CONFIDENTIALITY OF TEXAS MEDIATIONS: RUMINATIONS ON SOME THORNY PROBLEMS

by Brian D. Shannon

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I. INTRODUCTION

In 1987 the Texas Legislature enacted the Texas Alternative Dispute Resolution Procedures Act. One of the cornerstones of the enactment was the statute's broad confidentiality protection. Apart from certain narrow exceptions set forth in the act, the statute provides that a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

In addition,

[a]ny record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure

* Charles "Tex" Thornton Professor of Law, Texas Tech University School of Law; B.S., summa cum laude, Angelo State University, 1979; J.D., with high honors, The University of Texas School of Law, 1982. Professor Shannon serves on the Section Council of the State Bar of Texas Alternative Dispute Resolution Section and is the vice-chair of the South Plains Dispute Resolution Center Advisory Committee. The views set forth in this article, however, are entirely those of the author. Many of the hypothetical situations discussed in this article were first raised as part of a Continuing Legal Education presentation by the author at the 2000 Annual Meeting of the State Bar of Texas Alternative Dispute Resolution Section. The author wishes to thank Wesley Keng for his research assistance.

2. See id. § 154.073.
3. Id. § 154.073(a).
may not be required to testify in any proceedings relating to or arising out of
the matter in dispute or be subject to process requiring disclosure of
confidential information or data relating to or arising out of the matter in
dispute.4

Dean Ed Sherman has described the Texas ADR Act’s confidentiality
section as “perhaps the broadest ADR confidentiality provision in the
country.”5 Furthermore, another section of the Texas ADR Act explicitly
places a duty on the mediator to “at all times maintain confidentiality with
respect to communications relating to the subject matter of the dispute.”6
Indeed, even if the foregoing provisions are not sufficiently clear, section
154.053 of the Texas ADR Act goes on to provide that “[u]nless the parties
agree otherwise, all matters, including the conduct and demeanor of the
parties and their counsel during the settlement process, are confidential and
may never be disclosed to anyone, including the appointing court.”7

Despite the breadth and reasonable degree of clarity in the Texas ADR
Act’s confidentiality provisions, a number of thorny problems and issues have
arisen during the Act’s thirteen years of existence. Notwithstanding the
booming growth of mediation and other alternative processes in this state,
there remains scant case law. In addition, even among the few reported cases
relating to mediation confidentiality under the Texas ADR Act, there has been
limited, even superficial, analysis of the Act’s confidentiality provisions.8
Those cases that have been decided, however, have cast some degree of doubt
on the proper meaning and interpretation of the confidentiality statutes.9
Moreover, the National Conference of Commissioners on Uniform State Laws
has been developing a Uniform Mediation Act that has a much more limited
form of confidentiality protection than does the Texas ADR Act.10

4. Id. § 154.073(b).

5. Edward F. Sherman, Confidentiality in ADR Proceedings: Policy Issues Arising From the
Texas Experience, 38 S. TEx. L. REv. 541, 542 (1997). Edward F. Sherman is the Dean and a Professor
of Law at Tulane University School of Law, New Orleans, Louisiana.

6. Texas ADR Act, supra note 1, § 154.053(b).

7. Id. § 154.053(c). Section 154.053 primarily relates to the mediator’s duties, but there is some
degree of overlap with § 154.073. See id. §§ 154.053, 073.

S.W.2d 227, 234 (Tex. App.—Amarillo 1995, writ denied).


10. As of the time of the preparation of this article, the drafting committees of the National
Conference of Commissioners on Uniform State Laws had released their August 2000 Revised Interim
Draft of the UMA [hereinafter August 2000 Draft UMA]. The drafting committees have indicated an
intention to receive public comments on the August 2000 draft through the Fall of 2000. For copies of the
various drafts, see Uniform Mediation Act of The American Bar Association Section of Dispute Resolution
The August 2000 Draft UMA, which will be discussed throughout much of this article, is also
located at this site.
Earlier writings in the literature have explored aspects of the Texas ADR Act's confidentiality sections. This article, by way of contrast, will explore some of the issues developing in the emerging case law. In addition, this article will comment on the different approach taken to confidentiality in the draft Uniform Mediation Act. In particular, this article will examine problem areas such as disclosures of mediation communications outside of legal proceedings, the use of mediation communications as part of contractual defenses or claims, the seeking of disclosure of mediation communications in tangential criminal proceedings, the confidentiality aspects of settlement agreements, and disclosures relating to alleged bad faith by one of the parties at a mediation session. This article will address these topics by posing a series of hypothetical situations that are largely based on either reported case decisions or actual occurrences that have been related to the author.

II. DISCLOSURES OUTSIDE OF LEGAL PROCEEDINGS

**Hypothetical 1:** A Texas Dispute Resolution Center (DRC) conducted a mediation between a bank and one of its customers involving the bank's alleged theft of $100,000 of the customer's money. The customer filed suit in state district court, and the court ordered the parties to engage in mediation. During the course of the mediation, the bank offered to settle for $25,000. The customer rejected the offer, and the mediation reached impasse. Two weeks later, the customer met with a reporter and relayed the entire history of the dispute, including the fact that the bank offered to settle the matter for $25,000. This information was then included in a lengthy article that subsequently appeared in the local newspaper. The bank has filed a motion with the court for an order to have the plaintiff's case

11. See, e.g., ALAN S. RAU ET AL., RAU, SHERMAN & SHANNON'S TEXAS ADR & ARBITRATION STATUTES AND COMMENTARY 45-65 (2000) [hereinafter RAU, SHERMAN & SHANNON]; Sherman, supra note 5; Irene S. Said, Comment, The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute, 36 S. TEX. L. REV. 579, 588 (1995). Additionally, many commentators have addressed the importance of confidentiality in the mediation process. See, e.g., KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 180 (2000) (stating that "one of the most cited benefits of the use of ADR processes is the confidentiality surrounding them"); Sarah S. Vance & Charles F. Thensted, Confidentiality of Mediation Proceedings, 47 LA. B.J. 99, 99 (1999) (observing that the "freedom to speak frankly is the bedrock of mediation" and that the "expectation of confidentiality helps maintain trust and candor"); Gregory A. Litt, Comment, No Confidence: The Problem of Confidentiality by Local Rule in the ADR Act of 1998, 78 TEX. L. REV. 1015, 1015 (2000) (recognizing that "[c]onfidentiality is considered a critical element in the success of mediation"). But see Scott H. Hughes, A Closer Look: The Case for a Mediation Confidentiality Privilege Still Has Not Been Made, DISP. RESOL. MAG., Winter 1998, at 14, 16 (stressing that "it is important to remember that no empirical data exists that connects the success of mediation with the availability of a confidentiality privilege"). In sum, most mediation proponents would likely claim that confidentiality is critical to the success of the process.

12. See discussion infra Parts II - VI.

13. See discussion infra Parts II - VI.

14. See discussion infra Parts II - VI.

15. See discussion infra Parts II - VI.
dismissed as a sanction for violating confidentiality. How should the court address this motion?

Hypothetical 1 is based in large part on the Florida case of Paranzino v. Barnett Bank of South Florida. In Paranzino, a bank customer filed a breach of contract action against a Florida bank alleging that the bank had issued only one $100,000 certificate of deposit even though she had given the bank $200,000 in cash. While the litigation was pending, the Florida trial court ordered the parties to engage in mediation, but the mediation did not result in a settlement. Some months after the mediation, the plaintiff contacted the Miami Herald and relayed “her version of the events relating to the action” with the bank. Later, an article appeared in the Miami Herald’s Tropic Magazine that described statements made at the mediation conference, including information about a settlement offer made by the bank of $25,000. After this article appeared in print, the bank moved that the trial court strike the plaintiff’s pleadings and for sanctions because both the plaintiff and her attorney “had breached the confidentiality of the mediation proceeding by disclosing information concerning the settlement offer and by making statements concerning ... [the bank’s] alleged motivation for making said offer.” The trial court granted the bank’s motion to strike and dismissed the case with prejudice. The court of appeals affirmed the decision.

On appeal, the Paranzino court emphasized that as part of the mediation process, the parties had executed a “Mediation Report and Agreement” in which they agreed to be bound by confidentiality. The court below had found that “the Plaintiff and her attorney willfully and deliberately disregarded the confidentiality agreement by exposing confidential information, namely the settlement offer, to the media.” In addition, the court determined that the disclosures by the customer and her attorney also ran afoul of Florida’s mediation confidentiality statute, which provides, in

17. Id. at 726. The customer alleged that she had anticipated receiving two certificates of deposit, each in the amount of $100,000. Id. The bank denied receiving any more than $100,000. Id.
18. Id. The bank also made a written offer to settle the case “shortly after the mediation.” Id.
19. Id.
20. Id. The article stated that the plaintiff’s lawyer had disclosed that at the mediation “the bank offered to pay $25,000 to settle the case.” Id. at 727. In addition, the article attributed the following statements to the bank customer’s lawyer: “And earlier this year, ... [the bank] offered the woman $25,000 to settle the case. She turned it down. Wouldn’t a crook have taken the money and run?” Id. at 726.
21. Id. at 727.
22. Id.
23. Id. at 730.
24. Id. at 726-27.
25. Id. at 728. The trial court further found, “Indeed, the very basis of court ordered mediation is that parties can rely upon the confidentiality of all oral or written statements. This was clearly violated with their disclosure of the settlement offer.” Id.
pertinent part: "All oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be . . . confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise."26 Moreover, the court reasoned that the media contacts were in violation of a Florida Rule of Civil Procedure that provided a further basis for confidentiality.27 The court stressed that in mediations in which no settlement is reached "the confidentiality afforded to parties involved in mediation proceedings must remain inviolate."28 Accordingly, the court rejected the plaintiff's argument that the trial court's sanction of dismissal was too harsh.29 In sum, the court found no abuse of discretion by the trial court in light of the bank customer's violation of the confidentiality agreement, the confidentiality statute, and the relevant rule of civil procedure.30

How would a Texas court resolve a comparable situation? In Hypothetical 1, unlike the situation in Paranzino, there is no mention of a separate confidentiality agreement entered into by the parties to the dispute. However, in many court-ordered mediations in Texas, the judges' orders include confidentiality requirements.31 Moreover, as in the Florida case, the bank customer's disclosures are clearly contrary to the Texas ADR Act's confidentiality provisions.32 The settlement offer is a "communication relating to the subject matter of . . . [the] dispute" that was "made by a participant in an alternative dispute resolution procedure" that the statute makes "confidential" and "not subject to disclosure."33 Thus, there is no question that the hypothetical bank customer has violated the Texas ADR Act by revealing mediation communications to the newspaper.

Given the clear violation of the Texas ADR Act in Hypothetical 1 and the likely violation of a trial court order, would a Texas court be justified in ordering a dismissal with prejudice as did the Florida court in Paranzino? In Paranzino, the trial court relied on a Florida Rule of Civil Procedure that

26. Fla. Stat. Ann. § 44.102(3) (West 1998). The statute also provides the following privilege against disclosure to participants in the mediation: "Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding." Id.
27. Paranzino, 690 So. 2d at 728. In the event no agreement is reached at mediation, the rule limits the information that can be disclosed as follows: "If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation." Fla. R. Civ. P. 1.730(a) (emphasis added).
28. Paranzino, 690 So. 2d at 728.
29. Id. at 729.
30. Id. at 729-30.
31. For example, consider some of the local rules and orders collected in Rau, Sherman & Shannon, supra note II, at 718-58.
32. See Texas ADR Act, supra note I, § 154.073(a).
33. Id. Similarly, the mediator could not reveal the settlement offer because it relates to a confidential matter that "may never be disclosed to anyone, including the appointing court." Id. § 154.053(c).
allows a party to move for dismissal "for failure of an adverse party to comply with these rules [of civil procedure] or of any order of court." There is no comparable rule in Texas practice. Most of the rules and statutes that identify sanctionable conduct in Texas relate to pleadings and discovery abuses. Indeed, the Texas ADR Act does not include any provisions relating to sanctions for violations of the statutory requirements. Nonetheless, Texas courts have held that they possess the inherent power to issue sanctions. For a sanction to be valid, however, it must be regarded as "just." In TransAmerican Natural Gas Corp. v. Powell, the Texas Supreme Court established the following two-pronged test to ascertain the appropriateness of a sanction: (1) there must be a direct relationship between the sanction and the offensive conduct; and (2) the sanction may not be excessive. Moreover, because of the constitutional limitations on barring a party from being heard on the merits, a court should not impose a "death penalty" sanction of dismissal or default "absent a party's flagrant bad faith or counsel's callous disregard for the . . . rules." In TransAmerican, the court further opined that a court should employ death penalty sanctions only when the party's conduct or actions justify a presumption that the party's claims or defenses lack merit.

Given the high thresholds set forth in the TransAmerican test, perhaps not surprisingly, Texas appellate courts have been generally reluctant to uphold death-penalty sanctions imposed by trial courts. Thus, it is

34. Paranzino, 690 So. 2d at 728 (quoting FLA. R. CIV. P. 1.420(b)).
36. See, e.g., Williams v. Akzo Nobel Chemicals, Inc., 999 S.W.2d 836, 843 (Tex. App.—Tyler 1999, no pet.) ("The trial court has inherent power to sanction to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process."); Metzger v. Sebek, 892 S.W.2d 20, 50-51 (Tex. App.—Houston [1st Dist.] 1994, writ denied), cert. denied, 516 U.S. 868 (1995) ("[A] court's power to sanction for abuse of the legal process is not, however, limited to that specifically conveyed in rules and statutes. Such a power may be implicit in a particular rule or statute."); cf Shook v. Gilmore & Tatge Mfg. Co., 851 S.W.2d 887, 891 (Tex. App.—Waco 1993, writ denied) (observing that the Texas Supreme Court had only recognized the inherent power of Texas courts to sanction counsel in the absence of a rule or order, but had not recognized the sanctioning of a party absent the violation of a rule or order).
38. Id.
39. Id. at 918, 920.
40. Id. The trial court must first consider the availability of lesser sanctions. Id. at 917.
41. See, e.g., Remington Arms Co., Inc. v. Caldwell, 850 S.W.2d 167, 171 (Tex. 1993) (holding that sanctioned party's conduct did not justify presumption that claims lacked merit); Williams v. Akzo Nobel Chemicals, Inc., 999 S.W.2d 836, 846 (Tex. App.—Tyler 1999, no pet.) (finding that the sanction was more severe than necessary and not just); Shook v. Gilmore & Tatge Mfg. Co., 851 S.W.2d 887, 893 (Tex. App.—Waco 1993, writ denied) (stating that trial court did not consider lesser sanctions or whether the record supported a presumption that the party's claims lacked merit). For further analysis of death penalty sanctions, see Retta A. Miller & Kimberly O'D. Thompson, 'Death Penalty' Sanctions: When to Get Them & How to Keep Them, 46 BAYLOR L. REV. 737 (1994).
questionable whether a Texas trial court would be justified in imposing a death penalty sanction of dismissal for the confidentiality violations in Hypothetical 1. Nonetheless, the conduct of the bank customer in this hypothetical is egregious and indicates a complete and callous disregard for the confidentiality requirements of the Texas ADR Act. There is a grave concern that the newspaper article might poison the potential jury pool and limit the bank’s opportunity for a fair trial in that venue. Moreover, if the customer’s attorney also participated in the newspaper interview—like in Paranzino—there would be little doubt that the customer should be chargeable with knowledge of the statutory requirements. The court, however, will likely be reluctant to dismiss the case on the merits and must, given TransAmerican, consider lesser sanctions.

There is a move afoot to alter the law relating to the confidentiality of mediations. The American Bar Association (ABA) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) have been in the drafting process of a proposed Uniform Mediation Act (UMA). Early drafts of the UMA, however, have been controversial. Although the drafters were to have submitted the proposed UMA to the NCCUSL in July 2000 and to the ABA House of Delegates in February 2001, the drafting committees have postponed submitting their final proposals to the NCCUSL until July

42. Indeed, assuming that the mediator was properly trained, the mediator would have carefully explained the nature of the confidentiality requirements attendant to the mediation at the opening session of the mediation. Of course, in contrast to the situation described in Hypothetical 1, it is possible that the mediator might make improper disclosures to a newspaper—not the party. See Mike W. Thomas, City Scraps Negotiations with Oilman, LUBBOCK AVALANCHE-JOURNAL, May 15, 1998, at IA (quoting mediator about events that had taken place at a mediation of a dispute involving a city and an oilman over mineral rights).

43. Lesser sanctions might include imposing fines for contempt or entertaining a motion for a change of venue due to local prejudice. See TEX. R. CIV. P. 257. On the other hand, consider the result in Garcia v. Mireles, 14 S.W.3d 839 (Tex. App.—Amarillo 2000, no pet.). In Garcia, the plaintiff in a personal injury case obtained an order from the trial court to refer the case to mediation. Id. at 840. Although the court granted this order in January 1998 and the mediation was originally scheduled for March 1998, the mediation was rescheduled twice at the request of the plaintiff’s attorney. Id. Prior to the third scheduled mediation date in June 1998, the plaintiff’s counsel again requested postponement; however, this time the defense counsel refused. Id. Indeed, the defense counsel and an insurance adjuster appeared for the scheduled mediation, but neither the plaintiff nor the plaintiff’s counsel attended. Id. Thereafter, the defendant filed a motion to dismiss based on the plaintiff’s failure to comply with the court’s mediation order, delay of the mediation, and delay in prosecuting the case. Id. at 840-41. The trial court dismissed the case, and the court of appeals affirmed the dismissal, determining that the dismissal was not an abuse of discretion. Id. at 841, 843. Although the trial court’s order was somewhat unclear, the court of appeals concluded “that the ... order of dismissal ... was based on either its [the trial court’s] inherent power to control its docket, or its authority to dismiss under TRCP 165a [authorizing dismissal when cases are not timely prosecuted].” Id. at 843. Although Garcia did not involve a violation of mediation confidentiality, it does reflect a court’s willingness to impose a “death penalty” sanction for abuse of the mediation process. Id.


2001 and to the ABA House of Delegates until February 2002. 46 Thus, these bodies will not submit their proposal to the states for possible adoption until sometime after February 2002. 47 Accordingly, the Texas Legislature will not need to undertake consideration of the ultimate outcome of this drafting effort until the 78th Regular Session in 2003.

As will be discussed in the context of the various hypothetical situations posed in this article, the drafters' approach to confidentiality issues in the early drafts of the proposed UMA leaves much to be desired. 48 Although not perfect, the Texas ADR Act's approach to confidentiality is vastly superior to that included in the draft UMA. Unless the drafters undertake substantial revisions in future drafts, the Texas Legislature should not embrace the UMA and should reject attempts to substitute it for the Texas ADR Act. For example, consider the application of the August 2000 Draft UMA to Hypothetical 1. Although the draft UMA creates a privilege against disclosure of mediation communications in certain types of subsequent legal proceedings, the current version of the UMA offers absolutely no confidentiality protections outside such proceedings. 49 Thus, nothing in the August 2000 Draft UMA would appear to prohibit our bank customer's disclosures to the newspaper. 50

Hypothetical 2: Amy was a participant in a mediation with her former employer with regard to a claim for unpaid wages. During the course of the

46. Richard C. Reuben, UMA Drafters Extend Their Work a Year, DISP. RESOL. MAG., Spring 2000, at 34, 34.
47. See id.
48. See supra note 10.
49. August 2000 Draft UMA, supra note 10, § 5. Section 5(a) of the August 2000 Draft UMA provides the following:
A mediation communication is not subject to discovery or admissible in evidence in a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding, if it is privileged under Section 6 or 7, the privilege is not waived or precluded under Section 8, and there is no exception that prevents its disclosure under Section 9.
Id. § 5(a). With respect to the differences between a statutory privilege approach and a prohibition against disclosure of confidential mediation communications, one commentator has observed: "Evidentiary privileges operate to allow a person to refuse to disclose and to preclude another from disclosing specific communications. In contrast, prohibitions against disclosure proscribe and sanction voluntary disclosure." JOHN W. COOLEY, THE MEDIATOR'S HANDBOOK 42 (2000).
50. As one group commented on an earlier draft of the UMA: "[T]he draft approaches the issue backward. It would be far better if the participants in a mediation were required to maintain confidentiality . . . . As drafted, the provision affords scant protection, and no mediation participant could have any confidence that what is discussed will not be revealed sometime, somewhere . . . ." Philip J. Harter, Comments of the Section of Administrative & Regulatory Practice of the ABA on the June, 1999, Draft of the Uniform Mediation Act, at 6 (Oct. 8, 1999) (emphasis in original) (on file with the Texas Tech Law Review). It should also be noted that the August 2000 Draft UMA does permit, subject to several exceptions, the parties and mediator to enter into an agreement to "expand the nondisclosure of mediation communications." August 2000 Draft UMA, supra note 10, § 13(c). Obviously, this is a much more diluted approach to broad confidentiality than addressing the issue frontally in the statute.
mediation, Amy revealed that on one occasion she had smoked marijuana while operating machinery at the worksite. The former employer had been unaware of this drug use prior to the mediation. Nonetheless, the mediation resulted in a settlement. Two weeks later, however, Amy was fired from her new job with a different employer. Her boss explained that John, the representative of Amy's former employer who had been at the mediation, had called him and told him about Amy's marijuana use. Because the new employer had a zero tolerance policy, her termination was required. Amy wants to file claims against the former employer relating to the representative's breach of confidentiality. Are the confidentiality provisions of the Texas ADR Act relevant?

The scenario in *Hypothetical 2* is somewhat comparable to an actual situation that was relayed to the Author on a confidential basis by an attorney for the real-life "Amy." In the hypothetical situation, the disclosures made by John to the new employer are clearly in violation of the Texas ADR Act. As proscribed by section 154.073(a), the information revealed by John relating to Amy's marijuana use constituted a mediation "communication" that is "not subject to disclosure."51 John had no basis for knowledge of Amy's prior activities, other than through the mediation discussions. Hence, John has violated the Texas ADR Act's confidentiality provisions.

Despite John's breach of the confidentiality statute, however, would John's disclosure to Amy's new employer be actionable? In *Hypothetical 2* there is no mention of any employment contract between Amy and her new employer. Nonetheless, Texas courts have recognized that an at-will employment relationship can be the subject of a tortious interference claim.52 If Amy attempts to assert a tortious interference with contract claim, John's violation of the provisions of the Texas ADR Act could serve as the basis for establishing his breach of duty. Alternatively, if the parties to the mediation signed a confidentiality agreement as part of the mediation proceedings, Amy might have an additional claim for breach of that contract. In turn, she could assert that losses suffered from losing her subsequent employment were foreseeable consequential damages stemming from the breach of the confidentiality agreement.

Even assuming that Amy can proceed with these theories, a somewhat ticklish issue would be how she could prove her claims without revealing confidential mediation communications. Of course, she could endeavor to obtain the testimony of both the new employer and John about their post-meditation conversation. In contrast, however, the confidentiality statutes should bar both the mediator and Amy from testifying about what was

51. Texas ADR Act, supra note 1, § 154.073(a).
discussed at the mediation. An interesting situation might arise, however, if Amy attempts to testify about her having disclosed the marijuana use at the mediation, and John raises an objection. A court might take a particularly dim view of a party who has in all likelihood violated the confidentiality statutes from later trying to seek protection under those same statutes. On the other hand, if Amy’s claims can be established without resorting to confidential mediation communications, a court should follow the strictures of the Texas ADR Act.

Similar to the situation in Hypothetical 1, the August 2000 Draft UMA would not apply directly to the disclosures made by John in Hypothetical 2. As discussed above, the draft UMA does not afford a broad degree of confidentiality to mediation communications; instead, it simply establishes a privilege that can be raised at later litigation. Accordingly, because John’s statements to the new employer were not made in a later civil proceeding, his disclosures would not be barred by the draft UMA if it were to become law. Although there might be some potential application of the draft UMA’s privileges once Amy filed her later lawsuit, there would be no application to the unprotected statements made to the new employer. Moreover, Amy might not have an action to pursue. Because the draft UMA does not provide confidentiality protection to communications made outside a legal forum, John will likely not have breached a legal duty in making such disclosures to the new employer.

III. ASSERTING CONTRACTUAL DEFENSES AND CLAIMS

Hypothetical 3: John and Sue were involved in a business dispute that led to litigation in a Texas state district court. Upon being ordered to submit to mediation, the parties successfully mediated the dispute and signed a memorandum of agreement at the conclusion of the mediation session. Within days of the mediation session, John attempted to back out of the deal. Sue has returned to court and is attempting to enforce the terms of the settlement agreement. John has asserted the contractual defenses of misrepresentation and fraud against Sue and duress against the mediator. John plans to call the mediator as a witness in the later proceedings. What result?

The facts in Hypothetical 3 are based on several cases that have arisen in Texas and elsewhere. For example, in Randle v. Mid Gulf, Inc., a party asserted that a mediated agreement was void because he signed it under

53. Texas ADR Act, supra note 1, §§ 154.053(b)-(c), .073(a).
54. See supra notes 49-50 and accompanying text.
55. Under the approach of the August 2000 Draft UMA, John’s disclosures would only be confidential if the parties and the mediator had entered into a separate and more expansive mediation confidentiality agreement. See supra note 50.
duress. 56 He claimed that notwithstanding fatigue and chest pains, the mediator told him that he could not leave the session “until a settlement was reached”; hence, he signed the agreement. 57 The opposing party asserted that the duress defense could not be based on statements made at the mediation because of the confidentiality provisions of the Texas ADR Act. 58 The court, however, conclusorily determined that the opposing party could not “sue for specific performance of the mediation agreement” and simultaneously “argue that the mediation communications are confidential as to . . . [the other party’s] duress defense.” 59 Although this decision is “unreported” and carries no precedential value, it remains troubling. The court revealed no limits to this approach that would protect mediation confidentiality—a matter that is required by statute. 60 “This ‘waiver’ or ‘estoppel’ approach relies on equitable principles, but it could also considerably reduce the confidentiality protection of the Texas ADR Act if there will always be a waiver of confidentiality whenever a contract defense is asserted.” 61

The Texas ADR Act’s confidentiality provisions do not include an exception for providing evidence of traditional contract defenses. Thus, it is certainly arguable that Randle was wrongly decided. 62 Indeed, Dean Sherman has suggested that the state legislature needs to set standards for handling such cases. 63 Alternatively, he suggests that “judicial fine-tuning” is needed in light of Randle to limit, for example, testimony in such a situation (if it is to be allowed at all) to information relevant to the defense only. 64

Although there is a paucity of Texas authority on this issue, other jurisdictions have faced the problem. For example, Olam v. Congress Mortgage Co., 65 is a lengthy and “probing examination of the issues underlying an attempt to override confidentiality to require a mediator to

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57. Id.
58. Id.
59. Id.
60. See Texas ADR Act, supra note 1, § 154.073(a), (b).
61. RAU, SHERMAN & SHANNON, supra note 1, at 56.
62. Cf. Smith v. Smith, 154 F.R.D. 661, 669 (N.D. Tex. 1994) (upholding the quashing of a subpoena of a mediator in a later challenge to a mediated settlement agreement that allegedly resulted from misrepresentation in the mediation; the court applied the confidentiality provisions of the Texas ADR Act—given both the principle of comity and the lack of any challenge to the application of Texas law).
63. See Sherman, supra note 5, at 558 (commenting on issue).
64. See id. (suggesting, for example, that in Randle, testimony should have been narrowly limited to “what the mediator and the party said concerning chest pains and the party’s desire to leave”). See also David A. Ruiz, Note, Asserting a Comprehensive Approach for Defining Mediation Communication, 15 OHIO ST. J. ON DISP. RESOL. 851, 881 (2000) (arguing that Randle is “a perfect example of the abuses that may result” from having too broad a mediation privilege, and urging the use of a more narrowly tailored privilege).
65. 68 F. Supp. 2d 1110, 1118 (N.D. Cal. 1999).
testify about what went on in the mediation.\textsuperscript{66} The case involved a subsequent challenge to an agreement reached in mediation based on alleged undue influence and lack of capacity.\textsuperscript{67} Both parties sought the testimony of the mediator.\textsuperscript{68} Notwithstanding confidentiality protections set forth under California law, the court determined that public policy and a need for "doing justice" demanded that the mediator testify.\textsuperscript{69} Accordingly, the court required the mediator to testify in camera and under seal, and after determining that "the mediator's testimony was essential to doing justice," the court decided to use the evidence.\textsuperscript{70} Moreover, the court limited its inquiry to testimony relating to the alleged defenses, and ultimately found that the defenses were without merit.\textsuperscript{71}

Several federal district courts sitting in Texas have addressed comparable issues. In \textit{Smith v. Smith}, the court upheld the quashing of a subpoena of a mediator in a case in which there was a post-mediation challenge to a mediated settlement agreement that allegedly resulted from misrepresentation in the mediation.\textsuperscript{72} The court upheld a magistrate judge's application of the confidentiality provisions of the Texas ADR Act—given both the principle of comity and the lack of any challenge to the application of Texas law.\textsuperscript{73} By way of contrast, two other federal district courts have been less deferential to mediation confidentiality when federal law has been applicable.

In \textit{FDIC v. White}, parties to a mediated settlement agreement asserted that participating federal agency officials threatened them with criminal prosecution throughout the mediation if they did not settle the case.\textsuperscript{74} Despite a local rule in the Northern District of Texas that all ADR communications are to be confidential and protected from disclosure, the court concluded that the mediation communications were not privileged under federal law.\textsuperscript{75} Similarly,

\textsuperscript{66} RAU, SHERMAN & SHANNON, supra note 11, at 56.
\textsuperscript{67} \textit{Olam}, 68 F. Supp. 2d at 1118-19.
\textsuperscript{68} Id. at 1119.
\textsuperscript{69} Id. at 1131-38. In determining that a California court would engraft such an exception onto its confidentiality statute, the federal magistrate judge in \textit{Olam} relied on \textit{Rinaker v. Superior Court}, 74 Cal. Rptr. 2d 464 (Ct. App. 1998). The \textit{Rinaker} decision involved the determination that a juvenile's constitutional right to confrontation in a juvenile delinquency proceeding requires a mediator to testify despite statutory confidentiality protections. \textit{Id} at 470-71; see also Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., 92 Cal. Rptr. 2d 916, 927-28 (Ct. App.), review granted, 999 P.2d 666 (Cal. 2000) (explaining that as part of considering a sanctions motion, a court should be able to consider references in a mediator's written report about sanctionable conduct and evidence regarding such conduct from the mediation, notwithstanding statutory confidentiality provisions).
\textsuperscript{70} \textit{Olam}, 68 F. Supp. 2d at 1139.
\textsuperscript{71} Id. at 1151.
\textsuperscript{72} 154 F.R.D. 661, 675 (N.D. Tex. 1994).
\textsuperscript{73} Id. at 669.
\textsuperscript{74} 76 F. Supp. 2d 736, 737 (N.D. Tex. 1999).
\textsuperscript{75} Id. at 737-38. The court distinguished confidentiality from privilege and rejected the government's argument that Congress intended for there to be a mediation privilege in its 1998 enactment of the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58 (Supp. IV 1998), despite language in 28 U.S.C. § 652(d) requiring each district court's local rules to provide for mediation confidentiality.
in Allen v. Leal, the court "released all parties from the confidentiality requirements" of a Southern District of Texas local rule where a party alleged "that the mediator had 'forced' her and her husband into settling the case and had also misled them."76 The court tossed aside the confidentiality rule "to evaluate the validity of the settlement."77 The court expressed "grave concern" over the plaintiffs' "frontal attack on the mediation process," but indicated that coercion or "bullying" was not acceptable conduct for a mediator.78 Accordingly, the court proceeded to dispatch with confidentiality.79

Given this background, how should a court address the scenario set forth in Hypothetical 3? A Texas state court should have a difficult time ignoring confidentiality requirements when Texas law applies. The Texas ADR Act's confidentiality provisions simply do not include an exception for traditional contract defenses. However, given the decisions from other jurisdictions and the approach taken in the unreported case of Randle v. Mid Gulf, Inc. discussed above, it appears that courts may well decide that they should engraft an exception to confidentiality in such situations.80 This is a slippery slope for a court to proceed down and could easily eviscerate the policy reasons for confidentiality. Accordingly, if a court is so inclined, it should first conduct an in camera hearing as authorized by section 154.073(e) of the Texas ADR Act, and then carefully limit any foray into confidential communications by only taking into account matters related to the alleged defense.81 Moreover, to avoid abuse, the court should be ready and willing to sanction frivolous assertions of contract defenses. Because of the uncertainty associated with judge-made decision-making in this regard, however, a legislative solution would be far superior.82

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76. 27 F. Supp. 2d 945, 947. (S.D. Tex. 1998). In Allen, the plaintiffs brought a civil rights suit against the City of Bellaire and several police officers after one of the officers shot and killed Travis Allen. Id. at 946. The parties agreed to mediate the dispute, and during the mediation session the parties signed an agreement to settle the suit for $90,000 (the settlement was contingent on approval by the City of Bellaire City Council). Id. A few days after the mediation, but prior to the city council meeting, the plaintiffs tried to get out of the settlement; however, within the week, the city council met and voted to affirm the settlement agreement. Id. at 947. At a later court hearing, the plaintiffs urged that they should not be bound by the settlement agreement because they had been "coerced" and "intimidated" by the mediator into signing the agreement. Id. The mediator denied that he had engaged in coercive conduct. Id. at 947-49.

77. Id. at 947.

78. Id. at 947-49.

79. Id. at 947.

80. No. 14-95-01292-CV (Tex. App.—Houston [14th Dist.] Aug. 8, 1996, writ denied) (not designated for publication), 1996 WL 447954, at *1; see supra notes 56-64 and accompanying text.

81. Texas ADR Act, supra note 1, § 154.073(e).

82. Cf. LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (West Supp. 2000) (allowing an exception to confidentiality to determine "meaning or enforceability" of a mediated agreement if "necessary to prevent fraud or manifest injustice").
In this regard, the August 2000 Draft UMA appears to take a positive approach. The statute includes exceptions to confidentiality that would allow (1) testimony in cases alleging fraud, duress or incapacity, although the testimony cannot come from the mediator, and (2) evidence "to establish or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator, a party or a representative of a party based on conduct occurring during the mediation." The draft provision would also require an initial in camera hearing before the court to ascertain whether "there is a need for the evidence that substantially outweighs the importance" of confidentiality.

**Hypothetical 4:** During the court-ordered mediation of a liability suit against a Texas county (involving state law claims), the assistant county attorney represented that she had authority to settle the case. The parties verbally agreed to settle the dispute for $200,000, but at the close of the mediation the assistant county attorney announced that she would need to get approval for the settlement from the commissioners’ court. That approval was never forthcoming. The plaintiff then returned to court and asserted claims for breach of oral contract and breach of the implied warranty of authority of an agent. Are there confidentiality issues?

Hypothetical 4 is based on the facts in *Hur v. City of Mesquite*. In *Hur*, an individual was injured in an automobile-pedestrian accident, and she and her family brought suit against the City of Mesquite for negligence in failing to install pedestrian signals, crosswalks, and sidewalks. The plaintiffs alleged that at the outset of a subsequent court-ordered mediation, the city’s representative “fraudulently misrepresented that he had actual authority to contractually bind the defendant” to a settlement at the mediation. The plaintiffs further alleged that at the mediation the parties reached a verbal agreement to settle the case for $129,000; however, once the agreement was reached, the city’s representative “announced that the verbal settlement agreement would have to be approved by the Mesquite City Council or there [would be] no agreement.” The defendant city never paid the agreed sum, and the plaintiffs pursued actions for breach of the oral settlement agreement and breach of the implied warranty of authority of the agent to settle the

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84. Id. § 9(b).
86. Id. at 229-30.
87. Id. at 232.
88. Id.
The trial court dismissed both claims, but the appellate court reversed. The troubling aspect of *Hur* relates to the court's analysis of mediation confidentiality. On appeal, the defendant city urged that section 154.053(c) of the Texas ADR Act precluded the plaintiffs "from bringing a breach of contract claim arising out of mediation." The court of appeals, however, quickly brushed aside this argument and held the following:

The City's reliance on this provision, however, is misplaced. Section 154.053(c) does not prevent a party from bringing a suit for breach of contract arising out of mediation, but speaks only to the standards and duties imposed upon impartial third parties who participate in alternative dispute resolution proceedings. Voluntary agreements reached through mediation are binding. Thus, they are enforceable by suit upon the contract.

Although the *Hur* court was correct in observing that section 154.053(c) is part of a section of the Texas ADR Act relating to the standards and duties of mediators, the remainder of the court's conclusions do not withstand scrutiny. First, the court makes no mention of section 154.073 of the Texas ADR Act, which is the general ADR confidentiality provision. The confidentiality requirements set forth in section 154.053(c), which place precise limits on disclosures by the mediator, should "be read in conjunction with the confidentiality provisions of Section 154.073," which delineate the general confidentiality rules. As discussed earlier, section 154.073(a) generally bars later disclosures of communications made by participants at the mediation. This limit would certainly extend to a verbal offer and a verbal acceptance—the very underpinning of an oral settlement contract.

In addition, although the *Hur* court was technically correct in its statement that voluntary agreements reached at mediation "are enforceable by suit upon the contract," the application of this principle to the facts in *Hur*

89. *Id.* at 232-33.
90. *Id.* at 233-34.
91. *Id.* at 234. Section 154.053(c) provides: "Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court." Texas ADR Act, supra note 1, § 154.053(c).
92. *Hur*, 893 S.W.2d at 234 (citations omitted).
93. Even on this point, the court's analysis is questionable. Section 154.053 carries with it the heading, Standards and Duties of Impartial Third Parties. Texas ADR Act, supra note 1, § 154.053. The court's statement that the section "speaks only" to such standards and duties is misleading. *Hur*, 893 S.W.2d at 234. The Code Construction Act plainly states that "[t]he heading of a ... [code] section does not limit or expand the meaning of a statute." TEX. GOV'T CODE ANN. § 311.024 (Vernon 1998).
94. Texas ADR Act, supra note 1, § 154.073.
95. RAU, SHERMAN & SHANNON, supra note 11, at 34.
96. See discussion supra Parts II, III.
lacks support in the law. Section 154.071(a) of the Texas ADR Act provides: "If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract." Thus, the Texas ADR Act, by its own terms, creates an exception to confidentiality when the parties execute a written settlement agreement at the mediation session and one of the parties later brings a contract enforcement action on the agreement. The problem in Hur, however, was that there was no written settlement agreement. The statutory exception described in section 154.071(a) simply was not applicable. Moreover, sound policy reasons support limiting the confidentiality exception to written agreements. If courts were to follow Hur and regularly allow testimony about oral agreements reached at mediation, it is not difficult to envision the problem of repeated claims of verbal agreements or partial agreements having been reached. This would likely lead to frequent forays into detailed questioning of the parties and the mediator about what was or was not stated at the proceeding—all at the expense of confidentiality.

Future courts should not follow this aspect of Hur.

97. Hur, 893 S.W.2d at 234.
98. Texas ADR Act, supra note 1, § 154.071(a) (emphasis added).
99. The written memorandum of agreement would otherwise be a "communication" that is protected from later disclosure by section 154.073(a). Moreover, section 154.071(b) underscores the legislature's likely intent that a written agreement reached at mediation is not confidential in that it allows the court to "in its discretion . . . incorporate the terms of the agreement in the court's final decree disposing of the case." Id. § 154.071(b).
100. See Hur, 893 S.W.2d at 232.
101. Cf Sherman, supra note 5, at 554 (discussing whether there should be an exception to confidentiality to explain an unclear term in a written settlement agreement, Dean Sherman observed that the "specter of parties testifying as to what another party said in the ADR proceeding, and of third-party neutrals being called to testify as to their recollections, pose all of the concerns that lead to a confidentiality rule in the first place."). Louisiana has created a statutory exception to confidentiality relating to unclear or vague written settlement agreements "if the court determines that testimony concerning what occurred in the mediation proceeding is necessary to prevent fraud of manifest injustice." LA. REV. STAT. ANN. §9:4112 (B)(1)(c) (West Supp. 2000); see also Lyons v. Booker, 982 P.2d 1142, 1144 (Utah Ct. App. 1999) (admonishing attorney for violating confidentiality where the parties failed to execute a signed settlement agreement at mediation, a partial payment of the purported settlement was then made, a disagreement arose about the scope of the settlement, and counsel made numerous disclosures about statements made in mediation as part of a motion to enforce the alleged settlement agreement).
102. In addition, subsequent to the decision in Hur, the legislature in 1999 added subsection 154.073(d) to the Texas ADR Act to provide that a "final written agreement to which a governmental body . . . is a signatory that is reached as a result of . . . [ADR] is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code [the Texas Open Records Act]." Texas ADR Act, supra note 1, § 154.073(d). This enactment codified an earlier opinion of the Texas Attorney General that the Open Records Act controls the release of a final settlement agreement executed in a mediation in which a governmental body is one of the parties. Tex. Att'y Gen. ORD-658 (1998). The enactment also underscores the premise that the exception to confidentiality for agreements relates only to written agreements—the provision makes no mention of oral agreements. See Texas ADR Act, supra note 1, § 154.073(d).
Another disturbing aspect of *Hur* relates to the court’s allowance of the plaintiffs to proceed on their implied authority of an agent theory. Although it certainly was improper for the city representative in *Hur* to represent at the mediation that he had settlement authority when in fact he had none, the *Hur* court makes no mention of the applicability of the Texas ADR Act’s confidentiality provisions to the plaintiff’s allegations. Clearly, the only way that the plaintiffs could plead and prove any representations made by the city’s agent at the mediation would be to disclose communications from the mediation. Indeed, absent breaches of the Texas ADR Act’s confidentiality provisions, how else would the court have known that the city had made a settlement offer of $129,000, or that the city’s representative purportedly claimed he had authority to settle for the city at that amount? The court made absolutely no mention of the confidentiality statutes with regard to these improper disclosures.

Thus, how should a case like *Hur* be addressed in the future? If facts such as those described in *Hypothetical 4* were to arise, then confidentiality implications certainly exist. For the reasons just described, the plaintiffs should not be able to proceed on a breach of oral contract theory. The legislature has clearly intended to limit such enforcement actions to written mediation agreements. Obviously, this should underscore the need for counsel at mediations to reduce any settlement to writing. Otherwise, the Texas ADR Act would appear—notwithstanding *Hur*—to preclude later forays into what was said (or not said) at the mediation session in attempting to plead and prove a verbal agreement.

In addition, a court addressing facts like those in *Hypothetical 4* should also disallow the attempt to open up the discussions from the mediation proceeding by closing the door to any breach of implied warranty of authority of an agent claim. The legislature clearly intended broad, sweeping coverage for the Texas ADR Act’s confidentiality umbrella. As described in the discussion of *Hypothetical 2* above, however, it is possible that a court might be willing to entertain some type of estoppel or waiver argument by the plaintiffs in *Hypothetical 4* as to the implied warranty of authority claim. It would seem unfair to allow a representative of a public entity to make false representations about her authority at the mediation, only to then wrap herself in the mantle of confidentiality when her approach is challenged at a later trial. Given the dangers of false accusations of misrepresentations or the possibility of opening the door to aspects of the mediation unrelated to the

103. *Hur*, 893 S.W.2d at 232-34.
104. See id.
105. See id.
106. Raul Sherman & Shannon, supra note 11, at 37-38.
107. Id. at 46.
108. See supra pp. 84-86.
narrower issue of the agent’s authority, however, the court should, at the very
least, conduct an initial hearing in camera as authorized by section 154.073(e)
of the Texas ADR Act. Moreover, before a court attempts to engraft any
such judicial exception to the Act’s confidentiality provisions, the in camera
hearing should reveal proof of an egregious miscarriage of justice.

IV. TANGENTIAL CRIMINAL PROCEEDINGS

A. Investigations and Prosecutions

Hypothetical 5: A mediation is conducted at a Texas DRC through a
program that receives federal funds. The United States (U.S.) Attorney
suspects that one of the parties involved in the mediation might have
committed one or more crimes relating to the federal program. The U.S.
Attorney subpoenas the mediator to testify before a federal grand jury. Are
the confidentiality provisions of the Texas ADR Act relevant?

Hypothetical 5 reflects a scenario that is similar to one the Fifth Circuit
addressed in In re Grand Jury Subpoena Dated December 17, 1996. In
re Grand Jury Subpoena, the Fifth Circuit refused to quash a subpoena issued
to the Texas Agricultural Mediation Program (TAM) that required disclosure
to a grand jury of all files relating to program mediations. The court refused
to quash the subpoena for records despite enabling legislation for the program
requiring all such state programs to make program mediations confidential.
In extremely conclusory fashion, the court refused to apply the confidentiality
provisions of the Texas ADR Act despite the federal agency’s having certified
Texas Tech University as the operator of TAM based on TAM’s
representation that the program would be operated under the Texas ADR
Act’s confidentiality sections. Indeed, the “court ignored the fact that the
parties had agreed in writing that the mediation communications would be
confidential and that the mediations would be governed by the Texas ADR
Statute.” The court simply brushed aside any application of the Texas ADR
Act by taking the view that nothing in the enabling legislation “suggests that

109. Texas ADR Act, supra note 1, § 154.073(e).
110. 148 F.3d 487 (5th Cir. 1998), cert. denied sub nom. Moczygemba v. U.S., 526 U.S. 1040
(1999).
111. In re Grand Jury Subpoena, 148 F.3d at 489. TAM is a program that was then operated by
Plains Dispute Resolution Center now operates the current incarnation of TAM for the State of Texas.
112. 7 U.S.C. § 5101(c)(3)(D); In re Grand Jury Subpoena, 148 F.3d at 491-93.
113. In re Grand Jury Subpoena, 148 F.3d at 491-93.
114. Gary Condra, Chair’s Corner, ALTERNATIVE RESOLUTIONS, Nov. 1999, at 1 [hereinafter
Condra]. Mr. Condra is a former chair of the State Bar of Texas Alternative Dispute Resolution Section
and was the director of TAM at the time of the dispute in In re Grand Jury Subpoena.
the meaning of ‘confidential’ is [to be] determined by resort to other sources.\textsuperscript{115}

In addition to dismissing the application of the Texas ADR Act’s confidentiality provisions, the court also rejected application of the confidentiality sections of the federal Administrative Dispute Resolution Act (ADRA).\textsuperscript{116} That statute provides confidentiality protections to mediations in which federal agencies are involved.\textsuperscript{117} Despite direct participation in the relevant mediations by officials from the United States Department of Agriculture’s Farm Service Agency, the court inexplicably concluded that the ADRA did not apply.\textsuperscript{118} Finally, after excising any application of the Texas ADR Act or the ADRA, the court concluded that the enabling statute’s requirement of “mere” confidentiality did not equate to any type of privilege.\textsuperscript{119} Because of the court’s decision “the mediation files and confidential communications from over 600 mediations were turned over to (1) the inspector general for the federal agency, (2) the U.S. Attorney, and (3) a federal grand jury.”\textsuperscript{120}

Not surprisingly, the Fifth Circuit decision in \textit{In re Grand Jury Subpoena} has been heavily criticized.\textsuperscript{121} For the court simply to discard both the relevant state confidentiality law that was intentionally incorporated into the program along with the clear mandates of the ADRA is shocking, particularly when there was no intent to do so reflected in the program’s enabling legislation.\textsuperscript{122} Nonetheless, absent a Congressional override or contrary determinations in other circuits, the decision opens the door to required disclosures in cases like \textit{Hypothetical 5}.\textsuperscript{123} Even though \textit{In re Grand Jury

\begin{footnotesize}
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\item \textsuperscript{115} \textit{In re Grand Jury Subpoena}, 148 F.3d at 492.
\item \textsuperscript{116} 5 U.S.C. §§ 571-81. The ADRA is not to be confused with the Alternative Dispute Resolution Act of 1998, which is another more recent Congressional enactment that is also sometimes abbreviated as “ADRA.” 28 U.S.C. §§ 651-58. The Alternative Dispute Resolution Act of 1998 requires, \textit{inter alia}, that every federal district court implement an ADR program. \textit{Id.} § 651. For an excellent discussion of this latter enactment, see \textit{Litt}, supra note 11.
\item \textsuperscript{117} The confidentiality provisions are set forth in § 574. 5 U.S.C. § 574.
\item \textsuperscript{118} \textit{In re Grand Jury Subpoena}, 148 F.3d at 491-93.
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Condra}, supra note 114, at 1.
\item \textsuperscript{121} \textit{See Charles Pou, Jr., Gandhi Meets Elliot Ness: 5th Circuit Ruling Raises Concerns About Confidentiality in Federal Agency ADR, Disp. Resol. Mag., Winter 1998, at 9-11 (criticizing strongly the court’s conclusory determination about the ADRA’s applicability); RAU, SHERMAN & SHANNON, supra note 11, at 65 (stating that it is “inexplicable that the Fifth Circuit did not apply the Texas ADR Act’s confidentiality provisions”); \textit{Condra}, supra note 109, at 1 (criticizing throughout); \textit{Litt}, supra note 12, at 1033-34 (questioning court’s “readiness to disregard mediation confidentiality if the court prefers disclosure”). But see Joshua J. Engelbart, Note, \textit{Federal Mediation Privilege: Should Mediation Communications Be Protected from Subsequent Civil & Criminal Proceedings? In re Grand Jury Subpoena Dated December 17, 1996, 1999 J. Disp. Resol. 73 (1999) (praising decision).}
\item \textsuperscript{122} \textit{See 7 U.S.C.} § 5101.
\item \textsuperscript{123} A pending bill would trump \textit{In re Grand Jury Subpoena} by specifically incorporating the ADRA by reference in the program’s enabling statute. \textit{See S. 2741, 106th Cong.} § 1 (2000) (requiring state agricultural loan mediation programs “to implement procedures to ensure . . . confidentiality” in
\end{itemize}
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Subpoena only addressed mediation records, the analysis would also appear to apply to the subpoena of the mediator as posed in Hypothetical 5. Accordingly, mediators and participants should be well aware that there are surprising new limits on the extent and reach of mediation confidentiality. 124

Enactment of the August 2000 Draft UMA would likely have no impact on the scenario in Hypothetical 5. The draft UMA only extends evidentiary exclusions and privileges to certain disclosures in later civil proceedings "or in criminal misdemeanor proceeding[s]." 125 Unless the federal grand jury investigation described in Hypothetical 5 related solely to misdemeanors—a very unlikely event—then the Draft UMA would offer no confidentiality protections. Of course, in In re Grand Jury Subpoena, the Fifth Circuit disregarded existing state law, despite its apparent applicability. 126

Hypothetical 6: The South Plains DRC conducts a mediation of a divorce case. Later, the U.S. Attorney suspects that the husband might have committed tax fraud. The U.S. Attorney, believing that the husband likely made financial disclosures during the mediation, subpoenas the mediator to testify before a federal grand jury. Are the confidentiality provisions of the Texas ADR Act relevant?

Obviously, Hypothetical 6 is quite comparable to the scenario described in Hypothetical 5. In contrast to the situation in Hypothetical 5, however, there is no question that, given the application of state law to a divorce action, the Texas ADR Act was applicable to the mediation of the divorce proceeding in Hypothetical 6. For the reasons described below in the context of Hypothetical 7, a state prosecutor would be unable to subpoena the mediator if state crimes were being investigated, given section 154.073(a)'s application of mediation confidentiality to criminal matters. 127 Hypothetical 6, however, poses the issue of whether a federal court would be obliged to apply the Texas ADR Act's confidentiality sections to a federal grand jury proceeding. The answer to that question is uncertain.

124. See Condra, supra note 114, at 1.
126. See sources cited supra note 123.
127. Id. § 154.073(a). Section 154.053(c) also generally forbids later disclosures by the mediator in any forum. Id. § 154.053(c). For the discussion of Hypothetical 7 see infra notes 141-57 and accompanying text.
Rule 501 of the Federal Rules of Evidence supplies the standard for determining the applicability of state evidentiary privileges in federal court. Rule 501 provides:

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

Thus, Rule 501 only has a specific exception for application of state law privileges in civil matters in which an element of a claim or defense is grounded in state law. In the context of a criminal matter, the Fifth Circuit indicated in In re Grand Jury Subpoena that if "a party seeks to assert a privilege that does not exist at common law but is enacted by a state legislature, this court determines whether to recognize the privilege by ‘balancing the policies behind the privilege against the policies favoring disclosure.'" The court, however, declined to reach the question of whether it should recognize the Texas ADR Act’s confidentiality provisions because of its view that the challengers to the federal grand jury subpoena did "not argue that the Texas ADR statute in and of itself creates an evidentiary privilege that should be recognized in federal court." Given the court’s holding that the mediation documents were fair game for a federal grand jury investigation, however, it is questionable whether the court would be inclined to extend a state statutory privilege to a scenario such as Hypothetical 6.

128. FED. R. EVID. 501.
129. Id.
130. See, e.g., Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1125 (N.D. Cal. 1999) (applying California law in a case involving a challenge to an agreement reached in mediation on grounds of undue influence and lack of capacity because "state substantive law is the source of the rule of decision on the claim to which the proffered evidence from the mediation is relevant"). But cf. Smith v. Smith, 154 F.R.D. 661, 670-71 (N.D. Tex. 1994) (opining that federal law of privilege applies when the federal court’s jurisdiction is based on a federal question, even if a contrary state law of privilege applies to a pendent state law claim; the court, nonetheless, declined to determine whether there was a federal mediation privilege, and—based on notions of comity and the expectations of the parties—applied the confidentiality provisions of the Texas ADR Act).
132. Id. This is a rather startling statement given "that the parties [which included a federal agency] had agreed in writing that the mediation communications would be confidential and that the mediations would be governed by the Texas ADR Statute." Contra, supra note 114, at 1.
133. For a detailed discussion of the prospect of a federal court applying a mediation privilege under Federal Rule 501, see Charles W. Ehrhardt, Confidentiality, Privilege and Rule 408: The Protection
The closest case on point to the scenario depicted in *Hypothetical 6* is *In re March, 1994—Special Grand Jury*. In that case, the United States subpoenaed a mediator to testify before a grand jury that was investigating alleged false claims made in certain personal injury, "slip and fall" cases, "one of which was the subject of the mediation session conducted by" the mediator. The mediator moved to have the subpoena quashed under Indiana mediation confidentiality rules, but the court denied the motion. As one basis of its holding, the court noted that the Indiana ADR rules "by their own terms do not apply to either federal or criminal proceedings." This aspect of the decision is inapposite to *Hypothetical 6* because the Texas ADR Act does apply to subsequent criminal proceedings. The court in *In re March, 1994—Special Grand Jury*, however, also held that the state law mediation privilege should not be applicable in the federal criminal matter because the United States was not interested in information relating to settlement discussions at the mediation, but whether the plaintiffs were providing false information. Thus, a similar analysis by a federal court sitting in Texas could result in the mediator having to testify in *Hypothetical 6* because the tax fraud investigation is arguably unrelated to the attempts to settle the divorce issues. Accordingly, parties to a Texas state court mediation should not be entirely confident that the Texas ADR statute will offer full confidentiality.

*Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 110-26 (1999). See also Vance & Thensted, supra note 11, at 101 (commenting that *In re Grand Jury Subpoena* makes the existence of a federal mediation privilege "an open question" in the Fifth Circuit, but that "the adoption of a qualified Rule 501 mediation privilege with an exception for criminal proceedings would be entirely consistent with the court’s opinion") (emphasis added). The Honorable Sarah S. Vance is a federal district judge for the Eastern District of Louisiana.

135. Id. at 1171.
136. Id. at 1171-72.
137. Id. at 1172.
138. See Texas ADR Act, supra note 1, § 154.073(a).
140. For the reasons described in the context of *Hypothetical 5*, assuming that the grand jury is investigating felonies, there would be no debate or issue as to whether the August 2000 Draft UMA would apply to the scenario depicted in *Hypothetical 6*. The August 2000 Draft UMA simply does not offer protections outside of later civil proceedings or criminal misdemeanor actions. It should be noted, however, that as part of the report accompanying the August 2000 Draft UMA, the drafters included several proposals for addition that the Drafting Committees had yet to consider. One of those proposals would extend a party’s privilege to refuse to make disclosures from a mediation in "juvenile or adult felony proceedings, but only if the mediation is conducted by a program the state has designated as one deserving special protection." August 2000 Draft UMA, supra note 10, at 10 (providing commentary of Drafting Committees relating to proposed additions to section 6). The apparent intent of such a section would be to extend a privilege only to certain types of state-sanctioned victim-offender programs. The reach of this proposed addition is obviously narrow and would not reach the scenarios depicted in *Hypotheticals 5 or 6*. 
Hypothetical 7: After learning that her boyfriend Alan had been dating another woman, Sue vandalized Alan's car by scratching it in a variety of places with a rusty nail. Rather than filing charges, the local district attorney's office referred the ensuing misdemeanor vandalism case to a Texas DRC for victim-offender mediation. Alan and Sue reached a settlement at mediation, and the district attorney's office took no further action. Two months later, the police arrested Sue in connection with a comparable crime involving another victim, Ginger. The district attorney's office has subpoenaed both Alan and the mediator to testify before the state grand jury regarding the prior offense. Is the subpoena proper?

Hypothetical 7 is somewhat comparable to the situation in Williams v. State. In Williams, the appellant challenged his theft conviction by asserting an insufficiency of evidence. Apparently, prior to his arrest, the appellant and the victim participated in some form of alternative dispute resolution procedure, presumably victim-offender mediation. The state contended that the court should consider statements from the ADR procedure as part of the evidence upon which the conviction could be upheld on appeal, but the court disagreed. Instead, the court relied on section 154.073 of the Texas ADR Act in declaring that "disclosures made in an ADR procedure are confidential, and not subject to disclosure.

Although the Williams court offered little analysis or discussion on this point, the portion of the opinion relating to confidentiality of the statements made in the earlier ADR proceeding is significant in that there was no indication that the earlier victim-offender ADR procedure had been conducted pursuant to any court referral. Although the Texas ADR Act is included in the Texas Civil Practice and Remedies Code and the bulk of the statute relates to court-referred ADR procedures, section 154.073(a) clearly reaches and makes confidential "communication[s] relating to the subject matter of any civil or criminal dispute ... whether before or after the institution of formal judicial proceedings." As embraced by the court in Williams, this language reflects the legislature's intent that confidentiality provisions apply to ADR procedures other than just those referred by court order. Indeed,

[This language insures that confidentiality also applies to ADR procedures that are not held pursuant to court referral; in fact, confidentiality applies even if no suit is pending. This provision was intended to apply to

141. 770 S.W.2d 948 (Tex. App.—Houston [1st Dist.] 1989, no pet.).
142. Id. at 949.
143. See id. The court sketchily described the process as "the dispute resolution procedure that appellant and complainant participated in prior to his arrest." Id.
144. Id.
145. Id. (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 1997 & Supp 2000)).
146. Id.
147. Texas ADR Act, supra note 1, § 154.073(a) (emphasis added).
mediations conducted by dispute resolution centers, churches, and community organizations where suit had not been filed, which were the predominant form of ADR in the state when the [Texas ADR] Act was passed in 1987.148

Thus, the mediation described in Hypothetical 7 is clearly governed by the confidentiality provisions of the Texas ADR Act.149 As covered by section 154.073(a), Sue and Alan were “participants” in an alternative dispute resolution procedure—mediation—and no doubt engaged in “communications” that related to the “subject matter” of a “criminal dispute.”150 Given the holding in Williams and the legislature’s intent that the confidentiality provisions apply to all such ADR procedures, the discussions at the mediation should be strictly off-limits at this later judicial proceeding—the grand jury investigation.151 Thus, neither Alan nor the mediator should be compelled, or allowed, to testify about the prior mediation.152 There is no overlay here of possibly conflicting federal law, so the Texas ADR Act’s confidentiality rules should be recognized and enforced.

Unlike many of the situations described in the previous hypotheticals, the outcome of Hypothetical 7 under the Texas ADR Act might well be the same should the August 2000 Draft UMA ever become law. The parties and mediator may assert the privileges from disclosure set forth in the proposed UMA in “a criminal misdemeanor proceeding.”153 Thus, if the ensuing dispute being investigated between Sue and Ginger relates solely to one or more misdemeanors, then the UMA privileges appear to be available.154 This, of course, will depend on whether a grand jury investigation would fall under the definition of “a criminal misdemeanor proceeding.”155 In addition, the district attorney could merely assert that possible felonies are being investigated, and the UMA’s limited protections would suddenly become unavailable.156 Thus, although it is theoretically possible that the August 2000 Draft UMA will

148. RAU, SHERMAN & SHANNON, supra note 11, at 48.
149. Texas ADR Act, supra note 1, § 154.073(a).
150. Id.
151. See Williams, 770 S.W.2d at 949; RAU, SHERMAN & SHANNON, supra note 11, at 47.
152. See id. Indeed, given other statutory duties set forth in the Texas ADR Act, the mediator would be barred from giving any testimony about the mediation to the grand jury. See id. § 154.053(b), (c) (explaining that an “impartial third party . . . shall at all times maintain confidentiality” and “all matters” at the process “may never be disclosed to anyone”). In contrast, Alan could testify about other matters involving his dealings with Sue that existed independently from the mediation. See id. § 154.073(c) (“[O]ral communication . . . made a part of an alternative dispute resolution procedure is admissible . . . if it is admissible . . . independent of the procedure.”).
154. See id.
155. Id.
156. See id.
B. Establishing a Defense

**Hypothetical 8:** During the course of a mediation of a neighborhood dispute at a Texas DRC, Party "A" (Alan) verbally threatened Party "B" (Bob) with physical harm. The mediation quickly reached an impasse and was discontinued. Later that day, Alan approached Bob in Bob's front yard. When Alan reached into his coat pocket, Bob pulled out a pocketknife and fatally stabbed Alan. Bob's attorney is now seeking to have the mediator testify at the criminal trial in an attempt to support her client Bob's claim that he acted in self-defense and in fear for his life. What result?

This situation is loosely based on *Florida v. Castellano.* In *Castellano,* the defendant was on trial for attempted murder. Prior to the events leading to the charged crime, the accused and his alleged victim had participated in a mediation. After the state brought criminal charges, the defendant sought to depose the mediator by urging that the mediator would "be able to testify that during the course of mediation[,] the person who became the victim of the alleged attempted murder made life-threatening statements" to the defendant. The state sought to quash the subpoena by urging that the mediation was intended as means of settling disputes, and was not covered by the Texas ADR Act. See *id.* at n.3 (observing that pre-trial victim-offender mediation is not the same as the post-conviction victim-offender mediation that was the subject of the opinion). Moreover, mediators have been critical of this opinion "as lacking an understanding of the mediation process." 

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157. A proposed addition to the August 2000 Draft UMA would extend a privilege to a party to refuse to make disclosures from a mediation in "juvenile or adult felony proceedings, but only if the mediation is conducted by a program the state has designated as one deserving special protection." See August 2000 Draft UMA, supra note 10, at 10 (providing commentary of Drafting Committees relating to proposed additions to section 6). The apparent intent of this proposal would be to extend a privilege in certain types of state-sanctioned victim-offender programs. If ultimately included in the final UMA, this addition could extend a privilege to the scenario depicted in Hypothetical 7; however, the proposal is not a part of the August 2000 Draft UMA, and "the Drafting Committees have not yet acted on the proposed changes." *Id.* at 9 (commentary of Drafting Committees); see also Tex. Att'y Gen. ORD-659 (1999) (opining that a post-conviction victim-offender mediation was not a mediation subject to the Texas ADR Procedures Act). In this advisory opinion, the Texas Attorney General took the view that post-conviction mediations between victims and offenders were intended to allow "victims and offenders to therapeutically and emotionally cope with the aftermath of the commission of a crime rather than resolving any civil or criminal dispute," and accordingly, were not covered by the Texas ADR Act. *Id.* In reaching this conclusion, the state attorney general took the position that the Texas ADR Act applies to mediations that are intended as means of settling disputes. *Id.* Attorney General John Cornyn did not, however, address the application of the Texas ADR Act to victim-offender mediations that are conducted prior to any criminal trial or conviction. See *id.* at n.3 (observing that pre-trial victim-offender mediation is not the same as the post-conviction victim-offender mediation that was the subject of the opinion). Moreover, mediators have been critical of this opinion "as lacking an understanding of the mediation process." 

159. *Id.* at 481.
160. *Id.*
161. *Id.*
statements made to the mediator were privileged.\textsuperscript{162} At that time, Florida had no mediation confidentiality statute, and the court declined to extend any privilege to the situation involved.\textsuperscript{163} The mediator had to testify.\textsuperscript{164}

In contrast to the facts in \textit{Castellano}, the scenario set forth in \textit{Hypothetical 8} involves a mediation that took place in a Texas DRC. Accordingly, the criminal court must analyze the applicability of the Texas ADR Act. On its face, the act’s confidentiality provisions would appear to bar the mediator’s later testimony.\textsuperscript{165} Section 154.073(a) makes such communications—the alleged threat—“not subject to disclosure” and not admissible in evidence.\textsuperscript{166} Moreover, section 154.053(c) precludes the mediator from making later disclosures about “all matters, including the conduct and demeanor of the parties . . . during the settlement process.”\textsuperscript{167} Notwithstanding the apparent applicability of these statutory prohibitions on allowing the mediator to testify in Bob’s later criminal trial, broader constitutional issues are at stake with regard to Bob’s rights to confrontation and a fair trial.\textsuperscript{168} In \textit{Rinaker v. Superior Court}, a California court of appeals determined that in a post-mediation juvenile delinquency proceeding, a statute requiring mediation confidentiality “must yield when necessary to ensure the minors’ constitutional right to effective cross-examination and impeachment of an adverse witness.”\textsuperscript{169} The court, however, opined that prior to permitting the mediator to testify under oath regarding what was said at the mediation,

the juvenile court should have conducted an in camera hearing to weigh the public’s interest in maintaining the confidentiality of mediation against the minors’ constitutionally-based claim of need for the testimony, and to determine whether the minors have established that the mediator’s testimony is necessary to vindicate their right of confrontation. . . . [R]equiring an in camera hearing maintains the confidentiality of the mediation process while the juvenile court considers factors bearing upon whether the minors’ constitutional right of effective impeachment compels breach of the confidential mediation process.\textsuperscript{170}

The criminal court in \textit{Hypothetical 8} could take a comparable approach to that suggested by the \textit{Rinaker} court. Section 154.073(e) of the Texas ADR

\begin{itemize}
\item[162.] \textit{Id.}
\item[163.] \textit{Id.} at 481-82. The court also found that statements made by the mediator that all communications would be confidential were without legal authority. \textit{Id.}
\item[164.] \textit{Id.} at 482.
\item[165.] See Texas ADR Act, \textit{supra} note 1, §§ 154.053(c), 154.073(a).
\item[166.] \textit{Id.}
\item[167.] \textit{Id.} § 154.053(c).
\item[168.] The right to confront and cross-examine witnesses has "long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).
\item[169.] 74 Cal. Rptr. 2d 464, 466-67 (Ct. App. 1998).
\item[170.] \textit{Id.} at 467.
\end{itemize}
Act provides that if the confidentiality provisions conflict "with other legal requirements for disclosure . . . the issue of confidentiality may be presented to the court . . . to determine, in camera, whether the . . . communications . . . sought to be disclosed . . . are subject to disclosure."171 The court could then make an assessment, in camera, as to whether the constitutional concerns relating to Bob's self-defense theory outweigh the statutory confidentiality requirements, prior to the mediator's taking the stand to testify under oath.172

V. CONFIDENTIALITY OF SETTLEMENT AGREEMENTS

Hypothetical 9: Acme Corp. and Widget Co. are involved in a commercial dispute in state district court in Texas. At trial, Acme attempts to introduce a copy of a settlement agreement reached at a mediation of a similar, yet unrelated state court lawsuit of a different dispute involving the same two parties. Widget asserts that the agreement reached at the mediation of the prior lawsuit is confidential. What result?

Hypothetical 9 is somewhat comparable, albeit loosely, to the facts in Datapoint Corp. v. PictureTel Corp.173 In that case two individuals had previously sued Datapoint Corporation (Datapoint) in the Southern District of Texas in a case that settled at mediation.174 Meanwhile, Datapoint sued PictureTel Corporation (PictureTel) in the Northern District of Texas, and after the settlement of the prior case involving Datapoint, the two individuals who brought the first suit intervened in the second lawsuit.175 Thereafter, PictureTel filed a motion to compel production of the settlement agreement in the first lawsuit, as well as testimony regarding the terms of the agreement.176 Notwithstanding a local rule of the Southern District of Texas, which provides that "[a]ll communications made during ADR procedures are confidential and protected from disclosure and do not constitute a waiver of any existing privileges and immunities,"177 the court refused to provide protection to the settlement agreement.178 Somewhat inexplicably, the court took the view that even though the local rule made mediation communications

171. Texas ADR Act, supra note 1, § 154.073(a).
172. Interestingly, the result under the August 2000 Draft UMA in this situation would be much easier to assess. As discussed above, the UMA simply does not afford any privilege to mediation communications in later felony proceedings. See supra notes 163-71 and accompanying text. Obviously, Bob's later murder trial will be a felony prosecution. Thus, the mediator would have to testify. See August 2000 Draft UMA, supra note 10, §§ 5(a), 7 (extending privileges outside the civil realm only to a "criminal misdemeanor proceeding").
174. Id. at *1-2.
175. Id. at *1.
176. Id.
177. S.D. TEX. Loc. R. 20(b).
confidential, that did not mean that such information was "privileged." One commentator has suggested that presumably the court "made this distinction to show that, unlike a privilege, mere confidentiality and disclosure protections were not rights that the parties could exercise against the power of the court." Regardless of whether the court properly resolved the issue in Datapoint Corp., the necessary analysis for Hypothetical 9 is somewhat different. First, the earlier mediated settlement agreement between Acme and Widget involved a Texas state court lawsuit; thus, the Texas ADR Act is applicable. As a general matter, the settlement agreement reached at mediation should be confidential either as a protected "communication" covered by section 154.073(a), or as a "record made at an alternative dispute resolution procedure" under section 154.073(b). As described above, the Texas ADR Act creates an exception to confidentiality with respect to a written settlement agreement executed at mediation in the event of an enforcement action. Also, section 154.071(b) of the Texas ADR Act allows the presiding court "in its discretion . . . [to] incorporate the terms of the agreement [reached at mediation] in the court's final decree disposing of the case." Therefore, if the court has done so, the terms of the settlement may become part of the public record. If, however, there is no enforcement action pending and the court has opted not to include any of the terms of the settlement in the final disposition of the case, then the exception for settlement agreements reached at mediation is inapplicable. The earlier agreement between Acme and Widget should remain confidential unless its terms were made part of the final decree disposing of the earlier lawsuit.

179. Id.
180. Litt, supra note 11, at 1033 (observing that "while this analysis may be correct, it provides little comfort to parties who thought their mediation was confidential"). In addition, not all courts make such distinctions between mediation confidentiality and mediation privilege. For example, in Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1120 n.15 (N.D. Cal. 1999), the court commented that it would be "little more than a semantic slight of hand" for a court to negate a state mediation confidentiality mandate simply because the word "privilege" did not appear as part of the provision.
181. Texas ADR Act, supra note 1, § 154.073(a), (b).
182. Id. § 154.071(a); see supra notes 99-102 and accompanying text.
183. Texas ADR Act, supra note 1, § 154.071(b).
184. Given the 1999 amendments to section 154.073, there is now also an exception with regard to mediated settlement agreements when one of the parties is a governmental entity. Id. § 154.073(d). The policy underlying the Open Records Act may compel release of the final agreement. See id. § 154.073(d) (making the disclosure of such agreements subject to the Open Records Act). Of course, there is no governmental body involved in Hypothetical 9.
185. As an aside, if the earlier settlement agreement was not filed of record and concerned matters of potential adverse effects on the public health, the court may have needed to conduct a hearing on the sealing of court records pursuant to Tex. R. Civ. P. 76a. There is clearly some tension between the "open records" aspects of Rule 76a and the confidentiality provisions of the Texas ADR Act. See RALI, SHERMAN & SHANNON, supra note 11, at 661-65.
A different result would follow from application of the August 2000 Draft UMA. The Draft's proposal provides that there is no privilege or prohibition against any later disclosure "for a record of an agreement between two or more parties."\(^{186}\) Thus, the written settlement agreement from the first Acme-Widget mediation would be admissible at the trial of the second lawsuit if the UMA were enacted as presently drafted.

VI. DISCLOSURES RELATING TO ALLEGED BAD FAITH IN MEDIATION

**Hypothetical 10:** During the course of a state court mediation of a personal injury case involving claims in excess of $120,000 (including medical bills and lost wages in excess of $50,000), the plaintiff's lawyer is outraged that the defendant's insurance adjuster refuses to offer more than $250. The mediator tells the adjuster that if better offers are not forthcoming, the mediator will report to the court that the defendant has acted in bad faith. The mediation quickly reaches an impasse. The next week, both the mediator and the plaintiff's lawyer complain to the trial judge in chambers about the defendant's alleged bad faith at the mediation. Is there a confidentiality problem? Are their contacts with the judge appropriate?

The situation described in Hypothetical 10, which is based on a scenario that a party in an actual mediation relayed to the Author, is quite troubling. Both the mediator and the plaintiff's attorney have violated the confidentiality provisions of the Texas ADR Act.\(^{187}\) Absent an agreement by both parties, the mediator may not disclose any matter from the mediation "to anyone, including the appointing court."\(^{188}\) Also, the amount of any settlement offer(s) would certainly constitute "communications" made at the ADR proceeding.\(^{189}\) Thus, section 154.073 would bar both the mediator and the plaintiff's attorney from disclosure, even to the court.\(^{190}\) As Dean Sherman has observed:

A court is certainly entitled to know whether the parties and their attorneys appeared, as ordered, for the ADR proceeding. However, this can normally be accomplished without resort to what was communicated in the ADR proceeding since a report from the parties or the third party as to attendance or non-attendance would go to what occurred before, and not during, the ADR proceeding.\(^{191}\)

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\(^{186}\) August 2000 Draft UMA, supra note 10, § 9(a)(1).

\(^{187}\) See Texas ADR Act, supra note 1, §§ 154.053(c), 073(a).

\(^{188}\) Id. § 154.053(c).

\(^{189}\) Id. § 154.073(a).

\(^{190}\) Id.

\(^{191}\) Sherman, supra note 5, at 552. Dean Sherman also suggests that a court could seek other information regarding what occurred at the proceeding—at least as it relates to the court's order—such as whether the parties exchanged position papers or came with settlement authority. Id. at 552-53.
Of course, the disclosures in Hypothetical 10 go far beyond whether the parties showed up at the mediation session. Instead, the information that the mediator and plaintiff’s attorney relayed to the judge relate to whether the defendant’s insurer was acting in good faith. One can well imagine the frustration of both the plaintiff’s counsel and the mediator in this situation; they are probably reasonable in their belief that the defendant’s insurer is not participating in good faith. As a general matter, however, Texas courts have forbidden the disclosure of mediation communications with regard to whether a party participated in good faith.\footnote{192} In \textit{Decker v. Lindsay}, although upholding the power of a court to order parties to engage in mediation, the court held that a trial court has no power to order the parties to settle or to negotiate in good faith.\footnote{193} The \textit{Decker} court determined that such an order would violate the “open courts” provision of the Texas Constitution, thereby depriving the parties of their right to a trial by jury.\footnote{194} Separate and apart from the constitutionality concerns, Dean Sherman has observed that “[t]he confidentiality problems that would be raised by an attempt to prove lack of good faith compliance is a good reason for a court not to impose such a requirement.”\footnote{195}

In contrast to \textit{Decker} and its progeny, one court of appeals has upheld the award of costs, including attorney’s fees and mediator’s fees, for a party’s failure to mediate in good faith. In \textit{Texas Department of Transportation v. Pirtle}, a motorist brought suit against a state agency for injuries sustained in a one-car accident—a suit in which the agency ultimately prevailed before a jury.\footnote{196} Prior to trial, the court ordered the parties to mediate.\footnote{197} Although the defendant agency attended the mediation, the agency “pretty much told [the trial court] from the beginning they weren’t going to mediate because it’s the position of the Department of Transportation . . . not to settle disputed liability cases.”\footnote{198} The trial court assessed attorney’s fees and mediator’s fees against the defendant agency based on a finding that the department had failed to

\begin{itemize}
  \item \footnote{192} The ancillary issue of whether the law \textit{should} require some form of good faith participation in mediation is beyond the scope of this article. For two excellent discussions of this issue, see Kimberlee K. Kovach, \textit{Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic}, 38 S. TEx. L. REV. 575 (1997), and Edward F. Sherman, \textit{Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?}, 46 SMU L. REV. 2079 (1993).
  \item \footnote{193} 824 S.W.2d 247, 251 (Tex. App.—Houston [1st Dist.] 1992, no writ). \textit{Accord} Texas Parks \& Wildlife Dep’t \textit{v.} Davis, 988 S.W.2d 370, 375 (Tex. App.—Austin 1999, pet. filed) (explaining that while a “court may compel parties to participate in mediation, it cannot compel the parties to negotiate in good faith or settle their dispute”); Gleason \textit{v.} Lawson, 850 S.W.2d 714, 717-18 (Tex. App.—Corpus Christi 1993, no writ) (relying on \textit{Decker} in voiding sanctions imposed by trial court).
  \item \footnote{194} TEX. CONST. art. I, § 13; \textit{Decker}, 824 S.W.2d at 251.
  \item \footnote{195} Sherman, \textit{supra} note 5, at 552-53.
  \item \footnote{196} 977 S.W.2d 657, 658 (Tex. App.—Fort Worth 1998, pet denied).
  \item \footnote{197} \textit{Id}.
  \item \footnote{198} \textit{Id}.
\end{itemize}
mediate in good faith.199 In upholding the assessment of costs, the Pirtle court distinguished Decker by reasoning that "Decker addresses situations where a litigant does file a written objection within ten days, but the judge overrules the objection."200 In contrast, because the defendant agency in Pirtle had not filed an objection to the referral to mediation, yet did not attempt to mediate in good faith, the court upheld the sanctions.201

One troubling aspect of Pirtle is that the court did not address the "open courts" provision of the state constitution, which had been one of the linchpins of the Decker decision.202 Did the defendant state agency waive its constitutional rights by not objecting to the referral to mediation? Even more troubling is that the court in Pirtle made absolutely no mention of the confidentiality provisions of the Texas ADR Act. Just how did the trial court know what the defendant state agency did or did not do during the mediation, absent a breach of confidentiality? One must assume that either the plaintiff's counsel or the mediator gave the trial court a report on the agency's actions at the mediation. As described above, such disclosures would be in contravention of the Texas ADR Act's confidentiality provisions.203 Another court of appeals appears also to have been troubled by this aspect of Pirtle.

In Texas Parks & Wildlife Department v. Davis, a state park visitor sat on a bench that collapsed and injured him.204 After suit was brought, the court ordered the parties to mediation.205 Unlike in Pirtle, the defendant agency in Davis objected to the referral, although the objection was overruled.206 After the plaintiff prevailed in a jury trial, the trial court imposed sanctions against the agency for failing to negotiate in good faith at the court-ordered mediation.207 In reversing the imposition of sanctions for attorney's fees incurred by the plaintiff at the mediation, the court cited Decker for the proposition that a court "cannot compel the parties to negotiate in good faith or settle their dispute."208 The court also emphasized that given the confidentiality provisions of the Texas ADR Act, "the manner in which the participants negotiate should not be disclosed to the trial court."209 The court could have, and perhaps should have, stopped its analysis right there. Instead, the court went on to distinguish Pirtle on the grounds that the defendant

199. Id.
200. Id. The Texas ADR Act permits a party to file a written objection to the court's ADR referral within ten days after the party receives notice. Texas ADR Act, supra note 1, § 154.022(b).
201. Pirtle, 977 S.W.2d at 658.
203. See supra notes 190-94 and accompanying text.
204. 988 S.W.2d 370, 372 (Tex. App.—Austin 1999, pet. filed).
205. Id. at 375.
206. Id.
207. Id.
208. Id. The court upheld the imposition of a $250 assessment against the defendant for the mediation fee as an appropriate cost of court. Id. at 375-76.
209. Id. at 375.
agency in \textit{Davis} did object to the referral to mediation, and that the agency "attended the mediation and made an offer, so it cannot be said that it did not participate in the mediation."\textsuperscript{210} This is an unnecessary aspect of the court's analysis. How did the court know that the defendant "made an offer" at the mediation \textit{absent} an improper disclosure of confidential mediation communications? Although the \textit{Davis} court properly recognized that the confidentiality statutes bar disclosures to the trial court regarding "the manner in which the participants negotiate," the court then reversed field and discussed a matter that originated in the mediation.\textsuperscript{211}

So, how should this array of cases apply to the scenario in \textit{Hypothetical 10}? For the reasons described above, clearly the mediator and the plaintiff's counsel violated the confidentiality provisions of the Texas ADR Act.\textsuperscript{212} Their disclosures to the trial court were in direct contravention of the statute. Should it matter whether the defendant either did or did not file an objection to the referral to mediation? Because of its lack of analysis of the confidentiality statutes, \textit{Pirtle} is, at best, dubious authority. There appears to be no statutory authority within the Texas ADR Act to support the view that the confidentiality provisions are rendered a nullity when one party fails to object to engaging in ADR. As frustrating as it might seem in certain mediations, the law does not carve out an exception for reporting communications from the mediation regarding alleged bad faith.\textsuperscript{213} The \textit{Pirtle} decision appears to be out of step with other pertinent case law, and incompatible with the confidentiality statutes.\textsuperscript{214}

\section*{VII. CONCLUSION}

As evidenced by the discussion of the various hypothetical situations above, the Texas ADR Act does not, by its own terms, offer easy solutions to all the vexing confidentiality problems that are now arising through the rapid growth of mediation in this state. Indeed, the Act's confidentiality sections

\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} See supra notes 190-94 and accompanying text.
\textsuperscript{213} Despite its many shortcomings, as described throughout this article, the August 2000 Draft UMA actually attempts to create a clear line on the types of disclosures that a mediator can make to the appointing court; such a report must generally be limited to "whether the mediation occurred, a report of attendance at mediation sessions, whether the mediation has terminated, and whether settlement was reached." August 2000 Draft UMA, supra note 10, § 10(b).
\textsuperscript{214} An interesting scenario might arise if the same plaintiff's lawyer finds out that the same insurance adjuster will be involved in a subsequent mediation in a different case. The lawyer might consider filing an objection to the mediation and argue that the mediation would serve no useful purpose. However, the confidentiality statute would still bar the attorney from revealing the exact reason for such an objection (for example, the prior lack of effort to settle in the previous mediation). Nonetheless, even if the court overruled the objection, the ensuing referral hearing might create pressure on the defendant and the adjuster to commit publicly to engage in a meaningful manner in the upcoming mediation.
will no doubt be subject to future objections and interpretations. Nonetheless, the statute offers a solid wall of protection to the sanctity of the mediation process, and is vastly superior to the pending draft of the UMA. The Texas provisions remain a testament to the wisdom and foresight of the Act's original drafters and should provide a framework for continuing the successful use of mediation as a worthwhile tool to assist in the resolution of Texas disputes and lawsuits.