Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Parties in Court-Connected Mediation

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Maureen A. Weston†

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† Associate Professor, Pepperdine University School of Law. The Author would like to thank Professors Robert Pushaw and Sarah R. Cole for comments on earlier drafts and Carolina Watts for her helpful research assistance. This is dedicated in loving memory of my mother, Dolores Arellano Weston, whose light shines on.
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I. INTRODUCTION 

Public policy clearly favors the private negotiation and settle-
ment of litigated disputes. Despite the growing acceptance of private 
settlement of such disputes, it is important that parties who submit 
their disputes to the courts, which are publicly funded and serve a 
public function, adhere to the standards of the judicial process.¹ Increasingly, ‘private’ methods for resolving disputes, particularly alter-
native dispute resolution (“ADR”) processes, including arbitration

¹. Sarah Rudolph Cole, Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution, 51 HASTINGS L.J. 1199, 1202 (2000); see also Wayne
or mediation, are being integrated into the traditional judicial litigation process. The belief that ADR methods may reduce court congestion and provide more efficient and less costly options for resolving disputes has prompted courts and legislatures, at both state and federal levels, to call for establishing court-connected and publicly-funded ADR programs. Even absent a formal court ADR program,

D. Brazil, Comparing Structures for the Delivery of ADR Services by the Courts: Critical Values and Concerns, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999) (arguing that, even in court-sponsored ADR programs, courts must advance values of justice, process fairness and respect for the judicial system).


4. For example, the Alternative Dispute Resolution Act of 1998 (“ADRA”), 28 U.S.C. §§ 651-658 (2001), requires all ninety-four federal district courts to implement ADR programs and authorizes them to compel participation in mediation, early neutral evaluation, and if all parties consent, arbitration. Id. at § 651(b) (also authorizing the use of extra-judicial procedures, including summary jury trial, summary bench trial, and executive mini trial). The Act also directs all district courts to develop rules that prohibit disclosure of dispute resolution communications. Id. at § 652(d) (providing that, until a national rule is adopted under the Rules Enabling Act, each district court “shall, by local rule . . . provide for the confidentiality of the alternative dispute resolution processes and [to] . . . prohibit disclosure of confidential dispute resolution communications.”); see also id. at § 655 (authorizing the use and payment of private third-party neutrals). A number of districts have enacted elaborate program rules and procedures. See, e.g., W.D. OKLA., L.R. 16.3; see also Stone, supra note 2, at 4 (noting that more than one-half of the federal district courts maintain some type of voluntary or mandatory court-connected mediation program).

courts routinely order litigants to attempt settlement either privately or with the assistance of a third-party neutral as a prerequisite to trial pursuant to judicial case management powers.\(^6\)

Although the range of dispute resolution processes includes private negotiations, judicial settlement conferences, and ADR processes such as arbitration or mediation, legislatures have singled out mediation as warranting specific and substantial confidentiality protection. As a result of the popular belief that confidentiality is vital to mediation, legislatures across the country either have enacted or are contemplating legislation that provides broad confidentiality for participants in mediation, including court-connected mediation.\(^7\) The scope of such legislative protection varies by state, but typically expands the protection provided by evidentiary rules.\(^8\) Mediation confidentiality is the focus of the Uniform Mediation Act ("UMA"), which is proposed for adoption in all fifty states.\(^9\) The UMA establishes a privilege against the disclosure of mediation communications that prohibits parties and mediators from disclosing or reporting to a court virtually anything said or done in mediation, including court-connected mediation,\(^10\) with limited enumerated

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Some of these retain an adjudicatory or decisional element such as court-connected arbitration and summary jury trial, while others, such as mediation, are consensual and non-adjudicatory processes. See Katz, supra note 2, at 3 (categorizing ADR methods as decision-oriented processes, where the neutral renders a non-binding decision, and consensual methods, where the neutral assists the parties in reaching their own agreement). The basic objective of these court ADR programs is to alleviate congestion and delay in the court system. See, e.g., 28 U.S.C. § 651 (2001) (setting forth goals of ADR Act); Bernstein, supra note 2, at 2176-83 (noting goals of court ADR programs include reducing the private and social cost of disputing, delay, and the cost of civil discovery).

6. See, e.g., Fed. R. Civ. P. 16(c)(9) (authorizing the court "to take appropriate action, with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."). See also Thomas J. Stipanowich, The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation, 81 Ky. L.J. 855, 882 (1993) (referencing cases where courts relied on inherent judicial case management powers in ordering parties to mediation).

7. See UMA, supra note 3, at Prefatory Note; see also Ellen E. Deason, Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality, 35 U. CAL. DAVIS L. REV. 33, 39-40 (2001) (noting that most states have enacted some form of mediation confidentiality protection).

8. See infra Section II.B.

9. UMA, supra note 3.

10. Id. (establishing a privilege against disclosure for parties, a mediator, or non-party participant to refuse to disclose or prevent another person from disclosing a mediation communication "[i]n a civil proceeding before a court, a proceeding before an administrative agency, an arbitration panel, or other tribunal, including a juvenile court, or in a criminal misdemeanor proceeding.").
exceptions. Most states legislatures have enacted some form of mediation confidentiality legislation, some even more expansive than the scope of the confidentiality privilege proposed in the UMA, or with varied ad hoc exceptions. Few of these statutes, however, acknowledge the authority of a court to override the confidentiality privilege to enforce participation orders, address claims of participant misconduct, or to prevent abuse of process or professional ethics violations.

The need for a broad confidentiality privilege exclusive to mediation, as opposed to other private settlement processes, is more axiomatic than proven. The most commonly stated justification for the heightened protection is that mediation is a unique process whose effectiveness depends on the parties’ candor, informal exchange, and belief that what takes place in mediation will remain confidential. Legislatures have likewise determined that according broad confidentiality to mediation proceedings, including court-connected mediation, facilitates the private negotiated resolution of disputes. This legislative involvement, however desirable, potentially insulates parties or attorneys from discipline for actions in mediation that are otherwise sanctionable, unethical, or illegal. Legislative involvement also threatens separation of powers and federalism, where statutory

11. See UMA supra note 3, § 6 (specifying limited exceptions).
12. Id. at Prefatory Note (noting that “[v]irtually all States have adopted some form of [mediation] privilege . . . effected in approximately 250 different state statutes.”); see, e.g., CAL. EVID. CODE § 1119 (2000); TEX. CIV. PRAC. & REM. CODE ANN. §154.052(c) (2000); see also Deason, supra note 7, at 45 n.29 (describing a range of mediation confidentiality legislation).
13. See generally J. Brad Reich, A Call for Intellectual Honesty: A Response to the Uniform Mediation Act’s Privilege Against Disclosure, 2001 J. DISP. RESOL. 197 (2001) (concluding that no empirical proof supports the claim that mediation needs confidentiality); Eric D. Green, A Heretical View of the Mediation Privilege, 221 OHIO ST. J. ON DISP. Resol. 11203 (1986); Scott H. Hughes, A Closer Look: The Case for a Mediation Privilege Has Not Been Made, 5 DISP. RESOL. MAG. 14 (Winter 1998); see also Goldberg, Sander & Rogers, Dispute Resolution: Negotiation, Mediation, and Other Processes 442 (3d ed. 1999) (noting that “[l]awmakers have little evidence to guide them in assessing whether assurance of confidentiality is necessary to promote the frank discussion necessary to achieve settlement.”).
15. See Reich, supra note 13, at 239 (asserting that a privilege against disclosure can “actually encourage parties to lie during mediation. Their false statements cannot be used against them, for any purpose, at trial or in a similar forum . . .”); Deason, supra note 7, at 60 (noting problems of lying); Pamela A. Kenter, Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct, 1997 BYU L. Rev. 715, 753 (1997).
confidentiality may infringe upon a court’s ability to regulate and sanction litigants for abuses or misconduct in court-connected mediation.

A court’s power to regulate and sanction the conduct of parties and attorneys in the litigation and trial process is an established principle in the American legal system. Often this authority is express in legislation or written procedural rules. The Federal Rules of Civil Procedure ("Federal Rules") and state counterparts, for example, authorize trial courts to impose sanctions on parties and attorneys for an array of conduct throughout the pretrial process, such as abuse of process, failure to cooperate in the discovery process, violation of subpoenas, or procedural bad faith. Rule 16 of the Federal Rules also articulates many of a trial judge’s case management powers, which include the authority to direct attorneys and parties to attend pretrial settlement conferences, as well as to utilize "[s]pecial procedures to assist in resolving the dispute," such as ADR processes. The Rule further provides that a court may impose sanctions where a party or attorney has failed to comply with court pretrial orders or failed to attend, to be adequately prepared, or to participate in good faith in court-mandated settlement conferences. In addition to the authority expressed in legislation or procedural rules, courts have considerable inherent powers to manage, regulate, and sanction party conduct in the litigation process. Court orders or referrals of litigants to ADR are made pursuant to a court’s express or implied powers to control the litigants and litigation process. In connection with this authority, courts may mandate rules for participation, such as requiring the attendance of a party with settlement authority, the submission of position memoranda or briefs, the attendance of witnesses, or simply, good faith participation. The

18. See Fed. R. Civ. P. 26(g), 30(g), 37(d), 37(g).
23. As one scholar has noted, "much of what trial courts do, and indeed must do, in the conduct of their business is not provided for in any rule or statute and thus necessarily rests on inherent authority." Daniel J. Meador, Inherent Judicial Authority in the Conduct of Civil Litigation, 73 Tex. L. Rev. 1805, 1806 (1995). See infra Section IV.
question posed here is whether, and to what extent, the judicial power to monitor, regulate and sanction participants extends to court-connected ADR processes, in particular mediation, where the legislature has accorded a broad confidentiality privilege.

The strong statutory protection for mediation confidentiality threatens a court's traditional power to monitor the litigation process and to sanction parties and attorneys when the offending conduct occurs in a court-connected mediation context. In Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., the California Supreme Court refused to recognize a judicially-created exception to a statute that prohibited disclosure of mediation communications, based on a court's inherent power to police the litigation process and to sanction parties for non-compliance with court orders for participation in mediation.25 Other courts, by contrast, consider it within their inherent authority to admit reports of participants' court-connected ADR misconduct.26 Foxgate is indicative of how broad mediation confidentiality statutes may bar courts access to reports of actions that are unethical, fraudulent, or contrary to court orders.27

The expanded use of court-connected ADR programs and, in certain cases, the absence of the traditional "voluntary" aspect of ADR participation,28 invites the possibility that one or more of the parties ordered to an ADR process that lacks public scrutiny or judicial involvement will abuse the process, engage in obstreperous conduct, or simply refuse to participate as expected.29 While some might regard misconduct or bad faith participation in a court-connected mediation

25. 25 P.3d 1117. See infra Section III.B.
26. See infra Section III.A.
27. See infra Section II (surveying legislation and court rules that establish participation standards as well as promise confidentiality and reveals the absence of meaningful guidance in court rules for reporting conduct violations).
28. See Nancy H. Rogers & Craig A. McEwen, Mediation: Law, Policy & Practice, 1C app. B (2d ed. 1994 & Supp. 2000) (listing over 40 states where mandatory mediation is authorized); Stone, supra note 2, at 859 (noting that "several states, including Texas, Florida, and California, require parties to engage in mandatory mediation before they can obtain a trial in certain types of civil cases").
29. See Paul D. Carrington, ADR and Future Adjudication: A Primer on Dispute Resolution, 15 REV. LITIG. 485, 494-95 (1996) (noting that "court ordered mediation invites abuse by an aggressive party" and "may actually delay settlement of some cases."); Kimberlee K. Kovach, Mediation Principles and Practice 583 (2d ed. 2000) (providing a list of questionable conduct); Weston, supra note 2, at 595 (discussing concerns of mediation process abuse); Stipanowich, supra note 6, at 874-75 (noting potential that mediation "may be an instrument of oppression where there is gross imbalance in bargaining power between the parties," due to financial, informational, physical, or psychological disparities).
as a party’s choice to reject the potential benefits of mediation. Many courts believe that permitting non-compliance makes a mockery of the court-referral and jeopardizes the integrity of the judicial process. Where misconduct occurs in a judicial settlement conference, or even court-connected arbitration, courts impose sanctions ranging from costs and attorney’s fees to default judgment, dismissal, or contempt. Broad mediation confidentiality, however, effectively precludes judicial inquiry into participant conduct during the mediation process and thus limits a court’s power to control and monitor its processes. Broad confidentiality legislation that limits judicial inquiry into a court-connected dispute resolution process raises separation of powers concerns and questions about the role of the court in court-connected ADR programs. As desirable as they may seem, do these broad mediation confidentiality laws impermissibly usurp judicial authority to monitor and sanction party conduct in court-connected mediation?

This Article explores the interplay between mediation confidentiality legislation and judicial powers to regulate participant conduct in the pretrial process. Part II describes the role of the court in monitoring parties’ conduct in distinct settlement-related processes, such as private settlement negotiations, judicial settlement conferences, court-connected arbitration, and court-connected mediation, as well as the corresponding but varied confidentiality protection accorded these processes. Part III examines judicial decisions analyzing the tension between mediation confidentiality and judicial power to monitor and sanction misconduct in a settlement or court-connected mediation setting, specifically comparing the approach used in Foxgate with that of other courts, which have relied upon inherent powers to sanction parties for court-connected ADR misconduct. Part

30. Critics of a good faith participation requirement in mediation maintain that such a requirement is ambiguous and antithetical to the voluntary and flexible nature of the process. See, e.g., Edward F. Sherman, Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?, 46 S.M.U. L. Rev. 2079 (1993); Wayne D. Brazil, Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts, 2000 J. Disp. Resol. 11, 31 (2000) (contending that a good faith participation requirement could “distort the dynamic” between parties, the role of the mediator and of the mediation process). Nonetheless, good faith participation requirements are enforced in pretrial settlement conferences and court-related arbitrations, and numerous court rules and ADR referrals contain express good faith participation requirements. See infra Section II.A.


32. Fed. R. Civ. P. 16(f) (incorporating sanctions provided in Fed. R. Civ. P. 37(b)(2)(B), (C), and (D)).

33. See infra Section IV.
IV explores this tension from a constitutional perspective, examining the respective powers of the judiciary to control the litigation process and of the legislature to promulgate policy that impacts the judiciary. This analysis concludes that separation of powers principles implicitly restrict enforcement of broad confidentiality statutes to the extent these provisions materially impair judicial power to sanction participant conduct in court-connected dispute resolution proceedings. Thus, confidentiality legislation is implicitly, but should be expressly, "qualified" to accommodate the judicial power to enforce its orders and conduct its judicial duties. Notwithstanding this qualification, a court can minimize deleterious effects on confidentiality by adopting appropriate safeguards to shield information disclosed within mediation from unnecessary public revealment. Legislation that qualifies the scope of confidentiality to exclude protection for conduct that is sanctionable, illegal, or in violation of court orders or professional ethics codes, appropriately balances the need for respecting the judiciary's role with the legislature's concern for substantive confidentiality in court-connected dispute resolution processes.

II. ADR IN THE COURTS: JUDICIAL SETTLEMENT AND COURT-CONNECTED DISPUTE RESOLUTION

A. Judicial Oversight of Settlement and Court-Connected Dispute Resolution

Courts play a significant role in the pretrial management of litigated disputes and, increasingly, in encouraging parties to settle.\textsuperscript{34} Courts frequently direct parties to explore settlement\textsuperscript{35} by means of private negotiations, through pretrial judicial conferences, and

\textsuperscript{34} Facilitating case settlement is an express objective of court procedural rules. Rule 16 emphasizes the need for greater judicial intervention to improve case management and to expedite and facilitate settlement. See, e.g., Fed. R. Civ. Proc. 16(a)- (f); see also Marc Galanter & Mia Cahill, Symposium: Most Cases Settle: Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1340-41 (1994) (discussing the "pro-settlement" position of amended Rule 16 and judicial involvement in promoting settlement). For a criticism of this trend, see generally Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982), which disapproves of the extensive "managerial" role that judges take in pretrial and settlement.

\textsuperscript{35} It is often said that approximately ninety percent of all civil cases filed in the judicial system ultimately settle before trial. See Galanter & Cahill, supra note 34, at 1340-41. This is somewhat of an overstatement because many cases never go to trial as a result of voluntary or involuntary dismissal through judicial means. See F. Sander, H. Allen, and D. Hensler, Judicial (Mis)Use of ADR? A Debate, 27 U. Tol. L. Rev. 885, 888 (1996) (noting a study by the RAND corporation which found that "[a]lmost ninety-five percent of all private civil cases filed in the federal courts never reach trial, ending instead in settlements or other pretrial dispositions.").
through other ADR methods that are conducted by private or court-appointed third-party neutrals outside of the court’s presence. As compromise discussions, all settlement and ADR processes receive a level of confidentiality protection by evidentiary rules, which render inadmissible information offered to prove the claim or its amount. Courts may also compel attendance by attorneys and parties and set forth other conduct requirements, such as adequate preparation, the presentation of witnesses or documents, or good faith participation. The authority of a court to enforce such orders or to impose sanctions for non-compliance or other misconduct is expressed in procedural rules and largely unquestioned in court-annexed arbitration proceedings. In mediation, however, such authority is unclear because of the broad confidentiality accorded to the process. The following describes judicial involvement in regulating these processes as well as their attendant confidentiality protections.

1. Rule 16 and Judicial Authority in Private and Judicial Settlement Conferences

A court’s broad authority to manage and control conduct in litigation is memorialized in various statutes or court procedural rules. Federal Rule of Civil Procedure 16 ("Rule 16"), like most of its state counterparts, provides that a court may require attorneys and parties to appear for pretrial conferences prepared to consider a number of subjects, including settlement and “such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.” Either upon motion or sua sponte, a court may impose sanctions against a party or attorney “[i]f no appearance is made on behalf of party . . . or, if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith.” Rule 16 also provides that a court may

36. Fed. R. Civ. P. 16(c)(9) (authorizing the court to take appropriate action with respect to the “settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.”); SPIED, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1990), cited in Goldberg, Sanders, & Rogers, supra note 13, at 385-86 (discussing benefits and drawbacks of compulsory ADR referral by the courts).

37. See infra Section II.A.1-2.

38. Fed. R. Civ. P. 16(c)(1)-(16), 16(d).

39. Fed. R. Civ. P. 16(c), (d) and (f); see also G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 650-53 (7th Cir. 1989) (en banc) (holding that courts may also direct represented parties to attend, despite absence of language in the rule specifically requiring party attendance); In re Novak, 932 F.2d 1397, 1405 (11th Cir.
require a party, counsel, or both, to pay reasonable expenses incurred because of noncompliance, including attorney’s fees.  

Procedural rule sanction provisions are not the exclusive source of court authority. Courts also rely upon their inherent authority to exercise wide discretion in sanctioning attorneys and parties for a range of conduct in the litigation process. For example, although not expressly stated in Rule 16, courts have held that it is within their inherent powers to require that parties with full settlement authority attend pretrial settlement conferences. A party’s failure to appear at a pretrial conference has resulted in sanctions as extreme as dismissal or default judgment. Courts have also relied upon their express and/or inherent judicial powers to impose sanctions—in the form of costs, attorney fees, or the striking of pleadings or a jury demand—on parties and attorneys for other recalcitrant conduct, such as the failure to attend with settlement authority, the concealment

1991) (stating that “[t]he model for pretrial settlement conferences, then, as envisioned by the Federal Rules of Civil Procedure, presumes that fully prepared individuals, having taken advantage of the extensive discovery provided by rules and then evaluated their cases, will participate in such conferences; if these individuals actually are unprepared, Rule 16 authorizes the court to sanction them.

40. Fed. R. Civ. P. 16(f) (excepting sanctions where the compliance was substantially justified or other circumstances make an award of expenses unjust)


42. See G. Heileman Brewing Co., 871 F.2d at 656-57 (upholding sanctions against corporation for sending only attorney and not corporate representative to pretrial conference); In re Novak, 932 F.2d 1397, 1407 (11th Cir. 1991) (concluding that “the power to direct parties to produce individuals with full settlement authority at pretrial settlement conferences is inherent in the district court”).

43. See, e.g., Link v. Wabash, 291 F.2d 542, 545 (7th Cir. 1961) (holding that district court had inherent power to dismiss the action for plaintiff’s failure to appear at pretrial conference and stating “[i]t is sheer sophistry to argue that the trial court has no inherent power to enforce its rules orders or procedures and to impose appropriate sanctions for failure to comply.”), aff’d, 370 U.S. 626 (1962); see also Lkerd v. Lacey, 852 F.2d 1256 (10th Cir. 1988) (concerning failure to appear); Malone v. U.S. Postal Serv., 833 F.2d 128 (9th Cir. 1987) (concerning failure to prepare).

44. See G. Heileman Brewing Co., 871 F.2d at 656-57 (upholding sanctions against corporation for sending only attorney and not corporate representative to pretrial conference); Empire Inc. v. Nat’l Merit Servs., Inc., 188 F.R.D. 478 (D. Ky. 1999) (awarding attorneys’ fees and costs to plaintiff when defendant failed to send client with authority); Meeks v. United Air Cleaner Co., 174 F.R.D. 88 (D. Ill. 1997) (sanctioning lead counsel for failing to appear and instead sending an associate attorney, who had little information about the case); In re Novak, 932 F.2d at 1407 (recognizing inherent powers as a basis for order, where Rule 16 does not explicitly authorize court to require nonparty attendance at settlement conference; Schwartzman, Inc. v. ACF Indus., Inc., 167 F.R.D. 694 (D.N.M. 1996) (sanctioning for failure to send representative with full settlement authority and stating that failure to participate in good faith
of essential facts, or the failure to prepare for or participate in good-faith in pretrial settlement conferences. Although courts recognize that their powers to require parties to consider settlement do not extend to forcing concessions or settlement upon unwilling parties, a court can require that "parties or their attorneys must evaluate discovered facts and intelligently analyze legal issues before the start of pretrial conferences." Where the parties fail to do so, a court's power to sanction is invoked.

in pretrial conference is a serious matter that can have serious consequences of dismissal or default, and government is no less subject to such penalties than any private party.

45. See Crowe v. Smith, 151 F.3d 217, 241 (5th Cir. 1999) (recognizing district court's inherent powers to sanction attorneys for misrepresentations made in settlement conferences); Guillory v. Domtar Indus., Inc., 95 F.3d 1320, 1334–35 (5th Cir. 1996) (holding that the district court did not abuse its discretion in imposing sanctions on the manufacturer for failing to participate in a pretrial settlement conference in good faith in a products liability action; the manufacturer "concealed its true position that it never intended to settle the case," while offering $100,000 to employee who had been rendered quadriplegic as a result of a forklift injury).

46. See Francis v. Women's Obstetrics & Gynecology Group, P.C., 144 F.R.D. 646, 647 (W.D.N.Y. 1992) (holding that mere physical presence at settlement conference by defendant's attorney, who was not prepared to participate therein, was not sufficient compliance with order requiring attorney to attend settlement conference); In re Novak, 932 F.2d 1397.

47. See Fed. R. Civ. P. 16(f); Guillory v. Domtar Indus., 95 F.3d 1320, 1334–35 (5th Cir. 1996) (affirming sanctions, per Rule 16(f), against a party for lack of good faith participation in settlement conference but not for party's failing to make a serious offer); Ayers v. City of Richmond, 895 F.2d 1267, 1270 (9th Cir. 1990) (court acted within authority to require attorney who failed to appear at settlement conference to pay reasonable expenses because of noncompliance); see also Annotation, Imposition of Sanctions by Federal Courts for Failure to Engage in Compromise or Settlement Negotiations, 104 A.L.R. Fed. 461 (2001); Annotation, Imposition of Sanctions under Rule 16(f), Federal Rules of Civil Procedure, For Failing to Obey Scheduling or Pretrial Order, 90 A.L.R. Fed. 157 (2001).

48. Jack Friedenthal et al., Civil Procedure 442-43 (3d ed. 1999) (noting that the pretrial conference was introduced in 1929 and embodied in Fed. R. Civ. P. 16 in 1938); see also Fed. R. Civ. P. 16, Advisory Committee Notes Discussion subdivision c, clause 7 (1993 Amendment); Gross Graphics Sys. v. DEV Indus., 267 F.3d 624 (7th Cir. 2001) (courts may require parties to engage in settlement negotiations but cannot force settlement); Kothe v. Smith, 771 F.2d 687, 669 (2nd Cir. 1985) (Rule 16 "was not designed as a means for clubbing the parties—or one of them—into an involuntary promise.").

49. In re Novak, 932 F.2d 1397, 1405 (11th Cir. 1991).

50. Id.; see also Richard D. English, Annotation, Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith In, or Comply with Agreement Made in, Mediation, 43 A.L.R. 5th 545 (1996).
2. Court-Connected Arbitration

Court-connected ADR programs can consist of a range of adjudicatory or non-adjudicatory procedures.51 In court-annexed arbitration, for example, a neutral renders a non-binding decision or evaluation after an expedited, adversarial hearing.52 Although courts are not directly involved in the arbitration hearing, they do impose sanctions for misconduct in a court-annexed arbitration.53

51. Court ADR programs that incorporate adjudicative-type processes include the summary jury trial, summary bench trial, or mini-trial. A summary jury trial mirrors a civil trial to a court or jury and "[c]onsists of a summarized trial case presentation by attorneys to an empanelled jury or judge whose verdict or decision is non-binding but expected to be used as an aid for subsequent settlement negotiations." See, e.g., W.D. OKLA. LCR16.3 Supp. § 6.1; see also, id. at § 7.1 (defining summary bench trial). A mini-trial involves a summarized presentation of evidence by each party before a panel, consisting of a neutral advisor and client with full settlement authority, who are to consider the evidence and thereafter participate in settlement discussions with the neutral. Id. at § 8.1. In Early Neutral Evaluation (ENE), the parties discuss or present their case in a confidential session with a neutral who provides a non-binding assessment. Id. at § 8.3.

52. See Bernstein, supra note 2, at 2176 (describing basic features of court-connected arbitration programs). In arbitration, formal rules of evidence need not apply, witness testimony and cross-examination is limited, and the arbitrators are not required to issue formal findings of fact or conclusions of law. The parties may reject the arbitration verdict and request a trial de novo; otherwise the award becomes a binding judgment. See W.D. OKLA. LCR16.3 Supp. § 5.1(c) (describing non-binding arbitration and also stating that "[t]he nonbinding award can be used as a basis for subsequent negotiations or can be accepted and entered as judgment.").

53. See, e.g., Ill. Supreme Ct., R. 91(b) (2002) (requiring good faith participation in court-annexed arbitration hearing and authorizing sanctions, including, but not limited to, "[a]n order debarring that party from rejecting the award, and costs and attorney fees incurred for the arbitration hearing and in the prosecution of the petition for sanctions, against that party."); USDC DNJ L. Civ. R. 201.1(3) (authorizing court, upon finding of failure to participate in striking of any demand for a trial de novo filed by that party); ND NY USDC L.R. 83.7-5(c) (2002); USDC DNJ Appx. M IV (2002) (noting the "goals of the arbitration program and the authority of the Court will be seriously undermined if a party were permitted to refuse to attend an arbitration hearing and then demand trial de novo." Accordingly the Court has, in the same rule, allowed for the imposition of "appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo" filed by a party who fails to participate in the arbitration process in a "meaningful manner."); N.M. L.D.R. Dist 3 LR3-709(4) (2002) (authorizing the arbitrator to certify to the court or enter an award of default or dismissal against any party violating good faith participation requirement, which "[t]he court shall consider . . . when deciding attorney fees, costs and interest on appeal or when considering whether to set aside the default."); see also 1 Rogers & McEwan § 7:05, 7:06 (citing Firelock v. Dist. Court of the 20th Judicial Dist., 776 P.2d 1090 (Colo. 1989) (upholding statutory provision allowing financial penalty against party rejecting nonbinding arbitration award who failed to improve upon award at trial de novo)).
Court rules in several jurisdictions authorize imposing judicial sanctions and cost-shifting penalties on parties who reject arbitration results and fail to obtain a better result at trial.\textsuperscript{54} Courts also sanction parties or deny them the right to a trial \textit{de novo} where the party failed either to attend or to participate in the court-annexed arbitration in good faith.\textsuperscript{55} Conduct considered indicative of bad faith participation includes the failure to appear, failure to present any evidence or witnesses, as well as a range of conduct considered dilatory, obstructive or abusive of the process.\textsuperscript{56}

3. \textit{Court-Connected Mediation}

In contrast to the adjudicatory nature of arbitration, mediation is a more consensual process whereby the neutral’s role is to assist the parties in reaching their own resolution.\textsuperscript{57} Mediation is premised

\textsuperscript{54} See, e.g., D.N.J. L.Civ.R. 201.1(f)(3) (authorizing courts to “impose any appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo . . .” on behalf of any party who failed to participate “in a meaningful manner” in the arbitration); E.D.Pa. L.C.R. 8(E) (2001) (“In the event, however, that a party fails to participate in the trial before the arbitrators in a meaningful manner, the court may impose additional sanctions, including but not limited to the striking of any demand for a trial de novo by that party.”).

\textsuperscript{55} See, e.g., D.N.J. L.Civ.R. 201.1(f)(3) (authorizing courts to “impose any appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo . . .” on behalf of any party who failed to participate “in a meaningful manner” in the arbitration); E.D.Pa.L.C.R. 8(E) (“In the event, however, that a party fails to participate in the trial [before the arbitrators in a meaningful manner, the court may impose additional sanctions, including but not limited to the striking of any demand for a trial de novo by that party.”); Dist. of Ariz. R. 2.11(i)(3); (providing that “[i]ailure to appear or to participate in good faith at [the court-connected, voluntary, non-binding] arbitration hearing . . . shall constitute a waiver of the right to appeal absent a showing of good cause.”); see also Gilling v. Eastern Airlines, 880 F. Supp. 169 (D.N.J. 1988) (upholding arbitrator’s decision that defendant failed to participate in a meaningful manner and imposing sanctions of costs and fees where defendant’s attorney merely read fact summaries and failed to produce any witnesses); Wahle v. Med. Center of Delaware, 559 A.2d 1228 1233 n.4 (Del. 1989) (upholding dismissal of plaintiff’s suit for failure to participate in good faith in court-connected arbitration, the court quoted the trial court: “It would make a mockery out of the arbitration process if everyone just said ‘Forget it. I am going to concede. Enter judgment against me so I can take an appeal de novo.’”); Honeywell Protection Servs. v. Tandem Telecomms., Inc., 495 N.Y.S.2d 130 (1985) (prohibiting plaintiff who failed to present evidence at court-ordered arbitration from introducing evidence in a trial de novo); Mohamad v. Simmons, 534 S.E.2d 616 (N.C. App. 2000) (holding sanctions striking trial de novo for failure to participate in court-ordered arbitration in good faith do not deny jury trial right).

\textsuperscript{56} See Weston, supra note 2, at 609 n.85 (citing various cases where courts have imposed sanctions on parties for conduct related to court-annexed arbitration).

\textsuperscript{57} UMA, supra note 3, at Prefatory Note (2) (stating that, “[m]ediation is a consensual process in which the disputing parties decide the resolution of their dispute
upon the principle of self-determination, that parties should be allowed to decide the issues to be discussed during a dispute resolution process and the terms of their resolution.\textsuperscript{58} These features have generated substantial public, legislative and judicial support for mediation.\textsuperscript{59} Increasingly, courts order parties to mediation to attempt to resolve their differences as a prerequisite to trial.\textsuperscript{60} Court mediation rules and referral orders typically set forth various participation rules. These include requirements that parties attend mediation sessions with settlement authority, submit position memoranda, bring expert witnesses, or participate in good faith.\textsuperscript{61} Confidentiality, typically provided by evidentiary rule, party agreement, court rule, or statutory provision, at times, may curtail judicial supervision or enforcement of those rules.\textsuperscript{62}

B. \textit{Settlement-Related Confidentiality Protections}

Although cases filed in the judicial system are a matter of public record and trials are open to the public, efforts to settle lawsuits

\textsuperscript{58} \textit{See Kovach, supra} note 29, at 23-25, 302-303 (discussing the Society of Professionals in Dispute Resolution).

\textsuperscript{59} \textit{UMA, supra} note 3, at Prefatory Note (2) (noting that judicial and legislative support for mediation is reflected in the more than 2500 state and federal statutes and many more administrative and court rules that relate to mediation).

\textsuperscript{60} \textit{See UMA, supra} note 3, at Prefatory Note (2) ("State courts and legislatures have perceived [mediation] benefits, as well as and the popularity of mediation, and have publicly supported mediation through funding and statutory provisions that have expanded dramatically over the last twenty years... [t]he primary guarantees of fairness within mediation are the integrity of the process and informed self-determination.") (emphasis added).

\textsuperscript{61} See, e.g., E.D. Mo. L.R. 16-6.02 (2002) (requiring parties and counsel "to attend the ADR conference, participate in good faith, and possess the requisite settlement authority unless excused."); N.D.N.Y. L.R. 83.11-5(3) (requiring good faith participation); S.D.N.Y. L.R. 83.12(j) (requiring attendance with authority and preparation to discuss case); Miss. L.R. 83.7(H) (authorizing sanctions against party who is substantially unprepared to participate in court-annexed mediation); E.D.N.C. Rule 32.07(f) (requiring parties to be prepared to discuss issues in good faith); N.D. W.Va. L.R. Civ. P. 5.01(d) (mandating attendance, preparation, and participation in good faith by all parties and attorneys); U.S.B.C.W.D. Tex. App. L-1001-i(c) (requiring good faith participation in proceedings, subject to the power of the Court to "assess appropriate sanctions."); DEL. SUPR. CT. CIV. R. 16.1(i) (requiring participation and authorizing the imposition of sanctions on those who do not participate in good faith); ORE. CROOK AND JEFFERSON CIR. S.L.R. 12.011(3) (specifying that in child custody mediation, parties are prohibited from acting in bad faith to use the mediation for purposes of delay).

\textsuperscript{62} \textit{See infra} Sections III and IV.
before trial, whether by party negotiations, judicial settlement conferences, or court-connected ADR, are generally conducted in private.\textsuperscript{63} Whether a person may disclose evidence of what occurred or was said in these sessions varies depending upon the type of proceeding. The scope of settlement-related confidentiality protection is determined in one of four ways: by evidentiary rule, contractual agreement, local court rule, or statutory privilege.

1. **Limited Protection Under Evidentiary Rule 408**

   Parties may be wary of making admissions, concessions, or engaging in the necessary discussion or activity to reach settlement if some level of confidentiality is not afforded during the process. This premise, combined with the public policy favoring negotiated resolution of disputes, belies Rule 408 of the Federal Rules of Evidence and its state counterparts,\textsuperscript{64} which provide general evidentiary protection for settlement negotiations. The Rule renders offers, statements, and conduct made in the settlement process inadmissible where offered to establish the underlying substantive claim or defense.\textsuperscript{65}

   The policy justifications for Rule 408's evidentiary exclusion mirror the justifications for mediation confidentiality policy: to promote settlement, to foster candor between the parties, and to avoid prejudice where settlement-related statements are construed as an admission of liability or claim of weakness.\textsuperscript{66} At settlement negotiation

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\textsuperscript{63} Some local court rules may provide that particular ADR sessions, where a substitute for trial or involving public policy issues, are open to the public. See Bernstein, *supra* note 2, at 2179.

\textsuperscript{64} Wright, *supra* note 41, at § 5301 (noting that many states have adopted identical versions of Fed. R. Evid. 408 and collecting state statutes).

\textsuperscript{65} Fed. R. Evid. 408 (providing that, "[e]vidence 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.") (emphasis added).

\textsuperscript{66} Wright, *supra* note 41, § 5302 (describing Rule 408 policy rationale: "[t]he exclusion is based on the strong public policy favoring negotiated resolution of disputes. Since parties may be inhibited in making offers of compromise by fear that these will be used against them if the compromise efforts fail, the law alleviates that fear and encourages the making of offers by making them privileged."); see also Wayne Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings
processes. court-sponsored ADR receives this protection absent specific additional protective legislation.

But Rule 408's protection is intentionally limited. For example, the Rule only applies to exclude evidence introduced to prove or negate the validity of a claim or its amount in subsequent judicial proceedings, not in other settings such as discovery, arbitration, informal conversation, or the press. Likewise, testimony regarding compromise discussions may be admitted when offered "for another purpose," such as to prove witness bias or prejudice, undue delay, or obstruction of a criminal investigation or prosecution. Conduct or statements made in a settlement context that are unrelated to the substantive claim may be reported to establish "other" claims such as


67. See, e.g., W.D. OKLA. CIV. R. 16.3 Supp. § 6.6 (rendering inadmissible any information concerning the summary jury trial, including "the nature or amount of any verdict, or any other matter concerning the conduct of the summary jury trial or negotiations related to it, unless the evidence would otherwise be admissible under the Federal Rules of Evidence, or the parties have otherwise stipulated" and stating that "[s]ummary jury trial proceedings are considered pretrial settlement negotiations and are subject to such protections as the law may allow.").

68. Unlike most mediation legislation, rules regarding confidentiality in arbitration or other ADR processes are less prominent. The Revised Uniform Arbitration Act, for example, provides a limited confidentiality provision for arbitration. See National Conference of Commissioners on Uniform State Laws, UNIFORM ARBITRATION ACT § 17(e), available at http://www.law.upenn.edu/bl/ulc/ulc_frame.htm (last visited Jan. 11, 2003).

69. ROGERS & McC EWEN, supra note 28, § 9.3 ("Offers to compromise a disputed claim and responses to them, including settlement agreements—whether made during a mini-trial, a mediation or elsewhere—have traditionally been inadmissible to prove the validity or amount of the claim in litigation. The evidentiary exclusion for compromise negotiations serves both to encourage settlement discussions and to exclude evidence generally of low probative weight, since the compromise might have been motivated by a desire to buy peace rather than an acknowledgment of liability.").

70. See DWIGHT GOLANN, MEDIATING LEGAL DISPUTES 367-68 (1996) (discussing the limitations of evidentiary rules to protect confidentiality of settlement discussions); FED. R. CIV. P. 26(b)(1) provides that, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."; see also Pamela A. Kentra, Hear No Evil, See No Evil, Hear No Evil: The Intolerable Conflict Between The Duty to Maintain Mediation Confidentiality and Duty to Report Fellow Attorney Misconduct, 1997 BYU L. REV. 715 (1997).

71. FED. R. EVID. 408. The Rule also does not require exclusion of evidence that is "otherwise discoverable" merely because it is offered in the course of negotiations. Id.; see also GOLANN, supra note 70, at 368 (noting that "a litigant may be able to avoid Rule 408 by arguing that it is introducing evidence about what occurred in a mediation merely to show a witness's bias, to prove that a party bargained in good faith, or as evidence of a witness's state of mind.").
malicious prosecution, misconduct, false or inconsistent statements, fraud, wrongful acts, or bad faith participation. Thus, the evidentiary protection for settlement discussions and conduct is limited to the substantive aspects of the underlying claim but does not extend to protect other statements or conduct. The rationale for this limiting principle is to promote exchange on the underlying merits but not to provide a secrecy cloak for wrongful conduct.

2. Private Agreements for Confidentiality

Parties may also agree, orally or in writing, that all communications made in the course of a settlement negotiation or dispute resolution proceeding remain confidential. Private confidentiality provisions are typical in agreements to mediate, whether court-connected or private, and may be effective to ensure confidentiality in a non-judicial context. Disclosure in violation of such agreements

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72. See Wright, supra note 41, § 5314 (noting permissible uses of compromise evidence in Rule 408 is illustrative, not exhaustive and that Rule 408 does not apply when the claim is based upon wrongful acts committed in the course of settlement discussions). See also id. (citing Eisenberg v. University of New Mexico, 936 F.2d 1131, 1134 (10th Cir. 1991) (finding that Rule 408 does not bar the use of an affidavit submitted in settlement negotiations to impose Rule 11 sanctions); Resolution Trust Corp. v. Blasdell, 154 F.R.D. 675, 681 (D. Ariz. 1993) (Rule 408 does not bar use of settlement statements to prove that suit was filed in retaliation for refusal to settle); Bradshaw v. State Farm Mut. Auto Ins., 758 P.2d 1313, 1322 (Ariz. 1988) (admitting evidence of insurer's statements in settlement negotiation in action for malicious prosecution to show that insurer intentionally filed a meritless action to strong-arm plaintiff into settlement); Harrima v. Maddocks, 518 A.2d 1027, 1031 (Me. 1986) (admitting negotiation statements to show release signed as a result of fraud); Gorman v. Soble, 328 N.W.2d 119, 125 (Mich. Ct. App. 1982) (admitting settlement statements to prove parties were fraudulently induced to enter agreement); Tarrant County v. English, 989 S.W.2d 368, 378 (Tex. App. 1998) (admitting a settlement letter to show the recipient was misled by offeror)).

73. See Wright, supra note 41, § 5314. See also Golann, supra note 70, at 369 ("Rule 408, in other words, is designed to prevent a party from being 'shot' [in court] with a 'gun' it provided the other side in settlement discussions, not to keep such discussions confidential for all purposes.").

74. See Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (breaching of a confidentiality agreement can result in liability); Parazino v. Barnett Bank, 690 So. 2d 725, 728 (Fla. Dist. Ct. App. 1997) (affirming dismissal and sanctions on plaintiffs who divulged to the media terms of bank's settlement offer and information protected by a court-ordered and written confidentiality agreement), case dismissed, 695 So. 2d 700 (Fla. 1997), and review denied, 705 So. 2d 9 (Fla. 1997); see also UMA, supra note 3, at Prefatory Note (noting that statutory protection is needed to protect from compulsory or voluntary disclosure of mediation communication in a judicial and administrative proceeding, including discovery, deposition and otherwise compelled or subpoenaed evidence).
may result in liability as a breach of contract.\textsuperscript{75} Private agreements to exclude evidence are disfavored, however, and these private confidentiality contracts provide uncertain protection against subpoenas, particularly when weighed against public policy considerations.\textsuperscript{76}

3. \textit{Local ADR Court Confidentiality and Participation Rules}

Local court rules or ADR referral orders may also provide confidentiality assurances to participants in a court-connected ADR process. Like evidentiary rules, court rules typically provide only evidentiary protection and do not preclude disclosure in other contexts such as discovery, deposition, or otherwise compelled or subpoenaed evidence.\textsuperscript{77} In federal court, local ADR program rules define confidentiality rules, with the overriding principle to "prohibit disclosure of confidential dispute resolution communications."\textsuperscript{78} Court rules typically contain confidentiality assurances for court-connected mediation, yet rarely contain comparable confidentiality assurances for other ADR processes, such as court-connected arbitration.\textsuperscript{79}


\textsuperscript{76} Alan Kirtley, \textit{The Mediation Privilege's Transition From Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and The Public Interest}, 1995 J. Disp. Resol. 1, 10-11 (1995) (noting enforcement of written agreements to maintain confidences in mediation is uncertain, as public policy forbids contracting to exclude evidence); \textit{see also} Equal Employment Opportunity Comm'n v. Astra USA, 94 F.3d 738, 745 (1st Cir. 1996) (ruling that agreements to keep evidence from a public tribunal are void as against public policy).

\textsuperscript{77} \textit{See} UMA, \textit{supra} note 3, at Prefatory Note (discussing limitations of contractual and court confidentiality rules).

\textsuperscript{78} The Alternative Dispute Resolution Act of 1998 ("ADRA"), 28 U.S.C. § 652 (2001). The act also requires every federal district court to implement an ADR program and authorizes courts to mandate participation in mediation and ENE, and, if all parties consent, to arbitration, leaves issues such as program implementation, participation standards, and confidentiality to the individual courts. \textit{Id.} The local federal district court rules establishing these guidelines vary.

\textsuperscript{79} For example, court ADR rules for the Western District of Oklahoma provide express confidentiality protection for court-connected mediation. \textit{W.D. OKLA. CIV. R. 16.3 Supp. § 3.7} (extending confidentiality privilege to all written and oral communications made in connection with any mediation, prohibiting disclosure of mediation communications to anyone not involved in the litigation or to the assigned judge or use for any purposes, including impeachment, in any pending or future proceeding in this court and providing testimonial immunity for mediator). Court-annexed arbitration does not receive the same protection. \textit{See W.D. OKLA. CIV. R. 16.3 Supp. § 5.9(c)} (noting instead that arbitration awards are filed under seal, not disclosed to the assigned judge where the party requests a trial de novo, and treated as pretrial settlement negotiations).
While many court ADR rules assure confidentiality, a number also contain other participation rules, including requirements that parties appear with settlement authority or participate in good faith.\textsuperscript{80} Very few court rules address how such participation violations can or should be reported, or to whom, without abridging confidentiality.\textsuperscript{81}

4. Mediation Confidentiality Legislation

The limitations on settlement-related confidentiality provided by evidentiary rule and private agreement have prompted legislation providing for specific and generally broader confidentiality protection for mediation.\textsuperscript{82} Interestingly, such legislation is not focused on other ADR processes such as arbitration or private settlement negotiations. Although the scope of protection varies by jurisdiction and even among programs within states,\textsuperscript{83} mediation confidentiality statutes expand the scope of protection for otherwise admissible communications in mediation. Thus, the gap in the evidentiary rules that permits the introduction of settlement-related statements or conduct

\textsuperscript{80} See supra Section II. A.2.

\textsuperscript{81} Most court rules do not address the reporting of participation violations, while some court rules require the mediator to report participation violations. See, e.g., E.D. Mo. L.R. 16-6.05(A) (2002) (requiring neutral to report to the judge “[a]ny willful or negligent failure to attend any ADR conference, to substantially comply with the Order Referring Case to Alternative Dispute Resolution, or otherwise participate in the ADR process in good faith. The judge may impose any sanctions deemed appropriate.”); N.M. R3 Dist. L.R. 3-7.14 (2001) (the “Facilitator’s Outcome Report” asks: “In your opinion, did the parties participate in good faith? If no, please explain.”); D.C. LCvR App. B (2000) (permitting parties to report complaints of ADR misconduct to a non-presiding compliance judge); D.V.I. LRCi 3.2(e)(2) (requiring mediator to notify referring judge of parties who failed to participate in mediation in good faith).

\textsuperscript{82} See, e.g., UMA, supra note 3, § 5, at Reporter’s Working Notes 1 (noting that the overwhelming majority of mediation legislation employs a privilege structure). For a comprehensive summary of state mediation privilege laws, see ROGERS & McEWEN, supra note 28, at App. A.

\textsuperscript{83} See UMA, supra note 3, at Prefatory Note 3 (reporting that virtually every state has some form of mediation confidentiality legislation that is effected through approximately 250 different state statutes and explaining the need and benefits of uniformity); see also GOLANN, supra note 70, at 369 (“Privileges are more effective than evidentiary rules because they ordinarily bar persons subject to them from disclosing information not only in the course of adjudicatory hearings but also in any other context. A privilege thus prevents the disclosure of data not merely at trial but also in discovery proceedings, administrative and arbitral processes, media contacts, commercial dealings, and informal conversations.”).
“for another purpose” or that do not relate to the merits of the underlying substantive claims, may be narrowed by state privilege law. These state privilege laws apply in both state and federal courts.84

The statutory protection for mediation communications falls into one of three categories, generally affording mediation: (1) blanket confidentiality, whereby no disclosure of any mediation communications may be made (absolute confidentiality),85 (2) nearly absolute confidentiality, subject to enumerated exceptions, which vary by state statute, or disclosure only upon consent by all parties, including the mediator (enumerated confidentiality),86 or (3) qualified confidentiality, providing mediation confidentiality but expressly recognizing judicial discretion to order disclosure in individual cases where needed to prevent a manifest injustice or to enforce court orders.87

The Uniform Mediation Act (“UMA”) follows the enumerated confidentiality approach, establishing an absolute privilege but setting forth a series of specific exceptions. Under the UMA, mediation communications,88 including conduct that is considered “assertive,”89

84. See infra Section IV.B (regarding federalism implications of federal courts being bound to apply state mediation confidentiality laws).

85. For example, the California Evidence Code prohibits mediator reports or testimony concerning the mediation unless all parties to the mediation expressly agree otherwise. CAL. EVID. CODE § 1119 (West 2001); see also, id. at § 1121 (West 2001) (precluding mediator reports to a court). The California statutory scheme relating to mediation contains explicit exceptions to mediation confidentiality. Id. at § 703.5 (excepting statements or conducts could “give rise to civil or criminal contempt,” “constitute a crime,” or “be the subject of investigation by the State Bar or Commission on Judicial Performance.”). Cf. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (“Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.”).

86. See infra notes 88 to 101 (discussing UMA approach).

87. See WIS. STAT. § 904.085(4)(e) (2001) (permitting disclosure if necessary to prevent a “manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.”); see also OHIO REV. CODE ANN. § 2317.023(C)(4) (Anderson 2002); LA. REV. STAT. ANN § 9:4112(B)(c)(B)(c) (2002).

88. Communications are broadly defined to encompass “a statement, whether oral or in a record or verbal or non-verbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” UMA, supra note 3, § 2(2).

89. The UMA confusingly attempts to provide that some forms of conduct are privileged, while others not, by distinguishing “assertive” from “non-assertive” conduct. Id. § 2, at Reporter’s Notes § 2(2). The Reporter’s Notes go to some pain in this effort:

[T]he physical presence of a person—is not a communication. By contrast, nonverbal conduct such as nodding in response to a question would be a “communication” because it is meant as an assertion, however nonverbal conduct such as smoking a cigarette during the mediation session typically
whether or not related to the underlying substantive claim, will not be disclosed to a judge or in a legal proceeding, including discovery and subpoenaed evidence. The Act also provides testimonial immunity to participants, authorizing the mediator to refuse to disclose, and parties to refuse to disclose or to prevent any other person from disclosing, a mediation communication in a subsequent proceeding. The UMA Drafters intended the Act's confidentiality privilege to apply to both court-related and private mediation.

UMA Drafters acknowledged the risk that broad confidentiality could potentially shield sanctionable conduct, yet reasoned that "[i]f [the parties and mediators] realize that they will be unable to show would not be a "communication" because it was not meant by the actor as an assertion. . . . More specifically, communications include both statements and conduct meant to inform, because the purpose of the privilege is to promote candid mediation communications. U.S. v. Robinson, 121 F.3d 911, 975 (5th Cir. 1997).

UMA, supra note 3, § 2, at Reporter's Notes § 2(2). This distinction is often illusive. Presumably, a party who fails to attend, or who attends the mediation but wears headphones the entire time is asserting they are not interested in talking—is this privileged? Briefs submitted to the mediator are protected communications, but if a party refused to submit mediation briefs or submitted a brief that contained only the party's name and no discussion regarding the case or one's position on settlement, would the party's actions also be considered an "assertive" mediation communication?

90. Id. at Prefatory Note 1. The Act provides that "[a] mediation communication is confidential and, if privileged, is not subject to discovery or admissible in evidence in a proceeding." UMA, supra note 3, § 4(a).

91. Under the UMA, a mediator is precluded from making any "report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation." Id. at § 7(a). The mediator may, however, disclose "(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; (2) a mediation communication as permitted under Section 7; or (3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment." Id. at § 7(b).

92. Id. at § 4(b). The UMA authorizes a waiver of the privilege, "if it is expressly waived by all parties to the mediation and: (1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and (2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant." UMA, supra note 3, § 5(a).

93. Id. at § 3(a)(1) (applying to a mediation where "the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator."). Cf. id. at §3(b)(3) (excluding from coverage a mediation "conducted by a judge who might make a ruling on the case."). The Act does not apply to collective bargaining, educational peer programs, or correctional institutions' mediation programs. UMA, supra note 3, § 3(b). Parties may also agree in advance that the Act's provisions do not apply. Id. at § (3)(c).
that another party lied during mediation, they will ask for corroboration of the statement made in mediation prior to relying on the accuracy of it.94 The rationale underlying this broad privilege is that confidentiality is necessary to promote party candor and frank exchanges, which are “achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.”95

Unlike some blanket confidentiality statutes, the UMA contains limited exceptions to the mediation privilege96 for threats of bodily injury, communications used to plan or commit a crime, evidence of abuse or neglect, evidence of professional misconduct or malpractice by the mediator,97 or evidence of professional misconduct or malpractice involving a party, nonparty participant, or party representative.98 Upon a demonstration of need and showing that such information is otherwise unavailable, mediation communications may be introduced in a court proceeding involving a felony, or to prove a claim or defense to reform or avoid liability on a contract arising out of the mediation.99 These exceptions, however, are to be narrowly

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94. Id. at Prefatory Note 1 (“Once the parties and mediators know the protections and limits of mediation privilege, they can adjust their conduct accordingly.”). This recognition illustrates a problem with such confidentiality; i.e., why should a lie be privileged? Why not say to the parties, if you lie, that is not privileged in order to promote truth-telling? Obviously, extra litigation challenging the mediation process is undesirable, but the mediation privilege should not be used to permit unethical conduct or hide this from the court. See infra Section IV.

95. UMA, supra note 3, at Prefatory Note 1.

96. Id. at § 6(a).


98. UMA supra note 3, § 6(a)6, at 210 (reporting note states that “the failure to provide an exception or such evidence would mean that lawyers and fiduciaries could act unethically or in violation of standards without concern that evidence of the misconduct would later be admissible in a proceeding brought for recourse. This exception makes it possible to use testimony of anyone except the mediator in proceedings at which such a claim is made or defended . . . . Reporting requirements operate independently of the privilege and this exception. Mediators and others are not precluded by the Act from reporting misconduct to an agency or tribunal other than one that might make a ruling on the dispute being mediated, which is precluded by section 8(a) and (b).”) (emphasis added). Id. at 218.

99. Id. at § 6(b)1, at 210-11. (“There is no privilege . . . if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality and that the mediation communication is sought or offered in (1) a court proceeding involving a felony (or misdemeanor); or (2) . . . a
construed.\textsuperscript{100} The UMA's approach in establishing a mediation privilege while enumerating certain exceptions reflects a thoughtful \textit{a priori} weighing of competing policies between confidentiality and the need for disclosure.\textsuperscript{101} However, a statute cannot anticipate all circumstances where a court might determine that disclosure is essential to vindicate a court's powers and the integrity of the judicial system. The inquiry is thus whether a court may imply otherwise non-enumerated exceptions to a governing confidentiality statute based on its judicial authority to control the litigants and litigation process.

C. Confidentiality's Clash with Judicial Power and Potential to Shield Abuses from Judicial Supervision

Efforts to facilitate settlement through judicial settlement conferences, party negotiations, and private and court-connected ADR processes are increasingly integrated into the pretrial litigation process. ADR procedures can assist parties in gaining a more realistic perspective of their case's strengths and weaknesses, as well as providing parties an opportunity to control the outcome of their case rather than risking a win/lose proposition at trial. The benefits of incorporating ADR into the court system are thwarted, however, where participants fail to attend, prepare, or participate in the process, or when they use the process for improper reasons or engage in misconduct. The court in \textit{Nick v. Morgan's Foods} expressed the risk of abuse in court-ordered mediation for parties:

\begin{quote}
proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation . . .") (emphasis added).
\end{quote}

\textsuperscript{100} \textit{Id.} at § 6, at 212 ("the Act establishes what is in effect a presumption of privilege, which may be rebutted in an off-the-record hearing in which the proponent of the evidence must meet a high standard of need by demonstrating that the evidence is otherwise unavailable and that the need for it in the case at bar substantially outweighs the state's interest in protecting the confidentiality of mediation. In other words, the exceptions listed in 6(b) include situations that should remain confidential but for overriding concerns for justice.").

\textsuperscript{101} The Act's basic goal is to protect the parties' and public's expectation that mediation is a confidential process and that mediators will not later take sides or disclose their statements in subsequent judicial processes. Although the UMA seeks to ensure mediation confidentiality, it has met opposition for not providing enough confidentiality protection, see \textit{Pennsylvania Bar Association to Oppose Uniform Mediation Act}, (Jan. 28, 2002), \textit{available at} http://www.adrworld.com (last visited Jan. 11, 2003); \textit{Texas Bar Section to Oppose Uniform Mediation Act in State}, (Nov. 19, 2001); \textit{International Academy of Mediators Opposes Adoption of UMA} (Nov. 16, 2001); see also Scott H. Hughes, \textit{The Uniform Mediation Act: To the Spoiled Go the Privileges}, 85. MARQ. L. REV. 9 (2001).
to 'gain information about its opponent's case, strategy, and settlement posture without sharing any of its own information.' Instead of a negotiation session, the mediation becomes a stealth discovery session, to the unfair benefit of the party whose decision-maker is not in attendance. When that happens, the Court's referral to mediation has been callously misused. Meanwhile, the opposing side has spent money and time preparing for a good-faith, candid discussion toward settlement. If the other party does not reciprocate, most if not all of that money and time has been wasted.  

While the potential and actual abuse of court ADR referrals has led to the adoption of various participation or conduct rules, the ability of the court to police the parties' compliance and enforce rules for ADR referrals is limited by the confidentiality accorded to these processes. Basic evidentiary rules bar disclosure of communications that relate to the merits of substantive claims in private settlement negotiations, judicial settlement conferences, court-connected arbitration, and other court ADR processes. Mediation is afforded even stronger confidentiality protection. Given the confidentiality accorded to what takes place in these processes, can a court ever know when participants to a court-ordered mediation have engaged in misconduct, abused the process, or failed to participate in good faith, regardless of confidentiality?

III. Varied Judicial Treatment of Court-Connected Mediation Sanction Claims

The operation of statutory confidentiality provisions that preclude disclosure of virtually all mediation communications, including "assertive conduct," poses new questions as to the role and authority of the court to regulate, monitor, and sanction party conduct in a court-connected mediation or other ADR process. Judicial authority to sanction parties for conduct or participation violations in a pretrial settlement conference or court-connected arbitration is rarely challenged on confidentiality grounds. By contrast, courts are divided as to whether mediation statutory confidentiality privileges prevent

103. See supra Section II.A.1; see also Lockhart v. Patel, 116 F.R.D. 44 (E.D. Ky. 1987) (holding that a court has the authority to mandate attendance at settlement conferences and to impose sanctions on parties whose lack of attendance or meaningful participation violates a court order.); Goldman, Antonetti, Ferrainoli, Axtmayer & Hertell, a P'ship v. Medfit Intl Inc., et. al., 982 F.2d 686 (1st Cir. 1993) (affirming trial court's imposition of sanctions for failure to attend mandated settlement conference.).
104. See supra Section II.A.2.
judicial consideration of similar claims in a mediation setting. Some courts have been willing to entertain sanction motions arising out of court-connected mediation,\textsuperscript{105} despite countervailing arguments of confidentiality. These courts have relied on these inherent judicial powers: (1) to monitor parties in the litigation process; (2) to except from statutory confidentiality the procedural, as opposed to substantive, aspects of mediation communications; (3) to sanction a party for failure to comply with a specific court requirement; or (4) to weigh the need for evidence in the individual case against the purpose served by the privilege.\textsuperscript{106} The ability of a court to exercise this power has been called into doubt by the California Supreme Court's decision in Foxgate Homeowners' Ass'n, Inc. v. Bramaele California, Inc., which held that a court may not rely on judicial powers to imply such exceptions to mediation statutory confidentiality.\textsuperscript{107} The following examines the reasoning for these varied approaches.

A. Judicial Sanction Power Unaffected by Statutory Mediation Confidentiality

Despite legislation conferring broad confidentiality to the mediation process, a number of courts have relied upon their judicial authority to admit evidence of alleged mediation-related misconduct and impose sanctions. The following cases illustrate the reasoning underlying reliance on judicial power.


In Nick v. Morgan's Foods, Inc., the plaintiff filed a motion for sanctions contending that the defendant failed to participate in good faith in court-ordered mediation by failing to submit a position memorandum and to bring a client representative with full settlement authority, as directed by the court's mediation referral order.\textsuperscript{108} The

\textsuperscript{105} Requirements that parties participate in good faith appear almost routinely in some court-ADR referral orders, as well as expressly in certain local court ADR program rules. The requirement is also set forth in Rule 16, which some courts view as applicable to court-ordered ADR proceedings. \textit{See supra} Section II.A.

\textsuperscript{106} \textit{See} Olam \textit{v. Congress Mortgage Co.}, 68 F. Supp. 2d 1110 (N.D. Cal. 1999); \textit{see also} \textit{Ohio Rev. Code} § 2317.023.

\textsuperscript{107} 25 P.3d 1117 (Cal. 2001).

\textsuperscript{108} 99 F. Supp. 2d 1056, 1057 (E.D. Mo. 2000). The order referring parties to mediation also provided that all parties and counsel having full authority to settle "shall attend all mediation conferences and participate in good faith." \textit{Id.} at 1058 (emphasis omitted).
court found that the defendant employer had made a calculated decision to disregard the court's instructions. The employer conceded that it did not comply with the referral order because to do so would have been "a waste of time," yet contended that the court lacked authority to impose sanctions to enforce the [participation] order. The court based its authority to order and enforce participation not only on Federal Rule of Civil Procedure 16, but also on its inherent power to control litigation and to preserve the integrity of the judicial process. The court noted that a district court’s "ability to take action in a procedural context may be grounded in 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." According to the court, its good faith participation order did not mandate settlement but did require the participation of a corporate representative with authority to settle, and submission to the neutral with a position memorandum, even if that were used simply to alert the neutral that the party was not an appropriate ADR participant.

The Eighth Circuit Court of Appeals affirmed the district court's sanction order against the defendant for failure to comply with court participation orders in mediation on the basis of the district court's express authority under procedural rules governing pretrial conferences to impose sanctions.

109. Nick, 99 F. Supp. 2d at 1058-59. Because of the defendant's failure to comply, the court found "[n]ot surprisingly, the ADR conference did not result in a settlement." Id. at 1057.

110. Id. at 1061.

111. Id. at 1060-61; see also Turner v. Young, 205 FRD 592 (D. Kan. 2002) (clarifying that requirement in district court's procedural Rule 16.3 "applies not only when a court conducts a settlement conferences but also where the parties have a private mediator to facilitate a mediation session.").


113. Id. at 1060-61.

114. Nick v. Morgan's Foods, Inc., 270 F.3d 590, 595 (8th Cir. 2001) (noting that the court's ADR Referral Order required that each party provide "a memorandum to the mediator presenting a summary of disputed facts and a narrative description of its position on liability and damages, and that all parties, counsel, and corporate representatives with authority to settle claims shall attend all conferences and participate in good faith." Local Rule 6.05(a) required the mediator "to immediately inform the judge of any failure to attend any ADR conference, to comply with the Referral Order, or to otherwise cooperate with the ADR process."). The opinion did not address any objection to these rules or sanctions on the basis of mediation confidentiality.
2. *In re Daley*

A similar theme emanates through *In re Daley*, where a Texas Appeals court construed a broad statutory mediation confidentiality privilege to cover only matters relating to the *subject matter* of the underlying dispute in the mediation and ruling that administrative and procedural matters, such as attendance, whether a party left a mediation without mediator permission, and good faith conduct are reportable to the presiding court.115 In *Daley*, the trial court’s mediation referral order required the attendance of counsel and parties with settlement authority and provided that “[c]ounsel shall negotiate openly and knowledgeably; failure to be prepared and to negotiate knowingly and in good faith, may be treated as contempt. All individuals ordered to attend must remain in attendance until the mediator declares the mediation concluded . . . All settlement discussions shall be subject to [statutory] confidentiality protections.”116 Defendant’s employee, who had been given settlement authority, participated in the mediation session but reportedly left the mediation session early and without permission.117 Plaintiff’s counsel sought the employee’s deposition in order to support a motion for sanctions.118 The defendant resisted, contending that the mediation confidentiality provision precluded disclosure “of all matters relating to the mediation, including conduct and demeanor of the parties and their counsel.”119 Ruling that the statute does not confer a blanket confidentiality rule for ADR participants and renders confidential only communications “relating to the subject matter of any civil or criminal dispute made by a participant in an ADR procedure,”120 the court permitted disclosure of procedural matters.121

Stating that its ruling “does not pose ‘dire consequences for the mediation process’”122 the court distinguished the court’s inability to require parties to *negotiate* the substance of the underlying dispute in

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115. *In re Daley*, 29 S.W.3d 915, 917-18 (Tex. App. 2000) (“Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.” (quoting Tex. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (Vernon Supp. 2000))).

116. *Id.* at 917.

117. *Id.*

118. *Id.*

119. *Daley*, 29 S.W.3d at 918.

120. *Id.* (emphasis added by court).

121. *Id.* Thus, the employee, albeit a non-party, never objected to the mediation, and in so doing “voluntarily subjected himself to the jurisdiction of the trial court in its handling of the administrative and procedural matters concerning the mediation.”

122. *Id.* at 919.
good faith from the ability to require them to participate in an ADR process in good faith by setting forth procedural and administrative requirements.\(^{123}\) Chief Justice Walker also spoke to the court's need to retain control over procedural aspects of court-connected ADR:

Who is in control of the ADR process? Was it legislative intent to allow the use of the process for gamesmanship, diversion, or stalling, pending more serious concerns such as jury selection? The credible answer to this question is 'No.' The clear intent of the ADR statutes is to create a controlled atmosphere wherein parties may resolve their legal disputes, with the emphasis being on the words "parties" and "controlled." ... To effectively carry out the intent and purpose of the ADR statute, courts are necessarily endowed with the power to control the ADR process to prevent misuse or abuse of such process. Effectuating the process implies the application of full judicial authority to guarantee the credibility of the process, especially where the parties have agreed to seek, through ADR, an amicable termination of the judicial process.\(^{124}\)

3. Olam v. Congress Mortgage Company

The court in Olam v. Congress Mortgage Co.\(^{125}\) implicitly relied on its judicial powers in thoughtfully articulating the need for the court to be able to determine in an individual case whether a statutory mediation privilege should yield to a compelling need for evidence. In Olam, the defendants sought to enforce a written mediated agreement, which the plaintiff contended was procured by duress. Mediator testimony was needed to resolve the question.\(^{126}\) Although the applicable statute conferred broad mediation confidentiality and mediator testimonial immunity, the court considered that it had an

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123. Daley, 29 S.W.3d at 919 (quoting Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370, 375 (Tex. App. 1999) ("[w]hile a court may compel parties to participate in mediation, it cannot compel the parties to negotiate in good faith or settle their dispute . . . the manner in which the participants negotiate should not be disclosed to the trial court" and declining to read Davis to mean that all ADR communications remain confidential).

124. Id. at 919-20 (Walker, J. dissenting) (disagreeing on grounds that Daley's deposition testimony is cumulative).

125. 68 F. Supp. 2d 1110 (N.D. Cal. 1999); see also Smith v. Smith, 154 F.R.D. 661, 664 (N.D. Tex. 1994) (implying an exception to mediation confidentiality statute where fraud in the mediation was alleged); Allen v. Leal, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998) (implying an exception where the mediator and mediation process was under attack).

126. Olam, 68 F. Supp. 2d at 1127 (noting that party testimony was likely to be directly contradictory).
independent duty to determine whether evidence about what occurred during the mediation proceedings, including testimony from the mediator, should be permitted.\textsuperscript{127} The court found that the statutory confidentiality was subject to a judicial balancing of the competing policy considerations for confidentiality and the court’s need to establish facts to rule on the contested claim.\textsuperscript{128}

B. California Supreme Court’s Rejection of Judicial Power to Override Confidentiality Legislation

The foregoing opinions illustrate the inclination of many courts to regard mediation confidentiality legislation as implicitly subject to judicial power and discretion to monitor court-connected mediation-related misconduct.\textsuperscript{129} By contrast, the California Supreme Court rejected that precept, holding that a court must strictly apply and may not imply any exceptions to the statute governing mediation confidentiality. In 	extit{Foxgate Homeowners’ Ass’n, Inc. v. Bramalea California, Inc.}, the Court directly framed the issue:

[W]e face the intersection between court-ordered mediation, the confidentiality of which is mandated by law (Evid. Code, §§ 703.5, 1115-1128), and the power of a court to control proceedings before it and other persons ‘in any manner connected with a judicial proceedings before it’ (Code Civ. Proc., § 128,

\begin{itemize}
  \item \textsuperscript{127} Id. at 1130-31.
  \item \textsuperscript{128} Id. at 1131-32; see also 	extit{In re Anonymous}, 283 F.3d 627 (4th Cir. 2002) (authorizing limited waiver of confidentiality of mediation communications, despite “bright line” rule, upon weighing competing considerations in disclosures to determine whether disclosure was needed to avoid a “manifest injustice”).
  \item \textsuperscript{129} See 	extit{In re Grand Jury Subpoena}, 148 F.3d at 487 (5th Cir. 1998) (mediation confidentiality cannot be used as a shield for wrongdoing); Cooper v. Austin, 750 So. 2d 711 (Fla. Dist. Ct. App. 2000) (admitting wife’s statements made during a mediation that threatened the husband with extortion); Doe v. State of Nebraska, 971 F. Supp. 1305 (D. Neb. 1997) (ruling that confidentiality for mediation settlement proposals does not bar court’s deciding motion for sanctions arising out of court’s mediation program); Francis v. Women’s Obstetrics & Gynecology Group, P.C.144 F.R.D. 646 (W.D.N.Y. 1992) (sanctioning party for failing to timely and adequately submit mediation statement as required by order to mediate); 	extit{In re Waller}, 573 A.2d 780, 781 (D.C. Cir. 1990) (despite confidentiality provision of the mediation order, the trial court agreed that the mediator’s reporting an attorney’s misconduct and alleged misrepresentation in mediation to the court was appropriate because “it was a matter that had nothing to do with the negotiations between the parties but might affect the administration of justice in the Superior Court . . . ”); Dupeire v. Ray, 766 So. 2d 539 (La. 2000) (finding defendant who was not adequately prepared for court-ordered mediation in contempt for bad faith participation); Garcia v. Mireless, 14 S.W.3d 839, 843 (Tex. App. 2000) (holding court has inherent power to dismiss plaintiff’s suit as sanction for party’s failure to appear at court-ordered mediation); Schulz v. Nienhuis, 448 N.W.2d 655 (Wisc. 1989) (holding trial court could decide appropriate remedy for party’s failure to participate in court-ordered mediation).
\end{itemize}
subd. (aA)(5)), by imposing sanctions on a party or the party’s attorney for statements or conduct during mediation. (See Code Civ. Proc., §§ 128.5, 1209; Bus. & Prof. Code, § 6103.).130

As the following discussion demonstrates, Foxgate’s ruling that a court cannot imply exceptions to statutory confidentiality to vindicate its sanction powers, although applauded by many in the mediation community, is questionable in its assertion that only the legislature can determine the circumstances warranting exceptions to mediation confidentiality.

1. Background

Foxgate involved a construction defect case in which the homeowners’ association sued the developer and general contractor. The trial court’s case management order ("CMO") named retired judge Peter Smith as the mediator and authorized him to conduct “mediation” conferences, “make any orders governing the attendance of parties and their representatives thereat,” provided that “[t]he parties were ordered to make their best efforts to cooperate in the mediation process.”131 The CMO also stated that all mediation and settlement communication privileges would remain in effect.132 The Mediator scheduled a five-day mediation session for the parties to present and exchange claims of construction defects and repairs, instructing the parties to bring their experts and claims representatives.133 Neither party objected to these directions.

At the mediation, the plaintiff’s lawyer appeared with nine expert witnesses while defense counsel showed up late and with no experts.134 After a few hours, the sessions were canceled due to the absence of defense experts.135 Thereafter, the plaintiff’s counsel filed a motion for sanctions, seeking over $230,000 as reimbursement for the cost of the nine experts, the mediator, and the plaintiff’s counsel’s preparation. The motion recited a series of comments and actions by defendants that reflected a pattern of bad-faith participation, including delay tactics and appearance without experts at the mediation session.136 The mediator also filed a report to the court, recounting defense counsel’s conduct at the mediation session and stating that

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130. 25 P.3d 1117, 1119 (Cal. 2001).
131. Id. at 1125, 1120.
132. Id. at 1120.
133. Id.
134. Foxgate, 25 P.3d at 1120.
135. Id.
136. Id. (according to plaintiff's attorney declaration in affidavit in support of motion for sanctions, which also reported that, in response to a question as to why his
the attorney "spent the vast majority of his time trying to derail" the mediation process. 137 The mediator added that "[a]s a result of [defense counsel's] obstructive bad faith tactics, the remainder of the mediation sessions were canceled at a substantial cost to all parties." 138 The mediator's report also recommended that the defendants be ordered to reimburse the plaintiff for all costs incurred as a result of the cancelled mediation sessions. Based upon these reports, the trial court imposed sanctions exceeding $30,000 against the defendant. 139

2. The California Court of Appeals' "Judicial Carving"

On appeal, the defendants argued that the trial court's reliance on the mediator's report, along with evidence of statements and conduct made during the mediation session, violated two statutory mediation-confidentiality rules precluding admissibility of mediator reports and protecting mediation confidentiality. 140 Section 1119 of the California Evidence Code bars the disclosure of any written or oral communications made in the course of a mediation and specifically provides that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." 141 In addition, Section 1121 prohibits any type of mediator reports, assessments, recommendations or evaluations to the court other than whether an agreement was reached, absent the parties' consent. 142

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137. Id. at 1121.

138. Id. (noting that "[defense counsel] spent the vast majority of his time trying to derail the mediation sessions . . . . Even though the purpose of the mediation session was to have [defendant's] expert witnesses interact with plaintiff's experts on construction defect issues, [counsel] refused to bring his experts to the mediation . . . [counsel] also stated [that his client [did not] have any responsibility for the construction of the project since they did not 'pound any nails or swing any hammers' . . . . it became apparent that [counsel's] real agenda was to delay the mediation process so that he can file a Motion for Summary Judgment . . . . As a result of [counsel's] bad obstructive bad faith tactics, the remainder of the mediation sessions were canceled at a substantial cost to all parties . . . .").

139. Foxgate, 25 P.3d at 1122. The court noted that the state Code of Civil Procedure authorizes sanctions to control improper resort to the judicial process and burdensome and unnecessary legal tactics, and proof that a party engaged in bad faith actions or frivolous or delay tactics warrant sanctions.

140. Id. at 1124 (quoting CAL. EVID. CODE §§ 1119, 1121 (West Supp. 1999)).

141. CAL. EVID. CODE § 1119(c) (West Supp. 1999).

142. Id. at § 1121.
Although acknowledging that these privileges served to promote mediation and party disclosures, as well as to prevent mediator coercion or influence on the results of a mediation or adjudication, the Appeals Court reasoned that these considerations need to be balanced against the "equally important requirement of the meaningful, good faith participation of the parties and their lawyers."\textsuperscript{143} The Court added, "[w]e do not believe that the Legislature intended [statutory confidentiality] as an immunity from sanctions, shielding parties to court-ordered mediation who disobey valid orders governing their participation in the mediation process, thereby intentionally thwarting the process to pursue other litigation tactics."\textsuperscript{144}

In ruling the mediator's report admissible, despite the statutory provisions for mediation confidentiality,\textsuperscript{145} the Appeals Court surmised that "[t]he plain language of the mediation confidentiality privileges must sometimes yield to other competing interests,"\textsuperscript{146} thereby recognizing a narrow exception\textsuperscript{147} to report violation of court orders or misconduct as necessary to enable judicial oversight and inherent court authority to police and control its own processes.\textsuperscript{148}

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\textsuperscript{143} Foxgate, 25 P.3d at 1123.
\textsuperscript{144} Id. at 1124.
\textsuperscript{145} See id.
\textsuperscript{146} Id. at 1127 n.14 (citing Rinaker v. Superior Court, which held that a juvenile's constitutional right to confrontation in a civil juvenile delinquency case trumps a mediator's statutory right not to be called as a witness, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464).
\textsuperscript{147} Foxgate, 25 P.3d at 1123 (cautioning that "only [such] information that is reasonably necessary to describe sanctionable conduct in context" should be put before the court and . . . "the report should be no more than a strictly neutral account of the conduct and statements being reported, along with such other information as required to place those matters in context."). The court reversed and remanded the case for the trial court to prepare a written order supporting sanctions as required by a local procedural rule and advised that trial court to disregard portions of mediator's report that contained extraneous information such as recommendations, conclusions, or characterizations of conduct or statements. \textit{Id.}
\textsuperscript{148} Foxgate, 92 Cal. Rptr. 2d. at 928 (quoting \textit{Cal. Rules of Court}, rule 227, and \textit{Code Civ. P.} § 177.5 (West Supp. 1999) (authorizing sanctions for bad faith violation court orders or failure to participate in good faith in any court-ordered conference). The court posited, "What if a party to a particularly fractious and emotional dispute attacked or threatened an opposing party or counsel during a mediation session? Should those parties and the mediator be prevented by the mediation confidentiality privileges from alerting the trial court to such conduct? We think not . . . . [T]he court would have no way of learning that its orders had been disobeyed or that some serious misconduct occurred which warrants judicial oversight, the court would be stripped of its inherent power to police and control its own processes." Foxgate, 92 Cal. Rptr. 2d. at 928-29 (emphasis added).\end{flushleft}
3. The California Supreme Court Rejects Implied Exceptions to Confidentiality

On review, the California Supreme Court rejected the Court of Appeal's controversial opinion, stating that Section 1121 unambiguously barred both a mediator from submitting any report like that of Judge Smith and anyone else from submitting a document that revealed communications during mediation and barred the court from considering them . . . . Other than a report regarding the success of the mediation or lack thereof and findings related thereto, reports to the trial court concerning the events, communications, and occurrences during the mediation retained their confidential status.\(^{150}\)

The Court added that “Section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation. Section 1121 also prohibits the mediator, but not a party, from advising the court about conduct during mediation that might warrant sanctions.”\(^{151}\) The Court disagreed with the proposition that a judicially crafted exception to mediation confidentiality is necessary “either to carry out the purpose for which they [these sections] were enacted or to avoid an absurd result.”\(^{152}\) The Court reasoned that the purpose of confidentiality, to promote a candid and informal exchange of events, is achieved “[o]nly if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory process.”\(^{153}\)

The Court attempted to reconcile its holding with two other California decisions, which had implied exceptions to the mediation statutes. In Rinaker, the exception allowed mediation testimony when:

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149. The Court of Appeals decision created substantial controversy for its willingness to consider mediation reports and evidence of conduct in a mediation in the face of seemingly unambiguous statutory confidentiality provisions. Critics contended that Foxgate’s judicially created “good faith participation” exception to statutory confidentiality encourages ancillary, post-mediation litigation and undermines party confidence in the process by the potential for after-the-fact reports and inquiry into the mediation. Others argued the standard was vague and unworkable. See Justin Kelly, LA County Bar to Join Effort to Overtake Foxgate Ruling, at http://www.adrworld.com (Oct. 13, 2000) (last visited Jan. 11, 2003). Three amicus curiae briefs were submitted, urging the California Supreme Court to reject the appeals court’s recognition of an implied good faith participation exception to confidentiality. Foxgate Homeowners’ Ass’n v. Bramela Cal., Inc., 25 P.3d 1117, 1124 n.8 (Cal. 2001).
150. 25 P.3d 1117, 1125 (Cal. 2001).
151. Id. at 1125-26 (emphasis added).
152. Id. at 1125.
153. Id.
needed to vindicate a defendant’s constitutional right to cross-examine and impeach a witness. The court was less convincing in distinguishing *Olam*, which exercised its discretion to employ a balancing of equities test to overcome the mediator’s independent privilege despite parties agreement to waive confidentiality. As to a trial court’s right to enforce its order for the parties’ good faith participation in mediation, the court recognized the conflict between the policy of preserving mediation confidentiality and that of protecting the integrity of the judiciary, yet determined this to be a matter for legislative, not judicial, action.

IV. **CONSTITUTIONAL IMPLICATIONS OF STATUTORY CONFIDENTIALITY ON JUDICIAL MANAGING AND SANCTIONING POWER IN COURT-CONNECTED MEDIATION**

Is a court’s ability to enforce good faith participation or otherwise monitor and sanction participant conduct in court-connected ADR processes really a question “of legislative, not judicial,” concern, as the California Supreme Court suggests? Although declining to recognize judicial exceptions to statutory confidentiality, the *Foxgate* court mitigated the force of its decision by noting a competing procedural code provision that permits reporting and sanctioning obstructive conduct in trial proceedings. The court held that a party may report obstructive mediation conduct, but not “when doing so would require disclosure of communications or a mediator’s assessment of a party’s conduct.” The Court of Appeals took a different view of this quandary, reasoning that “[i]f the mediator or

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154. *Foxgate*, 25 P.3d at 1127 (discussing *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (1998) (upholding disclosure in a civil juvenile delinquency matter of mediator testimony about victim’s alleged inconsistent statements made in mediation and holding that the section 1119 statutory right must yield to the minor’s due process rights to put on a defense and confront, cross-examine and impeach the victim witness with his prior inconsistent statements)).

155. *Foxgate*, 25 P.3d at 1127 (discussing *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999)). The court in *Olam* admitted mediator testimony after employing a balancing process to determine if the parties’ interest compelling mediator testimony outweighed the state’s interest in maintaining confidentiality; it ruled that mediator’s testimony was the most reliable and probative evidence to establish whether a party was competent to enter into a mediated agreement.


157. *See id.*

158. *Id.* at 1128 (“[W]e do not agree . . . that the court may fashion an exception for bad faith in mediation because failure to authorize reporting such conduct during mediation may lead to ‘an absurd result’ or fail to carry out the legislative policy of encouraging mediation.”).

an aggrieved party can not tell the court about another party’s sanctionable conduct, it is hard to imagine who else would do so.”

Further, where the misconduct, such as fraud, duress, or bad faith is inextricably tied to or resulting from assertions made during a mediation, the conduct/communication distinction is elusive.

Constitutional concerns of separation of powers as well as federalism (where a state privilege law restricts a federal court from exercising its sanction powers) arise where mediation confidentiality statutes are construed to prohibit reporting sanctionable conduct in a court-connected mediation. Confidentiality statutes can conflict with a court’s authority to enforce its own procedural rules and orders mandating specific conduct or good faith participation in the court-connected ADR setting. Do these statutory confidentiality provisions trump a court’s express and inherent power to monitor and control the litigation process and participants? If so, what authority does the court retain to monitor court-ordered ADR proceedings? What is the status of statutory, professional ethics, and court participation rules and orders if violations cannot be reported?

Whether legislative attempts to confer near absolute confidentiality to court-connected mediation processes trump or unconstitutionally interfere with judicial powers to regulate and sanction party conduct depend on the whether: (1) regulation of participant court-connected ADR conduct is within the inherent, essential power of a court, or rather, (2) regulation is properly within the legislative province to shield as a matter of public policy.

A. A Separation of Powers Analysis of Judicial and Legislative Powers

1. Inherent Judicial Powers

Under the basic tripartite constitutional framework upon which both federal and state governments operate, the legislature is


161. For example, MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (1983) state that “[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” Only a few states have provisions excepting attorney reports of misconduct. See Kentra, supra note 97, at 715; see also MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (1983) (excepting from a lawyer’s duty of client confidentiality, disclosure “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”).

162. The precise scope of inherent power possessed by state and federal courts may vary by the degree of authority conferred under their respective state and federal
endowed with the power to determine public policy and prescribe substantive laws, with the judiciary as the final arbiter of how those laws are interpreted and applied.\footnote{See Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 787-88 (2001). However, the essence of inherent judicial power to include the ability to control party conduct and enter orders protecting the integrity of its proceedings is common to state and federal courts. See Tyrell Williams, The Source of Authority for Rules of Court Affecting Procedure, 22 Wash. U. L. Q. 459, 461 (1937) (noting the doctrine of separation of powers also exists in state constitutions, "[t]he supreme court of a typical American state, by virtue of the constitutional division of all governmental powers into three branches ... has an inherent power to prescribe rules of procedure even in derogation of legislative enactment."); see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58 (1982) (noting that the intent of the constitutional structure of government into three distinct Branches is for each to exercise inherently distinct governmental powers, "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.").}

A court's inherent powers

[consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore it has the powers reasonably required to act as an efficient court.\footnote{See U.S. CONST. art. I, § 1 and art. III.}

"Inherent powers" include those that relate to a court's ability "to maintain its authority, regulate its internal administrative affairs,

constitutions. See Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 787-88 (2001). However, the essence of inherent judicial power to include the ability to control party conduct and enter orders protecting the integrity of its proceedings is common to state and federal courts. See Tyrell Williams, The Source of Authority for Rules of Court Affecting Procedure, 22 Wash. U. L. Q. 459, 461 (1937) (noting the doctrine of separation of powers also exists in state constitutions, "[t]he supreme court of a typical American state, by virtue of the constitutional division of all governmental powers into three branches ... has an inherent power to prescribe rules of procedure even in derogation of legislative enactment."); see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58 (1982) (noting that the intent of the constitutional structure of government into three distinct Branches is for each to exercise inherently distinct governmental powers, "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.").]

\footnote{See Chambers v. NASCO, Inc., 501 U.S. 32, 53-54 (1991) (Scalia, J., dissenting) ("I agree with the Court that Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to 'the judicial Power,' U.S. CONST., art. III, § 1, that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings."); see also Daniel J. Meador, Inherent Judicial Authority in the Conduct of Civil Litigation, 73 Tex. L. Rev. 1805 (1995) (defining "inherent authority" as "the authority of a trial court, whether state or federal, to control and direct the conduct of civil litigation without any express authorization in a constitution, statute, or written rule of court. This authority ... flows from the powers possessed by a court simply because it is a court; it is an authority that inheres in the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction.").}

\footnote{Meador, supra note 164, at 1808 (emphasis in original) (quoting Jim R. Carri-gan, Inherent Powers of the Courts 2 (1973)).}
and supervise the judicial process.”

It is through this inherent authority that the court in *Nick* based its power to sanction the party who made a calculated decision to disregard instructions in the court’s mediation referral order requiring a position memorandum, good faith participation, and attendance by a party with settlement authority. The court noted that a district court’s “ability to take action in a procedural context may be grounded in ‘inherent power,’ governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”

The United States Supreme Court has recognized the breadth of a district court’s inherent power to sanction parties and attorneys, in particular, for bad faith conduct in the course of litigation. In *Chambers v. NASCO, Inc.*, the Court upheld, on the basis of a trial court’s inherent power to police party conduct, over $1 million in sanctions against a party who engaged in obstructive tactics and delay in the litigation process. Rejecting the argument that the statutory or procedural sanction provisions provide the exclusive basis of judicial sanction power, the Court stated:

> We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to fill in the interstices.

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166. Pushaw, supra note 162, at 742.
168. Id. at 1060 (citing Link v. Wabash R.R., 370 U.S. 626, 630-631 (1962)).
169. See Meador, supra note 164, at 1813.
171. Id. at 42-44, 45-46 (stating “a court may assess attorneys’ fees when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons’ . . . [or where] a party ‘shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order’ . . . . The imposition of sanctions in this instance transcends a court’s equitable power concerning relations between the parties and reached a court’s inherent power to police itself, thus serving the dual purpose of vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent’s obstinacy.”) (internal citations omitted).
172. Id. at 46 (emphasis added); see also id. at 50-51 (stating that “[m]uch of the bad-faith conduct by Chambers, however, was beyond the reach of the Rules; his
NASCO follows a line of Supreme Court jurisprudence recognizing inherent judicial powers to manage the litigation process and to sanction parties and attorneys who abuse judicial processes or fail to comply with court orders.\textsuperscript{173} Accordingly, the legislature cannot intrude upon powers that are deemed within a court’s inherent authority.

The precise breadth of what constitutes inherent powers is not well defined. Scholars have proposed tests that help identify inherent court powers immune from legislative control.\textsuperscript{174} Essentially, whether a certain power is “inherent” turns on the question of necessity. That is, can the court function efficiently and effectively without this power? Is the power “essential” to the court’s discharge of judicial duties?\textsuperscript{175} Professor Robert Pushaw posits that inherent judicial powers fall into at least two categories. The first relates to the court’s adjudicatory function and “discretion required to perform the core ‘judicial power’ of deciding cases.”\textsuperscript{176} The second concerns the court’s entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address. In circumstances such as these in which all of a litigant’s conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves.

173. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-67 (1980) (recognizing a court’s independent authority to impose sanctions and dismiss a class action because of a pattern of bad faith conduct and discovery violations). The Court has also struck down legislation it deemed impermissibly infringed upon a federal court’s Article III powers. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (invalidating legislation which conferred adjudicative power in non-Article III judges and that “impermissibly removed most, if not all, of the ‘essential attributes of the judicial power’ from the Art. III district court . . . .”).

174. See Meador, supra note 164, at 1818-19 (subscribing to Eash categories); Pushaw supra note 162, at 782 (categorizing judicial powers as deriving from (1) indispensable necessity, and (2) beneficial convenience and asserting that inherent powers must be exercised out of ‘indispensable necessity’, not convenience.”). The Supreme Court has rejected the argument that “all inherent powers are not created equal” or that such powers may be classified into categories that are either immune from or subject to legislative direction. See Chambers, 501 U.S. at 49 (noting that the Court has never relied upon any classification, such as that proposed by Eash v. Riggins Trucking, Inc., 757 F.2d 557, 562-63 (3rd Cir. 1985) (en banc) (describing three categories of inherent powers, as the “(1) irreducible powers derived from Article III, which exist despite contrary legislative direction; (2) essential powers that arise from the nature of the court, which can be legislatively regulated but not abrogated; and (3) powers that are necessary only in the sense of being useful, which exist absent legislation to the contrary.”).

175. Eash, 757 F.2d at 562-63.

need to maintain authority and supervise the process. This managerial power authorizes courts to manage, control, and sanction party pretrial and trial conduct for the purpose of protecting the integrity of the judicial system. The court’s power to require alternative dispute resolution falls within this inherent managerial power.

The power to manage party conduct is a corollary to the court’s inherent authority to manage judicial proceedings. The primary method of controlling conduct is through sanctions, which are “deemed imperative to protect against the disruption or abuse of judicial processes and to ensure obedience to a court’s orders, thereby preserving its authority and dignity.” Thus, sanctions are necessary to enable the court to protect its own integrity. Even those critical of reliance on inherent powers agree that among those powers essential to a court’s discharge of judicial duties include “the ability to maintain its authority, regulate its internal administrative affairs, and supervise the judicial process.”

those necessary to a court’s function of adjudicating cases and to “the ability to maintain its authority, regulate its internal administrative affairs, and supervise the judicial process,” and (2) ‘beneficial’ powers, those that are merely helpful, useful, or convenient for federal judges.

177. Id.

178. The Seventh Circuit, for example, held that the inherent authority of a court to control the litigation before them includes the authority to require parties who are represented by counsel to appear for pretrial settlement conferences, even though the procedural rules only refer to attorneys or to unrepresented parties. See G. Heileman Brewing Co., Inc., 871 F.2d at 650-52.

179. Pushaw, supra note 176, at 762-63.

180. Id. at 764-65 (“The inherent authority to administer judicial proceedings carries with it a corollary power to control those involved in court business—parties, witnesses, jurors, spectators, and lawyers—to maintain order, decorum, and respect.”). See Chambers, 501 U.S. at 44 (citing precedent).

181. Pushaw, supra note 176, at 764-65 (noting that certain inherent powers derive from the very existence of courts, which must be able to govern their internal affairs and the conduct of actors in the judicial process, such as “by making procedural rules and punishing contempt.”).

182. Id. at 765-66 (noting inherent judicial sanction authority against direct contempt, disobedience of or resistance to an order, and misconduct by court officers).

183. Id. at 738. Professor Pushaw argues that “federal judges have repeatedly cited ‘inherent powers’ as a catch-phrase to rationalize a wide range of actions that are not essential to (indeed, that often seem antithetical to) the proper exercise of judicial authority and urges a prudent definition of inherent authority. Id.; see also, id. at 787 (citing Felix F. Stumpf, Inherent Powers of the Courts: Sword and Shield of the Judiciary (1994) (arguing that judges indiscriminately invoke the phrase “inherent power.”)).
2. *Legislature Province to Assist But Not Frustrate Judicial Powers*

Judicial authority to manage and sanction party pretrial and trial conduct is subject to appellate review for abuse of discretion and to constitutional limitations.\(^{184}\) Moreover, legislative bodies can validly enact public policies and laws regulating courts to the extent that these policies or laws aid or facilitate courts in exercising their inherent powers.\(^{185}\) However, the legislature may not pass laws that “[t]hwart the courts’ ability to function” or impair exercise of core judicial powers.\(^{186}\) That is, as stated by Professor Williams,

[an inherent judicial power is a power granted impliedly by the people through the constitution and therefore not to be taken away, crippled or frustrated by the legislature. There is an inherent judicial power to regulate non-procedural matters ancillary to the administration of justice, which power is concurrent with legislative power so long as the legislative power is not exercised to frustrate the administration of justice. If the legislative power is exercised so as to destroy, cripple or frustrate the administration of justice, then the judicial power becomes exclusive and the frustrating legislation is unconstitutional.\(^{187}\)]

\(^{184}\) See Meador, *supra* note 23, at 1816 (noting, as an example, due process requirements of notice and of an opportunity to be heard before sanctions may be imposed).

\(^{185}\) On the federal level, the U.S. Constitution grants the legislative branch specific, enumerated powers, including, under the Necessary and Proper Clause, the power to enact laws related to implementation and to performance of the constitutional duties and of the powers of the three government branches. U.S. Const., art. I, § 8, cl. 8. Through this, Congress derives the ability to promulgate public policies relating to effectuating a functioning government and “[m]ay enact laws regulating the conduct of those courts and the means by which their judgments are enforced.” Willy v. Coastal Corp., 503 U.S. 131, 136 (1992). See also Pushaw, *supra* note 176, at 742.

Because the Constitution itself gives federal courts implied authority that is essential to their independent exercise of judicial power, Articles I and III cannot reasonably be interpreted as allowing Congress to negate this grant by eliminating or materially abridging such authority. Rather, the Constitution allows only legislation that facilitates the courts’ exercise of their implied indispensable powers . . . statutes could not thwart the courts’ ability to function. Likewise, the Necessary and Proper Clause should be construed as authorizing Congress to enact appropriate laws regarding essential inherent powers that help federal courts ‘carry into execution’ (in other words, effectuate) their express Article III duties.

\(^{186}\) Tyrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 Wash. U. L. Q. 459 (1937) (contending that state courts could make procedural rules only by delegation from the legislature, which is supreme in the field).

\(^{187}\) *Id.* at 470-74 (discussing inherent judicial powers in the context of the applicability of state laws that cannot be easily classified as substantive or procedural in federal courts—the unknown “borderland” of the *Erie* doctrine).
The separation of powers scheme, which requires a balance between the legislature's constitutional power to promulgate public policy and the judiciary's inherent power over its own proceedings, precludes Congress or state legislatures from enacting laws that seriously impair or materially abridge inherent court powers. Likewise, Congress is prohibited from taking actions that unduly interfere with the powers of the President. Under this doctrine, the judicial branch's role cannot be abridged by actions of one of the other branches, and the judiciary may not take on the roles that are appropriately within the authority of the other two branches.

Professors Levin and Amsterdam point out that “[t]here are ‘spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase judicial power.” They state:

[T]here is a . . . realm of judicial activity, neither substantive nor adjective law, a realm of ‘proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power.’ This is the area of minimal functional integrity of the courts, ‘what is essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court.’ Any statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge or how he shall comport himself in judging or which seeks to surround the act of judging with hampering conditions clearly offends the constitutional scheme of separation of powers and will be held invalid.

Although the legislature has constitutional authority to regulate the courts in certain ways, it may not seriously impair inherent judicial powers. Legislative regulations must be related to effectuating the powers of the court. Legislation that intrudes upon the 'spheres' of

188. Pushaw, supra note 176, at 831-33.
189. See Northern Pipeline, 458 U.S. at 87 (invalidating legislation that intruded upon courts' Article III powers); Myers v. U.S., 272 U.S. 52 (1996) (holding that a statute enacted by Congress that required the consent of the Senate before the President could remove first-class postmasters was invalid because the President had the sole power to remove executive branch officials); see also U.S. v. Nixon, 418 U.S. 683 (1974).
192. Id. at 31-32 (asserting that courts yield to legislative choices concerning adjective law but retain absolute independence in exercising core judicial power).
193. Pushaw, supra note 176, at 742.
fundamental judicial activity or divests a court's power violates separation of powers principles.

3. Federalism and Choice of Law Concerns

Federalism concerns respecting the judicial powers of federal courts are also implicated to the extent that federal courts may be obligated to apply state mediation confidentiality statutes that preclude judicial inquiry into sanctionable conduct in a court-connected mediation.194 Pursuant to Federal Rule of Evidence 501, federal courts in diversity cases are to apply state privilege laws; whereas, in cases where the court's jurisdiction is based upon a federal law, federal courts are authorized to define new privileges by interpreting "common law principles . . . in the light of reason and experience."195 In cases based upon diversity jurisdiction, then, federal courts are presumably obligated to apply the mediation confidentiality statute of the applicable state,196 subject to preservation of the court's.

194. See Wright, 20 FEDERAL PRACTICE AND PROCEDURE § 62 (2002) (noting that "the choice of law to be applied in the federal courts in diversity cases is an important question of federalism, and that the constitutional power of the states to regulate the relations among their people does overlap the constitutional power of the federal government to determine how its courts are to be operated.").

195. FED. R. EVID. 501:
Excerpt as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. (Emphasis added).


196. As noted, supra Section II, state mediation confidentiality provisions are characterized differently and appear in various forms, such as evidentiary rules, confidentiality provisions, or, as the form proposed in the UMA proposes, a "privilege." Although a privilege "falls within the borderland that could be classified as either substantive or procedural" law, FED. R. EVID. 501 makes clear that federal courts sitting in diversity should apply state privileges. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 5422 (1980). Even where a state provides for mediation confidentiality through an evidentiary exclusion, thus conflicting with FED. R. EVID. 408 and arguably entitling a federal court to apply the federal standard, e.g., Hanna v. Plummer, courts seem to treat the provision as a privilege statute. See Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1120 n.5 (N.D. Cal. 1999) ("We decline to accept, however, the notion that the proviso of F.R.E. 501 does not apply whenever a state fails formally to label the protection it offers to mediation communications a "privilege,""
judicial powers conferred by Article III of the U.S. Constitution. Likewise, although there is no comparable federal statutory privilege for cases based upon federal question jurisdiction, even supposing Congress enacted a federal mediation confidentiality privilege, similar separation of powers concerns would arise as state privileges, where either precludes a court from exercising its judicial powers to regulate and sanction party conduct or violation of court orders.

using instead language that promises an [sic]mandates confidentiality. We would view such an analytical out as little more than a semantic slight of hand."). But cf. In re Grand Jury Proceedings Subpoena, 148 F.3d at 487 (5th Cir. 1998) ("confidential' does not necessarily mean 'privileged.").

197. U.S. CONST. art. III vests federal courts with judicial powers that cannot be infringed upon by legislative or executive actions. See Mullenix, supra note 190, at 1297.

198. Although the Alternative Dispute Resolution Act of 1998, 28 U.S.C.S. §§ 651-658 (2002), requires each district court to authorize by local rule the use of ADR in civil actions, Congress did not enact a confidentiality provision but rather left this to individual courts. See 28 U.S.C. § 652(a) ("Each district court shall, by local rule adopted under section 2071(a) require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration."). Such communications are still covered under evidentiary Rule 408 for compromise negotiations. By contrast, the Administrative Dispute Resolution Act, 5 U.S.C.S. § 571 et. seq (2002), where Congress authorizes federal agencies to use mediation and other forms of ADR, contains an explicit provision in sec. 574 protecting the confidentiality of dispute resolution proceedings, except, _inter alia_, where a statute requires such a communication be made public, or "a court determines that such testimony or disclosure is necessary to (A) prevent a manifest injustice; (B) help establish a violation of law; or (C) prevent harm to the public health or safety. . . ." 5 U.S.C.S. § 574(a).

199. A few federal courts have recognized a federal common law mediation privilege but not defined the contours or limits of such a privilege. See Folb v. Motion Picture Indus., Pension & Health Plans, 16 F. Supp. 2d 1164, 1179-80 (C.D. Cal. 1998), aff'd, 216 F.3d 1082 (9th Cir. 2000) (recognizing a federal common law mediation privilege); Sheldone v. Pennsylvania Turnpike Comm'n, 104 F. Supp. 2d 511 (W.D. Pa. 2000) (recognizing federal mediation privilege). To determine whether to recognize a federal common law privilege, courts must employ the analytical framework established in Jaffee v. Redmond, 518 U.S. 1, 913 (1996) (requiring consideration of (1) whether the asserted privilege is "rooted in the imperative need for confidence and trust"); (2) whether the privilege would "serve public ends"; (3) whether the evidentiary detriment caused by exercise of the privilege is modest; and (4) whether denial of the federal privilege would frustrate a parallel privilege adopted by the states). See also Charles W. Ehrhardt, Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court, 60 LA. L. REV. 91 (1999) (asserting that a federal "common law" mediation privilege will not be recognized under Federal Rule 501 until empirical data is developed which supports the public and private interests served by recognition of a mediation privilege and consensus among the courts that such a privilege is necessary and desirable).

200. See Mullenix, supra note 190, at 1297 (noting an inherent attribute of judicial power is procedural rulemaking regulating the conduct of litigants).
At either the state or federal level, a statute that expands confidentiality can infringe upon a federal court's constitutional exercise of its judicial powers to supervise litigants and prescribe rules for the conduct of litigation in its court.201

B. Mediation Confidentiality Legislation's Intrusion upon Judicial Managing and Sanction Powers

1. Where Do Mediation Confidentiality Statutes Fall?

The foregoing compels the question—do broad mediation confidentiality statutes that prevent disclosure of misconduct, fraud, and other violations of court orders, laws, or professional ethics materially infringe upon core judicial managing and sanctioning powers? The answer depends upon whether the regulation of participant conduct in a court-connected ADR proceeding is within the inherent, essential power of the court, or properly within the legislative province to promote public policy shielding mediation conduct from judicial scrutiny.

If one concludes that a court has no role or need to monitor party conduct in a court-connected mediation process because of the uniqueness of mediation such that monitoring is not desired because dissatisfied parties can walk away, then statutory confidentiality may not infringe upon judicial powers. Perhaps such a position is consistent with the principle of self-determination. Thus, if parties choose to abuse the process or otherwise fail to participate in good faith, mediation is probably not appropriate in that case. The parties can walk away despite wasted costs and time or the mediator can utilize her skills to gain commitment to the process.202

But where mediation is part of the pretrial litigation process, particularly if participation is compulsory, ensuring a level of compliance with court orders for participation becomes important to the functioning of a court.203 When a court refers or orders parties to enter a court-connected mediation or other ADR process, it maintains

201. Id. at 1298 ("The basic theme of the Constitutional scheme of government is that the institutional independence of the Judiciary cannot be compromised by the actions of the other branches and the Constitution commands that the independence of the judiciary be jealously guarded. The inherent powers of the courts, once called into existence by Article III, include the powers of the judiciary to protect itself, to administer justice, to promulgate rules for practice, and to provide process where none exists.").

202. See, e.g., Sherman, supra note 30.

203. See Stone, supra note 2, at 859 ("Is not good faith participation by the parties a necessary precondition for a successful mediation? Without some obligation of good
some responsibility for the parties’ conduct in the mediation. Therefore, it appears within the judiciary’s power to manage the conduct of the litigation, to set forth orders for the participation of parties to mediation, and to sanction non-compliance or abuse of the process.

It is reasonably within legislative power to make a policy decision to protect confidentiality in mediation. Legislatures can affirm or codify inherent court powers through mechanisms such as sanction statutes, but it cannot intrude upon these powers. Legislatures may not pass a statute prohibiting courts from exercising sanctioning powers during the litigation process, because this function is essential to the court. Likewise, if the ability to enforce mediation participation orders and regulate party conduct in court-connected mediation lies within a court’s inherent powers, the legislature may not constitutionally impair these powers.

Imposing and enforcing participation and conduct standards in court-connected ADR proceedings is analogous to sanctioning parties in traditional judicial litigation. In the litigation process, courts demand and expect that the parties, attorneys, and witnesses comply with court orders, the law, and a certain code of conduct, including good faith participation in settlement conferences. When these standards of conduct are violated, the court must have a method of reclaiming control and thereby maintaining order. Similarly, court orders and rules for participation in mediation lack meaning if there is no method of enforcement. Consequently, legislatures may not prohibit a court from enforcing participation and conduct standards in a court-connected ADR process.

2. Reconciling Statutory Confidentiality and Judicial Authority

“[T]he line between legislative and judicial authority over court procedure is vague; the doctrine of separation of powers does not provide a readily ascertainable guide to this allocation of interbranch authority.” The legislature can validly enact policies promoting
mediation and providing confidentiality, but not to the extent they strip a court of its inherent judicial managing and sanctioning powers. In its legitimate and admirable concern for promoting mediation and other forms of ADR, the legislature also must be mindful that it not displace the role of the court when ADR and mediation processes are conducted in connection with public judicial systems. Confidentiality is important to mediation as well as other forms of settlement. However, confidentiality should not and cannot be used to strip a court of its inherent powers to conduct the litigation.\footnote{207} The limiting nature of Rule 408 recognizes the need for substantive confidentiality in settlement negotiations with the court’s need to regulate process abuse and non-compliance with its orders.

While the same basic policy rationale underlies both the evidentiary rule for settlement discussions and mediation confidentiality statutes, the scope of mediation confidentiality is much broader. Rule 408 prevents disclosure of settlement-related statements and conduct when offered to show liability or the invalidity of a claim, but not when introduced as evidence of misconduct, bad faith in a malicious prosecution, or abuse of process case.\footnote{208} Foxgate’s declaration that only the legislature can determine what falls outside of mediation confidentiality contravenes a court’s power to monitor its own

\footnote{207. As summarized by Professor Meador,} 

If one were to undertake to draft a Restatement-like formulation of the late-twentieth-century American version of inherent judicial authority, it might read something like the following:

A. Trial courts have the inherent authority to manage and control the conduct of civil cases within their jurisdiction as follows:

1. To issue orders governing the pretrial process as necessary, in the judgment of the court, to expedite with fairness and at the least possible expense the preparation of cases for trial and the achievement of a settlement by the parties;

2. To control the conduct of the trial and the participants in it in all respects;

3. To impose sanctions on parties and counsel for violation of the court’s orders and rules, for abuse of process, and for bad faith litigation, including adjudication for contempt, dismissal of the action, entry of default judgment, award of costs and attorneys’ fees to opposing parties, imposition of fines, and any other reasonable sanctions. Meador, supra note 23, at 1820.

\footnote{208. Fed. R. Evid. 408; see also Schwartzman, Inc. v. ACF Indus., Inc., 167 F.R.D. 694, 697 (D.N.M. 1996) (imposing sanctions under Fed. R. Civ. P. 16 for failure to participate in good faith in pretrial conference).}
process.\textsuperscript{209} Legislation that interferes with a court's inherent management of the litigation process is inconsistent with the separation of powers doctrine and thus unconstitutional.\textsuperscript{210}

C. The Need for Mediation Legislation's Recognition of Judicial Powers

Even assuming that mediation warrants a broader scope of confidentiality than other court-connected processes, it need not be so broad as to deprive a court from its inherent powers to enforce participation orders for court-connected mediation and to sanction non-compliance or improper conduct. Concluding that separation of powers considerations warrant limiting the construction of confidentiality statutes does not severely jeopardize confidentiality in mediation.

1. A Qualified Confidentiality Privilege Proposal

Respect for judicial authority to monitor litigants and its processes, as well as for legislative policies favoring mediation confidentiality, can be effectuated by expressly qualifying mediation confidentiality subject to a court's ability to enforce its orders. Admittedly, a court's reliance on inherent powers must be circumspect,\textsuperscript{211} and, by definition, need not be codified. Participants in a court-connected ADR process should be given appropriate notice that statutory confidentiality is not absolute.\textsuperscript{212} Thus, mediation confidentiality statutes should not only be amended to incorporate the exceptions set forth in the UMA,\textsuperscript{213} but also should include an express provision in this regard:

\begin{footnotesize}
\begin{enumerate}
\item 211. Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991 ("A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process . . . ."); see also Pushaw, supra note 162, at 782 (describing principle that inherent powers must be exercised out of "indispensable necessity," not "convenience.").
\item 212. Perhaps the limiting nature of FED. R. EVID. 408, rendering inadmissible only communications related to the merits, was the recognition that a wide evidentiary protection would unnecessarily infringe on court power over litigants.
\item 213. UMA, supra note 3, at Section 6(a) (listing exceptions to a mediation privilege to include, inter alia,
\begin{itemize}
\item (3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence; (4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity; (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; (6) except as otherwise
\end{itemize}
\end{enumerate}
\end{footnotesize}
(a) There is no privilege against disclosure of a mediation communication that is:

(i) sought or offered in a proceeding involving sanctions or contempt to prove or disprove claims that any person in the mediation violated, or failed to comply with, court orders governing the parties' referral to and participation in a court-connected mediation, including requirements for attendance, appearance of parties with settlement authority, good faith participation, standing orders of the court, local court rules, procedural rules including the standards under Rule 16, or

(ii) sought or offered to prove or disprove claims of professional misconduct, violation of professional ethical standards, abuse of process, fraud, or illegal conduct;

(b) Only the portion of the communication necessary for the application of the exception from the nondisclosure may be admitted. A party may request that disclosures made pursuant to section (a) are submitted in camera and that a court determine whether a protective order is appropriate.

(c) A court's power to impose sanctions, including, but not limited to, dismissal of a claim or defense and monetary sanctions, applies to violation of court orders for participation in mediation in the same manner that a party or a lawyer might be sanctioned under Fed. R. Civ. P. 16(f).

2. Safeguards to Ensure Substantive Confidentiality

Recognizing that a court retains power to enforce its orders and to monitor participant conduct in a court-connected mediation setting and qualifying a popular confidentiality privilege admittedly injects uncertainty into the mediation process. This uncertainty can be reduced by legislatively codifying the parameters of these inherent court powers. An essential attribute of judicial power is that a court's orders must be obeyed. Thus, a court order to participate in mediation is as binding as any other court order, such as to turn over a document in discovery. To the extent that a party's words or actions defy the court's order to engage in mediation seriously, the court can exercise its authority and sanction the party. Moreover, a party or

provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or (7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party). Id.
attorney should not reasonably expect that abusive, unethical, or illegal conduct, including defiance of a court order or professional obligation, be protected by confidentiality. A judge hearing such information can minimize deleterious effects by adopting appropriate safeguards to shield the information from unnecessary public disclosure, such as an in camera sanctions hearing conducted by a judge who will not preside over the merits of the case.\footnote{214}

In sum, legislation that qualifies the scope of confidentiality to exclude protection for conduct that is sanctionable, illegal, or in violation of court orders or professional ethics codes appropriately balances the judiciary’s interests against the legislature’s concern for substantive confidentiality in a court-connected dispute resolution process.

V. Conclusion

Substantial public resources have been invested in instituting ADR options in the court system. In an effort to encourage mediation, legislatures have sought to guarantee parties nearly absolute confidentiality in mediation, while parties in other court dispute resolution processes such as arbitration, judicial settlement conferences, or private settlement discussions receive limited, but arguably, sufficient confidentiality. In referring parties to court-connected mediation or ADR processes, courts set forth orders for participation in order to insure the integrity of the judicial process.

Providing nearly absolute confidentiality for court-connected mediation may be popular public policy, and acknowledging inherent judicial powers can admittedly introduce some uncertainty to the process. However, our system of separation of powers mandates that courts, if they are to be courts, must have a sphere of control over attorneys and participants. The purposes underlying statutory confidentiality can still be achieved through a qualified confidentiality privilege. Constitutional principles make such qualification implicit.

\footnote{214. Certain courts have implemented programs or procedures to permit reporting of grievances concerning court-connected arbitration or mediation. For example, in the District of Columbia, the courts have found a way to ensure confidentiality of ADR proceedings while still ensuring that court orders and policies for dispute resolution are properly followed. One judge is designated to serve as the Dispute Resolution Compliance Judge. This judge has authority over complaints that parties have engaged in misconduct or otherwise failed to comply in good faith. U.S. District Court Rules for the District of Columbia Civil Rules Rule 84.10 (2001).}
Parties who submit their dispute to the public judicial system have a legitimate expectation of due process and fair treatment, provided they comply with court orders and procedural rules of law. When they are diverted, however temporarily, into court-connected mediation, the court has an obligation to protect that expectation as well as the parties' financial, emotional, and intellectual investment in mediation. Where courts offer or require parties to use court-connected mediation, the court has some responsibility to prevent abuse of process. Parties avail themselves of the benefits and protections of the judicial system and unless they can persuade the court that a participation requirement should not apply to them, it is reasonable to require parties to comply with ADR conduct rules set forth by the legislature and courts.

In turning to mediation in order to escape the pitfalls of litigation, the legislature desires to treat mediation as a completely separate and private process. Mediation offers a promising and productive means for parties to achieve understanding and resolution of their differences, but is not immune from the rule of law. Particularly where mediation is a component of the public judicial system, the authority and responsibility of the court cannot be completely divested.

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215. See In re Atl. Pipe Corp., 304 F.3d 135, 145 (1st Cir. 2002) (holding that a district court may rely on its inherent powers to order reluctant parties to mediation and to share costs of the process, provided the order contains adequate safeguards for procedural fairness).