

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 88-11

**NEITHER COP NOR COLLECTION AGENT:
ENCOURAGING ADMINISTRATIVE
SETTLEMENTS BY ENSURING MEDIATOR
CONFIDENTIALITY**

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Settlements are Essential to Achieving Administrative Goals

The resolution of issues through negotiations among the affected parties has long been recognized as an essential ingredient of the administrative process. The influential Attorney General's *Manual on the Administrative Procedure Act* explained in 1947 that

[t]he settlement of cases and issues by informal methods is nothing new in Federal administrative procedure. In its Final Report, the Attorney General's Committee on Administrative Procedure pointed out ... that "even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process".¹

To that end, the Administrative Procedure Act itself specifically provides for the settlement of adjudicatory proceedings.²

EPA, for example, estimates that about 95% of its enforcement cases are settled through negotiations between the government and the alleged violator.³ Interestingly, this rate is remarkably close to the percentage of Federal cases that are resolved short of disposition by the courts.⁴ Thus, settlements continue to play a crucial role in resolving administrative adjudication. Indeed, without it, the process would bog down, and agencies would be severely hampered in achieving their goals. Moreover, the costs of processing cases would escalate substantially.

Settlements bring to bear firsthand, direct information on a problem and foster creative solutions that would be difficult to achieve without the concurrence of the parties. Moreover, an agreement reached through procedures ensuring adherence to existing law and policy result in decisions being made far faster and with far fewer resources than if the matter has to be resolved through formal litigation. These agreements are not only politically acceptable, they affirmatively help the agency and the affected parties accomplish their designs. Thus, for example, the Administrative Conference⁵ and the former director of Superfund enforcement have found that EPA must rely on more voluntary settlements if it is to achieve the requisite cleanup; without them, the trust fund, large as it is, will be prematurely depleted.⁶

1. United States Department of Justice, Attorney General's on the Administrative Procedure Act 48 (1947), reprinted in Administrative Conference of the United States, Federal Administrative Procedure Sourcebook 51, 97 (1985).
2. Section 5(b), codified as 5 U.S.C. § 554(c) provides:
The agency shall give all interested parties opportunity for --
(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision
3. Environmental Protection Agency, Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases, reprinted in ACUS, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution 737, 739 (1987).
4. See, e.g., Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983).
5. Recommendation 84-4, 1 CFR § 305.84-4.
6. Lucero, Son of Superfund: Can the Program Meet the Expectations, 5 Enviro. For. 5 (1988).

Structured Processes in Aid of Settlement

Congress intentionally left the agencies free to develop the precise manner by which they implement the opportunity for settlement.⁷ Thus, there is no one, accepted settlement process nor even guidelines within the APA or administrative law generally. Most settlements occur simply through ad hoc negotiations among the lawyers for the parties, generally on the eve of hearing. Although agencies have used a variety of procedures to help settle cases,⁸ until recently little attention was paid to specific processes that foster both more and better settlements.

Some commentators caution, however, that settlement must not become an end in itself, a means of managing the docket at the cost of subverting established law.⁹ Briefly stated, their concern is that care must be taken to ensure that public rights are not compromised simply to reach closure. Rather, decisions by courts -- and, by extension, agencies -- made in formal proceedings protect societal values and provide the norms that guide future conduct and by which future disputes will be resolved.¹⁰ This relationship between formal decisions and settlements means that when developing settlement policies, agencies must determine whether a potential settlement is within its statutory mandate and existing policies or whether the question is sufficiently unclear that an authoritative decision is needed to resolve the matter and provide guidance for resolving similar cases in the future.

EPA has been a leader among the agencies in establishing procedures to foster responsible settlements while maintaining an aggressive enforcement program. For example, the Agency announced that a "fundamental goal" of its Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) enforcement program "is to facilitate voluntary settlements,"¹¹ and it issued a general settlement policy designed to increase the participation of potentially responsible parties in response actions.¹² The approach met with favor: "Congress recognized the value of enhancing the settlement process"¹³ by enacting the Superfund Amendments and Reauthorization Act of 1986 (SARA). EPA recently noted that SARA

maintains the importance of a strong Superfund enforcement program. In particular, SARA emphasizes the importance of entering into negotiations and reaching settlements with potentially responsible parties (PRPs) to allow PRPs to conduct or finance response actions. SARA generally codified the Agency's Interim CERCLA Settlement Policy but also established some new authorities and

7. Attorney General's Manual, supra note 1 at 48.

8. For a survey of such techniques, see Harter, Points on a Continuum: Dispute Resolution and the Administrative Process, 1986 ACUS 165, 240.

9. Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668 (1986); Fiss, Against Settlement, 93 Yale L. J. 1073 (1984); Schoenbrod, Limits and Dangers of Environmental Mediation: A Review Essay, 58 N.Y.U. L. Rev. 1463 (1983).

10. The Attorney General's Manual, supra note 1, was of a similar view when it said,

Where an agency believes that the informal settlement of an alleged violation or certain classes of violations will not insure future compliance with law, it would be justified in concluding that such settlement by consent would not be in the public interest.
At 49-50.

11. EPA, Superfund Program: Interim Guidance on Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5298 (1988).

12. 50 Fed. Reg. 5034 (1985).

13. Memorandum from J. Winston Potter, Assistant Administrator Office of Solid Waste and Emergency Response and Thomas L. Adams, Assistant Administrator for Enforcement and Compliance Monitoring, Interim Guidance: Streamlining the CERCLA Settlement Decision Process (February 12, 1987) at 2.

procedures that were designed to facilitate settlements.¹⁴

Section 122 of SARA, like the APA, explicitly authorizes settlements. It provides that the agency

may enter into an agreement with any person ... to perform any response action ... if [it] determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the [agency], the [EPA] shall act to facilitate agreements under this section that are in the public interest ... in order to expedite effective remedial actions and minimize litigation.¹⁵

The statutory structure of SARA,¹⁶ and the informal processes that have grown up around the resolution of other issues, is to encourage direct negotiations among the parties.¹⁷ Other than creating a hospitable environment, however, neither SARA nor informal practice provide other means of enhancing the potential for reaching agreement once negotiations are undertaken. Yet, a vast literature has developed exploring the use of alternative means of dispute resolution, many of which are specifically designed to help the parties negotiate a mutually satisfactory agreement.¹⁸

The Administrative Conference of the United States has formally recommended that agencies use ADR techniques in a variety of contexts for resolving issues in controversy.¹⁹ It found that in appropriate circumstances these procedures "have yielded decisions that are faster, cheaper, more accurate or otherwise more acceptable, and less contentious"²⁰ than those reached by traditional processes. Thus, many of these techniques operate to enhance a period of negotiation, to stimulate the possibility of reaching agreement within the confines of the agency's authority and policy.

To tap this potential, the Administrator of EPA sent a memorandum to the Assistant Administrators and Regional Administrators to "encourage the use of alternative dispute resolution (ADR) [techniques] in EPA enforcement actions."²¹ He continued,

14. EPA, *supra* note 11.

15. 42 U.S.C. § 9622(a).

16. To the end of fostering agreements, SARA provides a "formal" period of negotiation as part of the settlement process. 42 U.S.C. § 9622(e)(2). If EPA determines that a period for negotiating settlements would expedite remedial action, it is to notify the parties and provide them with specified information. See Interim Guidance, *supra* note 11. To foster productive negotiations, the statute provides for a moratorium of 120 days on filing suits and on EPA's taking independent action once it has notified the parties that it wishes to negotiate. 42 U.S.C. § 9622 (e)(2). Under the statute, the parties have 60 days after receiving the notice to make an appropriate proposal. Thus, SARA provides a structural approach to encouraging settlement negotiations among the PRPs and EPA.

17. Although SARA provides explicit authority to EPA to settle Superfund cases, it should be emphasized that Congress largely codified EPA's existing practice and that no additional legislation was required to authorize the agency to resolve these issues through negotiation and settlement.

18. Administrative Conference of the United States, Bibliography: Dispute Resolution in the Federal Government (1988); Bingham, Resolving Environmental Disputes: A Decade of Experience (1986) (Bibliography); Goldberg, Green, and Sander, Dispute Resolution (1986); and Bureau of National Affairs, Dispute Resolution Report.

19. Agencies' Use of Alternative Means of Dispute Resolution, 1 CFR § 305.86-3; Alternatives for Resolving Government Contract Disputes, 1 CFR § 305.87-11; Procedures for Negotiating Proposed Regulations, 1 CFR §§ 305.82-4, 85-5; Negotiated Cleanup of Hazardous Waste Sites under CERCLA, 1 CFR § 305.84-4; Resolving Disputes under Federal Grant Programs, 1 CFR § 305.82-2.

20. Agencies' Use of Alternative Means of Dispute Resolution, 1 CFR § 305.86-3.

21. Memorandum of February 2, 1987, reprinted in ACUS, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution 809 (1987).

* * *

I want to encourage your support and active participation in the promotion of this concept.

ADR is the use of third-party neutrals to aid in the resolution of all or part of a dispute. Examples of ADR techniques include arbitration, mediation, mini-trials and fact-finding. In recent years these techniques have gained increasing support and use in resolving private commercial disputes. EPA is already applying ADR in various contexts: negotiated rulemaking, certain Superfund sites where a facilitator is aiding negotiations between EPA and the community, and RCRA siting.²²

EPA then issued a document entitled *Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases*.²³ It sets forth EPA's policy on the use of ADR, describes applicable types of ADR and the characteristics of cases for which its use might be appropriate, formulates case selection procedures, establishes qualifications for third party neutrals, and furnishes model case management procedures that use ADR techniques. The Guidance defines the role of a neutral third party in ADR procedures. The particular emphasis, however, is on ADR techniques in which the neutral third party aids the parties in resolving the issues in controversy through agreement, as opposed to the neutral's making a decision that is binding on the parties.

Briefly, these techniques are:²⁴ In mediation and facilitation, the neutral third party works with the parties in helping them negotiate a settlement; the process of mediation is described in more detail below.²⁵ In non-binding arbitration the parties present evidence and arguments to the neutral who makes a tentative decision concerning the resolution of issues. The parties may, and often do, accept the decision and abide by it. But, since the arbitrator's opinion is not binding on anyone, even if it is rejected it helps the parties resolve the issues through negotiation by providing a benchmark as to how the matter might be resolved if it were to go to hearing. In factfinding the neutral is asked to review a factual matter and, like non-binding arbitration, provide an opinion as to the issues specified. It customarily uses an investigative process that uses informal procedures. Like non-binding arbitration, its use in inducing settlements is to provide a framework for the negotiations. In a mini-trial the parties present summaries of their cases in the presence of representatives who have the authority to settle the matter. The neutral presides at the hearing. Following the presentations, the representatives of the parties seek to negotiate a resolution of the issues. The neutral may serve as a mediator to help those discussions or, if asked by the parties, render an informal opinion as to the outcome which will then be taken into account in subsequent negotiations.

22. Id.

23. EPA, *supra* note 3.

24. For a more elaborate description, see EPA, *supra* note 3 at 742-743 and Harter, *supra* note 8.

25. See page 5, *infra*.

The terms facilitation and mediation are often used interchangeably. In both the neutral assists the parties in negotiating an agreement. To the extent there is a difference, a facilitator tends to run meetings and generally provide the framework for negotiations, whereas a mediator tends to be more actively involved in working with the parties. Because the term "mediation" is so closely associated with labor relations and other situations in which there are only a few identified parties, in some instances concerning issues of public policy, those participating in the negotiations have preferred the term "facilitator" regardless of the degree of the neutral's involvement. Instead of relying on the terms to differentiate between distinct processes, the parties and the neutral need to define -- or evolve into -- the role the neutral will play in the negotiations. For these purposes the two terms can be viewed as synonymous.

The Role of the Mediator

Professor Lon Fuller, one of the early, astute observers of the dispute resolution process, succinctly described the role of a mediator in improving negotiations:

Where the bargaining process proceeds without the aid of a mediator the usual course pursued by experienced negotiators is something like this: the parties begin by simply talking about the various proposals, explaining in general terms why they want this and why they are opposed to that. During this exploratory or "sounding out" process, which proceeds without any clear-cut offers of settlement, each party conveys -- sometimes explicitly, sometimes tacitly, sometimes intentionally, sometimes inadvertently -- something about his relative evaluations of the various items under discussion. After these discussions have proceeded for some time, one party is likely to offer a "package deal," proposing in general terms a contract that will settle all the issues under discussion. This offer may be accepted by the other party or he may accept it subject to certain stipulated changes.

Now it is obvious that the process just described can often be greatly facilitated through the services of a skillful mediator. His assistance can speed the negotiations, reduce the likelihood of miscalculation, and generally help the parties to reach a sounder agreement, an adjustment of their divergent valuations that will produce something like an optimum yield of the gains of reciprocity. These things the mediator can accomplish by holding separate confidential meetings with the parties, where each party gives the mediator a relatively full and candid account of the internal posture of his own interests. Armed with this information, but without making a premature disclosure of its details, the mediator can then help to shape the negotiations in such a way that they will proceed most directly to their goal, with a minimum of waste and friction.²⁶

In the first instance, especially in complex matters involving public policy, a mediator²⁷ may help identify who should participate in the negotiations by making a concerted effort to determine who will be affected by the ultimate decision. Once the parties²⁸ are identified, the neutral may work to develop the framework for negotiations. For example, it may be appropriate to conduct negotiations among only the private parties,²⁹ between the group of private parties and the government,³⁰ or among all of the parties at once.

Proposing to negotiate with a putative adversary is frequently taken as a sign of

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26. Fuller, Mediation -- Its Forms and Functions, 44 S. Cal L. Rev. 305 (1971), reprinted in Goldberg, Green, and Sander, Dispute Resolution 104, 105-106 (1985).
 27. A neutral whose task is to identify the parties that would need to participate in the dispute resolution proceeding, assess the issues to determine whether some form of ADR would be appropriate, and contact the parties to secure their interest in participating is customarily called a "convenor". That person necessarily gets to know the parties and the issues, so he or she also usually, but not always, serves as the mediator if a mediated negotiation is undertaken. As a result, the person who puts together the negotiations is also commonly called the mediator. For these purposes, the important feature is the relationship of the parties to the neutral, regardless of name or function.
 28. In some mediations involving policy matters there may not be "parties" in the normal sense in that they are named in an adjudicatory proceeding. Rather, the term "party" in these negotiations means someone, or a representative of a group of people, who is interested in the outcome of the proceeding and who participates directly in the negotiations.
 29. For example, in a Superfund site, the mediator may work only with the PRPs in developing a potential remedial plan or allocating responsibility among the PRPs.
 30. The parties to a negotiation may be a group of private parties on the one hand and a government agency on the other. In a Superfund case, for example, the mediator may assist the negotiations between the PRPs as a unit and EPA.

weakness by some litigators and public officials.³¹ And it is certainly not uncommon to find at least some of the parties "grandstanding"³² about the rectitude of their cause while rattling sabres over their unquestionable victory before the tribunal. The parties themselves often find it difficult to initiate negotiations in this environment. A mediator can help establish the negotiations by talking with the parties one after another. In these individual meetings, the mediator explores the benefits of direct negotiations, the potential adverse consequences of not settling, the issues that might be discussed, at least preliminarily, in the negotiations, and some potential resolutions of those issues. Armed with this information, if negotiations look productive, the mediator can then propose that the parties attempt to bridge their differences through negotiations. In that way, no party has to take the first step, at least publicly; even though one party likely suggested initially that the mediator review the potential for negotiations, the others do not need to know just who took the leap. Thus, the mediator can make it "safe" for parties to begin the process and commitment to negotiation. That alone can be a major initiative in fostering settlement.

As part of this process, and continuing as part of the mediation itself, the mediator will explore with the individual parties what their real *needs* or *interests* are, not what their litigating position will be. Given the law and the facts, each party must make an assessment of what the potential outcome of a litigated decision might be and, given that, what their interests are.³³ As one observer noted, parties will often share things with the mediator that they are unwilling to discuss with each other.³⁴ The mediator can tease out what the parties would be willing to accept and alternative approaches that meet their needs.

With this information, the mediator can propose ideas or an outline of an approach that can provide a common framework for discussions among the parties. In a very real way, this structure can "make it safe" for the parties to talk directly and productively. During negotiations, the mediator serves as a proponent of the negotiation process, keeping the parties' attention on the task at hand and maintaining momentum, especially during the difficult times. He or she carries messages back and forth among the parties and can launch trial balloons. For example, someone may think an idea meets important needs but may be reluctant to raise it directly for fear that others may not embrace it and yet view it as something the other party will always be willing to accept.³⁵ To avoid being trapped, the party may want the mediator to try it out on the others but without attribution. If the notion does not meet with a favorable response, no one is bound by it, even informally; if it does work, then all the parties can perfect it and claim it as their own. In this way, the parties often feel more free to raise sensitive issues and creative ideas.

A mediator also acts as an agent of reality and as an advocate. As the agent of reality, the mediator will help a party assess a proposal, need, or expectation against what is likely to

31. Just why this should be the case is not immediately apparent since a party with a very strong case may nevertheless wish to avoid the expense, hassle, and delay attendant to litigation and hence resolve the matter by direct agreement. Thus, whether or not someone is interested in negotiating a settlement is in fact independent of the strength of the underlying case. Be that as it may, one hears often that a party may be reluctant to initiate negotiations for fear that the adversaries will take it as a sign of weakness: the fear, rational or not, is clearly an operative fact of the litigation environment.
32. Rogers and Salem, A Student's Guide to Mediation and the Law 64 (1987).
33. A common example from Superfund cases is where the agency proposes a particular clean up strategy and the PRPs, or at least some of them, believe the same level can be achieved for less cost through another technology. See, e.g. Naj, How to Clean Up Superfund's Act, Wall Street Journal, September 15, 1988, at 30.
34. McCrory, Environmental Mediation -- Another Piece for the Puzzle, 6 Vt. L. Rev. 49, 54 (1981).
35. As with the fear of initiating negotiations, the fear parties have about making proposals because the other parties will take the proposal as an "option" they can accept later since the initiating party will always be willing to yield on it is totally misplaced. As any participant in a complex negotiation knows, a proposal may have a very short life span indeed: if it is not accepted readily, it dies. It must be raised anew if it is to be considered in the future, at which time it will be the subject of further negotiations. Any mediator has seen parties try desperately to get back to a proposal that was rejected earlier.

happen short of agreement or how the other side will likely react: deflating grandiose ideas certainly helps secure realistic approaches. As an advocate, the mediator presents the views of others in a way that the party can analyze and hence take into account in deciding what response to make. Finally, and critically importantly, the mediator serves as a metronome by establishing and maintaining the rhythm and pace of the negotiations.

Throughout, however, it is important for everyone to recognize that the mediator has no power whatever: every decision is made by the parties and the parties alone. The mediator does not participate in the actual resolution of the substantive issues.

The neutral in non-binding arbitration and factfinding obviously plays a different role from that of a mediator because he or she issues a tentative decision that is then used as the basis for negotiations among the parties. The neutral in a mini-trial may or may not render such an opinion and is more likely to assume the attributes of a mediator in helping the principals reach agreement after the mini-trial is concluded. For these purposes, however, all neutrals have the common characteristic of helping the parties negotiate an agreement. The role of the neutral may vary, but in each the goal of the parties is to reach agreement, not win an adjudicatory proceeding.

Need for Confidentiality

Negotiations Generally. As the quotation from Professor Fuller³⁶ and the above description of the mediation process indicate, at least some of the mediation process needs to be in confidence for it to be successful. To be sure, a facilitator who runs meetings and coordinates public sessions provides a substantial benefit to negotiations by establishing an orderly process. But, many of the putative benefits of mediation can be achieved only if the proceedings are held confidential.

One of the central functions of mediation is to encourage the parties to speak candidly about their interests, needs, fears, and desires. If a party had *any* concern that what it tells the mediator in confidence or what it does in the negotiations might be revealed to its detriment, any rational person would likely not be as forthcoming -- they would want to protect against revealing too much and hence maintain an adversarial position akin to litigation.

Moreover, in some instances a party may approach negotiations not with an aim of settling the matter but of learning more about the other side; that is, they would use the mediation as a form of discovery for tactical advantage. An unwary opponent may then reveal too much to its disadvantage. Preventing the subsequent use of the information gained will go a long way towards protecting against such bad faith. Or, a party may fear that the mediator might report information learned in the negotiations to the authorities -- either voluntarily or under pressure by an agency -- and hence they would view the mediator in about the same vein as an agency investigator.³⁷ Confidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be free to be forthcoming without fear of the mediator's reporting questionable activities.³⁸

Finally, parties may be reluctant initially to engage in direct negotiations simply because they may be unsure of what they are giving up or what will happen. Providing some

36. See page 5 *supra*.

37. In informal discussions, several PRPs have expressed reluctance to engage in mediated negotiations among the PRPs as a group for fear that EPA will seek to compel the mediator to reveal information that is disclosed during the negotiations and that that would compromise the litigating position of at least some of them should the negotiations be unsuccessful or EPA reject the agreed upon approach. Thus, they fear that the mediator would involuntarily be converted into an investigator for the agency.

38. Rogers and Salem, *supra* note 32.

degree of confidentiality makes it "safer" for them to undertake the negotiations since it will protect them by ensuring that, unless they reach an agreement, nothing that goes on in the negotiations will subsequently be used against them.

Communications with the Mediator. Mediation can only work as designed if the parties have confidence in the mediator's impartiality.³⁹ Beyond the obvious requirement that the mediator must approach the negotiations in a balanced manner, this has significant implications with respect to the need to maintain confidentiality.

First, the mediator needs to keep notes of his/her reactions, thoughts, strategy, and ideas. Although the notes are solely for the mediator's own benefit and to aid in the negotiation process, others could certainly misconstrue parts of them as indicating a bias against some party or interest. For example, the mediator may note that the position taken by a particular person may be unrealistic or too intractable, and that future work needs to be done to determine whether that party is willing to look at other means of resolving the issue; if made public, the party could feel -- reasonably or not -- that such a notation indicated a bias or hostility towards it when in fact it is made to help the mediator discharge his or her duty in a fully neutral manner. Thus, if the notes were subject to release, the mediator would likely not keep them with sufficient candor, and the process would suffer accordingly.

Secondly, if the mediator were to testify in a subsequent formal proceeding as to what went on during the negotiations, the integrity of the entire process could be jeopardized. No matter how true or objective the report, one party or another is likely to feel disadvantaged by what is said. As a result, that party may feel the mediator is biased against it, and that could adversely affect that party's entire perspective of the negotiations. For example, following a complex, protracted, but ultimately successful negotiation a question arose over the interpretation of the resulting agreement. One the parties asked the mediator to review his notes and describe his view as to the evolution and meaning of a particular paragraph in the contract. He responded that he would not meet with the one party alone since that could disadvantage the other side, but that he would meet with all the parties to see if they could work out an agreement on the contested issue; all parties then concurred in having the meeting. When the mediator reviewed his recollection of the purpose of the clause, one of the parties -- interestingly, the one making the initial request -- flatly rejected the description and said that it reflected a bias on the part of the mediator that favored the other side; because of this new, hostile feeling, the dissatisfied party began to doubt the integrity of the entire negotiation and resulting agreement.

To protect against situations like this, some argue that a mediator should not be required to testify about what went on even if all of the parties concur that the mediator should do so. The basis for the apprehension is that even though the parties may initially want the mediator to testify someone will be hurt and hence the testimony will harm the integrity of the process.⁴⁰ This concern was expressed succinctly and powerfully by a court that considered the matter in the labor context:

To execute successfully their function of assisting in the settlement of ... disputes, the [mediators] must maintain a reputation for impartiality, and the parties to

39. To be sure, in some cases a mediator may be an employee or affiliated with one of the parties and hence is not impartial. An ombudsman in an organization is necessarily such an animal. Indeed, in some instances having the mediator be close to one of the parties can help the negotiations substantially by securing the attention and willing participation of a party that may otherwise be difficult to reach. In the situation where a mediator has a potential conflict of interest, the parties should be notified at the outset so they can decide whether that person can still serve a useful role as a mediator. Moreover, the parties can then tailor their behavior accordingly.

40. In some instances, of course, it would be perfectly appropriate for a mediator to testify without any risk to the process. An example would be when a person signing an agreement has died and the question arises over whether he actually signed it. The mediator could provide the ministerial task of testifying that indeed he did.

One way to take account of situations like this is to provide that the mediator can testify if all the parties and the mediator agree to do so.

[mediated negotiations] must feel free to talk without any fear that the [mediator] may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the [negotiations]. If [mediators] were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of [mediators] in the settlement of future disputes would be seriously impaired, if not destroyed.⁴¹

Four Types of Potential Disclosures. Disclosure by the mediator of what went on in the negotiations, of the mediator's notes, or documents furnished the mediator by a participant in the negotiations may occur in any of four ways:

- *Voluntarily.* Without some understanding or requirement, the mediator would, of course, be free to reveal publicly what was said or done during the negotiations. As the discussion above indicates, however, that would largely destroy much of the benefit of mediation, so that it is customary for the mediator to promise the parties that he or she will maintain the confidentiality of the negotiations and not disclose anything voluntarily.
- *Request or Direction of a Third Party.* In some instances, a statute may require as a matter of law that a mediator who learns something during the negotiations must disclose that fact to the authorities. For example, many state statutes require the mediator to report evidence of child abuse that may be disclosed during a mediation; another example is where a party reveals he is about to commit a crime.

Or, someone who was not a party may want to learn about what occurred during the negotiations because the information might be useful to that third party. For example, a company and a complainant may settle a discrimination case through mediation, and another employee may seek to learn the details of the settlement because it may be helpful to a suit that person brought against the same company.⁴²

- *Request of One of the Parties to the Negotiation.* After the close of the negotiations, whether or not they successfully result in an agreement, one or more of the parties may request the mediator to testify about some aspect of the negotiations. It may concern an interpretation of the resulting agreement or even whether there was an agreement⁴³ or something else.
- *Request of All of the Parties.* All of the parties to the negotiations may ask the mediator to testify or otherwise describe his or her impressions about some aspect of the negotiations.

It seems clear in the abstract that ensuring the confidentiality of communications between the parties and the mediator and of the mediator's notes would help the parties negotiate an agreement. Without more, it would therefore be wholly appropriate to require categorically that that information remain sealed with the mediator. But, other considerations frequently need to be taken into account.

41. NLRB v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980), quoting from Tominson of High Point, Inc., 74 NLRB. 681, 688 (1947).

42. See, e.g., Scaramuzzo v. Glenmore Distilleries Co., 501 F. Supp. 727 (N.D. Ill. 1980); Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981).

43. See, e.g., Drukker Communications, Inc. v. NLRB, 700 F.2d 727 (D.C. Cir. 1983).

A number of questions must also be addressed in deciding the appropriate scope of confidentiality surrounding the mediator. Who may enforce confidentiality: the parties, the mediator, a non-party participant, or conceivably someone else? And, just what is confidentiality: does it mean that it may not be revealed, period; that it may not be discovered or subject to other process; or only that it may not be admitted into evidence in an adversary proceeding? When does confidentiality apply: always; only in adversarial proceedings involving the same parties or issues; all proceedings, including subsequent mediations? May a general rule favoring confidentiality be superceded for some important reason? If so, what are the reasons and who makes the decision?

The Uncertain Legal Environment

Every Person's Evidence. The most formidable obstacle to protecting the confidentiality of communications with the mediator is the basic premise that the "public is entitled to every person's evidence."⁴⁴ Under the prevailing theory, if someone has evidence that bears on an issue before the court, a party is entitled to compel that person to provide it, absent some overriding interest or privilege. Thus, if something that was told to the mediator during the negotiations or something the mediator saw in the process would help resolve an issue before the court, unless protected by some privilege or other legal doctrine, the mediator could be required to testify. The issue might be whether the parties reached an agreement at all when one side contends they did and the other thinks not,⁴⁵ what the terms of an admitted agreement were,⁴⁶ whether the negotiations were in fact an illegal price-fixing conspiracy,⁴⁷ or whether during the negotiations one side admitted liability but now, after the negotiations have failed, repudiates it.

Settlements Have Limited Protection. Even at common law, however, negotiations between the parties aimed at settling pending litigation received at least some protection. The concern was not particularly that of fostering settlements. Rather, it was because the information derived from the negotiations may not be all that reliable since the parties may be more interested in buying peace than in the accuracy of their statements.⁴⁸ Thus, the evidence derived from settlement negotiations was excluded on grounds of accuracy and relevance, not to improve the efficiency of the process itself. As a result, an independent admission of fact made during the discussions could be admitted on traditional evidentiary grounds. Because of that, negotiations took on a game-like quality, with sophisticated negotiators qualifying statements by describing them as "hypothetical" or asserting that "this statement is without prejudice". The unsophisticated could be trapped. Moreover, the legally sophisticated would wrap the negotiations in an agreement between the parties that would define the contours of the negotiations and seek to provide blanket protection for them.

Federal Rule of Evidence 408. Federal Rule of Evidence 408 rejects the relevancy basis of excluding information derived from settlement negotiations, and is specifically aimed at

44. 8 Wigmore, *Evidence*, § 2191-92, 2285 (McNaughton rev. 1961); *Branzburg v. Hayes*, 403 U.S. 665 (1972); *Blackmer v. U.S.*, 284 U.S. 421 (1932).

45. *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983).

46. See p. 8 *supra*.

47. Professor Eric Green presents a number of difficult issues surrounding the confidentiality of mediated negotiations in Green, *A Heretical View of the Mediation Privilege*, 2 Ohio S. J. Dis. Res. 1 (1986). The example is from this article, at 13.

48. Hoxie, *Mediation Confidentiality: The Need for Protection and Its Limits*, 98 Harv. L. Rev. 441 (1984).

stimulating settlements.⁴⁹ FRE 408 provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FRE 408 protects information conveyed by a party during a settlement negotiation, and actions or conduct that occur during the negotiations, from being admitted into evidence. That is, of course, a significant step towards affording the confidentiality of mediation. But, 408 has many exceptions and limitations,⁵⁰ and hence it provides an insecure basis for protection.

First, the rule applies only to "compromise negotiations" over a disputed claim. It is therefore unclear whether it would cover negotiations aimed at resolving issues in controversy that have not yet ripened into a "dispute" of sufficient magnitude to have resulted in litigation in Federal court.⁵¹ In particular, 408 may or may not cover the settlement of issues pending in an administrative proceeding let alone before an administrative case has been filed. One would think the theory of the rule would extend to these issues, but the rule itself does not provide comfort.

Second, Rule 408 only prevents the admissibility of the evidence; it does not protect against its discovery. Thus, on the face of the rule, a third party could discover what was said and done in a settlement negotiation in hopes of ascertaining admissible evidence. Several courts have extended the rule, however, and also protect evidence that is made inadmissible by the rule also non-discoverable.⁵² In *Bottaro v. Hatton Associates*,⁵³ the court

49. 10 Moore, Federal Procedure, § 408.

The Senate Report on the Rule said:

This rule ... makes evidence of settlement or attempted settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.
Id. at § 408.5

50. One exception which seems entirely appropriate is that information and data that has an independent existence and that is otherwise discoverable or admissible will remain so: it is not insulated simply because it was used in the negotiations. What might be protected, however, and what should be protected in any sort of mediation privilege is the fact that the document or other information was used in settlement negotiations. Thus, for example, it would be appropriate to admit into evidence an engineering drawing that was prepared years before the settlement negotiations and that played a major role in the negotiations; it would not be appropriate to mention that the drawing was used in settlement negotiations.

51. Brazil, Protecting the Confidentiality of Settlement Negotiations, 39 *Hastings L.J.* 955, 960-966 (1988).

At least some courts appear to require at least the threat of litigation before the rule become applicable; otherwise, the negotiations are viewed simply as business discussions not subject to protection under FRE 408. *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365 (10th Cir. 1977); *Olin Corp. v. Insurance Co. of North America*, 603 F. Supp. 446, 450 (S.D.N.Y. 1986); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338 (9th Cir. 1987).

52. Restivo and Mangus, Alternative Dispute Resolution: Confidential Problem-Solving Or Every Man's Evidence?, 5 *Alternatives* 5, 7 (May, 1984). *Branch v. Phillips Petroleum Co.*, 638 F.2d 873 (6th Cir. 1981); *Bottaro v. Hatton Associates*, 96 F.R.D. 158 (E.D.N.Y. 1982).

found:

Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we ... require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.

These cases do not provide a general "settlement privilege" that will defend against any discovery request. Rather, they require someone who would discover settlement materials to make a showing of need⁵⁴ or at least that the material will lead to admissible evidence.⁵⁵

Third, the rule protects only evidence used to prove or disprove liability or its amount. Thus, for example, if the defendant admits liability and the amount but seeks to negotiate a settlement by offering installment payments, his acknowledgement of liability is admissible: neither the claim nor its amount are contested.⁵⁶ Nor did it protect a hapless defendant who stole some property and agreed to return it in exchange for its owner dropping criminal charges; the admission implicit in the bargain was introduced in a subsequent trial since it was not made in a proceeding over a contested claim.⁵⁷

Fourth, the rule excludes the material only with respect to proving liability. It does not ward off introduction for other purposes, such as impeaching a witness.⁵⁸ While certainly appearing neutral in the abstract, this can be a major exception to the general rule: it takes very little creativity on the part of a trial lawyer to invent an alleged inconsistency in a witness's testimony sufficient to bring the exception into play. Moreover, that the negotiation documents may be used for impeachment necessarily makes them relevant and hence subject to discovery if they can be linked to any potential witness. Fortunately, however, most courts resist such use.⁵⁹ But, evidence of settlement agreements may still be admitted for a variety of reasons, so long as one is not to prove contested liability.⁶⁰

Fifth, the rule simply does not protect the negotiations in any forum that has not adopted it. In particular, it does not apply to administrative or legislative proceedings.

Sixth, it does not protect against anyone's voluntarily divulging publicly what went on in the negotiations, even if some of the information would still not be admissible.⁶¹ The

53.(...continued)

53. 96 F.R.D. 158, 160 (E.D.N.Y. 1982).

54. See the discussion of the protection accorded workproduct by F.R.Civ.P. 26(b)(3) *infra* at p. 14.

55. As Brazil, *supra* note 51 at 956, has said: "[T]he weight of authority suggests that there is no generalized privilege for settlement communications and that they are discoverable, at least after a showing of substantial need."

One court was faced with a discovery request by a nonsettling defendant for the terms on which the plaintiff settled with his former cohorts. The court found that since Rule 408 did not bar the admission of settlement materials for all purposes, the defendant was entitled to discovery to determine if it might be admissible for some purposes in the trial. Bennett v. La Pere, 112 F.R.D. 136 (D. R.I. 1986).

56. The example is from the Advisory Committee's Notes. Moore, *supra* note 49, § 408.7.

57. United States v. Peed, 714 F.2d 7, 9 (4th Cir. 1983).

58. For an extensive discussion of these exceptions to the rule that evidence from settlement negotiations is not admissible, see Brazil, *supra* note 51, at 966-982.

59. Green, *supra* note 47, at 18.

60. Green, *supra* note 47, at n.33; Hoxie, *supra* note 48.

61. Freedman and Prigoff, Confidentiality in Mediation, Need for Protection, 2 Ohio S. J. Dis. Res. 37 (1986).

privacy would nonetheless be lost.

Seventh, the rule does not explicitly address the role of a neutral in settlement negotiations. Inasmuch as the purpose of the rule is to encourage settlement, one would certainly think that the presence of a neutral in the negotiations would not reduce the level of protection afforded under the rule. Interestingly, very few cases address the issue directly.⁶² One case found that the presence of a conciliator in the settlement negotiations had no effect on the application of the rule.⁶³ But in another case the parties to a settlement retained a neutral third party to prepare a factfinding report on the effects of some price-fixing activities; the parties agreed that the report should remain confidential. The court found, however, that the parties could not contract for confidential treatment and that others should be able to obtain evidence relevant to their cause, so discovery was permitted.⁶⁴ Although perhaps troubling, this case is not direct precedent for the proposition that Rule 408 does not apply when a neutral third party assists in the negotiations.⁶⁵ The neutral in that case was employed to make a report *as a consequence of* the negotiations, not help the parties reach agreement initially. Thus, it would appear that the theory of Rule 408, as well as the one case that was found directly on point, would mean that the rule would apply to settlement negotiations in which a neutral assists.

As should be clear, FRE 408 offers protection of only limited reach. Exceptions to the seemingly broad sweep of the rule may prevent the mediator and the participants in a negotiation from achieving their expectations -- and even promises -- of confidentiality.⁶⁶

Workproduct. Another potential source of protecting the mediator's notes and impressions of what went on in the negotiations, if not the documents furnished by the participants, is the "workproduct" exception to discovery created by *Hickman v. Taylor*.⁶⁷ The Court held in that case that the private memoranda, personal recollections, written statements of witnesses, and notes that are developed by an attorney in preparation of litigation are not protected from disclosure by the attorney client privilege. The Court continued, however, that their routine discovery would contravene the public policy: "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney";⁶⁸ "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."⁶⁹ The Court continued with an oft-quoted passage:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the

62. A Lexis search found no cases that mention 408 within 20 words of "mediator".

63. EEOC v. Air Lines Ass'n, 489 F. Supp. 1003, 1008 (D. Minn. 1980) rev'd on other grounds, 661 F.2d 90 (8th Cir. 1981).

64. Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84 (E.D.N.Y. 1981).

65. Indeed, this case was decided by the same judge who subsequently decided Bottaro v. Hatton Associates, 96 F.R.D. 158 (E.D.N.Y. 1982) which is often cited as one of the strongest cases in favor of protecting the full range of settlement documents from discovery absent at least a preliminary showing that discovery will lead to admissible evidence.

66. Hoxie, *supra* note 48.

67. 329 U.S. 495 (1947).

68. *Id.* at 510.

69. *Id.* at 510-511.

preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.⁷⁰

To the end of protecting against this untoward intrusion into the attorney's workproduct, the Court required a substantial showing before factual material generated by the attorney can be discovered; the "opinion workproduct" -- the attorney's mental impressions and theories -- should be available only on a truly rare showing of need.

The Federal Rules of Civil Procedure codified this holding. They provide that a party may discover documents and tangible things prepared in anticipation of trial "only upon showing [of] substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."⁷¹ The protection afforded the attorney's mental impressions is categorical:

In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.⁷²

Although the full scope of the protection afforded the workproduct is not entirely clear,⁷³ it is independent of the attorney client privilege and belongs to the attorney, not the client.⁷⁴ Thus, at least theoretically, the attorney could refuse to reveal information developed in preparation for trial even if his client authorized, or even directed, him to do so.

The protection afforded workproduct by the Federal Rules of Civil Procedure applies to materials prepared in anticipation of litigation by a party or his representative, "including his attorney, consultant, surety, indemnitor, insurer, or agent."⁷⁵ The list does not include "mediator," and a mediator is not explicitly the "representative" of any of the parties. But, in a sense the mediator is an agent or representative of all parties to the negotiation, and to a very real extent a mediator is a "consultant" to the parties with respect to the processes of settlement. And, as the discussion above indicates, surely the mediator needs the same degree of privacy to function efficiently as does the lawyer. Moreover, the same policy that favors the ends of justice and voluntary settlement that underlies the workproduct protection of attorneys would apply equally to a mediator. Thus, it would be only a short step to apply the workproduct doctrine to a mediator, and indeed its contours fit remarkably well.

70. *Id.* at 511.

71. F.R.Civ.P. 26(b)(3).

72. *Id.*

73. Cohn, Work Product Doctrine: protection, not privilege, 71 *Geo. L. J.* 917 (1982); Note, Workproduct Doctrine in Subsequent Litigation, 83 *Col. L. Rev.* 412 (1983).

74. As summarized by one article:

The attorney's "workproduct" privilege, if privilege it is, is the privilege of the attorney and not of the client, its rationale being based on the right of a lawyer to enjoy privacy in the course of preparation of his suit.

Ghent, Discovery -- Attorney's "Work Product", 35 *ALR* 3d 412, 423.

See also, Hiltachk, Legal Malpractice and Discovery of Opinion Workproduct in California: The Dilemma Created by Absolute Protection, 17 *Pac. L. J.* 1993 (1986).

75. F.R.Civ.P. 26(b)(3).

If the workproduct doctrine were to be applied to a mediator, someone could secure documents generated in the negotiations from a mediator, but only by demonstrating particular good cause and that burden could virtually never be met if the documents were available from another source. The mediator's mental impressions of what went on during the negotiations would have a higher degree of protection, and the mediator could refuse to reveal them even if all the parties to the negotiations authorized the testimony or release of notes. The disclosures would be protected against intrusion by a party to the negotiations as well as someone who was not a participant. Although less clear, the protection would apply regardless of the issues in the subsequent litigation.⁷⁶ It would not, however, protect against the mediator's voluntarily disclosing what went on. Like Rule 408, however, it applies only to cases actually filed and even then only in Federal court or other forums with similar rules.

As discussed in the next section, at least one court has found the analogy applicable.

Adler v. Adams. One of the early examples of mediating complex public policy issues among a variety of interests involved the nature and location of Interstate 90 into Seattle. Dr. Gerald Cormick, a pioneer in the area of environmental mediation, served as the mediator. He was eventually subpoenaed to provide all documents relevant to the "negotiated compromise", including all "handwritten notes, memoranda, notes and telephone conversations, file memoranda, correspondence, and contracts of employment."⁷⁷ He was also noticed for a deposition. After reviewing the benefits of confidentiality in mediation and the promises of confidentiality that mediators make, the Motion to Quash argues that enforcing the subpoena would place the mediator in a "cruel trilemma": he would have to perjure himself; violate his ethical canons that require a mediator to maintain the confidence of negotiations; or face a prison sentence for contempt. Thus, Dr. Cormick argued that, absent compelling circumstances, discovery through the mediator should be blocked and the subpoena quashed. Even if the court did not concur as to materials exchanged between the mediator and the parties, the mediator argued that his personal notes should be protected on the basis of *Hickman v. Taylor*.

The Magistrate⁷⁸ held in an important, but unfortunately unreported order, that the mediator must furnish documents provided at meetings open to the public, since they were not secret or confidential when produced and hence should not be so regarded subsequently. The Magistrate also ordered the production of materials from a source not a party to the negotiations since that would not violate any assurances of confidentiality. The Magistrate further held that "[a]ll memoranda, notes, summaries and other documents prepared by Dr. Cormick [or his staff] and any other documents reflecting their work product" need not be produced unless it was previously made available to the general public. He thought that forcing disclosure would "undercut the effectiveness of the mediation process" and "severely inhibit the proper performance of his duties." The Magistrate noted that "any information properly sought from [the mediator] is equally available from other sources, indeed, generally from the parties to this litigation".

As for the deposition, the Magistrate noted that information as to what took place in the negotiations is available from the parties. Moreover, it would be impossible after the passage of time to sort out what happened in public meetings and what went on in private negotiations, so it would also be inappropriate to ask the mediator to testify concerning public meetings. Records of these proceedings are protected workproduct.

On review, the court found "that the Magistrate's decision properly resolves the

76. "The literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *FTC v. Grolier, Inc.*, 462 U.S. 19, 25 (1983).

77. The pleadings and order with respect to Dr. Cormick's motion to quash are included in American Bar Association Special Committee on Dispute Resolution, *Confidentiality in Mediation: A Practitioner's Guide*, 245 (1985).

78. Adler v. Adams, No. 673-73C2 (W.D. Wash. 1979).

questions presented for the reasons stated therein."⁷⁹

Freedom of Information Act. If the mediator is either a government employee or a contractor of the Federal government, the effects of the Freedom of Information Act must also be considered: Are either the documents received during the negotiations or the mediator's notes prepared in conjunction with the negotiations agency "records" that would have to be produced in response to an FOIA request?

No Exemption for Settlements. Although public policy clearly favors the voluntary settlement of lawsuits, that policy has not been explicitly incorporated into any of the exemptions to the Freedom of Information Act. As the Department of Justice recently noted:

There exists strong policy grounds for maintaining the confidentiality of the information exchanged during the settlement negotiation process, but this necessary confidentiality has yet to be recognized under the FOIA by the courts.⁸⁰

Indeed, the court in *Center for Auto Safety v. Department of Justice*⁸¹ found that FOIA itself did not include such an exemption, nor could one be read in by analogy to FRE 408.⁸²

Interestingly, there is some legislative history to support the contention that negotiations involving a mediator should be protected from disclosure. The House Report that explains Exemption 4 describes it as embracing "negotiation positions or requirements in the case of labor-management mediations."⁸³ The language was added in response to a request by the National Mediation Board for express protection of labor-management mediation sessions.⁸⁴ A court noted that given the confused and tortured history of FOIA, one House's version "must be accorded great weight, absent compelling contraindications."⁸⁵ For whatever reason, the splinter of history has never broadened into a more generally applicable exemption, however.

Whether or not there is a general exemption to FOIA to protect the confidentiality of settlement material akin to FRE 408, much of the data provided the mediator during negotiations will be "trade secrets and commercial or financial information obtained from a person and privileged or confidential" and hence squarely within Exemption 4. Thus, if a private party were to furnish a mediator with documents containing such information, the mediator could resist an FOIA request on grounds of Exemption 4.⁸⁶

79. Order on Application for Review of Magistrate's Ruling, *Adler v. Adams*, No. 673-73C (W.D. Wash. 1979).

80. U.S. Department of Justice, Office of Information Policy, *FOIA Update: Protecting Settlement Negotiations* (1985), published at ACUS, Sourcebook: *Federal Agency Use of Alternative Means of Dispute Resolution* 883 (1987).

81. 576 F.Supp. 739, 749 (D.D.C. 1983).

82. Accord, *NAACP Legal Defense & Educational Fund v. Department of Justice*, 612 F.Supp. 1143, 1146 (D.D.C. 1985).

83. H.Rep. No. 1497, 89th Cong. 2d Sess. 10, reprinted in 1966 U.S. Code Cong. & Admin. News, 2418, 2427.

84. *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863, 869 (2d Cir. 1978).

85. *Id.* at 870.

86. See, e.g., *M/A-Com Information Systems v. HHS*, 656 F.Supp. 691 (D.D.C. 1985) in which an FOIA request was made for settlement documents developed and exchanged by counsel for HHS and counsel for a company in an unsuccessful effort to settle a debarment action. The documents that were sought described accounting and other actions the company was willing to implement as a condition of avoiding debarment. The court held the documents were exempt from disclosure by Exemption 4.

In addition, the Department of Justice takes the position that Exemption 5 should also provide the basis for protecting documents generated in settlement negotiations from FOIA.⁸⁷ There are two strands to the argument that Exemption 5 would protect these materials. The first is that whether the materials originate inside the agency itself or are submitted by other parties in an effort to settle litigation with the government, they are used by the government to make decisions -- the decision as to whether or not to settle the litigation and, if so, on what terms. Thus, the argument runs, settlement materials fall within the "predecisional" exemption to FOIA. The other strand is closely related to the applicability of Exemption 4 in that it builds on the emerging case law⁸⁸ that FRE 408 protects settlement documents from discovery absent a showing of need. This "privilege" would necessarily mean that the "intra-agency" material "would not be available by law to a party ... in litigation with the agency."⁸⁹ Thus far, however, the latter argument has not met with favor. Several courts have held that documents exchanged with others are not "intra-agency" memoranda.⁹⁰ The Department of Justice believes these cases are excessively narrow and, in light of the privilege resulting from Rule 408, will result in an adversary with the government's being able to obtain more in FOIA than in discovery.⁹¹ The Department notes that the Supreme Court has already condemned such an anomaly.⁹² Thus, DOJ is likely to continue to press the point that Exemption 5 protects documents developed for settlement purposes.⁹³

Whatever else, workproduct is clearly protected from disclosure under Exemption 5.⁹⁴

Agency Records. Only agency records are subject to the Freedom of Information Act.⁹⁵ Thus, if a document is not an agency record, an agency is not obligated under FOIA to disclose it.

Although the exact terms vary, a standard clause in many government contracts -- entitled "Rights in Data" -- provides that all material or data generated, produced, or collected pursuant to the performance of tasks under the contract are the property of the contracting agency.⁹⁶ Such a clause in a contract between an agency and a mediator would mean that the documents provided the mediator in confidence by any party to or participant

87. FOIA Update, supra note 80.

88. See discussion at p. 11 supra.

89. 5 U.S.C. § 552(b)(5). The Supreme Court has said "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed" in civil discovery. FTC v. Grolier, Inc., 462 U.S. 19, 26 (1983).

90. County of Madison v. Department of Justice, 641 F.2d 1036, 1040-1042 (1st Cir. 1981); Norwood v. FAA, 994, 1002-3 (W.D. Tenn. 1984); M/A-Com Information Systems, Inc. v. HHS, 666 F. Supp. 691, 692 (D.D.C. 1986).

91. DOJ, supra note 80.

92. United States v. Weber Aircraft Corp., 465 U.S. 792 (1984).

93. Even if this effort is ultimately successful, the protection accorded settlement documents under FOIA would be less than that afforded by Rule 408 unless the courts read the rule into FOIA totally. Customarily an agency would be required under FOIA to disclose essentially factual material. Mead Data Central, Inc. v. Dept. of the Air Force, 566 F.2d 242 (D.C. Cir. 1977). Once the agency has made a decision, the documents embodying it must then be released. Taxation with Representation Fund v. IRS, 646 F.2d 666 (D.C. Cir. 1981).

To be sure, this law evolved from the general "governmental privilege" that protected the internal deliberative process, and consequently the same requirements may not apply if the courts find a privilege in Rule 408 and incorporate it in Exemption 5: in that case the requirements should be coterminous.

94. FTC v. Grolier, Inc., 462 U.S. 19 (1983).

95. 5 U.S.C. § 552(a)(3).

96. See, Federal Acquisition Regulation Regarding Patents, Data, and Copyrights, Subpart 27.4 -- Rights in Data and Copyrights, 52 Fed. Reg. 18140 (1987).

in the negotiations and the mediator's notes would be agency records subject to FOIA: the mediator's notes would be produced and the documents would be "collected" pursuant to tasks under the contract. In that case, unless covered by an exemption, virtually all of the material developed by the mediator could be subject to mandatory disclosure. That would surely be a chilling prospect with respect to realizing any notion of confidentiality.

To meet that concern, two agencies have agreed in contracts for mediation services that the government will not claim rights to "mediators' notes, recollections, or documents given to mediators in confidence by any party."⁹⁷ This clause recognizes that the government is purchasing the professional services of a mediator and not, as the model clauses are aimed at, information or products. Thus, to ensure a broader scope of protection of confidential material, agencies could include similar provisions. For these purposes, it would be better if the protection ran to all materials provided in confidence pursuant to a mediation, and not just those furnished by a party.

Even if a form of the standard clause is included in a contract between the government and the mediator, the mediation material may nevertheless be relatively safe from having to be turned over in response to an FOIA request. The agency may have a *right* to the data, but if -- as is virtually always the case -- it does not take possession of it, the material is not an agency record subject to the act.⁹⁸ In short, the agency is not required to round it up and turn it over in response to a request.⁹⁹ Although not as secure as a contract provision that explicitly provides that the mediation material is not an agency record, the practical effects of FOIA would have the same result.

The mediator's notes are potentially free from disclosure under FOIA whether the mediator is an independent contractor or an agency employee, although to be sure the matter is not free of doubt.

The Supreme Court defined the criteria to be used in deciding when materials are agency records when deciding whether notes of telephone conversations that Henry Kissinger made while National Security Advisor must be released under FOIA. The notes were not subject to FOIA when they were made inasmuch as Dr. Kissinger was then part of the Executive Office of the President which is not covered by the Act. They were subsequently transferred, however, to the State Department when he became Secretary of State. Thus, the notes were physically present in the Department which is covered by FOIA. The notes were not generated in the Department, were not used by the Department itself for any purpose, and never entered the Department's filing system. The Court found that four factors are instrumental in determining whether material that is physically present in an agency are "agency records" subject to FOIA: whether the documents were (1) in the agency's control; (2) generated within the agency; (3) placed into the agency's files; and, (4) used by the agency for any purpose.¹⁰⁰ The Court held that the notes were not agency records.

Subsequent cases elaborated on the status of documents that were generated outside the agency,¹⁰¹ but which were in the agency's physical possession. They held that under this standard, mere possession is not enough: There must be "some 'nexus' between the agency and

97. Council on Environmental Quality, Contract No. EQ8C08 (July 17, 1988); Environmental Protection Agency, Contract No. 68-01-7388 (1987).

98. Forsham v. Harris, 445 U.S. 169 (1980).

99. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 138 (1980).

100. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 157 (1980).

101. If documents are generated in one agency and would be within the reach of FOIA but for the fact they were transferred to another agency, they retain their status as an "agency record" regardless of whether the second agency "used" them. McGehee v. CIA, 697 F.2d 1095, 1109 (D.C. Cir. 1983).

the documents other than the mere incidence of location."¹⁰² Thus, even if an agency were to obtain materials from a mediator, so long as they remained segregated from the agency's own files and the agency did not use them for any purpose, they would not be "agency records" subject to FOIA.

The more difficult question is the status of a mediator's notes and the attendant settlement materials if the mediator is a government employee. Several cases have considered the applicability of FOIA to a government employee's notes that were written by an employee during working hours.¹⁰³ As with documents originating outside the agency, the test turns on whether the agency has control and the use to which they are put.¹⁰⁴ In *Bureau of National Affairs v. DOJ*,¹⁰⁵ the requestors sought the appointment calendars, telephone logs, and daily agendas of the Assistant Attorney General for Antitrust. The court reasoned

[A]t least in some circumstances, the agency's use of a document is relevant for determining its status as an "agency record." Where, as here, a document is created by an agency employee, consideration of whether and to what extent that employee used the document to conduct agency business is highly relevant for determining whether that document is an "agency record" within the meaning of FOIA. Use alone, however, is not dispositive; the other factors mentioned in *Kissinger* must also be considered: whether the document is in the agency's control, was generated within the agency, and has been placed into the agency's files.

And, even if they are physically in the agency's file cabinets,

the statute cannot be extended to sweep into FOIA's reach personal papers that may "relate to" an employee's work -- such as a personal diary containing an individual's private reflections on his or her work -- but which the individual does not rely upon to perform his or her duties.

The court held that telephone slips and appointment calendars were for the personal convenience of the official and were not used in facilitating agency business. But, the agendas were prepared to inform the staff of the AAG's schedule and they were distributed to the staff for its use. The court held that these were not created for the personal convenience of the AAG but for the staff in the conduct of official business.

If, and it is a big if, the mediator's personal notes are regarded as facilitating his or her work in mediating the dispute as opposed to being used by the agency in pursuit of its program, the notes would not be regarded as agency records under FOIA. Under the circumstances, however, it is hard to predict whether a court would agree that the notes are solely for the personal convenience of the agency mediator as opposed to something the individual relies upon to perform official duties. The analysis would be bolstered if the agency mediator were to segregate the files, so they are not seen by any other agency employee, and take precautions that mediation data not be commingled with other agency materials. It could then be argued that the agency does not actually have control. But, the argument seems attenuated, and the risk that they will be regarded as agency records is accordingly high.

102. *Wolfe v. HHS*, 711 F.2d 1077, 1080 (D.C. Cir. 1983) (Presidential transition documents not agency records).

103. Two courts have held that handwritten notes recounting impressions of meetings and substantive discussions are not agency records. *British Airports Authority v. CAB*, 531 F.Supp 408 (D.D.C. 1982); *Porter County Chapter of the Isaac Walton League of America v. AEC*, 380 F.Supp. 630 (N.D. Ind. 1974). The reasoning of these cases was expressly disapproved by the District of Columbia Circuit in *Bureau of National Affairs v. DOJ*, 742 F.2d 1484 (D.C. Cir. 1984).

104. *Bureau of National Affairs v. U.S. Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984).

105. 742 F.2d 1484 (D.C. Cir. 1984).

In sum, the materials developed by a mediator under contract to a government agency will likely not be subject to an FOIA request because the agency will not have taken control of them and hence they are not agency records. But the agency *could* take possession under the standard contract clause, and some of the parties may fear revelation to the agency most of all. Thus, the agency should include a clause in the contract that explicitly protects this material.

If, on the other hand, the mediator is an agency employee the question becomes whether the agency itself has sufficient control over the materials, including the mediator's notes, and whether the materials are used "by the agency 'for any purpose.'" If, as seems likely, part of the employee's job is the mediation of disputes, it would seem that the mediation materials are indeed agency records subject to FOIA. Hence they would be subject to disclosure unless -- as will often be the case -- they are protected under one of the exemptions.¹⁰⁶

Mediation Privilege

Because of the uncertain legal environment with respect to protecting the confidentiality of mediation materials and the perceived benefit to be derived from it, many practitioners and writers have urged the establishment of at least some sort of privilege for mediation materials.¹⁰⁷

There is, however, a contrary argument against a broad privilege.¹⁰⁸ Bearing particularly on negotiations having public policy implications is the belief that mediation behind closed doors may undermine the public's confidence in the resulting agreement. The opponents of such a privilege also point out that mediation succeeds in some programs without an elaborate confidentiality scheme. Indeed, they argue, virtually all of the complex mediation conducted thus far is subject to the vagaries of the law described above and has been relatively successful without a more elaborate scheme of protection for the confidentiality of mediation.

In addition to this argument against a privilege that would protect the confidentiality of mediation generally, some feel that the mediator should be able to release proposed settlements as a means of putting pressure on the parties to settle. They argue that a party who fails to bargain in good faith should be held accountable for doing so by means of public disclosure. In their view, if someone accepts a proposal at the table but subsequently repudiates the deal, the mediator should be able to reveal that the person had indeed agreed to the provision, either by means of a public announcement on television or a press release.¹⁰⁹ The mediator in this situation can use the potential of disclosure as a threat to the parties to adhere to the deals made at the table; they believe that will help hold the participants in

106. For example, notes the agency mediator exchanges with his or her immediate staff or superiors for purposes of helping in the negotiation would be covered by Exemption 5; routine factual reports, however, likely would not.

107. See, e.g. Restivo and Mangus, *supra* note 52, at 9:

Strong arguments can and should be made to protect the confidentiality of [ADR] proceedings. Under statutory and public policy grounds such proceedings should not be admissible. Under public policy grounds or a "privilege" analysis, such proceedings should not even be discoverable. Under public policy and statutory grounds, the third-party neutral should be immune from subpoenas.

See also, Freedman and Prigoff, *supra* note 61; Rogers and Salem, *supra* note 32.

Eric Green begins his analysis of mediation privilege this way: "Conventional wisdom among practicing mediators is that the confidentiality of mediation should be protected by a statutory or court-created privilege." Green, *supra* note 47, at 1.

108. Arguments against a broad privilege are summarized in Rogers and Salem, *supra* note 32 at 67-71.

109. See, Bacow and Wheeler, *Environmental Dispute Resolution*, 246-7 (1984).

public negotiations accountable for what is said and done in the discussions.¹¹⁰

Professor Eric Green believes the proponents of a mediation privilege have simply not made their case sufficiently:

[T]he current campaign to obtain a blanket mediation privilege rests on faulty logic, inadequate data, and short-sighted professional self-interest. Neither the necessity for such a privilege nor the social utility of a general mediation privilege have been demonstrated. Moreover, an adequate degree of confidentiality in mediation can be obtained with only slight changes in current laws.¹¹¹

In his view, if there is to be a privilege, it should belong to the parties and not the mediator.¹¹² It would seem to follow that if all the parties to the negotiation request the mediator to reveal their discussions, he or she should do so.¹¹³ But, Green continues,

mediation, over the long run, may require that the mediation be separated from and protected against adjudication, so that even if all the parties to mediation are willing to dispense with the confidentiality and inadmissibility of mediation, the law would not permit information from the mediation to be used in court. Recognition of a privilege in this situation is based on an institutional concern for mediation as an important and distinct resolution process, rather than a concern for the mediators' own professional interests.¹¹⁴

He contends that the current law can be supplemented by a carefully tailored confidentiality agreement among the parties that will afford adequate and well tailored protection to the confidentiality of mediation.

The main thrust of Green's dissent is that a blanket privilege will result in little gain and yet incur public distrust that agreements negotiated in secret may produce unfair results.¹¹⁵ By and large, therefore, he counsels a carefully crafted protection that provides the requisite protection without the overbreadth that generally results from statutory provisions or court rules. For example, he suggests that since "the mediator's notes, impressions, and opinion may be among the most tempting items of evidence," the mediation agreement should explicitly tie them to the settlement process in an effort to tuck them under FRE 408.¹¹⁶

110. Of course, a contrary way of looking at this situation is that the representative at the table made what he or she thought was a satisfactory tentative agreement only to discover that it did not fly with the constituents. The representative then had to modify his or her position accordingly. This contrarian view would then argue that the ability to change position in response to the desires of the constituents is a better means of preserving accountability -- leadership it is not, but it is accountability. The confidential nature of the negotiations would then enable the participants to work out a package that might be difficult in a public meeting, and the package can then be taken as a whole to the folks back home.

111. Green, *supra* note 47, at 2.

112. *Id.* at 4.

113. The American Bar Association's Standing Committee on Dispute Resolution drafted a proposed rule on the confidentiality of mediation. It provided that if all the parties authorized the mediator to release documents developed in the negotiations or to testify concerning them, he or she should be required to do so. This provision was quite controversial in the Committee's deliberations. The Committee has not yet acted on completing the draft rule which is in the form of a resolution to be considered by the House of Delegates of the ABA as the Association's policy; the proposal has no other formal status.

114. *Id.* at 5.

115. *Id.* at 11.

116. *Id.* at 19-20.

Because of the uncertain status of the confidentiality of mediation materials under current law, the many holes in the protection regardless of its strength in other areas, and the premium on careful lawyering that is entailed in relying on detailed confidentiality agreements, many mediators rely on an "ad hoc" privilege: They return all documents provided them by others during the negotiations and destroy their own notes; they may be compelled to testify, but they will be unable to provide any written material. To foster the resolution of disputes by mediated negotiations by providing a more comprehensive and systematic basis for the confidentiality of the negotiations, many statutes, rules, and guidelines have explicitly provided for some degree of confidentiality of mediation materials.

Examples of Standards Governing Mediator Confidentiality

Statutes and Regulations. The Federal Mediation and Conciliation Service regulations provide:

Public policy and the successful effectuation of the Federal Mediation and Conciliation Service's mission require that commissioners and employees maintain a reputation for impartiality and integrity. Labor and management or other interested parties participating in mediation efforts must have the assurance and confidence that information disclosed to commissioners and other employees of the Service will not subsequently be divulged, voluntarily or because of compulsion, unless authorized by the Director of the Service.

No officer, employee, or other person officially connected in any capacity with the Service, currently or formerly shall, in response to a subpoena, subpoena duces tecum, or other judicial or administrative order, produce any material contained in the files of the service, disclose any information acquired as part of the performance of his official duties or because of his official status, or testify on behalf of any party to any matter pending in any judicial, arbitral or administrative proceeding, without the prior approval of the Director.¹¹⁷

The statute creating the Community Relations Service of the Department of Justice, which mediates community disputes relating to discriminatory practices, provides:

The activities of all officers and employees of the Service in providing conciliation assistance shall be conducted in confidence and without publicity, and the Service shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held.¹¹⁸

Similarly, the regulation governing the mediation of age discrimination disputes provides:

The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in an adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the agency appointing the mediator.¹¹⁹

Those governing conciliation efforts of the Equal Employment Opportunity Commission are:

117. 29 C.F.R. § 1401.2.

118. § 1003(b), PL 88-352, 78 Stat 267.

119. 45 CFR § 90.43.44.

(a) Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned....

(b) Factual information obtained by the Commission during such informal endeavors, if such information is otherwise obtainable by the Commission under section 709 of Title VII, for disclosure purposes will be considered by the Commission as obtained during the investigatory process.¹²⁰

Congress very recently passed a statutory requirement that is more limited in scope. It provides that the Office Administrative Law Judges in the Department of Education

shall establish a process for the voluntary mediation of disputes pending before the Office. ... In accordance with rule 408 of the Federal Rules of Evidence, evidence of conduct or statements made in compromise negotiations shall not be admissible in proceedings before the Office.¹²¹

Administrative Guidelines. The Department of Justice issued a policy statement concerning the use of mini-trials for resolving disputes between the Department and private parties. The guidelines provide that

all oral presentations made, and all discussions between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or board action which directly or indirectly involves the parties and the matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent agreement.¹²²

More generally, the Society of Professionals in Dispute Resolution recently adopted a Code of Ethical Standards of Professional Responsibility that provides in pertinent part:

Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues, and a neutral's acceptability. There may be instances, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process must also be honored.¹²³

As a final example of guidelines or rules applicable to mediation, the Commercial Mediation Rules of the American Arbitration Association provide:

120. 29 CFR § 1601.26

See, International Ass'n of Machinists v. National Mediation Board, 425 F.2d 527 (D.C. Cir. 1970); Burlington Northern, Inc. v. EEOC, 582 F.2d 1097 (7th Cir.) cert. den., 440 U.S. 950 (1978).

121. § 451(h) of the General Education Provisions Act, as amended by § 3501 (a) of PL 100-297. For a discussion of Rule 408 of the Federal Rules of Evidence, see *infra* at note 48.

122. ACUS, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution 827, 839 (1987). The relevant guidelines of the Corps of Engineers with respect to mini-trials is identical. *Id.* at 703, 719.

123. Society of Professionals in Dispute Resolution, Ethical Standards of Professional Responsibility, Paragraph 3 (1986).

Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.¹²⁴

State Legislation. At least ten states have recently enacted legislation to protect the confidentiality of mediation.¹²⁵ Not surprisingly, they vary widely in scope and style. The Massachusetts Confidentiality in Mediation provision, for example, provides:

All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.¹²⁶

The recent Virginia enactment is fairly typical:

All memoranda, workproducts and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation which relates to the controversy being mediated, whether made to the mediator or a party, or to any other person if made at a mediation session is confidential. However, a mediated agreement shall not be confidential unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding except

- (i) where all parties to the mediation agree, in writing, to waive the confidentiality,
- (ii) in a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation, or
- (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation.¹²⁷

Abstract of the Various Requirements. Each of these standards provides for some degree of confidentiality with respect to communications with a mediator and of the mediator's notes or other workproduct. Each of them direct the mediator to maintain confidentiality. Many of them do not specifically authorize the parties to the negotiation to waive any resulting privilege and direct the mediator to testify in a subsequent proceeding or

124. American Arbitration Association, Commercial Mediation Rules, Rule 12 (1987).

125. See, Standing Committee on Dispute Resolution, American Bar Association, State Legislation on Dispute Resolution (1988).

126. § 23C, added by St. 1985, c. 325.

127. Virginia Code § 8.01-581.22.

otherwise reveal portions of the discussions.¹²⁸ Some, however, permit the parties to do so.¹²⁹ Some of the standards enable someone in a higher position than the mediator to authorize the mediator to divulge the information -- that is, they provide an override to the general rule.¹³⁰ Some explicitly direct that the material may not be used in an adjudicatory proceeding.¹³¹

A few implicitly direct the mediator to resist a subpoena or other order for the information.¹³² EEOC's regulations¹³³ provide that factual information learned during a conciliation effort will be treated as part of an investigatory file if it would be obtainable by the Commission under other regulatory requirements; Virginia¹³⁴ and presumably the new Education Act¹³⁵ recognize that material that would otherwise be discoverable does not become immune simply because it crossed the negotiating table. The Department of Justice's mini-trial guidelines¹³⁶ establish a blanket confidentiality during the negotiations, but at the conclusion of a successful mini-trial, they authorize the use of everything to document the agreement. In Massachusetts, the mediator's notes, workproduct and case file are immune from inquisition but only in proceedings involving at least one of the parties to the negotiation; otherwise, it appears that the materials are not protected. Virginia¹³⁷ alone among the standards, authorizes the release of the otherwise confidential material "in a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation." The SPIDR Ethical Standards¹³⁸ recognize that there will be situations in which a mediator is required by law to disclose something that was learned in otherwise confidential negotiations. In that case, the mediator is directed to inform the parties that confidentiality cannot in all instances be maintained; customarily, if the mediator is aware of specific requirements, he or she informs the parties to the negotiation of the types of information that will have to be revealed.

Thus, there is no one, single approach to mediator confidentiality. To stimulate administrative settlements while taking account of other essential attributes of resolving public disputes, a carefully crafted rule is needed that draws on this experience.

Proposed Approach

Negotiations over issues involving the statutes, regulations, and policies of administrative agencies necessarily have important public attributes. Maintaining rigorous con-

128. FMCS, *supra* p. 22; CRS, *supra* p. 22; age discrimination, *supra* p. 22; DOJ's mini-trial guidelines, *supra* p. 23, except, however, these guidelines are to be incorporated into a contract among the participating parties and hence it would be likely that they could modify their own agreement subsequently should they so desire; SPIDR, *supra* p. 23; AAA, *supra* p. 23; Massachusetts, *supra* p. 24.

129. EEOC, *supra* p. 22; inasmuch as the new Education Act incorporates the standards of Rule 408, it would, see *supra* p. 23; Virginia, *supra* p. 24.

130. FMCS, *supra* p. 22; age discrimination, *supra* p. 22.

131. Age discrimination, *supra* p. 22; EEOC, *supra* p. 22; Education, *supra* p. 23; Massachusetts, *supra* p. 24.

132. FMCS, *supra* p. 22; CRS, *supra* p. 22; age discrimination, *supra* p. 22; EEOC, *supra* p. 22; SPIDR, *supra* p. 23; AAA, *supra* p. 23; Massachusetts, *supra* p. 24.

133. *Supra* p. 22.

134. *Supra* p. 24.

135. *Supra* p. 23.

136. *Supra* p. 23.

137. *Supra*, p. 24.

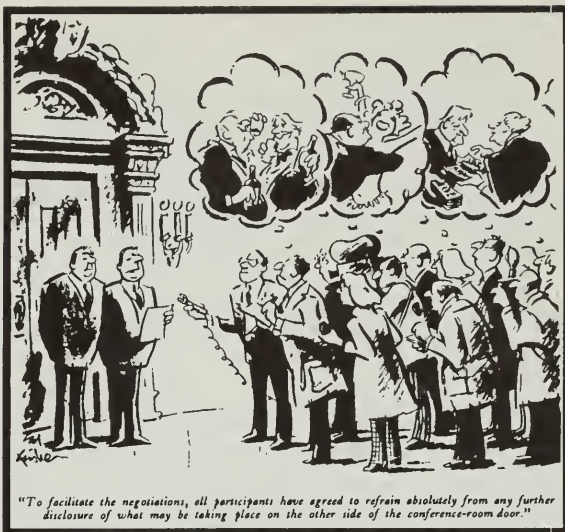
138. *Supra* p. 23.

Confidentiality of all aspects of the negotiations would unquestionably facilitate the parties' reaching agreement. But equally unquestionably, decisions affecting the public welfare that are made in the open and are subject to scrutiny have a far greater political acceptance. Since settlements are essential to administrative agencies, a careful balance must be struck between the openness that is critical for the legitimacy of the agreements reached and the confidentiality that is critical if agreements are to be reached. The proposal below attempts to strike that balance.¹³⁹

The fundamental premise of the proposed approach is that for certain types of cases a mediator can significantly help the parties reach a responsible

agreement. To encourage the use of a mediator in these negotiations, the rule protects the communications between the mediator and the parties or other participants in the course of the negotiations as well as the mediator's own notes and impressions. Importantly, the proposed approach is limited solely to protecting these communications, and it provides a series of limited, narrow exceptions to deal with extraordinary circumstances. The proposed rule does not address when meetings or other aspects of negotiations should be held in public; that is a matter for other law and political considerations. Nor does it address directly the extent to which the parties or other participants can or should be able to preserve the confidentiality of their negotiations. Thus, the extent to which the parties are free to disclose what went on or be compelled to do so is independent of this rule. Also, the rule does not address the extent to which any agreement that is reached will have to be documented by materials that are developed or otherwise produced in the course of the negotiations. Surely many of the agreements reached pursuant to a settlement proceeding involve significant issues of public policy, and their factual and policy basis will have to be explained. This rule has no bearing on the extent to which materials used in the negotiations can and should be incorporated into that document or disclosed in response to an investigation by an Inspector General or other body.

The mediator will virtually *never* have information or evidence that is not shared by at least one other person, excepting of course the mediator's own notes, recollections, and judgments. All the documents and statements of the parties to each other would exist but for the mediator. Thus, shielding the mediator from being the source of information about the negotiations does not restrict the availability of evidence beyond that which would exist if the mediator did not serve. As to the material the neutral has in common with others, it would be inconsistent with stimulating settlements to convert the mediator into a cop or



"To facilitate the negotiations, all participants have agreed to refrain absolutely from any further disclosure of what may be taking place on the other side of the conference-room door."

Drawing by Ed Fisher, © 1982
The New Yorker Magazine, Inc.

THE DILEMMA

139. For an outstanding discussion of the issues involved in developing a general rule for mediation privilege, see Hyman, *Model Confidentiality Rule: A Commentary*, 12 Seton Hall Leg. J. ____ (Forthcoming 1988).

collection agent. Thus, that information should be obtained from the others: the mediator should be the source of information only as a last resort.

The only *new* evidence that exists because of the presence of the mediator is the mediator's own notes and impressions. Of course, some litigants might want the mediator to testify about the negotiations precisely because it would provide a neutral appraisal of the events. But, the role of mediator is antithetical to that of judge or arbitrator, and forcing the mediator to reveal his or her judgments about the events would greatly harm the ability of the neutral to function as a mediator. While having some "independent" view of what went on may be helpful to resolve a conflict in testimony between those who were also there, adjudicatory proceedings are designed to do just that, and the value in achieving settlements has been held to outweigh whatever benefit there may be to the trial process.¹⁴⁰ It seems doubtful that a subsequent litigant would subpoena a judge who brokered a settlement in chambers; the same theories would seem to apply.¹⁴¹

The mediator's notes¹⁴² and mental impressions should be held rigorously confidential to preserve the integrity of the settlement process and for the same reasons that underlie the workproduct doctrine. Forcing their revelation would virtually destroy the benefits of the process and would, except in extremely rare cases, yield little that cannot be gained from the parties themselves.

There may be other instances when a public policy in an individual case favoring disclosure is of sufficient magnitude to override the diminution in the confidence future parties will have that their communications will remain confidential: the specific need should be extraordinarily strong to override the general benefit of confidentiality. For example, someone may make a preliminary showing that the negotiations resulted in an antitrust offense or a major contract fraud. Some initial demonstration of a significant offense should be required before breaching the confidentiality; if a mere allegation or any minor infraction could penetrate the assumption of confidentiality, the general rule would become worthless -- any lawyer could concoct such a complaint. Similarly, if an issue was revealed during negotiations that would significantly affect the public health or safety, the material should be revealed so suitable precautions can be taken. The point is not any specific set of facts or law, but rather that the veil should be pulled back only for truly exceptional cases of substantial magnitude.

Applicability. The purpose of the model rule is to protect the integrity of confidential communications with the mediator and the mediation process itself. Since its purpose is to facilitate settlements of issues directly relevant to an agency program, and not just those in which the agency is a participant, the rule should apply to a group of private parties that are seeking to resolve an among themselves. It is in the agency's interest to facilitate that process, and the rule would do so. Moreover, if the issues in controversy can be resolved before formal proceedings are instigated, both the private parties and the agency can save valuable resources. The rule therefore applies to *all* negotiations over issues of concern to the agency, whether or not the agency itself is a party and whether or not a formal proceeding has been initiated.

140. *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980).

141. There are, of course, important differences: The judge can be held directly accountable for his or her actions by public authorities, whereas a mediator is not licensed nor holds public office and hence is not as directly accountable to the public. In addition, the judge has disciplinary powers that could be wielded to parties that were less than forthright in the negotiations. As one experienced practitioner puts it, a mediator has all the power of a volunteer directing traffic around an accident. But that emphasizes the earlier point: the power in the negotiations belongs to the parties alone, and hence it should be they who provide the evidence. The mediator merely aids in the discussions.

142. These notes include not only those taken by the mediator alone, but also those of his or her staff and to his or her superior for purposes of conducting the negotiations: it is the nature of the material that is confidential, not just who prepared it.

The protection of the rule would start whenever someone begins serving as a neutral¹⁴³ and the parties deal with that person in such a way as to indicate a reasonable belief that their communications will be held confidential. It would be best, of course, if the parties formally indicated that their negotiations were subject to the rule. Doing so would remove any doubt as to their intentions. But, requiring the parties to make the acknowledgement would place a premium on knowing the details of the Code of Federal Regulations and careful lawyering. The provisions of the rule should apply to the innocent as well as the sophisticated.

On the other hand, it does not seem appropriate to attempt to impose the terms of the rule on all the parties for all issues. If they prefer a different set of protections -- or, indeed, none at all -- they should be free to vary the terms by entering into a confidentiality agreement that is specific for their negotiations. In that case, the rule provides that the specific agreement will govern to the extent authorized by law. If some aspect of that agreement is held to be unenforceable, the agreement should nevertheless be upheld to the extent consistent with the rule.

To be sure, it is appropriate for the parties to be able to modify the confidentiality rule applicable to their negotiations. But, the rules of the game are likely to be very important to the mediator, so it would *not* be appropriate for the parties to be able to change those rules in the middle of or even after the game has been played. Therefore, if the parties wish to modify the "default" rule, they should do so before beginning their mediated negotiations and inform the neutral of their desires. In that way, the neutral can decide whether or not he wishes to serve under those groundrules; if so, he can adapt his behavior accordingly.

What is Covered. A "settlement proceeding" is defined as any process that is designed to resolve matters involving a statute, regulation, or policy of the agency (defined as "issues in controversy") by agreement of the parties and in which a neutral serves.

The rule covers oral communications or actions that are related to a settlement proceeding. It also applies to documents that are created specifically for the negotiations or other, previously existing documents that are furnished to the mediator in confidence by a participant in the negotiation.¹⁴⁴ A party need not designate a communication or document as confidential for the rule to apply; it is sufficient if the circumstances are such that they create a reasonable expectation that the information will be held confidential.¹⁴⁵ The presumption would be that non-public meetings of the parties and the mediator would be confidential.

Since the rule is designed to foster candor and confidence in proceeding through direct negotiations, and to make it "safe" to explore a variety of potential solutions to the controversy, it applies to both the parties and to others who participate in the negotiation process.

The General Rule: Neutral Shall Not Disclose or Testify Concerning Settlements. The rule provides that the neutral may not voluntarily reveal confidential information from the negotiations. Moreover, the neutral is protected from having to disclose the information in response to a discovery request or a subpoena.

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143. This may be when a party has asked the person to explore the potential for resolving the issues in controversy through negotiation or to serve as the neutral in such a proceeding; the idea for such an effort may originate elsewhere, in which case at least one of the parties would need to accept the person as a neutral for these purposes.
144. Although previously existing material may be provided to the mediator and other parties in confidence for purposes of the negotiation, as in Rule 408, it would not be immune from discovery if it would otherwise be discoverable. The rule would provide, however, that it would not be discoverable from the mediator, only from the originating party or participant.
145. That the parties had no reasonable expectation of confidentiality was instrumental to the court in deciding to require a mediator to testify concerning the negotiations in Drukker Communications, Inc. v. NLRB, 700 F.2d 727 (D.C. Cir. 1983).

One of the major shortcomings of Rule 408 on its face is that it would permit the discovery, if not the admissibility, of settlement materials. That revelation alone can be significantly inhibiting since that alone could mean the parties to the negotiation could be disadvantaged by things that were said or done in the negotiations. For example, a party to the negotiations may make a proposal that indicates it could "live with" a particular approach that is not ultimately accepted. If that could be discovered, it could be used in other fora to demonstrate that the party would accept this approach; that would force the party to argue as to why the proposal was made and why it was rejected; the end result would be that parties would be understandably reluctant to make proposals and express their views candidly since their revelations could haunt them later. Thus, if the process is to work, the protection must extend to discovery as well as formal admissibility into evidence.

Finally, the restriction against testifying and providing documents would apply regardless of who makes the request and when -- an original party or a person who was not a party; whether or not the issue in the subsequent proceeding is the same or different; no matter whether the request or order is made during the pendency of the original claim or after it has been resolved. Thus, the rule would not permit the ancillary use of mediation materials for such things as impeachment of a witness, because such use would result in the same breach in confidence that can be inhibiting.¹⁴⁶

Exceptions to the General Prohibition. Unlike some confidentiality requirements, the restrictions on the mediator's disclosing information from the negotiation is not categorically absolute.

Mutual Agreement of Parties and the Mediator. If all of the parties to the negotiation and the neutral agree in writing, the neutral can respond to requests; if the information to be revealed came from a non-party participant, that person would also have to agree. Because of the necessity of protecting the integrity of the mediation process as such, it is important that the neutral have a say in whether he or she will disclose aspects of the negotiations. The parties may lack the long-term perspective and also an appreciation of the potential effect on how they will feel about the agreement or the process if the mediator testifies. Thus, the mediator is given a veto power over whether or not to divulge the information sought. It would be expected that the neutral would agree to testify in instances when the question is largely administrative or needed only for a technical reason. If the testimony would go to the substance of the negotiations, the neutral would likely take a far more restrictive position.

Public Documents. If the request is for documents that were exchanged in a public meeting, it seems far easier to have them contact the mediator as a central source than to force someone to canvass everyone who traded papers. The rule would therefore permit the neutral to furnish documents that were submitted in public meetings or are otherwise already in the public domain.

Required by Law. Some materials that are furnished to the mediator will be required by law either to be made public or to be furnished to an agency or other official. Simply because they were used in the negotiations would not override that obligation. But, the mediator should be the source of last resort, and not simply a convenient place to gather in the required materials. Thus, the mediator would be required to provide this type of information, but only if it is not available either from the person or organization that originated it or from any other source. It could be, for example, that a party to a negotiation provided the mediator with a document that is required to be filed with an agency and subsequently destroyed all copies; in that case, the mediator would be obligated to furnish the document. By its nature, this exception should rarely be called into play.

Judicial Override for Extraordinary Cases of Importance. There may be some instances of a vitally important, overriding need to invade the confidentiality of the negotiations. The mediator would be authorized under the rule to respond to a court order that finds the

146. Hyman, *supra* note 139.

revelation of the material is necessary to prevent a manifest injustice or a violation of law. The court is directed to balance the needs in the case before it against the damage that disclosure may make to the long-run integrity of the process by diminishing the confidence the parties have that their negotiations will remain private. The issue presented should be of significant magnitude and a preliminary showing made that the information sought will indeed provide unique¹⁴⁷ admissible evidence that is necessary to resolve an issue of overriding importance. In addition, the court may order that information be made public to protect the public health or welfare.

When faced with questions such as these, a court is likely to order the mediator to reveal the material whether or not the rule provides for it. The rule therefore acknowledges what may well occur anyhow, and by doing so it relieves the mediator of the conflict he or she would feel in having to choose whether to honor the rule or the order. In doing so, the rule defines the criteria a court would use in making that decision, so that it would not be too cavalier in intruding into the settlement process.

The mediator alone could, of course, be authorized to make the decision to disclose in situations such as this. But that would place the mediator in an extraordinarily difficult position of conflict, and he or she may lack the resources to determine the accuracy of the claim. In the FMCS regulations,¹⁴⁸ for example, the Director of FMCS is authorized to decide to override the general confidentiality requirement. In this case, however, there is no "higher authority" over the neutral that could make such a decision. It would be inappropriate to have the agency itself make it since the private parties could reasonably fear that the agency would misuse the power to its advantage and hence that the negotiations would not in fact remain confidential. Thus, to protect the integrity of the process, the rule provides that a court should make the determination of overriding public need.

Dispute Involving the Neutral. Finally, a dispute may arise between the mediator and one or more of the parties, such as over-payment or ethics. Since that controversy is likely to surround what went on in the negotiations, the neutral should be free to defend his interest by disclosing otherwise confidential materials. But, the rule provides that that material may be used only for that limited purpose and not for resolving any issue in controversy in the settlement proceeding.

Notice. The rule directs the neutral to take reasonable steps to notify the parties and affected non-party participants of any attempt to compel disclosure of confidential material. In that way, the parties can assist the neutral in protecting their integrity.

Although the rule does not explicitly address the issue, the question will surely arise as to who pays to defend the confidentiality of this information against attack. It would be expected that if a party to the negotiations wishes that the data remain confidential, that party should defray any expenses the mediator incurs in defending his or her ability to maintain the confidence. If, on the other hand, all the parties to the negotiation ask the mediator to disclose the material but the mediator refuses, the costs of defending the challenge will have to be borne by the mediator. They may, of course, be quite significant for a process that is typically relatively low budget.

Agency Records. The agency should include in any contract for the services of a neutral that it is not claiming any right to the neutral's notes, memoranda, workproduct, and materials received by the neutral during the negotiations. In the event the agency fails to provide that sort of insulation, the agency should not seek these materials even if it has a right to them. The materials will then not be agency records subject to FOIA.

147. If the evidence is not unique in that it can be obtained elsewhere, the confidentiality should be maintained.

148. See *supra* page 22.

For an extensive discussion of a similar provision, see Hyman, *supra* note 139.

If the neutral is a government employee, the issue is more complex. To preserve the integrity of the process, the neutral should carefully segregate the materials so they will be used only by the neutral and no other agency employee. Moreover, they should be used solely for purposes of resolving the issues in controversy in the settlement negotiations. Whether or not they become "agency records" for purposes of FOIA will then depend on the circumstances.

A document that is an agency record independent of the negotiations would, of course, remain such.

Judicial Interpretation. The proposed rule is quite close to the actual implementation of FRE 408 by many courts and the workproduct doctrine. Thus, if courts were to apply the workproduct doctrine to mediators and uniformly apply Rule 408 to prohibit the discovery of settlement data, most of the benefits of this rule could be achieved under existing law at least as to neutrals retained by agencies. To cover neutrals employed by agencies, the courts would, in addition, need to apply the criteria used in determining whether documents prepared by agency employees are "agency records" in such a way as to find that segregated materials that are segregated and used only for settlement purposes by the neutral alone are not within the control of the agency or lack the requisite nexus with the agency's substantive program.