ethics codes around the country authorize the mediator to indicate nonconcurrence with or to refuse to draft an agreement that the mediator believes is unconscionable or inherently unfair.[31] Which approach is preferable, in your view?

§12.4 MEDIATION AND THE PROBLEM OF CRIMINAL AND OTHER UNLAWFUL CONDUCT

Perhaps you are not troubled by possible unfairness created by various kinds of imbalances at the bargaining table, or maybe you believe that duties of impartiality and neutrality tie the mediator's hands in trying to correct any imbalances or unfairness that may be encountered. What about situations in which a neutral is being asked to help the parties craft an unlawful agreement? Or situations in which a mediated agreement may enable one or both of the parties, without your assistance, to continue to act unlawfully in the future? Consider these cases:

Problem Six: Problematic Agreements

In the following (real case) scenarios, indicate your comfort level with continuing to serve as a mediator and helping the parties settle their dispute on the terms they propose. What considerations guide your answer? Would it matter if, under court or agency rules, you were expected to sign the agreement as mediator? If you would not be comfortable helping the parties consummate their deal, what *specifically* would you do?

a. The parties in an employment discrimination claim filed with the EEOC agree to characterize the bulk of the payments to be made to the plaintiff as (nontaxable) "compensation for physical injury" instead of (taxable) lost wages so as to reduce the plaintiff's income tax burden in the coming fiscal year. Both are represented by able counsel. The plaintiff has claimed he suffered "health problems" on account of being fired but has presented no evidence in the mediation of any medical treatment received or of damages other than the pay he lost. In exchange for this characterization, the plaintiff has agreed to accept $10,000 less than his earlier communicated "final" settlement demand. You are a mediator in private practice who is appointed to handle approximately ten mediations a year at the local EEOC office on a reduced fee basis. (VC) (SC) (SU) (VU)

b. You are a staff mediator in a local small claims court where mediations take place an hour before the scheduled court hearing. The plaintiff, an elderly widow we will call Mrs. Rosen, sues for return of $1,000, allegedly loaned to a younger man, Mr. Schwartz. There is no written loan agreement. In mediation, when confronted with Mrs. Rosen's righteous anger, he quickly admits that he borrowed the money and now offers to repay the debt in full, half in cash immediately, the balance over two months.

31. *See* EXON, *supra* note 2, at 403-405, collecting statutes.

In caucus with the plaintiff to discuss the defendant's proposed payment plan, Mrs. Rosen now tells you that Mr. Schwartz is a scam artist who preys on vulnerable widows by taking them out to dinners, romancing them and then "borrowing" money with no intention of paying it back. She has learned that he did this with four other women in her neighborhood (who have not themselves sued) and is continuing to do it with others. She then takes out a cell phone and calls one of these alleged victims, who, on the phone with you, confirms that the same thing happened to her (conduct, that if proven, constitutes larceny). Despite all of this, Mrs. Rosen tells you that she wants to accept the offer and settle her case quietly. If this happens, the parties will sign an agreement and there will be no court hearing. (VC) (SC) (SU) (VU)

c. You are a mediation trainee co-mediating a landlord-tenant dispute in your local housing court. The landlord has brought an eviction action against two unmarried co-tenants for non-payment of the last two months' rent, totaling $1,800. Under state law, tenants are subject to eviction upon proof that they have failed to pay their rent on a timely basis. The male tenant, the single father of an eleven-year-old son, admits that he did not pay rent during this two-month period because he was injured on the job and was unable to work. The female tenant is unemployed and has never contributed to the monthly rent. All parties are unrepresented. If the case is not settled, it will go to trial this afternoon.

The male tenant offers to pay the entire $1,800 rent arrearage today if the eviction case is withdrawn. The landlord agrees to accept this offer, but only if the tenants agree (a) that the girlfriend will vacate the apartment within thirty days and (b) that the apartment will not be occupied in the future by anyone other than the tenant and his son. The landlord states that she only recently learned that the girlfriend is an African American and that she does not approve of interracial cohabitation. Rental discrimination on the basis of race is unlawful under both state and federal fair housing laws, but it is not a crime. In caucus, the male tenant indicates that while he is repulsed by the landlord's attitudes, he wants to accept the deal because he doesn't want an eviction on his record and needs to *"keep my son in his local school."* The girlfriend says, *"Look, he needs the apartment and he pays the bills, so whatever he says, I'll do."* (VC) (SC) (SU) (VU)

Standard VI(A) of the Model Standards provides: "If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation." Note first the use of the word "should" rather than "shall" in this Standard. This formulation presumably means that the mediator may exercise discretion in deciding how to proceed in the face of different kinds of proposed criminality, including doing nothing. Is this desirable? Note also that this language only addresses *criminal* agreements, not otherwise *unlawful* ones. Do you agree with the way the drafters of the Standards have drawn these lines?

Withdrawal of the Mediator or Termination of the Mediation as Responses to Serious Party Imbalance or Criminality. Standard II of the

Model Standards directs mediators to withdraw from or terminate a mediation if the mediator's ability to act impartially is compromised, as would likely occur in some cases of serious party imbalance, and as just noted, Standard VI affords mediators the discretion to withdraw from or terminate the mediation to avoid participating in a settlement that "furthers criminal conduct."

In the case of criminal agreements, what ends are served by withdrawal if the parties can negotiate the same unlawful terms themselves after the mediator departs? In cases of serious power imbalance or other unfairness, what good does termination of the mediation accomplish if, as research suggests, the stronger party is likely to come out ahead anyway if the matter then proceeds to court?[32] Is mediator withdrawal designed to serve justice? To relieve the mediator from having to make tough ethical judgments? To protect the good name of mediation? On a process level, if you intended to withdraw from a mediation based on an imbalance of legal information or bargaining ability, how exactly would you explain or announce this to the parties?

Before the 2005 amendments to the Model Standards were promulgated, mediation scholar Jon Hyman proposed that the drafters include a specific provision expressly urging mediators to discuss questions of fairness, justice and morality with the parties.[33] This suggestion did not find its way into the Standards. Should it have been included? In Problem Six (c) above, what might such a "justice" conversation sound like?

Note finally that the confidentiality protections in Standard V(A) of the Model Standards contain no exception for disclosure of unfair or unlawful agreements or problematic conduct by participants, unless such revelations are "otherwise . . . required by applicable law." Thus, the Standards' drafters appear to have taken the view that, unless state or federal law expressly requires otherwise, preserving the confidentiality of the process trumps any duty or discretion on the part of the mediator to blow the whistle on unfair, unlawful or criminal agreements, or offensive or coercive party behavior, no matter how egregious. Do you agree with this balancing of competing values? For example, suppose the mediator in Problem Six (c) withdraws from the mediation rather than assist the parties in concluding a racially discriminatory settlement agreement. Should the mediator be afforded *discretion* to inform the state's human rights commission about the landlord's practices? Why or why not? Would it matter if the mediator knew that the landlord owned many rental properties around the city? What if the mediator were later subpoenaed as part of a civil rights investigation of that landlord's rental practices? Should she be allowed or compelled to testify as to what she learned in mediation? We take up the topic of mediation confidentiality in the section that follows.

32. KRITZER & SILBEY, *supra* note 14.
33. *See* JON HYMAN, *The World of Conflict Resolution: A Mosaic of Possibilities*, 5 CARDOZO J. CONFLICT RESOL. 205-206 (2004). These ideas are further elaborated in HYMAN, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19 (2004).

§12.5 ETHICAL AND POLICY ISSUES REGARDING CONFIDENTIALITY

Of all the ethical and policy issues pertaining to mediation, none is as difficult to describe concisely as confidentiality. That confidentiality is essential to mediation is considered axiomatic by most practitioners and commentators.[34] However, no consensus exists regarding its implementation or limits. There are many variations in approach from state to state, and judicial protection of mediation confidentiality has been uneven at best.

The Costs and Benefits of Mediation Confidentiality. An often-cited article[35] makes the following primary arguments for protecting confidentiality in mediation:

> *Effective mediation requires candor.* . . . Mediators must be able to draw out baseline positions and interests which would be impossible if the parties were constantly looking over their shoulders. Mediation often reveals deep-seated feelings on sensitive issues. Compromise negotiations often require the admission of facts which disputants would never otherwise concede. Confidentiality ensures that parties will voluntarily enter the process and further enables them to participate effectively and successfully.
>
> *Fairness to the disputants requires confidentiality.* The safeguards present in legal proceedings, qualified counsel and specific rules of evidence and procedure, for example, are absent in mediation. In mediation, unlike the traditional justice system, parties often make communications without the expectation that they will later be bound by them. . . . Mediation thus could be used as a discovery device against legally naive persons if the mediation communications were not inadmissible in subsequent judicial actions. . . .
>
> *The mediator must remain neutral in fact and in perception.* The potential of the mediator to be an adversary in a subsequent legal proceeding would curtail the disputants' freedom to confide during the mediation. Court testimony by a mediator, no matter how carefully presented, will inevitably be characterized so as to favor one side or the other. This would destroy a mediator's efficacy as an impartial broker.
>
> *Privacy is an incentive for many to choose mediation.* Whether it be protection of trade secrets or simply a disinclination to "air one's dirty laundry" in the neighborhood, the option presented by the mediator to settle disputes quietly and informally is often a primary motivator for parties choosing this process.

34. *See, e.g.,* LAWRENCE R. FREEDMAN & MICHAEL L. PRIGOFF, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986); ELLEN E. DEASON, Reply: *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability*, 85 MARQ. L. REV. 79, 80-85 (2001); ALAN KIRTLEY, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1 (1995); MICHAEL PRIGOFF, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988). *But see* ERIC D. GREEN, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 32 (1986). ("Although most mediators assert that confidentiality is essential to the process, there is no data of which I am aware that supports this claim, and I am dubious that such data could be collected.")

35. FREEDMAN & PRIGOFF, *supra* note 34, at 37-39.

As persuasive as these arguments may be, recognizing a principle that broadly prohibits the mediation participants from testifying about what occurred during the mediation process comes at a high price to courts and to the public:

- It may deprive the courts of critical evidence. For example, a disputant in a mediation who alleges that he agreed to the settlement terms only after being coerced to do so by a mediator would have little recourse if confidentiality were strictly enforced. Obtaining relevant information about what occurred during the mediation is often necessary if the court is going to be able to "do justice."[36]
- It may prevent other potential litigants and the general public from learning important information. In a products liability context, for example, should a mediator be free to refuse to testify about what a crib manufacturer said during the successful mediation of a previous lawsuit about an allegedly defective crib design when cribs of the same design were subsequently kept on the market and one later allegedly killed an infant? Commentator David Luban has noted that such information can be important not only because it "might save lives" but also because it "informs public deliberation about an issue of substantial political significance."[37]

Sources of Confidentiality in Mediation. Confidentiality in mediation can emanate from a variety of sources. Federal and state rules of evidence provide protection against disclosure in court of certain party communications made as part of a settlement effort. In private mediation and in some court and agency settings, confidentiality agreements signed by the parties can expand the scope of protection of the process by contract.[38] Almost all states now have confidentiality statutes that apply to at least some forms of mediation, although what degree of protection is afforded, to what kinds of communications, in what forms of mediation, subject to what exceptions, varies greatly from state to state. In an attempt to create some uniformity of approach, the National Conference of Commissioners on Uniform State Laws disseminated the Uniform Mediation Act[39] in 2003, recommending that it be enacted in all the states. As of 2011, ten states plus the District of Columbia had approved some version of the Act.[40]

Rules of Evidence. The Federal Rules of Evidence have been adopted in all the federal courts. They also provide the model, with minor exceptions, for the rules of

36. In the frequently cited case of *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999), the court compelled a mediator to testify in a case in which the plaintiff alleged that she signed a "memorandum of understanding" during a court-sponsored voluntary mediation under duress and sought to avoid its enforcement. In compelling the mediator to testify, the court argued that the mediator is positioned in this case to offer what could be crucial, certainly very probative, evidence about the central factual issues in this matter. There is a strong possibility that his testimony will greatly improve the court's ability to determine reliably what the pertinent historical facts actually were. Establishing reliably what the facts were is critical to doing justice. . . .

37. David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2653 (1995).

38. Where mediation is internal to an organization such as a university, hospital or other large employer, the scope of confidentiality may be determined by the unique and overriding needs of the host institution.

39. *See* Appendix D, *infra* for excerpts from the Act.

40. *See http://www.nccusl.org/LegislativeFactSheet.aspx?title=Mediation%20Act* (last visited August 23, 2011).

evidence adopted in forty-two states. Under the Rules, both "offers to compromise" and "evidence of conduct or statements made in compromise discussions" are not admissible to prove "liability for or invalidity of [a] claim or its amount."[41] This provision is designed to exclude evidence of settlement offers ("*We offer to settle this case for $30,000*") that may be weak (if not misleading) proof of legal responsibility at a trial and to encourage frankness in discussing the underlying facts of the dispute ("*We admit that our crib could have been designed differently*"), so as to promote the voluntary resolution of disputes.

Suppose you were mediating our premises liability case, *Resnick v. Stevens Realty*. In joint session, defense counsel stated, "*Ok. So what if our maintenance man says that the fire escape stairs were only about a foot and a half above ground? You still have to prove how the intruder could have gotten into the alley, which we keep securely locked. In light of that, we won't pay a penny more than $50,000. And that's our final offer.*" If the case did not settle, but instead proceeded to trial, would Josh Resnick be permitted (or could you as the mediator be compelled) to testify as to any of the above statements as evidence of Stevens' liability? In jurisdictions adopting Rule 408, the presumptive answer would be no.

Rule 408 thus provides a great deal of protection against subsequent disclosure of settlement discussions in court proceedings. But many would argue that even more protection is needed. Why?

First, the rule only protects against the giving of testimony regarding settlement offers and settlement statements in *trials*.[42] It does not prevent the information from being used or pursued further in pre-trial discovery (and thus potentially brought — albeit less directly — into a trial). If the above statements in mediation led to later deposition questioning of the defendant ("*In our mediation last month, Mr. Stevens, I believe your attorney conceded that, according to the building's maintenance man, the fire escape stairs were only a foot and a half above ground. Is that correct? . . . What's the name, address and telephone number of the maintenance man he referred to? . . . Was it you who spoke to the maintenance man about this subject? . . . Tell me everything you remember about that conversation. . . . Have you had any other conversations about the fire escape stairs with anyone other than your attorney?*"), all such questions would be unobjectionable. The legal standard for permissible discovery is whether the questions asked are "reasonably calculated to lead to the discovery of admissible evidence,"[43] not whether they themselves would be admissible at a trial.

Second, Rule 408 does not preclude disclosure of settlement information for any purpose other than proof of "liability for, invalidity of, or amount of a [disputed] claim." For example, if, after their handshake agreement, either party in *Resnick* later claimed that no settlement had been reached, statements made

41. *See* Fed. R. Evid. 408 (Dec. 1, 2006). Rule 410 provides comparable protection in criminal plea negotiations. In states not adopting the Federal Rules of Evidence, some protect only offers to settle, not factual statements and admissions made during settlement discussions. *See, e.g.,* Conn. Code Evid. §4-8 (2000).

42. Because Rule 408 is a rule of evidence, applying only to court testimony, it does not apply to statements made to the press or public. Thus, if Josh Resnick wanted to tell his family, friends, former neighbors or the local newspaper about Mr. Stevens' monetary offer or his mediation statements, he could do so freely, consistent with this rule.

43. Fed. R. Civ. Pro. 26(b)(1).

during mediation that might support or refute such a claim would not be inadmissible under Rule 408.[44]

Confidentiality Agreements. For these reasons, private mediators and ADR provider organizations often try to create an additional privacy protection for the mediation process by crafting confidentiality provisions for the parties to sign as part of their initial agreement to mediate. Such provisions can be useful, because they enable the parties to tailor the scope of secrecy to their needs in a specific dispute.[45] But these clauses are subject to limitations, the most important of which is that no private contract can create an enforceable privilege not to testify if a judge decides that the testimony of a party or mediator is required at trial. The general rule is that the courts have the right to every person's evidence and that only legislatures or courts themselves can create enforceable privileges to refuse to testify. In addition, even if confidentiality agreements are enforceable against the parties who signed them, they may not be enforceable against non-signatories.

Mediation Confidentiality and Privilege Statutes. Mediators, attorneys and policy makers seeking additional protection for mediation confidentiality have therefore sought to persuade state legislatures to provide it. Today, virtually every state has enacted some form of mediation confidentiality or privilege legislation. The details and scope of protection afforded by state mediation confidentiality or privilege statutes vary so greatly that it is difficult to generalize about them. Among the most significant variables are the following:

- **What types of mediations are covered by statute?** Some state statutes extend confidentiality to all forms of mediation, public and private. More commonly, however, only mediations sponsored by state courts and agencies are covered. Some states afford confidentiality only to mediations conducted by mediators with specific credentials, such as lawyers or persons who have completed court-approved mediation training programs.
- **What stages of mediation are covered by statute?** Some statutes provide confidentiality only to statements made or conduct at the bargaining table. Other statutes afford protection to conversations during pre-mediation screening and intake procedures and/or post-mediation conversations regarding reconvening the mediation or enforcing an agreement.
- **What information is protected by statute?** Sometimes mediation confidentiality statutes are structured like testimonial privileges and protect only oral communications between the parties themselves or between the parties and the mediator. Other statutes are broader, providing protection for documents and other submissions to the mediator in preparation for mediation, mediator notes and impressions, the identities of the parties in mediation and, occasionally, communications made by non-parties attending the mediation.

---

44. *See* Fed. R. Evid. 408(b); *see, e.g., UformalShelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997) (Rule 408 is inapplicable when the claim is based on a wrong committed during the course of settlement discussions).
45. Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 450 (1984).

- **Who holds the privilege?** Only holders of a privilege or their designated agents have standing to invoke the privilege or to waive it. Some mediation statutes grant the privilege only to the disputants to prevent their statements and the statements of the mediator from being used in future proceedings. Other statutes afford the mediator an independent privilege to prevent the parties from revealing the mediator's statements, even if the parties are willing to waive their own privilege. A surprising number of statutes are silent on this important question.

- **What exceptions to confidentiality are recognized by statute?** Almost all mediation confidentiality statutes are subject to exceptions—often significant and wide-ranging ones. These range from specific exceptions for parties seeking to enforce a mediation agreement or set it aside on grounds of perjury, fraud or duress; to exceptions in order to prove child or domestic abuse or threats of violence during the mediation process; to broad or elastic exceptions for certain case categories—for example, all criminal cases or all cases in which the "interests of justice" outweigh the need for confidentiality.[46]

The net effect of all this legislation is a far-from-uniform approach to mediation confidentiality. Given the leeway some courts have to balance other interests against claims of mediation confidentiality, the protection provided to the process is far from ironclad.[47]

Confidentiality in Action. Given this complex and less-than-clear picture, what, if anything, should a mediator tell the parties at the start of the process about the *limits* of confidentiality?

Problem Seven: Describing Mediation Confidentiality

You are a mediator in a community mediation program in a state in which a recently enacted (and yet-to-be court-interpreted) statute, applicable to all mediations that are not court-ordered, provides in part that

> All oral or written communications received or obtained during the course of a mediation shall be confidential. No mediator shall be

continues on next page >

46. *See generally* COLE, MCEWAN & ROGERS, *supra* note 3, at §9.12, for an excellent survey of this subject, which provides much of the basis for the above discussion.

47. A recent study suggests that the courts may be less reliable protectors of confidentiality than might be supposed. In 2006, James Coben and Peter Thompson studied 1,223 federal and state court cases dealing with mediation between 1999 and 2003. Overall, the authors uncovered 152 court opinions during this time period in which courts considered a confidentiality claim. Of these claims, confidentiality was upheld in whole or in part in just 50 percent of the cases. Although some, perhaps most, of the decisions rejecting confidentiality are no doubt correct, the authors note critically that "few of these decisions involve a reasoned weighing of the pros and cons of compromising the mediation process." Instead they provide a relatively cursory justification for the result reached. *See generally* JAMES R. COBEN & PETER N. THOMPSON, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

compelled to disclose any such communications unless the disclosure is necessary to enforce a written agreement that came out of the mediation, the disclosure is required by statute or regulation or the disclosure is required because the court finds that the interest of justice outweighs the need for confidentiality.

You are assigned to mediate a dispute that included a physical altercation between two seniors at an urban high school and was referred to mediation by local police. You have no more than ninety minutes in which to conduct the mediation. In your opening statement, what, if anything, would you say about mediation confidentiality? (Rank your answers from 1 to 4, with 1 being the best answer:)

a. Say nothing at all about confidentiality unless asked, because I wouldn't want to mislead the participants about the uncertain scope of protection.
b. Promise confidentiality (e.g., *"Everything you say here is confidential"; "What's said in this room stays in this room"*), without more; getting bogged down in complicated exceptions might confuse the participants and deter candid discussions.
c. Promise confidentiality, making a general reference to limits (e.g., *"There are some exceptions, but they don't come up very often"*) and leaving it to the participants to ask about those exceptions if they want to.
d. Try to provide a full description of the rule, its exceptions and the uncertainty of court enforcement.

What factors affected your choice?

As suggested earlier, subsequent in-court testimony as to what was said at a mediation may not be the only concern for unwary participants. Consider this case:

Problem Eight: Confidentiality and Discovery

You are mediating a claim for damages and a restraining order arising out of an incident in which the ex-lover of a female police officer allegedly hit her with her billy club, threatened her with more harm, stormed out of their apartment and then left threatening messages on her telephone answering machine. At the court-mandated mediation (which is taking place two hours before the potential trial in the case), the plaintiff appears with her lawyer and the defendant is unrepresented. After the mediator's opening, in which the parties were promised that *"what's said in this room stays in this room,"* the plaintiff's attorney presents a summary of his client's claims and the history of the dispute. The mediator then turns to the defendant for his opening statement. As the defendant starts an emotional and lengthy defense, talking unguardedly about his feelings and conduct, the plaintiff's lawyer begins to take notes furiously on his legal pad. What, if anything, will you say or do at this point?

"External" versus "Internal" Confidentiality. The preceding discussion of confidentiality has focused on "external" confidentiality: the principle of keeping those *outside* the mediation process—judges, other litigants or their lawyers, the press and so forth—from learning about what took place in mediation. But as we have seen, mediators also commonly promise an additional level of privacy through the caucus process, during which they promise each party not to share information *with the other party* unless he or she consents. This type of protection, which has been labeled "internal" confidentiality,[48] raises difficult questions as well.

"Leaking." One question has to do with subtle messages from the mediator that do not exactly reveal confidential caucus communications but nonetheless may signal important strategic information to the other side. Have a look at one of our mediators in the *Resnick* case conveying the defendant's last offer to the plaintiff and "interpreting" for the plaintiff and his lawyer what further bargaining room might exist. **Video Clip 12-B.**

Did this mediator's conduct violate his earlier promise to the parties to keep confidential "what you discuss with the mediator"? Does it matter that he did not at any time reveal what the parties actually *said*, but only his impressions of what they would and would not *do*? Does the fact that sophisticated parties sometimes expect their mediator to "move the discussions" in this way affect your response? If this mediator's actions made you uncomfortable, consider the comments of Judge Richard Posner on mediation as an aid to settlement:[49]

> Since the mediator can meet with the parties separately and his discussions with them are confidential, they are likely to be more candid with him than they would be with each other, enabling him to form a more accurate impression of the actual strengths and weaknesses of their respective positions than they can and to communicate this impression to them in a credible fashion. He can thus help them to converge to a common estimate of the likely outcome of the case if it is litigated to judgment. *To do this, however, the mediator must be not only a conduit of information between the opposing sides but also an impediment to transparent communication between them. When a mediator formulates a proposal to one party, that party will infer that the proposal reflects information conveyed to the mediator by the other party. But so long as the information is fuzzied up by the mediator, that other party will be giving up less in the way of strategically valuable information (should mediation fail and the case go to trial) than if he had to communicate with his opponent face to face.* (Emphasis supplied.)

Internal Confidentiality: Any Limits? Promising a party that "*I won't reveal anything you tell me privately in caucus unless you give me express permission to*

48. Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 Harv. Negot. L. Rev. 81, 108 (2003) (distinguishing external and internal confidentiality).
49. Richard Posner, Economic Analysis of Law 576 (6th ed. 2003).

do so" can sometimes put the mediator in a difficult if not untenable bind. Consider this scenario:

Problem Nine: Confidentiality that Assists Fraud

You are mediating a small claims case between a plumbing contractor and a homeowner concerning the contractor's $3,000 claim for unpaid services plus interest at 12 percent. The original contract called for payment in full upon completion of the job and made no provision for the payment of interest. In caucus with the homeowner, he admits the debt and proposes to pay it in fifteen monthly payments of $200, plus interest at the rate of 6 percent on the outstanding principal balance. He then states: *"Confidentially, it doesn't much matter what the payment plan is, because I am planning to consult a lawyer in the next couple of weeks in order to declare bankruptcy. I'll make payments until my bankruptcy petition is filed, but after that, this guy will be lucky to get ten cents on the dollar. Of course, I don't want you to tell him that!"*

This troubles you sufficiently that you place a quick call to a bankruptcy lawyer you know to check out your hunches. Based on that call, you advise the homeowner that he needs to be aware that the refinancing of a debt under false pretenses may prevent the discharge of the debt under federal bankruptcy laws and that when the plumbing contractor discovers his bankruptcy petition, he might decide to sue him for fraud. In response, the homeowner says, *"Thanks for the tip, but let me worry about that. Just convey my proposal to pay the debt on these terms. If you aren't comfortable, I'll propose it to him myself."*

If you were the mediator, what *specifically* would you do?

§12.6 PURSUING SETTLEMENT: WHAT ARE THE ETHICAL LIMITS?

Standard I(B) of the Model Standards states that "A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others." In our experience, this is a great deal easier said than done.

First, mediators in high-volume courts and agencies are often under substantial pressure, whether stated or otherwise, to "move the docket." Second, from a psychological standpoint, just as winning is more enjoyable than losing, mediators tend to see cases they are able to resolve as "notches in their belt." Third, because they want to succeed in resolving their dispute, consumers of private mediation services often select mediators based on their settlement rates. But this shared definition of a "successful" mediation raises an important question: How far may the mediator go, and what tactics may he or she use, in the pursuit of a negotiated resolution?

Voluntary Decisions: How Much Pressure Is Too Much? As we saw in Chapters 9 and 10, mediators employ a wide variety of persuasive tactics in seeking settlement. Sometimes they use the waning moments of mediation to take advantage of the scarcity principle to obtain final resolution. Sometimes they