UMA also explicitly excludes otherwise admissible evidence from its proposed privilege. See *Uniform Mediation Act*, *supra* note 2, at 197 (excepting from privilege otherwise admissible or discoverable evidence discussed in mediation).

71. See MASS. GEN. LAWS ANN. ch. 233, § 23C (2000) (including no enumerated exception for otherwise-admissible evidence); see also Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 40-41 (discussing need for otherwise admissible evidence exception to prevent derailing discovery). But see Rambo, *supra* note 10, at 1062 (claiming no jurisdiction extends privilege to otherwise admissible subject matter). Rambo may be correct that no statute explicitly extends the privilege to pre-existing facts discussed in mediation, but the explicit exclusion of otherwise admissible evidence from the privilege by many jurisdictions suggests the concern that a silent statute, like that in Massachusetts, could swallow any evidence discussed during mediation. See *supra* note 70 and accompanying text (showing statutes with exception for otherwise admissible material).

materials could form highly relevant evidence.⁷² The Massachusetts statute provides no exception for evidence establishing a fundamental contract defense in an action to enforce or disavow a mediated agreement.⁷³ Use of prior inconsistent statements to impeach a witness would be precluded by the statute if the prior statements were made during mediation, potentially causing fact-finders to improperly accept the truth of questionable testimony.⁷⁴ Physical evidence produced for mediation purposes has been excluded under one state's expansive privilege statute, despite being unavailable elsewhere.⁷⁵

2. *Protecting the Public*

The Massachusetts privilege includes no exceptions for evidence of threats, criminal activity, or fraud by mediation participants.⁷⁶ Numerous jurisdictions

72. See *supra* notes 73-74 and accompanying text (noting relevant and important evidence potentially excluded by mediation privilege).

73. See *Randle v. Mid Gulf, Inc.*, No. 14-95-01292-CV, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996) (holding party seeking contract enforcement cannot assert mediation confidentiality against opponent duress claim). The Massachusetts statute's complete privilege could prevent a party like the plaintiff in *Randle*, who was told he could not leave a mediation session despite chest pains, from presenting evidence of duress to defend an action to enforce an agreement reached in mediation. See MASS. GEN. LAWS ch. 233, § 23C (2000) (providing confidentiality to mediation without exception); *Randle*, 1996 WL 447954, at *1 (allowing evidence of duress despite mediation confidentiality). The *Randle* court referenced the Texas mediation privilege statute, which includes an exception allowing courts to apply a balancing test to determine whether disclosure is warranted. *Randle*, 1996 WL 447954 at *1; see also TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(e) (2005) (granting courts discretion to determine legal need for disclosure).

74. See *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 469 (Cal. Ct. App. 1998) (holding constitutional right to confront witness outweighs mediation privilege). The Massachusetts statute, which could be read to totally preclude judicial discretion, does not guarantee decisions favoring constitutional rights and the need for evidence over the need for privilege. See MASS. GEN. LAWS ch. 233, § 23C (2000) (containing broad privilege language with no exceptions). The supremacy of a statutory mediation privilege over seemingly reasonable judicial discretion is illustrated by two California Supreme Court decisions admonishing lower courts for finding exceptions not enumerated in the state's mediation statute. See *Rojas v. Superior Court*, 93 P.3d 260, 270-71 (Cal. 2004) (holding broad mediation protection extends to evidence generated by mediation process); *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1128 (Cal. 2001) (reversing lower decision suspending privilege to avoid "absurd result"). The *Foxgate* court found that the California legislature's strong desire to protect confidentiality left no room for courts to craft an exception. *Foxgate Homeowners' Ass'n*, 25 P.3d at 1127. The appellate court's decision that maintaining the privilege would result in "an absurd result" was held unjustified and beyond judicial discretion by the supreme court. *Id.* at 1128. In *Rojas*, the plaintiffs sought admission of photographs, videotapes, witness accounts and scientific data collected during mediation of their claim against an apartment building for harm from toxic mold. *Rojas*, 93 P.3d at 263. The California appeals court found the privilege did not extend to evidence collected during mediation. See *id.* at 264. It reasoned that a contrary decision would allow parties to hide evidence behind the privilege. *Id.* The California Supreme Court reversed, holding that while the privilege does not extend to pre-existing evidence, it does cover evidence produced for mediation. *Id.* at 265-66. The decision thus denied the plaintiffs evidence that was likely otherwise unavailable. See *id.* at 264. In *Foxgate*, the California Supreme Court noted its agreement with the appellate decision in *Rinaker* that due process concerns outweighed the privilege, but noted that the decision was not without criticism. *Foxgate Homeowners' Ass'n*, 25 P.3d at 1127; see also *supra* note 67 and accompanying text (discussing *Rinaker* holding).

75. See *supra* note 74 (describing *Rojas* decision excluding evidence produced during mediation investigation).

76. See MASS. GEN. LAWS ch. 233, § 23C (2000) (providing blanket confidentiality without public

with statutory mediation privileges have recognized that in certain circumstances the need for confidentiality is outweighed by greater societal interests.⁷⁷ These include provisions allowing disclosure to prevent child abuse, report threats of harm, or to stop crimes.⁷⁸

The UMA includes exceptions for testimony regarding threats to inflict harm or commit a crime.⁷⁹ The UMA's drafters note that "the policy rationales supporting the privilege do not support mediation communications that threaten bodily injury or crimes of violence."⁸⁰ The UMA draws a distinction between past criminal activity and threats of future harm, and excludes the former from its exception.⁸¹ The use of mediation in criminal cases and the need for maximum disclosure in any mediation session preclude granting an exception for admissions of past criminal activity.⁸²

Massachusetts excepts threats of harm from the protections of other privileges.⁸³ The Massachusetts Supreme Judicial Court has recognized a "crime-fraud exception" to the attorney-client privilege.⁸⁴ Child abuse cases are excepted from the Massachusetts statute protecting spousal communication from disclosure.⁸⁵ The state's psychotherapist-patient privilege statute contains an exception for threats of "imminently dangerous activity by the patient against himself or another person."⁸⁶ At the federal level, a statute governing confidentiality of mediators in administrative proceedings allows courts to determine the need for disclosure to protect public health and safety.⁸⁷

interest exceptions).

77. See, e.g., COLO. REV. STAT. § 13-22-307(2)(b) (2004) (allowing disclosure to prevent felony, bodily harm or protect minor); KAN. STAT. ANN. § 23-605(b)(3) (2004) (exempting disclosure to stop or prevent fraud or crime); OR. REV. STAT. § 36.220(5) (1999) (allowing report of child or elder abuse); OR. REV. STAT. § 36.220(6) (1999) (exempting to prevent harm threatened against specific person); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(f) (2005) (providing exception for duty to report abuse or neglect). The UMA also excepts threats of bodily harm or crimes of violence from its proposed privilege. See *Uniform Mediation Act*, *supra* note 2, at 206.

78. See *supra* note 77 and accompanying text (providing examples of statutes with public policy exceptions).

79. See *Uniform Mediation Act*, *supra* note 2, at 206-09 (discussing exceptions for crime or threats of physical harm).

80. See *Uniform Mediation Act*, *supra* note 2, at 215 (discussing rationale for excepting threats of crime or physical harm).

81. See *Uniform Mediation Act*, *supra* note 2, at 217 (noting exception does not extend to admissions of past crimes).

82. See Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 45 (arguing against past criminal activity exception).

83. See *infra* notes 84-86 and accompanying text (discussing exceptions to other privileges under Massachusetts law).

84. See *Purcell v. Dist. Attorney*, 676 N.E.2d 436, 438-39 (Mass. 1997) (recognizing existence of crime-fraud exception to attorney-client privilege).

85. MASS. GEN. LAWS ch. 233, § 20 (2000) (excluding child abuse cases from statute disqualifying testimony regarding spousal communication).

86. MASS. GEN. LAWS ch. 233, § 20B(a) (2000) (allowing psychotherapist disclosure when patient threatens harm to self or another).

87. Alternative Dispute Resolution Act, 5 U.S.C. § 574(a)(4) (2004) (providing confidentiality for

The UMA's drafters stress that the proposed statute does not prevent parties from notifying authorities or warning a threatened person, because it is concerned with admissibility of evidence rather than a broader duty of confidentiality.⁸⁸ The exception exists to prevent the insulation of relevant evidence from a criminal case.⁸⁹ The Massachusetts mediation statute contains no language inhibiting immediate notification of authorities to prevent harm, but does bar testimony regarding threats.⁹⁰

3. Enforcing Agreements

a. Admissibility of Written Agreements

Leary v. Geoghan, the only Massachusetts appellate case to consider the mediation privilege statute, involved a dispute over the enforceability of an oral agreement reached during mediation.⁹¹ The plaintiffs were denied in their effort to have the mediator testify regarding whether the agreement reflected the terms discussed by the parties.⁹² Privilege statutes containing an exception for agreements reached during mediation are usually limited to written agreements, which would have led to the same result for the plaintiffs in *Leary*.⁹³ Unlike the explicit exception in other states, however, the

"neutrals" in administrative proceeding with exceptions). There is no uniformity in federal jurisdictions regarding the existence of a mediator privilege. See *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1180 (C.D. Cal. 1998) (finding mediation privilege under federal law); see also *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487, 493 (5th Cir. 1998) (denying existence of federal mediation privilege). The Fifth Circuit noted that the Alternative Dispute Resolution Act applies only to administrative proceedings and does not create an overall federal mediation privilege. *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d at 492. The federal courts are split on the issue of whether or not a mediation privilege exists because of the flexible language of Federal Rule of Evidence 501 that assigns federal judges the task of recognizing new privileges based on "principles of the common law as they may be interpreted. . . in the light of reason and experience." FED. R. EVID. 501; see also *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 56 (9th Cir. 1980) (providing early recognition of mediator privilege in labor dispute context).

88. See *Uniform Mediation Act*, *supra* note 2, at 217 (emphasizing difference between evidentiary privilege and broader duty of confidentiality).

89. See *Uniform Mediation Act*, *supra* note 2, at 217 (discussing intent behind exception allowing introduction of necessary evidence from mediation).

90. See *supra* note 56 and accompanying text (explaining Massachusetts statute best read as creating evidentiary privilege instead of broad confidentiality duty).

91. See *supra* notes 42-57 and accompanying text (discussing issues and disposition of *Leary*).

92. See *Leary v. Geoghan*, No. 2002-J-0435, 2002 WL 32140255, at *1 (Mass. Super. Ct. Aug. 5, 2002) (noting plaintiffs' desire to question mediator regarding reflection of parties' intent in agreement).

93. See, e.g., 42 PA. CONS. STAT. § 5949(b)(1) (2000) (excepting from privilege written agreement in enforcement proceeding unless agreement provides otherwise); VA. STAT. ANN. § 8.01-576.10 (2005) (declaring written agreements not confidential unless parties agree otherwise); WASH. REV. CODE § 5.60.070(1)(e) (1995) (excluding from privilege written settlement agreement reached in mediation); WIS. STAT. § 904.085(4)(a) (2000) (excluding written agreements from mediation privilege); see also *Uniform Mediation Act*, *supra* note 2, at 213 (noting majority of mediation privileges except written agreements and listing statutes). But see Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 42 (claiming few statutes except settlement agreements from privilege).

Massachusetts statute's broad protection of mediator work product does not contain an exception for written agreements.⁹⁴

b. Testimony Regarding Intended Agreement

A federal court decision interpreting a Connecticut mediation privilege statute highlights the difference between an exception allowing admission of a written document and one allowing mediator testimony regarding an agreement, as sought by the *Leary* plaintiffs.⁹⁵ In *New Horizon v. First Financial Equities*,⁹⁶ the plaintiff moved for an order allowing mediator testimony regarding whether the parties had reached an agreement.⁹⁷ The court turned to the Connecticut mediation statute, which contains an exception for enforcing written agreements.⁹⁸ In holding that the plaintiffs could call the mediator to testify, the court cited a separate exception in the statute granting courts authority to make an exception to the privilege if "the interest of justice outweighs the need for confidentiality."⁹⁹ The judicial discretion exception, not the exception for written agreements, allowed testimony regarding whether an oral agreement was reached.¹⁰⁰

The UMA also excludes oral agreements from its exceptions.¹⁰¹ Its drafters were concerned that an oral agreement exception could potentially swallow the privilege, because all statements during mediation could be characterized as necessary to establish an oral agreement.¹⁰² For this reason, only written agreements are included as an exception to the UMA's privilege.¹⁰³

94. See MASS. GEN. LAWS ch. 233, § 23C (2000) (lacking exception for written agreements); see also *supra* note 93 (listing statutes excepting written agreements from mediation privilege). But see Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 51 (suggesting states without contractual defense exceptions assume courts will suspend privilege when defenses raised). Other than referencing a state court decision interpreting a rule of evidence, Kirtley offers no support for this proposition that courts would infer a contractual defense exception to a statutory privilege where one is not explicitly provided. *Id.* at 51 n.4.

95. See *New Horizon Fin. Servs., LLC v. First Fin. Equities, Inc.*, 278 F. Supp. 2d 259, 263 (D. Conn. 2003) (allowing mediator testimony per judicial discretion exception despite written agreement exception).

96. 278 F. Supp. 2d 259 (D. Conn. 2003).

97. See *id.* at 260 (discussing plaintiff motion to allow mediator testimony).

98. See CONN. GEN. STAT. § 52-235d(b)(2) (2005) (providing exception for enforcing written agreements); *New Horizon Fin. Servs., LLC*, 278 F. Supp. 2d at 261-62 (discussing statutory exceptions).

99. See CONN. GEN. STAT. § 52-235d(b)(4) (2005) (providing judicial discretion exception for instances where interest of justice outweighs confidentiality); *New Horizon Fin. Servs., LLC*, 278 F. Supp. 2d at 263 (finding judicial discretion provision met).

100. See *New Horizon Fin. Servs., LLC*, 278 F. Supp. 2d at 263 (applying judicial discretion exception to allow mediator testimony rather than written agreement exception).

101. See *Uniform Mediation Act*, *supra* note 2, at 214 (discussing reasoning for not including oral agreements in exceptions).

102. See *Uniform Mediation Act*, *supra* note 2, at 214 (discussing need to exclude oral agreements from exception). The UMA drafters suggested that the tendency of courts and state statutes to suspend the privilege only with written agreements should lead mediators to inform participants that only written agreements will be enforceable. See *id.*

103. *Uniform Mediation Act*, *supra* note 2, at 210, 212-13 (including and describing written agreement exception). The drafters suggested that the ease with which an oral agreement can be memorialized obviates

c. Contract Defenses

At least one court has rejected the use of a state mediation privilege to block contractual defenses.¹⁰⁴ The absence of an exception for parol evidence in an action over a mediated agreement has been called the “greatest defect” in mediation privilege statutes.¹⁰⁵ Inability to access evidence from mediation could prevent assertion of valid contractual defenses, or allow a party to invent a contractual defense.¹⁰⁶ The UMA’s written agreement exception is limited to communication within a written record,¹⁰⁷ but a separate exception provides that evidence establishing a contractual defense may be admitted following a balancing test by the court.¹⁰⁸ The UMA’s balancing test reflects concern that an unconfined contractual defense exception could swallow the privilege by opening entire mediation proceedings to searches for evidence.¹⁰⁹ Some jurisdictions have averted this possibility by allowing judges to make preliminary in camera determinations of whether a contract defense justifies admitting mediation communication, often allowing judges more discretion than the UMA’s balancing test would provide.¹¹⁰

4. Evidence of Mediator Malpractice

The UMA also includes an exception for evidence of mediator malpractice, to make mediators accountable and to allow mediators to defend a malpractice

the need for an oral agreement exception. *Id.* at 214.

104. *Randle v. Mid Gulf, Inc.*, No. 14-95-01292-CV, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996) (holding agreement enforcement action required allowing contract defense evidence from mediation session).

105. *Protecting Confidentiality in Mediation*, *supra* note 20, at 453 (disapproving of different treatment given mediated contracts compared to other settlement agreements); *see also* Hughes, *supra* note 12, at 66 (criticizing UMA’s preclusion of contractual defense evidence). Hughes argues that “[t]he confidentiality afforded the mediation process should not abrogate common law contract principles and result in the destruction of the self-determination of the disputant.” Hughes, *supra* note 12, at 66.

106. *See* Hughes, *supra* note 12, at 73 (arguing lack of contractual defense exception risks baseless claims).

107. *See Uniform Mediation Act*, *supra* note 2, at 210, 212-13 (providing exception for communication in written agreement only).

108. *See Uniform Mediation Act*, *supra* note 2, at 210-11 (including contractual defense exception with balancing test). The UMA has been criticized for creating a procedural hurdle to evidence of contractual defenses. *See* Hughes, *supra* note 12, at 43 (arguing UMA contract defense balancing test standard “artificially high and totally inappropriate”). Hughes argues that a clear exception for contractual defenses without a balancing test should exist, even if a closed hearing is needed to determine whether the exception applies. *See id.* at 77.

109. *See Kirtley, Mediation Privilege’s Transition*, *supra* note 4, at 51 (discussing possibility of contract defense misuse by unsatisfied parties).

110. *See Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1139 (N.D. Cal. 1999) (discussing initial determination by court of need for mediator testimony). The *Olam* court took the mediator’s testimony under seal, then unsealed it upon determining that it was “essential to doing justice.” *Id.*; *see also* Hughes, *supra* note 12, at 77 (assenting to need for closed hearing while arguing for clear contractual defense exception); Kirtley, *Mediation Privilege’s Transition*, *supra* note 4, at 51-52 (suggesting in camera hearings to balance confidentiality with need for contract defense evidence).

claim.¹¹¹ The drafters note the role that actions against mediators can play in monitoring the industry without the need for extensive state regulation.¹¹² Statutes lacking this exemption raise concerns that legitimate claims against mediators could be silenced.¹¹³

Several states have included an exception for mediator malpractice in privilege statutes.¹¹⁴ In another context, Massachusetts has recognized that a client's claim of attorney malpractice constitutes waiver of the attorney-client privilege.¹¹⁵ The Massachusetts Supreme Judicial Court has also recognized the need for attorneys to defend themselves in its exceptions to the confidentiality requirement of its rules governing professional responsibility.¹¹⁶

5. Judicial Discretion

Many mediation privilege statutes include an exception granting judges discretion to decide if the need for evidence in a particular circumstance outweighs the policy behind the privilege.¹¹⁷ An exception in this form is intended to cover situations unique to a particular case that could merit suspending the privilege.¹¹⁸ The UMA includes a judicial balancing test for felony or misdemeanor proceedings, or to prove or defend a contract claim

111. See *Uniform Mediation Act*, *supra* note 2, at 210, 217-18 (providing mediator malpractice exception and rationale). The drafters noted that mediators must be allowed disclosure to defend malpractice claims "as a matter of fundamental fairness." *Id.* at 217.

112. See *Uniform Mediation Act*, *supra* note 2, at 217-18 (finding private actions lessen licensing and credentialing need).

113. See Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 49 (promoting need for mediator malpractice exception to avoid "de facto immunity").

114. See, e.g., ARIZ. REV. STAT. § 12-2238(B)(2) (2003) (excepting evidence necessary to mediator malpractice action); COLO. REV. STAT. § 13-22-307(2)(d) (2004) (excepting communication when relevant to claim of willful or wanton mediator misconduct); WASH. REV. CODE § 5.60.070(1)(g), (2)(b) (1995) (allowing evidence in action between mediator and party).

115. See *Commonwealth v. Brito*, 453 N.E.2d 1217, 1221 (Mass. 1983) (holding ineffectiveness of counsel charge waives privilege to extent needed for defense); *Commonwealth v. Woodberry*, 530 N.E.2d 1260, 1261 (Mass. App. Ct. 1988) (noting client can waive privilege explicitly or implicitly by claim against attorney).

116. See MASS. SUP. JUD. CT. R. 3:07; MASS. R. PROF'L. CONDUCT 1.6(b)(2) (2005) (allowing admission of confidential information in action between attorney and client).

117. See, e.g., *Alternative Dispute Resolution Act*, 5 U.S.C. § 574(a)(4), (b)(5) (2004) (granting judicial discretion to determine need for evidence relative to privilege); CONN. GEN. STAT. § 52-235d(b)(4) (2005) (allowing court determination if "interest of justice" outweighs confidentiality); WIS. STAT. § 904.085(4)(e) (2000) (excepting disclosure to prevent "manifest injustice" in action separate from mediation issue).

118. See *Uniform Mediation Act*, *supra* note 2, at 212 (balancing privilege need against case specific facts); see also Alan Kirtley, *Best of Both Worlds*, DISP. RESOL., Winter 1998, at 5, 6 [hereinafter Kirtley, *Best of Both Worlds*] (describing "qualified" privileges as those allowing judicial discretion beyond interpreting statutory exception). Kirtley argues that judicial favor toward mediation will prevent overuse of a qualified exception, but that a high discretionary bar of allowing evidence only to prevent manifest injustice should be used. Kirtley, *Best of Both Worlds*, *supra*, at 6-7. The court in *Olam*, allowing the privilege to be set aside, comments that in its experience mediator testimony is rarely sought. *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1134 (N.D. Cal. 1999); *But see Hughes*, *supra* note 12, at 56 (describing mediation community's disfavor toward manifest injustice exception).

based on a mediated agreement.¹¹⁹ This UMA exception is distinct from other statutes with judicial discretion exceptions in that it limits the controversies to which it applies.¹²⁰ The UMA balancing test provides that the evidence must not be otherwise available, and its importance must substantially outweigh the need for confidentiality.¹²¹

6. Waiver

Numerous state statutes and the UMA allow for waiver of the privilege by the parties, the mediator, or both.¹²² To avoid inadvertent waiver, the UMA provides that it must be explicit.¹²³ This type of exception would not have helped the plaintiffs in *Leary*, who argued the privilege was impliedly waived.¹²⁴ By including a waiver provision, the UMA drafters acknowledged that parties may wish to avoid the privilege in certain circumstances.¹²⁵ The drafters also note that the allowance of explicit waiver “further[s] the principle of party autonomy.”¹²⁶

Unlike the Massachusetts statute, the UMA specifically delineates who may invoke the privilege.¹²⁷ In separate provisions, mediators, parties, and nonparty participants are all granted the right to avoid disclosure of mediation communication.¹²⁸ Parties may prevent the disclosure of anyone’s communication, and the mediator or nonparty participants may prevent

119. See *Uniform Mediation Act*, *supra* note 2, at 210-11 (suggesting judicial discretion balancing test in limited circumstances).

120. See *supra* note 117 (listing statutes with judicial discretion exceptions).

121. See *Uniform Mediation Act*, *supra* note 2, at 210-211 (providing judicial discretion balancing test); see also Hughes, *supra* note 12, at 38-64 (criticizing UMA judicial discretion balancing test).

122. See, e.g., COLO. REV. STAT. § 13-22-307(2)(a) (2004) (allowing waiver in writing); TEX. CIV. PRAC. & REM. § 154.053(b),(c) (2005) (allowing party authorization of disclosure); WASH. REV. CODE § 5.60.070(1)(a), (1)(c), (2)(a)(1995) (allowing written agreement to disclose).

123. See *Uniform Mediation Act*, *supra* note 2, at 206 (requiring express waiver).

124. See *Leary v. Geoghan*, No. 2002-J-0435, 2002 WL 32140255, at *2 (Mass. Super. Ct. Aug. 5, 2002) (analyzing plaintiffs’ waiver argument). The *Leary* plaintiffs argued that the mediator had talked to the press with their consent, but the UMA provision would require not only consent but language explicitly stating the privilege has been waived. *Id.*; *Uniform Mediation Act*, *supra* note 2, at 206 (discussing need for express waiver requirement).

125. See *Uniform Mediation Act*, *supra* note 2, at 207 (noting parties rarely, but occasionally, have reason to waive privilege); see also Hughes, *supra* note 12, at 70-71 (discussing self-determination of parties as central to mediation).

126. *Uniform Mediation Act*, *supra* note 2, at 207.

127. See MASS. GEN. LAWS ch. 233, § 23C (2000) (lacking language indicative of who may invoke privilege); *Uniform Mediation Act*, *supra* note 2, at 197 (delineating who may exercise privilege); see also *supra* note 37 and accompanying text (discussing absence of language on who may exercise privilege under Massachusetts statute).

128. See *Uniform Mediation Act*, *supra* note 2, at 197 (providing privilege rights to mediation party, mediators, and nonparty participants). The UMA drafters extend the right to exercise the privilege to mediators to encourage mediator candor and to avoid images of bias. *Id.* at 203-04. The UMA has been criticized for extending the privilege to mediators. See Hughes, *supra* note 12, at 37-38 (arguing privilege extension to mediator “unique among all of the professional relationships”). Hughes argues that the mediator’s role as the participant’s agent should preclude the mediator from having a separate right to invoke the privilege. *Id.*

disclosure of their own communications.¹²⁹ The UMA's waiver provision then distinguishes the circumstances under which the three distinct parties may waive the privilege.¹³⁰ The party participants must explicitly waive the privilege before anyone's communication can be disclosed, and mediators or nonparty participants must additionally agree to waiver of their communications.¹³¹

III. ANALYSIS

The protection provided mediation communications in Massachusetts is far too broad.¹³² While the role of confidentiality in mediation may be unique compared to other protected communications, the need for a complete ban on disclosure is not clear.¹³³ Absent compelling need for a blanket privilege, exceptions must be provided to avoid unduly hampering admission of relevant evidence.¹³⁴ With other privileges, Massachusetts has acknowledged that the need for evidence at times outweighs the policies behind protecting mediation confidentiality.¹³⁵ As currently drafted, the Massachusetts statute stands to act as a vacuum undercutting the adversarial process's demand for relevant evidence.¹³⁶

A. Otherwise Admissible Evidence

The Massachusetts mediation privilege does not *explicitly* extend to otherwise admissible pre-existing facts once they are discussed in mediation.¹³⁷ At the same time, the statute's lack of language clearly excepting pre-existing facts from the privilege invites arguments that anything discussed in mediation

129. See *Uniform Mediation Act*, *supra* note 2, at 197 (allowing refusal to disclose communications and prevention of disclosure by others).

130. See *Uniform Mediation Act*, *supra* note 2, at 206 (granting ability to waive according to who holds privilege).

131. See *Uniform Mediation Act*, *supra* note 2, at 206-07 (describing waiver control according to communication subject to disclosure).

132. See *supra* notes 62-63, 66-67 and accompanying text (addressing doubts over need for strict confidentiality in mediation); *supra* notes 23, 68 and accompanying text (discussing concern over risk of evidence lost to privilege); *supra* notes 84-86 and accompanying text (describing exceptions to other privileges in Massachusetts).

133. See Honeyman, *supra* note 65, at 12 (arguing need for mediation confidentiality exaggerated); Rambo, *supra* note 10, at 1074-78 (questioning impact of confidentiality on participant disclosure).

134. See Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 10-15 (advocating exceptions in discussion of need for privilege); *Protecting Confidentiality in Mediation*, *supra* note 20, at 457-59 (including need for exceptions in argument for strong mediation privilege).

135. See *supra* notes 84-86 and accompanying text (evaluating other Massachusetts privileges with recognized exceptions).

136. See *supra* note 23 and accompanying text (considering long-standing recognition of evidence's importance over privilege).

137. See MASS. GEN. LAWS ch. 233, § 23C (2000) (lacking language regarding preexisting facts); Rambo, *supra* note 10, at 1062 (claiming no mediation privilege excludes otherwise admissible evidence).

becomes inadmissible.¹³⁸ Other states have included unambiguous language to protect otherwise admissible evidence from being swallowed by the privilege.¹³⁹ A clear exception for otherwise admissible material prevents mediation statutes from ever being read to exclude preexisting evidence.¹⁴⁰

B. Evidence of Threats to Inflict Injury, Commit Crime, or Commit Fraud

As it has done with other privileges, Massachusetts should include an exception for statements involving a threat to inflict harm or commit a crime or fraud.¹⁴¹ As the UMA drafters have noted, the policies that underlie a privilege do not extend to protecting a mediation participant's harmful intent.¹⁴² Nonetheless, to encourage candid mediation and mediation in criminal cases, a crime-fraud exception should apply only to threats made during mediation.¹⁴³

The addition of a crime-fraud exception would be significant in allowing relevant testimony regarding threatening statements during mediation.¹⁴⁴ The Massachusetts mediation statute attaches no enforcement mechanism to its confidentiality requirement other than the exclusion of evidence from judicial proceedings.¹⁴⁵ Though they could face possible claims of malpractice or breach of contract, mediators face no sanction according to the Massachusetts statute for disclosures to outside parties.¹⁴⁶ A crime-fraud exception to the privilege would enable access to relevant evidence, an issue separate from the ability of a mediator or participant to immediately prevent harm.¹⁴⁷

C. Agreements Reached During Mediation and Contractual Defenses

The Massachusetts statute should allow admission of written agreements

138. See Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 39-41 (advocating clear exception to protect otherwise admissible evidence from being swallowed by privilege); *see also supra* note 70 and accompanying text (reviewing mediation privilege statutes explicitly excepting otherwise admissible evidence).

139. See *supra* note 70 (listing state statutes excepting otherwise admissible evidence from privilege).

140. See Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 39-41 (arguing for exception to protect existing evidence).

141. See *supra* notes 84-86 and accompanying text (discussing exceptions in Massachusetts privilege law to protect the public).

142. See *supra* note 80 and accompanying text (noting UMA's reasoning behind excepting threats of crime or physical harm).

143. See Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 45 (explaining need to distinguish ongoing or threatened crimes from past crimes).

144. See *Uniform Mediation Act*, *supra* note 2, at 217 (distinguishing privilege exception from general rule of confidentiality).

145. See *Uniform Mediation Act*, *supra* note 2, at 170 (noting other mechanisms protect confidentiality outside judicial proceedings); *supra* notes 38, 56 (examining Massachusetts statute's language and finding confidentiality only enforceable in excluding evidence).

146. See MASS. GEN. LAWS ch. 233, § 23C (2000) (mandating confidentiality but including no enforcement provisions); *see also supra* note 56 (arguing creation of privilege only practical impact of statutory confidentiality).

147. See *Uniform Mediation Act*, *supra* note 2, at 217 (noting criminal activity exception intended to avoid hampering criminal cases).

reached in mediation.¹⁴⁸ Contractual obligations should not be avoidable merely because they arose during mediation.¹⁴⁹ In addition, mediation participants must be able to rely on resolutions represented by a written agreement.¹⁵⁰ As the UMA's drafters have advocated, an exception for mediated agreements should be limited to those reduced to writing.¹⁵¹ An oral agreement exception would risk eviscerating the privilege because of potential arguments that a variety of statements amounted to an oral agreement.¹⁵²

Evidence of traditional defenses to contract formation—such as fraud, duress, and mistake—should also be allowed under the Massachusetts statute.¹⁵³ As recognized by one Texas court, defenses to contractual formation must be allowed when actions to enforce mediated agreements are heard.¹⁵⁴ The Massachusetts statute can alleviate overuse of a contractual defense exception by requiring in camera review to determine the propriety of admitting evidence from a mediation session.¹⁵⁵ Massachusetts need not adopt the strict balancing test attached to the UMA's contractual defense exception, but should require an initial determination by the court that a contractual defense claim is valid and mediation evidence necessary.¹⁵⁶

D. Mediator Malpractice

As it stands now, the Massachusetts mediation privilege could serve to completely insulate mediators from malpractice claims.¹⁵⁷ The statute should

148. See *supra* note 93 and accompanying text (discussing states with privilege statutes excepting written agreements).

149. See *supra* notes 93-94 and accompanying text (contrasting absolute Massachusetts privilege with states excepting written agreements).

150. See *supra* notes 93-94 and accompanying text (discussing potential for avoidance of contractual obligations under Massachusetts statute).

151. See *Uniform Mediation Act*, *supra* note 2, at 210, 212-13 (discussing written agreement limitation).

152. See *Uniform Mediation Act*, *supra* note 2, at 214 (addressing concerns over oral agreement exception).

153. See *Randle v. Mid Gulf, Inc.*, No. 14-95-01292-CV, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996) (not designated for publication) (holding action to enforce mediated agreement required allowance of formation defense evidence); Hughes, *supra* note 12, at 43, 50 (articulating need for contract defense exception without prohibitive balancing test); *Protecting Confidentiality in Mediation*, *supra* note 20, at 453 (calling lack of parol evidence exception "greatest defect" in mediation privileges).

154. *Randle*, 1996 WL 447954, at *1 (holding action to enforce mediated agreement required evidence of contractual defenses).

155. See *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1137-39 (N.D. Cal. 1999) (reviewing lower court's initial consideration of need for mediator testimony). The *Olam* court called for a balancing test during in camera review, weighing potential harm caused by disclosure against harm caused by nondisclosure. *Id.* at 1132-33; see also Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 51-52 (advocating in camera hearings to balance confidentiality need with need for contractual defense evidence).

156. See *Uniform Mediation Act*, *supra* note 2, at 210-11 (attaching balancing test to contractual defense exception); Hughes, *supra* note 12, at 43 (criticizing UMA balancing test).

157. See MASS. GEN. LAWS ch. 233, § 23C (2000) (lacking exception for evidence of mediator malpractice); Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 49 (advocating necessity for mediator

be amended to allow claims against mediators and to permit mediators to defend themselves.¹⁵⁸ An exception for mediator malpractice would strengthen the mediation industry and participant confidence in choosing mediation.¹⁵⁹ As it has done with the attorney-client privilege, Massachusetts should view malpractice claims by a participant as waiver of the privilege in order to allow mediator defense.¹⁶⁰ An exception allowing for evidence from a mediation session by the plaintiff in a malpractice claim would be unacceptable without allowing equal use by the defense.¹⁶¹

E. Judicial Discretion

Massachusetts should allow for judicial discretion in cases that do not fit another exception but where manifest injustice would result from the denial of evidence.¹⁶² Unlike the UMA, the Massachusetts statute need not limit the controversies to which the judicial discretion exception applies.¹⁶³ The mediation privilege should contain enough flexibility to accommodate the justice system's demand for the greatest amount of relevant evidence.¹⁶⁴ The statute should direct courts to override the privilege when the need for evidence is so great that manifest injustice would result from maintaining confidentiality.¹⁶⁵

F. Waiver

A central tenet of mediation is a feeling of control by the parties.¹⁶⁶ A

malpractice exception to avoid insulating liability).

158. See *Uniform Mediation Act*, *supra* note 2, at 210, 217-18 (including mediator malpractice exception and discussing rationale).

159. See *Uniform Mediation Act*, *supra* note 2, at 217-18 (suggesting private litigation as alternative to public regulation of mediation); Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 49 (arguing lack of exception for mediator malpractice creates "de facto immunity").

160. See *supra* notes 115-16 and accompanying text (discussing Massachusetts courts' recognition of action against attorney as waiver of privilege).

161. See *Uniform Mediation Act*, *supra* note 2, at 217 (noting exception for defense of mediator malpractice required "as a matter of fundamental fairness").

162. See *supra* note 117 (listing statutes with judicial discretion exception).

163. See *Uniform Mediation Act*, *supra* note 2, at 210-11 (limiting judicial discretion exception to distinct controversies).

164. See *supra* note 23 and accompanying text (discussing recognition of evidence's paramount importance in judicial proceedings).

165. See CONN. GEN. STAT. § 52-235d(b)(4) (2005) (allowing court to suspend privilege according to "interest of justice" determination); WIS. STAT. § 904.085(4)(e) (2000) (including judicial discretion exception to avoid "manifest injustice" in action separate from mediation issue); see also Kirtley, *Best of Both Worlds*, *supra* note 118, at 6-7 (arguing for judicial discretion exception restricted to avoiding manifest injustice).

166. See *Uniform Mediation Act*, *supra* note 2, at 207 (noting importance of waiver provision to fostering party autonomy); Hughes, *supra* note 12, at 70-71 (describing self-determination as "a principle goal of mediation"). The drafters of the UMA include self-determination as a central principle of the proposed act; see also *Uniform Mediation Act*, *supra* note 2, at 168. The drafters suggested that "[t]he primary guarantees of fairness within mediation are the integrity of the process and informed self-determination." *Id.* at 172. In addition to guaranteeing fairness, the UMA drafters note the importance of self-determination to party

statute designed to protect participants and encourage the use of mediation should not prevent parties from agreeing that disclosure better serves their mutual interests.¹⁶⁷ Massachusetts should follow the UMA's model of broad party control combined with consent by mediators or nonparty participants when their communication is subject to disclosure.¹⁶⁸ A waiver provision in this form maintains party control while sustaining expectations of privacy shared by mediators and nonparties.¹⁶⁹ Parties could become hesitant to participate in mediation if the privilege's protection of a mediator's communication could be waived without party consent.¹⁷⁰ Like the UMA, the Massachusetts statute should specify that parties, mediators, and nonparty participants can all invoke the privilege, and then provide the mechanism for waiver.¹⁷¹ A malpractice action against a mediator should be the only circumstance under which the privilege is considered impliedly waived.¹⁷²

IV. CONCLUSION

The high value society places on candor in certain relationships has led to the creation of numerous testimonial privileges, despite the resulting loss of relevant evidence. To maintain a reasonable balance between encouraging forthrightness and the need to maximize admissible evidence, exceptions have been attached to most professional privileges. In creating a broad mediation privilege without exceptions, Massachusetts has ignored the balance between encouraging candor and maximizing admissible evidence.

The need for complete confidentiality without exceptions is far from definite. Some have questioned whether confidentiality is necessary to mediation at all. Those who maintain confidentiality's importance and advocate for a privilege, including the drafters of the UMA, generally recognize the need for exceptions. Massachusetts has attached exceptions to other testimonial privileges, and mediation has not been shown to require greater deference. The legislature should recognize the importance of evidence by adding exceptions to the statutory privilege.

In addition to being applied to other privileges in Massachusetts, the

satisfaction. *Id.* at 171.

167. See *Uniform Mediation Act*, *supra* note 2, at 207 (recognizing situations arise in which parties wish to waive privilege).

168. See *Uniform Mediation Act*, *supra* note 2, at 206-07 (suggesting waiver control by parties and mediator or nonparty with communication subject to disclosure).

169. See Birke & Teitz, *supra* note 60, at 195 (noting expectation of privacy's importance to mediation); Kirtley, *Mediation Privilege's Transition*, *supra* note 4, at 31-32 (noting importance of confidentiality to mediator as professional).

170. See *Protecting Confidentiality in Mediation*, *supra* note 20, at 456 (stressing importance of perceived mediator neutrality to participation in mediation).

171. See *Uniform Mediation Act*, *supra* note 2, at 197 (including specific language on who may exercise mediation privilege).

172. See *supra* note 114 and accompanying text (discussing malpractice action as implicit waiver).

exceptions proposed in this Note have been included with mediation privilege statutes in other states. The legislature departed from this recognition of the justice system's need for evidence when it passed the mediation privilege statute. Massachusetts must ensure that mediation does not undermine the judicial system it was meant to compliment.

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