Study K-402 April 7, 2014

Memorandum 2014-14

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Law in Other Jurisdictions

As requested by the Legislature, the Commission[1] has been studying the relationship between mediation confidentiality and attorney malpractice and other misconduct. This memorandum begins exploring the law of other jurisdictions on the topic. It provides an introduction to the Uniform Mediation Act ("UMA"), which was approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL," now known as the Uniform Law Commission or "ULC") in 2001, and amended to address international commercial mediation in 2003. A memorandum for the June meeting will discuss the implementation of the UMA in eleven states and the District of Columbia, as well as pending UMA legislation in two more states. After the Commission has examined the law in other jurisdictions, pertinent scholarly work, and California sources not yet discussed in detail, a future memorandum will compare and contrast the merits of various approaches, including the UMA.

The staff has attached the following materials for convenient reference:

Before turning to the UMA, we present some pertinent news articles for the Commission to consider. Each of those articles is attached, as described below. After discussing the articles, we make some preliminary remarks about

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

terminology and the scope of our research, and then provide a quick refresher on California law governing mediation confidentiality. The remainder of the memorandum is devoted to the UMA.

NEW ARTICLES

In recent years, the *San Francisco Daily Journal* has published a number of articles on mediation confidentiality. Because of the Commission's previous involvement in this area, the staff kept copies of many of those articles. In addition, we received a few such articles from people following the Commission's current study.

Many of the *Daily Journal* articles are sufficiently relevant to this study that the staff thought they would be of interest to the Commission. We requested permission to include those articles in this memorandum, and the *Daily Journal* graciously granted our request.

The following articles are attached for the Commissioners and other interested persons to read:

The articles are short and worth reading in full, at the Commission's convenience. The staff does not plan to raise them for discussion at the upcoming meeting, but may refer back to them in the future.

Most of the articles focus on *Cassel v. Superior Court*,[2] in which the California Supreme Court determined that private "attorney-client communications, like any other communications, were confidential, and therefore were neither discoverable nor admissible — even for purposes of proving a claim of legal malpractice — insofar as they were 'for the purpose of, in the course of, or pursuant to, a mediation ….'"[3] The articles take varying points of view:

- Jeff Kichaven criticizes *Cassel* and California's statutory scheme, while pointing to the UMA as a preferable alternative. J. Daniel Sharp takes a similar view. Along the same lines, Nancy Yeend and Stephen Gizzi warn that *Cassel* will discourage mediation and candid mediation discussions. Allen Grodsky also criticizes *Cassel*, but cautions that mediators should not be forced to testify about alleged legal malpractice in a mediation.
- Jeffrey Bases views the *Cassel* decision more favorably, concluding that "[l]ife is short, and closure is a valuable thing — even to the party that might otherwise have wanted to sue his lawyer for recommending that he settle for a 'lower' sum than what he thought the case was worth."[4] Similarly, Michael Leb emphasizes the importance of privacy and says that *Cassel* should give attorneys and litigants another reason to use mediation to resolve disputes.
- Michael Marcus describes the *Cassel* decision without expressing his personal view, while noting that the Legislature may be tempted to act.
- Emily Green describes the debate over *Cassel* and the events leading to the Commission's current study. Similarly, Alexandra Schwappach describes the *Cassel* debate without expressing her personal view.

The remaining articles (Jan Schau's article and the article co-written by Noah Steinsapir and John Zaimes) contrast California law on mediation confidentiality with federal common law on the same subject. The staff will describe the federal approach in greater detail later in this study.

2. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).
3. *Id.* at 138, *quoting* Evid. Code § 1119(a).
4. Exhibit p. 93.

TERMINOLOGY

A few words about terminology may be helpful before discussing the UMA. In particular, the Commission should be aware that the term "privilege" is not always used consistently. For example, certain general requirements apply to the evidentiary privileges recognized in the California Evidence Code.[5] Among those rules is an implied waiver provision, under which almost all of the evidentiary privileges are implicitly waived if the holder of the privilege voluntarily discloses, or consents to disclosure of, a significant part of a communication.[6] In contrast, the UMA's protection for mediation communications is referred to as a "privilege," but it cannot be implicitly waived by disclosure, unless the disclosure prejudices another mediation participant.[7] Throughout this memorandum and future materials, the staff will try to avoid using the term "privilege" in a manner that might cause confusion about the consequences of being categorized as a "privilege."

Another terminological issue relates to the term "mediation confidentiality." Courts and commentators often use that term loosely, to refer to one or more of the following types of protection for mediation communications:

(1) A rule making mediation communications inadmissible in a legal proceeding.
(2) A rule preventing compelled discovery of mediation communications in a legal proceeding.
(3) An agreement or rule providing that mediation communications must be kept confidential and not disclosed to anyone (i.e., true confidentiality).
(4) A rule precluding a mediator from testifying about a mediation.
(5) A contractual agreement between mediation participants to keep their discussions and mediation-related documents confidential.

Such usage may result in confusion about the type of protection at stake. For example, the New York State Bar Association's Committee on Alternative Dispute Resolution had the following comments about the UMA:

> Despite its name, the UMA is an Act that addresses only whether mediation communications are discoverable or admissible in legal proceedings. Other than preserving the rights of parties to contract for confidentiality, it does not prescribe any rules

5. See Evid. Code §§ 911-920.
6. Evid. Code § 912.
7. See UMA § 5 & Comment.

> governing confidentiality generally. Although it is debatable whether the UMA should be more comprehensive, the important fact for legislators and others in the legal community to remember is that the UMA is a very narrow Act addressing only the issue of privilege. That many of those who would be impacted by the Act had and likely still have a misperception about the scope and purpose of the Act, was one of the first indications to the ADR Committee that a thorough and detailed analysis of the Act was needed.[8]

Thus, instead of using the term "mediation confidentiality" to encompass all five types of protection for mediation communications, it might be better to save that term for true mediation confidentiality (Item #3). The phrase "protection of mediation communications" would suffice to refer to all five types of protection. When referring specifically to a restriction on admissibility (Item #1), it may be best to identify it as such. The same seems true with regard to a restriction on discoverability (Item #2), a restriction on mediator testimony (Item #4), and a contractual agreement to keep mediation discussions and documents confidential (Item #5).

For purposes of clarity, the staff will try to follow the above approach as much as possible in describing the UMA and similar laws in other jurisdictions. Unfortunately, that is challenging, because it is simpler to refer to "mediation confidentiality" than to "protection of mediation communications," and references to "mediation confidentiality" in the comprehensive sense are common in the sources we will be describing.

Of particular note, we have been referring to the Commission's current study as a study of the "Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct." That title comes directly from the legislative resolution assigning this project to the Commission, which asks the Commission to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct …."[9]

From the resolution's detailed description of the scope of the study,[10] it is clear that the Legislature expects the Commission to consider all five of the above-described types of protection for mediation communications. It might therefore be appropriate to rename this study. For instance, the Commission

8. N.Y. State Bar Ass'n Committee on ADR, *The Uniform Mediation Act and Mediation in New York*, p. 3 (Nov. 1, 2001).
9. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).
10. See *id.*

could refer to it as a study on "Protection of Mediation Communications: Relationship with Attorney Malpractice and Other Misconduct."

We encourage the Commission to consider this point, particularly as the study moves forward. It is not critical to definitively settle on an appropriate name for the study now, but it will be important for the Commission to use a clear title in its final report on the subject.

SCOPE OF RESEARCH

There is a vast amount of literature and case law on protection of mediation communications. For example, when the UMA was being drafted, "legal rules affecting mediation [could] be found in more than 2500 statutes," and the "strong public policy favoring confidentiality in mediation" was "effected through more than 250 different state statutes."[11]

In starting to examine the law of other jurisdictions, the staff tried to bear in mind the Commission's instruction to "begin by focusing on attorney malpractice and other attorney misconduct, which is clearly within the scope intended by the Legislature in Assembly Concurrent Resolution 98 (Wagner & Gorell) …."[12] We found, however, statutory schemes such as the UMA are difficult to understand without taking a broader view, there is comparatively little information on attorney misconduct in mediation, and the available research materials are not organized in a manner facilitating such a focus.

We have therefore been looking more broadly at the law and literature on protection of mediation communications, which is slower and more time-consuming than proceeding with a narrow focus. If we are able to figure out an effective way to conduct more focused research in the future, we will do so. In the interest of being thorough and careful, however, it seemed best to be over-inclusive rather than under-inclusive. That research approach *does not imply anything* about the appropriate breadth or narrowness of whatever reform (if any) the Commission should ultimately recommend in this study.

We invite comments on this matter, particularly from the Commission regarding the impact on its limited staff resources.

11. UMA Prefatory Note at #3 (importance of uniformity).
12. Minutes (Aug. 2013), p. 3.

To help the Commission compare the UMA with California law, it might be useful to provide a brief reminder regarding the main features of California law on protection of mediation communications. The relevant statutes and Commission Comments are attached in case Commissioners wish to refer to them. [13]

The California statutes protecting mediation communications are not in the part of the code relating to evidentiary privileges. As the California Supreme Court has explained:

> [T]he mediation confidentiality statutes do not create a "privilege" in favor of any particular person. Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation. [14]

Thus, the chapter on mediation evidence was placed in Division 9 of the Evidence Code, entitled "Evidence Affected or Excluded by Extrinsic Policies."

The key statute is Evidence Code Section 1119, which restricts the admissibility and discoverability of mediation communications, and also provides for confidentiality:

> 1119. Except as otherwise provided in this chapter:
>
> (a) *No evidence* of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation *is admissible or subject to discovery, and disclosure of the evidence shall not be compelled*, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (b) *No writing*, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, *is admissible or subject to discovery, and disclosure of the writing shall not be compelled,* in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation *shall remain confidential*. [15]

13. Evid. Code §§ 703.5, 1115-1128 (attached at Exhibit pp. 1-10).
14. *Cassel*, 51 Cal. 4th at 132.
15. Emphasis added.

This rule is subject to few exceptions and limitations, and the ones that exist are relatively clear-cut and easy to apply.

Of particular importance, the protection of Section 1119 applies only in a noncriminal proceeding. It does not restrict the use of mediation communications in a criminal case.[16]

Other exceptions and limitations include:

- **Preexisting evidence.** Evidence that was admissible or subject to discovery before a mediation does not become inadmissible or protected from disclosure upon being used in a mediation. [17]
- **Specified agreements.** The rule does not restrict the admissibility of an agreement to mediate a dispute, an agreement not to take a default, or an agreement for an extension of time in a pending civil action. [18]
- **Mediator background.** The rule does not prevent disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute. [19]
- **Excluded proceedings.** The rule does not apply to a court settlement conference, a family conciliation proceeding, or a court-connected mediation of child custody and visitation issues.[20]
- **Constitutional rights.** The rule does not apply if it conflicts with a constitutional right, such as the right of due process,[21] or a juvenile's constitutional right of confrontation in a juvenile delinquency proceeding. [22]
- **Absurd results.** The rule does not apply if it would "lead to absurd results that clearly undermine the statutory purpose."[23]
- **Express agreement to waive protection.** The rule does not prevent admissibility or disclosure of mediation materials if all of the participants in a mediation expressly agree in writing (or orally, pursuant to a specified procedure) to waive the protection.[24] If a communication or writing was prepared by or on behalf of fewer than all of the mediation participants, only an express waiver by those participants is needed. [25]
- **Settlement agreement.** The rule does not prevent admissibility or disclosure of a written settlement agreement signed by the settling

16. See, e.g., *Cassel*, 51 Cal. 4th at 135 n. 11.
17. Evid. Code § 1120(a).
18. Evid. Code § 1120(b)(1)-(2).
19. Evid. Code § 1120(b)(3).
20. Evid. Code § 1117(b).
21. *Cassel*, 51 Cal. 4th at 119, 127.
22. See Rinaker v. Superior Court, 62 Cal. App. 4th 155, 72 Cal. Rptr. 2d 464 (1998).
23. *Cassel*, 51 Cal. 4th at 119.
24. Evid. Code § 1122(a)(1).
25. Evid. Code § 1117(a)(2).

parties if certain requirements are met.[26] An oral settlement agreement may also be used, but only if it was prepared in accordance with a statutory procedure and meets certain requirements.[27]

- **Conduct not intended as an assertion.** The rule does not protect conduct at a mediation, only mediation communications.[28]

The California Supreme Court has repeatedly said that California's statutes protecting mediation communications "are clear and absolute" and "do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected."[29]

To further help persons determine whether their statements are protected by Section 1119, the Evidence Code includes a provision specifying when a mediation ends.[30] Among other circumstances, a mediation ends when the parties execute a written settlement fully resolving the mediated dispute, or complete a statutory procedure for orally agreeing to fully resolve the dispute.[31]

In addition to restricting the admissibility and disclosure of mediation communications and protecting the confidentiality of such communications, the Evidence Code includes a provision making a mediator incompetent to testify in any subsequent civil proceeding.[32] Certain exceptions apply.[33]

If a mediator is subpoenaed to testify or produce a writing, and a court or other adjudicative body determines that the evidence is inadmissible under the chapter on mediation communications, the mediator is entitled to attorney's fees.[34] Similarly, any reference to a mediation in a subsequent trial or other adjudication is an irregularity in the proceedings.[35]

There is also a provision barring a mediator from reporting to a judge or other decisionmaker about a mediation conducted by the mediator, "other than a report that is mandated by court rule or other law and that states only whether

26. Evid. Code § 1123.
27. Evid. Code § 1124.
28. See Radford v. Shehorn, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010).
29. *Cassel*, 51 Cal. 4th at 118 & cases cited therein.
30. Evid. Code § 1125.
31. Evid. Code § 1125(a)(1)-(2).
32. Evid. Code § 703.5.
33. See *id*.
34. Evid. Code. § 1127.
35. Evid. Code. § 1128.

an agreement was reached."[36] That restriction does not apply if the parties expressly agree to permit such a report.[37]

California's mediation statutes do not address the validity of a contractual requirement to keep settlement terms confidential. That issue (sometimes referred to as "settlement in sunshine") arises with regard to all settlements, not just mediated settlements. It is governed by other law.

UNIFORM MEDIATION ACT

California's current statutory scheme governing protection of mediation communications was enacted in 1997, on the Commission's recommendation.[38] The UMA was drafted and approved shortly afterwards. The remainder of this memorandum (1) describes the process of drafting the UMA, (2) reports on the staff's efforts to elicit information from the ULC about the UMA, (3) discusses the objectives of the UMA, and (4) explains the content of the UMA, focusing on the provisions on protection of mediation communications.

Drafting Process

In the 30 years preceding the drafting of the UMA, the use of mediation "expanded beyond its century-long home in collective bargaining to become an integral and growing part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict."[39] Because there had been such a period of expansion and experimentation across the country, experts in the area felt the time was ripe to prepare legislation based on the most helpful approaches and attempt to attain a degree of nationwide uniformity.[40]

The UMA was drafted over a period of four years, through "an historic collaboration" between an NCCUSL drafting committee and a drafting committee sponsored by the American Bar Association ("ABA"), working through its Section of Dispute Resolution.[41] "While the two organizations had

36. Evid. Code § 1121.
37. *Id.*
38. See *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996); *Report of the California Law Revision Commission on Chapter 722 of the Statutes of 1997 (Assembly Bill 939)*, 27 Cal. L. Revision Comm'n Reports 595 (1997).
39. UMA Prefatory Note, at introduction.
40. UMA Prefatory Note, at #4 (ripeness of a uniform law).
41. UMA Prefatory Note, at #5 (product of consensual process).

worked together toward the common goal of improving the law for nearly a century, they never before had participated jointly in the actual drafting of proposed legislation for state consideration."[42] "The leadership of both organizations agreed to share resources, meet together, and work collaboratively but independently" in drafting the UMA.[43]

With the assistance of a grant from the William and Flora Hewlett Foundation, the drafting committees had academic support from many mediation scholars.[44] Numerous bar groups, mediators, and organizations of mediation professionals also participated in the drafting process. According to one of the reporters for the project, "[t]he four year drafting of the UMA was an intense national dialogue on the mediation process — the nature of the process, its goals and values, its practices and experience, and its relationship to law — on a scale that the field of mediation had never before engaged so publicly."[45]

NCCUSL approved the UMA in the summer of 2001, and the ABA approved it six months later. The UMA has been endorsed by the American Arbitration Association ("AAA"), the Judicial Arbitration and Mediation Service ("JAMS"), the CPR Institute for Dispute Resolution, and the National Arbitration Forum. In 2003, the UMA was amended to address international commercial mediation.

Contact with the ULC Regarding the UMA

At the February meeting, mediator Ron Kelly provided the Commission with a 2-page chart comparing the UMA to California law on protection of mediation communications.[46] Commissioner Boyer-Vine (who is also a member of the ULC and the California Commission on Uniform State Laws) asked the staff to provide that chart to the ULC.

The staff has since done so, and used the opportunity to inform ULC staff about the Commission's ongoing study and seek ULC input. In particular, we expressed interest in information on (1) how the UMA is working in the states that have adopted it (particularly its impact on the use of mediation and the effectiveness of its treatment of attorney misconduct), and (2) whether the UMA has been adopted in any state that had a stricter mediation confidentiality rule

42. Richard Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA,* 2003 J. Disp. Resol. 99, 103 (2003).
43. *Id.*
44. UMA Prefatory Note, at #5 (product of consensual process).
45. Reuben, *supra* note 42, at 106.
46. Exhibit pp. 91-92.

beforehand (as opposed to a rule that accorded a lesser degree of confidentiality than the UMA).

After learning of the Commission's study, Casey Gillece (ULC Legislative Counsel assigned to the UMA) contacted one of the UMA reporters, who expressed interest in assessing the mediation landscape approximately ten years after approval of the UMA. According to Ms. Gillece, he expects that it will take some time to complete that project, but he might have a finished product by the fall. In the meantime, Ms. Gillece may provide some information to the Commission about the UMA. Upon receiving any input from the ULC, the staff will include it in a memorandum for distribution to the Commission and other persons interested in this study.

Objectives of the UMA

The Prefatory Note to the UMA explains the objectives of the legislation. In preparing the Act, the drafters intended for it to "be applied and construed in a way to promote uniformity …."[47] In addition, the drafters sought to:

- promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests …;
- encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties …; and
- advance the policy that the decision-making authority in the mediation process rests with the parties.[48]

The Prefatory Note addresses those points in detail, as described below.

Promoting Candor

A "central thrust of the [UMA] is to provide a privilege that assures confidentiality in legal proceedings."[49] The drafters noted that "[v]irtually all state legislatures have recognized the necessity of protecting mediation confidentiality to encourage the effective use of mediation to resolve disputes."[50] According to the drafters, mediation involves a frank exchange of information and ideas that "can be achieved *only* if the participants know that what is said in

47. UMA Prefatory Note, at introduction.
48. *Id.*
49. *Id.*
50. *Id.* at #1 (promoting candor).

the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes."[51] The drafters also specifically observed that "public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements …."

While emphasizing the importance of protecting mediation communications, the drafters did not consider it necessary to enact a statute making such communications confidential (as opposed to inadmissible or protected from discovery). Rather, they concluded that a statute was needed only with regard to evidence compelled in a judicial and other legal proceeding.[52] In their view, "*the major contribution of the Act* is to provide a privilege in legal proceedings, where it would otherwise either not be available or would not be available in a uniform way across the States."[53]

The drafters also concluded that the statutory protection should not be absolute:

> As with other privileges, the mediation privilege must have limits, and nearly all existing state mediation statutes provide them. Definitions and exceptions primarily are necessary to give appropriate weight to other valid justice system values …. They often apply to situations that arise only rarely, but might produce grave injustice in that unusual case if not excepted from the privilege.[54]

In the opinion of the drafters, "these exceptions need not significantly hamper candor."[55]

Encouraging Resolution in Accordance With Other Principles

The drafters of the UMA further noted that mediation has many societal benefits. For example, because it is a consensual process in which the disputing parties help shape the resolution, it leads to greater participant satisfaction than other methods of dispute resolution.[56] In addition, the drafters observed that "disputing parties often reach settlement earlier though mediation, because of the expression of emotions and exchanges of information that occur as part of the

51. *Id.* (emphasis added).
52. *Id.*
53. *Id.* (emphasis added).
54. *Id.*
55. *Id.*
56. *Id.* at #2 (encouraging resolution in accordance with other principles).

mediation process."[57] As the drafters pointed out, "[w]hen settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways."[58] The drafters also commented that mediation may foster a civil society by bolstering confidence in the justice system, and promoting means of conflict resolution that directly seek to reconcile the interests of those involved.[59] In preparing the UMA, the drafters strove to advance these beneficial aspects of mediation and values consistent with effective use of the process.[60]

Importance of Uniformity

Lastly, the UMA was "designed to simplify a complex area of the law."[61] The drafters stressed that there were many existing statutes on the subject, with a wide variety of approaches.[62] They then explained why a uniform law would be helpful:

> Uniformity of the law helps bring order and understanding across state lines, and encourages effective use of mediation in a number of ways. First, uniformity is a necessary predicate to predictability if there is any potential that a statement made in mediation in one State may be sought in litigation or other legal processes in another state.…. Without uniformity, there can be no firm assurance in any State that a mediation is privileged.…
>
> A second benefit of uniformity relates to cross-jurisdictional mediation. Mediation sessions are increasingly conducted by conference calls between mediators and parties in different States and even over the Internet. Because it is unclear which State's laws apply, the parties cannot be assured of the reach of their home state's confidentiality protections.
>
> A third benefit of uniformity is that a party trying to decide whether to sign an agreement to mediate may not know where the mediation will occur and therefore whether the law will provide a privilege …. Uniformity will add certainty …, and thus allows for more informed party self-determination.
>
> Finally, uniformity contributes to simplicity. Mediators and parties who do not have meaningful familiarity with the law or legal research currently face a more formidable task in understanding multiple confidentiality statutes that vary by and within relevant States than they would in understanding a Uniform Act. Mediators and parties often travel to different States for the

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at #3 (importance of uniformity).
62. *Id.*

> mediation sessions. If they do not understand these legal protections, participants may react in a guarded way, thus reducing the candor that these provisions are designed to promote, or they may unnecessarily expend resources to have the legal research conducted.[63]

General Structure of the UMA

As just explained, the main focus of the UMA is on protection of mediation communications. Like most uniform acts, it begins with some preliminary provisions, which establish the title[64] and scope[65] of the Act, and define key terms used in it.[66] The provisions relating to protection of mediation communications come next,[67] followed by two provisions on other aspects of mediation[68] and a provision on international commercial mediation.[69] The remainder of the Act consists of general provisions such as a severability clause and effective date.[70]

The scope of the UMA, like California law on the same subject, is broad. With certain exceptions,[71] the UMA applies to any mediation in which:

(1) 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;
(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or
(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.[72]

The definition of "mediation" is also similar to California law:

> "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.[73]

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63. *Id.* For further discussion of the importance of uniformity, see UMA § 13 & Comment.
64. UMA § 1.
65. UMA § 3.
66. UMA § 2.
67. UMA §§ 4-8.
68. UMA §§ 9 (mediator disclosure of background and conflicts of interest), 10 (party's right to participate in mediation).
69. UMA § 11 (international commercial mediation).
70. See UMA § 12 (relationship to E-SIGN), 13 (uniformity of application & construction), 14 (severability clause), 15 (effective date), 16 (repeals), 17 (application to existing agreements or referrals).
71. See discussion of "Limits on Coverage and Scope" *infra*.
72. UMA § 3(a).

Unlike California law, however, the UMA definition of "mediator" does not require that the "mediator" be neutral. A "mediator" as defined in the UMA is simply "an individual who conducts a mediation."[74]

The remainder of this memorandum focuses on the UMA provisions relating to protection of mediation communications. Where necessary, the staff refers to other provisions of the UMA, particularly the relevant definitions.

Restriction on Admissibility and Disclosure (UMA § 4(a)-(b))

The key provisions of the UMA protecting mediation communications are subdivisions (a) and (b) of Section 4, which provide:

> (a) Except as otherwise provided in Section 6, *a mediation communication is privileged* as provided in subsection (b) *and is not subject to discovery or admissible in evidence* in a proceeding unless waived or precluded as provided by Section 5.
>
> (b) In a proceeding, the following privileges apply:
>
> (1) A *mediation party* may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
>
> (2) A *mediator* may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
>
> (3) A *nonparty participant* may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.[75]

These provisions establish "a *privilege* for mediation communications that, like other communications privileges, allows a person to refuse to disclose and to prevent other people from disclosing particular communications.[76]

In classifying the UMA's protection as a "privilege," the drafters of the UMA deliberately chose not to create a categorical, policy-based exclusion as in California, or a rule making a mediator flatly incompetent to testify.[77] They also decided not to extend evidentiary rules on settlement discussions (such as Federal Rule of Evidence 408) to mediation.[78]

They explained:

> Upon exhaustive study and consideration, … each of these mechanisms proved either overbroad in that they failed to fairly

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73. UMA § 2(1).
74. UMA § 2(3). An optional provision of the UMA allows a State to require the mediator to be impartial. See UMA § 9(g).
75. Emphasis added.
76. UMA § 4 Comment (emphasis added).
77. *Id.*
78. *Id.*

> account for interests of justice that might occasionally outweigh the importance of mediation confidentiality (categorical exclusion and mediator incompetency), underbroad in that they failed to meet the reasonable needs of the mediation process or the reasonable expectations of the parties in the mediation process (settlement discussions), or under-inclusive in that they failed to provide protection for all of those involved in the mediation process (mediator incompetency).[79]

In contrast, the drafters thought that "[t]he privilege structure carefully balances the needs of the justice system against party and mediator needs for confidentiality."[80] They further explained:

> The Drafters ultimately settled on the use of the privilege structure, the primary means by which communications are protected at law, an approach that is narrowly tailored to satisfy the legitimate interests and expectations of participants in mediation, the mediation process, and the larger system of justice in which it operates. The privilege structure also provides greater certainty in judicial interpretation because of the courts' familiarity with other privileges, and is consistent with the approach taken by the overwhelming majority of legislatures that have acted to provide broad legal protections for mediation confidentiality. Indeed, of the 25 States that have enacted confidentiality statutes of general application, 21 have plainly used the privilege structure.[81]

Under Section 4 of the UMA, every mediation participant is a "holder" of the privilege — i.e., a "person who is eligible to raise and waive the privilege."[82] Unlike California law, however, all mediation participants are not treated equally.

Rather, the UMA distinguishes between a mediation party ("a person that participates in a mediation and whose agreement is necessary to resolve the dispute"),[83] a mediator ("an individual who conducts a mediation"),[84] and a nonparty participant ("a person, other than a party or mediator, that participates in a mediation").[85] The drafters explained:

> As with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular communications.

79. UMA § 4 Comment.
80. *Id.*
81. *Id.*
82. UMA § 4(b) Comment.
83. UMA §2(5).
84. UMA § 2(3).
85. UMA § 2(4).

> …. *[P]arties* have the greatest blocking power and may block provision of testimony about or other evidence of mediation communications *made by anyone* in the mediation, including persons other than the mediator and parties.…
>
> *Mediators* may block *their own provision of evidence,* including their own testimony and evidence provided by anyone else of the mediator's mediation communications, even if the parties consent.…
>
> Finally *a nonparty participant* may block evidence of *that individual's mediation communication* regardless of who provides the evidence and whether the parties or mediator consent.[86]

In the drafters' view, this structure, giving mediation parties the greatest control over the use of mediation communications, "is consistent with fixing the limits of the privilege to protect the expectations of those persons whose candor is most important to the success of the mediation process."[87] The drafters also recognized, however, that mediators should be "made holders with respect to their own mediation communications, so that they may participate candidly, and with respect to their own testimony, so that they will not be viewed as biased in future mediations.[88] Similarly, the drafters provided a limited privilege for a nonparty participant "to encourage the candid participation of experts and others who may have information that would facilitate resolution of the case.[89]

Exceptions to the Restriction on Admissibility and Disclosure (UMA §§ 4(c), 6, 9(d))

As previously mentioned, the protection established by UMA Section 4 is subject to some exceptions. We begin by describing three exceptions most pertinent to the Commission's ongoing study:

(1) An exception for professional misconduct.
(2) An exception for mediator misconduct.
(3) An exception for evidence needed to prove a claim to rescind or reform a mediated settlement, or a defense to avoid liability pursuant to such a settlement.

Next, we describe other exceptions to the UMA privilege. We then discuss ways in which that privilege may be waived, and certain limits on its coverage and

86. UMA §4(b) Comment (citation omitted) (emphasis added).
87. UMA § 4(b) Comment.
88. *Id.*
89. *Id.*

scope. Finally, we briefly mention some other provisions relevant to the Commission's study.

Exception for Professional Misconduct (UMA § 6(a)(6))

Unlike the key California statute protecting mediation communications (Evidence Code Section 1119), the UMA privilege is subject to an exception relating to professional misconduct:

> (a) There is no privilege under Section 4 for a mediation communication that is:
>
> ….
>
> (6) except as otherwise 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….[90]

Notably, this exception is not limited to evidence that an attorney engaged in legal malpractice or other professional misconduct while representing a client in a mediation. It also extends to evidence that any other mediation party, nonparty participant, or representative of a party engaged in professional misconduct of any kind (such as medical malpractice or accounting malpractice) during a mediation.

Moreover, the exception includes both evidence tending to prove a claim of professional malpractice, and evidence tending to disprove such a claim. Importantly, however, a significant constraint exists with regard to establishing whether professional misconduct actually occurred: In such an inquiry, a mediator cannot be compelled to provide evidence of a mediation communication.[91]

The drafters of the UMA gave the following reasons for their approach to professional misconduct:

> Sometimes the issue arises whether anyone may provide evidence of professional misconduct or malpractice occurring during the mediation. The failure to provide an exception for 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

90. UMA § 6(a)(6).
91. UMA § 6(a)(6), (c).

> which such a claim is made or defended. Because of the potential adverse impact on a mediator's appearance of impartiality, the use of mediator testimony is more guarded, and therefore protected by Section 6(c). It is important to note that evidence fitting this exception would still be protected in other types of proceedings, such as those related to the dispute being mediated.[92]

Exception for Mediator Misconduct (UMA § 6(a)(5))

In addition to the exception for evidence that a mediation party, nonparty participant, or party representative engaged in professional misconduct during a mediation, the UMA includes a similar exception for mediator misconduct:

> (a) There is no privilege under Section 4 for a mediation communication that is:
>
> ….
>
> (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator….[93]

As the drafters explained,

> The rationale behind the exception is that disclosures may be necessary to promote accountability of mediators by allowing for grievances to be brought against mediators, and as a matter of fundamental fairness, to permit the mediator to defend against such a claim. Moreover, permitting complaints against the mediator furthers the central rationale that States have used to reject the traditional basis of licensure and credentialing for assuring quality in professional practice: that private actions will serve an adequate regulatory function and sift out incompetent or unethical providers through liability and the rejection of services.[94]

Again, California law on protecting mediation communications includes no comparable exception.

Exception Relating to the Validity and Enforceability of a Mediated Settlement Agreement (UMA § 6(b)(2))

The third UMA exception that is particularly relevant to the Commission's current study applies when a mediation party challenges the validity of a mediated settlement agreement, as happened in some of the cases that prompted this study. This UMA exception does not apply every time there is a challenge to a mediated settlement agreement.

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92. UMA § 6(a)(6) Comment (citations omitted).
93. UMA § 6(a)(5).
94. UMA § 6(a)(5) Comment (citations omitted).

Rather, the exception applies only if the proponent of the evidence convinces a judge, in an *in camera* proceeding, "that the evidence is unavailable, and the need for the evidence outweighs the policies underlying the privilege."[95] UMA Section 6(b)(2) provides:

> (b) There is no privilege under Section 4 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:
>
> ….
>
> (2) except as otherwise provided in subsection (c), *a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation*.[96]

If the proponent of the evidence provides the required proof of need, the evidence may be used in the proceeding to rescind or reform or otherwise avoid liability on a mediated settlement agreement, regardless of whether the evidence tends to support or refute the effort to avoid such liability. But the mediator cannot be forced to testify in the proceeding, only the other mediation participants. The drafters of the UMA imposed this limitation "to protect against frequent attempts to use the mediator as a tie-breaking witness, which would undermine the integrity of the mediation process and the impartiality of the individual mediator."[97]

The drafters offered the following explanation of the exception relating to the validity and enforceability of a mediated settlement agreement:

> This exception is designed to preserve traditional contract defenses to the enforcement of the mediated settlement agreement that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications. A recent Texas case provides an example. An action was brought to enforce a mediated settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to permit him to leave because of chest pains and a history of heart trouble, and that the mediator had refused to let him leave the mediation session. The exception might also allow party testimony in a personal injury case that the driver denied having insurance, causing the plaintiff

95. UMA § 6(b) Comment.
96. Emphasis added.
97. UMA § 6(c) Comment.

> to rely and settle on that basis, where such a misstatement would be a basis for reforming or avoiding liability under the settlement.[98]

California has no comparable exception to its key provision protecting mediation communications. However, a mediated settlement agreement may be introduced "to show fraud, duress, or illegality that is relevant to an issue in dispute."[99] The concept is that if a mediation party enters into a settlement agreement in reliance on a statement made during the mediation, that party can protect itself by incorporating the statement into the terms of the settlement agreement. That concept is relevant to the UMA example involving the uninsured driver. As for the duress scenario in which the mediator allegedly refused to let a party leave even though the party had chest pains, California's statute would preclude introduction of any statements made during the mediation, but would not bar evidence of the mediator's conduct or the party's physical condition.

Other Exceptions (UMA § 4(c); UMA § 6(a)(1)-(4), (7), (b)(1))

In addition to the three exceptions described above, which seem most pertinent to the Commission's ongoing study, the UMA includes a number of other exceptions. Two of them are similar to exceptions that exist in California: an exception for preexisting evidence that is used in a mediation[100] and an exception for a fully executed agreement reached in a mediation.[101]

The other five UMA exceptions have no counterpart in California law. Those exceptions are:

(1) An exception for a mediation communication that is available to the public under an open records act, or is made during a mediation session that is open to the public, or required by law to be open to the public.[102]

(2) An exception for "a threat or statement of a plan to inflict bodily injury or commit a crime of violence."[103]

(3) An exception for a mediation statement that is "intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity.[104]

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98. UMA § 6(b)(2) Comment (citation omitted).
99. Evid. Code § 1123(d).
100. UMA § 4(c) & Comment.
101. UMA § 6(a)(1) & Comment.
102. See UMA § 6(a)(2) & Comment.
103. UMA § 6(a)(3).
104. UMA § 6(a)(4).

(4) An exception for a mediation communication that is "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 …."[105] The UMA provides two alternative versions of this exception.[106]

(5) An exception for a mediation communication that is offered in a criminal case. Again, the UMA provides two alternative versions of this exception: States can either apply the exception to all criminal cases, or limit it to cases involving a felony. Either way, the exception only applies if the proponent of the evidence convinces a judge, in an *in camera* proceeding, that the evidence is unavailable, and the need for the evidence outweighs the policies underlying the UMA privilege.[107]

Although California does not have any of these exceptions, it is important to remember that California's provision protecting mediation communications does not restrict the use of such communications in a criminal case.

Waiver of the Protection Against Admissibility and Disclosure (UMA §§ 5, 9(d))

The UMA privilege for mediation communications can also be waived in a number of different ways. Unlike California, where a waiver requires the express agreement of *all* of the mediation participants (in a writing or orally, pursuant to a statutory procedure), waiver under the UMA generally depends on whose mediation communication is at stake and who is being asked to testify:

- For testimony about mediation communications made by a party, all parties are the holders and therefore all parties must waive the privilege before a party or nonparty participant may testify or provide evidence; if that testimony is to be provided by a mediator, all parties and the mediator must waive the privilege.
- For testimony about mediation communications made by the mediator, both the parties and the mediator are holders of the privilege, and therefore both the parties and the mediator must waive the privilege before a party, mediator, or nonparty participant may testify or provide evidence of a mediator's mediation communications.
- For testimony about mediation communications that are made by a nonparty participant, both the parties and the nonparty participants are holders of the privilege and therefore both the parties and the nonparty participant must waive before a party or

105. UMA § 6(a)(7).
106. See *id.*; see also UMA § 6(a)(7) Comment.
107. See UMA § 6(b)(1) & Comment.

> nonparty participant may testify; if that testimony is to be offered through the mediator, the mediator must also waive.[108]

As in California, such a waiver must be express; it can either be made in a record, or orally in an adjudicative or legislative proceeding.[109] "The rationale for requiring explicit waiver is to safeguard against the possibility of inadvertent waiver …."[110]

Waiver under the UMA also occurs when a person discloses or makes a representation about a mediation communication and that action prejudices another person in a proceeding.[111] In that situation, the person who made the prejudicial disclosure or representation loses the right to assert the UMA privilege, "but only to the extent necessary for the person prejudiced to respond to the representation or disclosure."[112] California has no comparable waiver rule.

The UMA also includes two more waiver rules that have no counterpart in California law. In particular, "[a] person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting" the UMA privilege.[113] Further, a mediator who fails to comply with the UMA's mediator disclosure requirements is precluded from asserting the UMA privilege, as is a mediator who fails to comply with the requirement of impartiality in states that elect to impose that optional UMA requirement.[114]

Limits on Coverage and Scope (UMA §§ 2(2), 3(b)-(c))

In addition to the limitations described above, the UMA privilege is subject to some constraints on coverage and scope. For example, it goes almost without saying that state and federal constitutional requirements would override the UMA protection, just as such requirements override California's statutes protecting mediation communications.

Further, although the UMA's definition of "mediation communications" includes both verbal and nonverbal statements, it excludes mediation conduct that is not intended as an assertion.[115] In this respect too, the UMA is similar to

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108. UMA § 5(a) & (b) Comment; see UMA § 4(b)(2) ("mediator may refuse to disclose a mediation communication"); UMA § 5(a) (express waiver requirements).
109. UMA § 5(a); see also UMA § 2(7) ("proceeding").
110. UMA § 5(a) & (b) Comment.
111. UMA § 5(b).
112. *Id.*
113. UMA § 5(c).
114. UMA § 9(d) & Comment.
115. UMA § 2(2) & Comment.

California law.[116] As the drafters of the UMA explain, "[o]ne of the primary reasons for making mediation communications privileged is to promote candor, and excluding evidence of a readily observable characteristic is not necessary to promote candor."[117]

The UMA, like California's mediation statute, is also inapplicable to a judicial settlement conference, at least "those settlement conferences in which information from the mediation is communicated to a judge with responsibility for the case."[118] Thus, the Act expressly states that it does not apply to a mediation "conducted by a judge who might make a ruling on the case …."[119]

The UMA is also inapplicable to a mediation involving collective bargaining,[120] a peer mediation conducted by primary or secondary school students,[121] and a mediation at a correctional institution for youths, if all of the parties are residents of that institution.[122] In addition, the UMA can be made inapplicable upon advance agreement of the mediation parties, subject to certain restrictions.[123] California's mediation statute has no such exclusions, but it does exclude family conciliation proceedings and court-connected mediation of child custody and visitation issues.

Other Relevant Provisions (UMA §§ 7, 8)

In addition to the provisions already described, two more UMA provisions are relevant in understanding its degree of protection for mediation communications.

First, Section 7 of the UMA prohibits a mediator from making, and prohibits a court, administrative agency, or arbitrator from considering, "a 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."[124] California has a similar provision, which served as a model in drafting the UMA provision.[125] Unlike the California provision, however, the UMA provision

116. *Id.*
117. *Id.*
118. UMA § 3(b)(3) Comment.
119. UMA § 3(b)(3).
120. UMA § 3(b)(1) & Comment.
121. UMA § 3(b)(4)(A) & Comment.
122. UMA § 3(b)(4)(B) & Comment.
123. UMA § 3(c) & Comment.
124. UMA § 7(a), (c).
125. Evid. Code § 1121; see UMA § 7 Comment.

expressly allows a mediator to disclose (1) a mediation communication satisfying an exception listed in Section 6 of the UMA,[126] or (2) "a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment."[127]

Second, Section 8 of the UMA addresses the confidentiality (as opposed to the admissibility or discoverability) of a mediation. It says that unless a mediation is subject to an open meetings act or open records act, "mediation communications are confidential *to the extent agreed by the parties or provided by other law or rule of this State*."[128]

The drafters of the UMA explained:

> The Act takes an approach of restraint. In providing an evidentiary privilege, it established statutory law when statutory law is necessary and uniformity is appropriate: the discoverability and admissibility of mediation communications. A statute is necessary in this context because parties by private contract cannot agree to keep evidence from the courts; uniformity is appropriate because it promotes certainty about the treatment of mediation communications in the courts and other formal proceedings, thus allowing the parties to guide their conduct as appropriate.
>
> By contrast, uniformity is not necessary or even appropriate with regard to the disclosure of mediation communications outside of proceedings. In some situations, parties may prefer absolute non-disclosure to any third party, in other situations, parties may wish to permit, even encourage, disclosures to family members, business associates, even the media. *These decisions are best left to the good judgment of the parties*, to decide what is appropriate under the unique facts and circumstances of their disputes, a policy that furthers the Act's fundamental principle of party self-determination. Such confidentiality agreements are common in law, and are enforceable in courts.[129]

The UMA thus generally leaves it to the parties to determine whether they want their mediation to be confidential. In contrast, California law expressly states that "[a]ll communications, negotiations, or settlement discussions by and between

126. UMA § 7(b)(2).
127. UMA § 7(b)(3). The UMA provision also allows a mediator to disclose "whether the mediation occurred or has terminated, whether a settlement was reached, and attendance." UMA § 7(b)(1). Somewhat similarly, California's chapter on mediation "does not limit … [d]isclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute." Evid. Code § 1120(b)(3).
128. UMA § 8 (emphasis added).
129. UMA § 8 Comment (emphasis added).

participants in the course of a mediation or a mediation consultation *shall remain confidential*."[130]

Omissions

Finally, we should point out that the UMA lacks several provisions that exist in California's statutory scheme protecting mediation communications. In particular, the UMA does not include a provision establishing when a mediation ends. The Commission included such a provision in California law to "provid[e] guidance on which communications are protected by Section 1119 (mediation confidentiality)."[131] Other California provisions with no UMA counterpart include the attorney's fee provision[132] and the provision relating to irregularities at trial.[133] For reasons already explained, the UMA also lacks a mediator incompetency provision like Section 703.5 of the Evidence Code, but it does restrict mediator testimony to the extent described above.

Summary

The UMA is more complicated and nuanced than California's approach to protecting mediation communications. It creates a privilege restricting the admissibility and discoverability of such communications, but it generally lets the mediation parties determine whether their mediation discussions will or will not be confidential. With regard to admissibility and discoverability, the UMA level of protection varies depending on the status of a mediation participant: mediation parties have the most control over the use of mediation communications, mediators have an intermediate degree of control, and nonparty participants receive the least protection. The UMA includes more exceptions to the statutory protection for mediation communications than in California. Some of those exceptions include alternative options for enactment, some are inapplicable to a mediator, and some apply only upon a specific showing of need. Of particular relevance to the Commission's ongoing study, the UMA includes an exception relating to professional misconduct at a mediation. The UMA protection can also be waived in more ways than in California, and is subject to certain limits on its coverage and scope.

130. Evid. Code § 1119(c) (emphasis added).
131. Evid. Code § 1125 Comment.
132. Evid. Code § 1127.
133. Evid. Code § 1128.

The UMA's complexity has been the subject of debate. Some people contend that it is overly complex, difficult to explain, and may chill mediation communications. A Hamline Law School video, in which a person painstakingly explains the UMA to persons pretending to be mediation participants, vividly illustrates this perspective.[134] Other people defend the UMA as a precise balancing of competing interests, and note, for example, that "just as one does not need to know precisely how a clock works in order to tell time, parties do not need to know every wrinkle of confidentiality law in order to participate safely and effectively in a mediation."[135]

The staff will explore the pros and cons of the UMA more extensively after we present information about its enactment and implementation in various jurisdictions. **We encourage input on the UMA, particularly its provision on professional misconduct.** The staff would also appreciate **information on the mediation environment in states that have enacted the UMA, both before and after such enactment.** In addition, we urge the members of the Commission to **think hard about how closely to constrain future research and analysis to the context of attorney misconduct.** We invite comment on that point as well.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

134. See "Uniform Mediation Act video," which is available at the following url: <http://law.hamline.edu/Content.aspx?id=2147496294>.
135. Reuben, *supra* note 42, at 109.

EVIDENCE CODE SECTION 703.5

§ 703.5. Testimony by judge, arbitrator, or mediator

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

EVIDENCE CODE SECTIONS 1115-1128 & COMMENTS

§ 1115. Definitions

1115. For purposes of this chapter:

(a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

Comment. Subdivision (a) of Section 1115 is drawn from Code of Civil Procedure Section 1775.1. To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator. The definition focuses on the nature of a proceeding, not its label. A proceeding may be a "mediation" for purposes of this chapter, even though it is denominated differently.

Under subdivision (b), a mediator must be neutral. The neutrality requirement is drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative of a party is not neutral and so does not qualify as a "mediator" for purposes of this chapter.

A "mediator" may be an individual, group of individuals, or entity. See Section 175 ("person" defined). See also Section 10 (singular includes the plural). This definition of mediator encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary. The definition focuses on a person's role, not the person's title. A person may be a "mediator" under this chapter even though the person has a different title, such as "ombudsperson." Any person who meets the definition of "mediator" must comply with Section 1121 (mediator reports and communications), which generally prohibits a mediator from reporting to a court or other tribunal concerning the mediated dispute.

Subdivision (c) is drawn from former Section 1152.5, which was amended in 1996 to explicitly protect mediation intake communications. See 1996 Cal. Stat. ch. 174, § 1. Subdivision (c) is not limited to communications to retain a mediator. It also encompasses contacts concerning whether to mediate, such as where a mediator contacts a disputant because another disputant desires to mediate, and contacts concerning initiation or recommencement of mediation, such as where a case-developer meets with a disputant before mediation.

For the scope of this chapter, see Section 1117.

§ 1116. Effect of chapter

1116. (a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

Comment. Subdivision (a) of Section 1116 establishes guiding principles for applying this chapter.

Subdivision (b) continues the first sentence of former Section 1152.5 without substantive change.

§ 1117. Scope of chapter

1117. (a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 3.1380 of the California Rules of Court.

Comment. Under subdivision (a) of Section 1117, mediation confidentiality and the other safeguards of this chapter apply to a broad range of mediations. See Section 1115 Comment.

Subdivision (b) sets forth two exceptions. Section 1117(b)(1) continues without substantive change former Section 1152.5(b). Special confidentiality rules apply to a proceeding in family conciliation court or a mediation of child custody or visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

Section 1117(b)(2) establishes that a court settlement conference is not a mediation within the scope of this chapter. A settlement conference is conducted under the aura of the court and is subject to special rules.

§ 1118. Recorded oral agreement

1118. An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter or reliable means of audio recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

Comment. Section 1118 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include Sections 1121 (mediator reports and communications), 1122 (disclosure by agreement), 1123 (written settlement agreements reached through mediation), and 1124 (oral agreements reached through mediation). See also Section 1125 (when mediation ends). For guidance on authority to bind a litigant, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

§ 1119. Mediation confidentiality

1119. Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Comment. Subdivision (a) of Section 1119 continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, the protection of Section 1119(a) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.

Subdivision (b) continues without substantive change former Section 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, subdivision (b) expressly encompasses any type of "writing" as defined in Section 250, regardless of whether the representations are on paper or on some other medium.

Subdivision (c) continues former Section 1152.5(a)(3) without substantive change. A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process.

See Sections 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Section 703.5 (testimony by a judge, arbitrator, or mediator).

For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); Code Civ. Proc. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Food & Agric. Code § 54453 (agricultural cooperative bargaining associations); Gov't code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); Garstang v. Superior Court, 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

§ 1120. Types of evidence not covered

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or

protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

Comment. Subdivision (a) of Section 1120 continues former Section 1152.6(a)(6) without change. It limits the scope of Section 1119 (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure.

Subdivision (b)(1) makes explicit that Section 1119 does not restrict the admissibility of an agreement to mediate. Subdivision (b)(2) continues former Section 1152.5(e) without substantive change, but also includes an express exception for extensions of litigation deadlines. Subdivision (b)(3) makes clear that Section 1119 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial mediator. Similarly, mediation participants may express their views on a mediator's performance, so long as they do not disclose anything said or done at the mediation.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined), 1115(c) ("mediation consultation" defined).

§ 1121. Mediator reports and communications

1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

Comment. Section 1121 continues the first sentence of former Section 1152.6 without substantive change, except to make clear that (1) the section applies to all submissions, not just filings, (2) the section is not limited to court proceedings, but rather applies to all types of adjudications, including arbitrations and administrative adjudications, (3) the section applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. The section does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation.

Rather, the focus is on preventing coercion. As Section 1121 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral. See Section 1117 (scope of chapter), which excludes settlement conferences from this chapter.

The exception to Section 1121 (permitting submission and consideration of a mediator's report where "all parties to the mediation expressly agree" in writing) is modified to allow use of the oral procedure in Section 1118 (recorded oral agreement) and to permit making of the agreement at any time, not just before the mediation. A mediator's report to a court may disclose mediation communications only if all parties to the mediation agree to the reporting and all persons who participate in the mediation agree to the disclosure. See Section 1122 (disclosure by agreement).

The second sentence of former Section 1152.6 is continued without substantive change in Section 1117 (scope of chapter), except that Section 1117 excludes proceedings under Part 1 (commencing with Section 1800) of Division 5 of the Family Code, as well as proceedings under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1127 (attorney's fees), 1128 (irregularity in proceedings).

§ 1122. Disclosure by agreement

1122. (a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

Comment. Section 1122 supersedes former Section 1152.5(a)(4) and part of former Section 1152.5(a)(2), which were unclear regarding precisely whose agreement was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a)(1) states the general rule that mediation documents and communications may be admitted or disclosed only upon agreement of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Agreement must be express, not implied. For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program.

Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion. Materials that necessarily disclose mediation communications may be admitted or disclosed only upon satisfying the general rule of subdivision (a)(1).

Mediation materials that satisfy the requirements of subdivisions (a)(1) or (a)(2) are not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

Subdivision (b) makes clear that if the person who takes the lead in conducting a mediation agrees to disclosure, it is unnecessary to seek out and obtain assent from each assistant to that person, such as a case developer, interpreter, or secretary.

For exceptions to Section 1122, see Sections 1123 (written settlement agreements reached through mediation) and 1124 (oral agreements reached through mediation) & Comments.

See Section 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1119 (mediation confidentiality), 1121 (mediator reports and communications).

§ 1123. Written settlement agreements reached through mediation

1123. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1123 consolidates and clarifies provisions governing written settlements reached through mediation. For guidance on binding a disputant to a written settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

As to an executed written settlement agreement, subdivision (a) continues part of former Section 1152.5(a)(2). See also Ryan v. Garcia, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162 (1994) (Section 1152.5 "provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings," i.e., the "parties may consent, as part of a writing, to subsequent admissibility of the agreement").

Subdivision (b) is new. It is added due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure.

As to fully executed written settlement agreements, subdivision (c) supersedes former Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only agreement of the parties. Agreement of the mediator and other mediation participants is not necessary. Subdivision (c) is thus an exception to the general rule governing disclosure of mediation communications by agreement. See Section 1122.

Subdivision (d) continues former Section 1152.5(a)(5) without substantive change.

A written settlement agreement that satisfies the requirements of subdivision (a), (b), (c), or (d) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

See Section 1115(a) ("mediation" defined).

§ 1124. Oral agreements reached through mediation

1124. An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with Section 1118.

(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify the rule of Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of Regents of University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

Subdivision (a) of Section 1124 facilitates enforcement of an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. For guidance in applying subdivision (a), see Section 1125 (when mediation ends) & Comment.

Subdivision (b) parallels Section 1123(c).

Subdivision (c) parallels Section 1123(d).

An oral agreement that satisfies the requirements of subdivision (a), (b), or (c) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion. For guidance on binding a disputant to a settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

See Section 1115(a) ("mediation" defined).

§ 1125. When mediation ends

1125. (a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that fully resolves the dispute.

(2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.

(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

Comment. By specifying when a mediation ends, Section 1125 provides guidance on which communications are protected by Section 1119 (mediation confidentiality).

Under subdivision (a)(1), if mediation participants reach an oral compromise and reduce it to a written settlement fully resolving their dispute, confidentiality extends until the agreement is signed by all the parties. For guidance on binding a disputant to a settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

Subdivision (a)(2) applies where mediation participants fully resolve their dispute by an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. The mediation is over upon completion of that procedure, and the confidentiality protections of this chapter do not apply to any later proceedings, such as attempts to further refine the content of the agreement. See Section 1124 (oral agreements reached through mediation). Subdivisions (a)(3) and (a)(4) are drawn from Rule 14 of the American Arbitration Association's Commercial Mediation Rules (as amended, Jan. 1, 1992). Subdivision (a)(5) applies where an affirmative act terminating a mediation for purposes of this chapter does not occur.

Subdivision (b) applies where mediation partially resolves a dispute, such as when the disputants resolve only some of the issues (e.g., contract, but not tort, liability) or when only some of the disputants settle.

Subdivision (c) limits the effect of Section 1125.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined).

§ 1126. Effect of end of mediation

1126. Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

Comment. Section 1126 clarifies that mediation materials are confidential not only during a mediation, but also after the mediation ends pursuant to Section 1125 (when mediation ends).

See Section 1115(a) ("mediation" defined).

§ 1127. Attorney's fees

1127. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

Comment. Section 1127 continues former Section 1152.5(d) without substantive change, except to clarify that either a court or another adjudicative body (e.g., an arbitrator or administrative tribunal) may award the fees and costs. Because Section 1115 (definitions) defines "mediator" to include not only the neutral person who takes the lead in conducting a mediation,

but also any neutral who assists in the mediation, fees are available regardless of the role played by the person subjected to discovery.

See Section 1115(b) ("mediator" defined).

§ 1128. Irregularity in proceedings

1128. Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

Comment. Section 1128 is drawn from Code of Civil Procedure Section 1775.12. The first sentence makes it an irregularity to refer to a mediation in a subsequent civil trial; the second sentence extends that rule to other noncriminal proceedings, such as an administrative adjudication. An appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary's refusal to disclose mediation communications.

See Section 1115 ("mediation" defined).

UNIFORM MEDIATION ACT

(Last Revised or Amended in 2003)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TENTH YEAR
WHITE SULPHUR SPRINGS, WEST VIRGINIA
AUGUST 10–17, 2001

AMENDMENTS APPROVED
at its
ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWELFTH YEAR
IN WASHINGTON, DC
AUGUST 1-7, 2003

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Philadelphia, Pennsylvania, February 4, 2002

December 10, 2003

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UNIFORM MEDIATION ACT

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PREFATORY NOTE

During the last thirty years the use of mediation has expanded beyond its century-long home in collective bargaining to become an integral and growing part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.

Public policy strongly supports this development. Mediation fosters the early resolution of disputes. The mediator assists the parties in negotiating a settlement that is specifically tailored to their needs and interests. The parties' participation in the process and control over the result contributes to greater satisfaction on their part. *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 Ohio St. J. on Disp. Resol. 885 (1998). Increased use of mediation also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. For this reason, hundreds of state statutes establish mediation programs in a wide variety of contexts and encourage their use. *See* Sarah R. Cole, Craig A. McEwen & Nancy H. Rogers, Mediation: Law, Policy, Practice App. B (2001 2d ed. and 2001 Supp.)(hereinafter, Cole et al.). Many States have also created state offices to encourage greater use of mediation. *See*, *e.g.*, Ark. Code Ann. Section 16-7-101, *et seq.* (1995); Haw. Rev. Stat. Section 613-1, *et seq.* (1989); Kan. Stat. Ann. Section 5-501, *et seq.* (1996); Mass. Gen. Laws ch. 7, Section 51 (1998); Neb. Rev. Stat. Section 25-2902, *et seq*. (1991); N.J. Stat. Ann. Section 52:27E-73 (1994); Ohio Rev. Code Ann. Section 179.01, *et seq*. (West 1995); Okla. Stat. tit. 12, Section 1801, *et seq.* (1983); Or. Rev. Stat. Section 36.105, *et seq.* (1997); W. Va. Code Section 55-15-1, *et seq.* (1990).

These laws play a limited but important role in encouraging the effective use of mediation and maintaining its integrity, as well as the appropriate relationship of mediation with the justice system. In particular, the law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated. For this reason, a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings (*see* Sections 4-6). Because the privilege makes it more difficult to offer evidence to challenge the settlement agreement, the Drafters viewed the issue of confidentiality as tied to provisions that will help increase the likelihood that the mediation process will be fair. Fairness is enhanced if it will be conducted with integrity and the parties' knowing consent will be preserved. *See* Joseph B. Stulberg, *Fairness and Mediation*, 13 Ohio St. J. on Disp. Resol. 909 (1998); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?,* 6 Harv. Neg. L. Rev. 1 (2001). The Act protects integrity and knowing consent through provisions that provide exceptions to the privilege (Section 6), limit disclosures by the mediator to judges and others who may rule on the case (Section 7), require mediators to disclose conflicts of interest (Section 9), and assure that parties may bring a lawyer or other support person to the mediation session (Section 10). In some limited ways, the law can also encourage the use of mediation as part of

the policy to promote the private resolution of disputes through informed self-determination. *See* discussion in Section 2; *see also* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. on Disp. Resol. 831 (1998); *Denburg v. Paker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1000 (N.Y. 1993) (societal benefit in recognizing the autonomy of parties to shape their own solution rather than having one judicially imposed). A uniform act that promotes predictability and simplicity may encourage greater use of mediation, as discussed in part 3, below.

At the same time, it is important to avoid laws that diminish the creative and diverse use of mediation. The Act promotes the autonomy of the parties by leaving to them those matters that can be set by agreement and need not be set inflexibly by statute. In addition, some provisions in the Act may be varied by party agreement, as specified in the comments to the sections. This may be viewed as a core Act which can be amended with type specific provisions not in conflict with the Uniform Mediation Act.

The provisions in this Act reflect the intent of the Drafters to further these public policies. The Drafters intend for the Act to be applied and construed in a way to promote uniformity, as stated in Section, and also in such manner as to:

- promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests (*see* part 1, below);
- encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties (*see* part 2, below); and
- advance the policy that the decision-making authority in the mediation process rests with the parties (*see* part 2, below).

Although the Conference does not recommend "purpose" clauses, States that permit these clauses may consider adapting these principles to serve that function. Each is discussed in turn.

1. Promoting candor

Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications. *See* Sections 4-6. Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality to encourage the effective use of mediation to resolve disputes. Indeed, state legislatures have enacted more than 250 mediation privilege statutes. *See* Cole et al., *supra*, at apps. A and B. Approximately half of the States have enacted privilege statutes that apply generally to mediations in the State, while the other half include privileges within the provisions of statutes establishing mediation programs for specific substantive legal issues, such as employment or human rights. *Id.*

The Drafters recognize that mediators typically promote a candid and informal exchange

regarding events in the past, as well as the parties' perceptions of and attitudes toward these events, and that mediators encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange can be 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. *See*, *e.g.*, Lawrence R. Freedman and Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 Ohio St. J. Disp. Resol. 37, 43-44 (1986); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 Admin. L. Rev. 315, 323-324 (1989); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,* 1995 J. Disp. Resol. 1, 17; Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?,* 85 Marquette L. Rev. 79 (2001). For a critical perspective, *see generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Disp. Resol. 1 (1986); Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marquette L. Rev. 9 (2001). Such party-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges. *See*, *e.g.*, Unif. R. Evid. R. 501-509 (1986); *see generally* Jack B. Weinstein, et. al, Evidence: Cases and Materials 1314-1315 (9th ed.1997); *Developments in the Law – Privileged Communications*, 98 Harv. L. Rev. 1450 (1985); Paul R. Rice, Attorney-Client Privilege in the United States, Section 2/1-2.3 (2d ed. 1999). This rationale has sometimes been extended to mediators to encourage mediators to be candid with the parties by allowing the mediator to block evidence of the mediator's notes and other statements by the mediator. *See*, *e.g.*, Ohio Rev. Code Ann. Section 2317.023 (West 1996).

Similarly, public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes. The public confidence rationale has been extended to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable parties. *See*, *e.g., NLRB v. Macaluso*, 618 F.2d 51 (9th Cir. 1980) (public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator's testimony). To maintain public confidence in the fairness of mediation, a number of States prohibit a mediator from disclosing mediation communications to a judge or other officials in a position to affect the decision in a case. Del. Code Ann. tit. 19, Section 712(c) (1998) (employment discrimination); Fla. Stat. Ann. Section 760.34(1) (1997) (housing discrimination); Ga. Code Ann. Section 8-3-208(a) (1990) (housing discrimination); Neb. Rev. Stat. Section 20-140 (1973) (public accommodations); Neb. Rev. Stat. Section 48-1118 (1993) (employment discrimination); Cal. Evid. Code Section 703.5 (West 1994). This justification also is reflected in standards against the use of a threat of disclosure or recommendation to pressure the parties to accept a particular settlement. *See*, *e.g.*, Center for Dispute Settlement, National Standards for Court-Connected Mediation Programs (1994); Society for Professionals in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991); *see also* Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 Ohio St. J. on Disp. Resol. 831, 874 (1998).

A statute is required only to assure that aspect of confidentiality that relates to evidence compelled in a judicial and other legal proceeding. The parties can rely on the mediator's assurance of confidentiality in terms of mediator disclosures outside the proceedings, as the mediator would be liable for a breach of such an assurance. *See*, *e.g.*, *Cohen v. Cowles Media Co*, 501 U.S. 663 (1991) (First Amendment does not bar recovery against a newspaper's breach of promise of confidentiality); *Horne v. Patton*, 291 Ala. 701, 287 So.2d 824 (1973) (physician disclosure may be invasion of privacy, breach of fiduciary duty, breach of contract). Also, the parties can expect enforcement of their agreement to keep things confidential through contract damages and sometimes specific enforcement. The courts have also enforced court orders or rules regarding nondisclosure through orders striking pleadings and fining lawyers. *See* Section 8; *see also Parazino v. Barnett Bank of South Florida*, 690 So.2d 725 (Fla. Dist. Ct. App. 1997); *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778 (S.D.N.Y. 1995). Promises, contracts, and court rules or orders are unavailing, however, with respect to discovery, trial, and otherwise compelled or subpoenaed evidence. Assurance with respect to this aspect of confidentiality has rarely been accorded by common law. Thus, the major contribution of the Act is to provide a privilege in legal proceedings, where it would otherwise either not be available or would not be available in a uniform way across the States.

As with other privileges, the mediation privilege must have limits, and nearly all existing state mediation statutes provide them. Definitions and exceptions primarily are necessary to give appropriate weight to other valid justice system values, in addition to those already discussed in this Section. They often apply to situations that arise only rarely, but might produce grave injustice in that unusual case if not excepted from the privilege.

In this regard, the Drafters recognize that the credibility and integrity of the mediation process is almost always dependent upon the neutrality and the impartiality of the mediator. The provisions of this Act are not intended to provide the parties with an unwarranted means to bring mediators into the discovery or trial process to testify about matters that occurred during a court ordered or agreed mediation. There are of course exceptions and they are specifically provided for in Section 5(a)(1), (express waiver by the mediator) or pursuant to Section 6's narrow exceptions such as 6(b)(1), (felony). Contrary use of the provisions of this Act to involve mediators in the discovery or trial process would have a destructive effect on the mediation process and would not be in keeping with the intent and purpose of the Act.

Finally, these exceptions need not significantly hamper candor. Once the parties and mediators know the protections and limits, they can adjust their conduct accordingly. For example, if the parties understand that they will not be able to establish in court an oral agreement reached in mediation, they can reduce the agreement to a record or writing before relying on it. Although it is important to note that mediation is not essentially a truth-seeking process in our justice system such as discovery, if the parties realize that they will be unable to show that another party lied during mediation, they can ask for corroboration of the statement made in mediation prior to relying on the accuracy of it. A uniform and generic privilege makes it easier for the parties and mediators to understand what law will apply and therefore to understand the coverage and limits of the Act, so that they can conduct themselves in a mediation

accordingly.

2. Encouraging resolution in accordance with other principles

Mediation is a consensual process in which the disputing parties decide the resolution of their dispute themselves with the help of a mediator, rather than having a ruling imposed upon them. The parties' participation in mediation, often accompanied by counsel, allows them to reach results that are tailored to their interests and needs, and leads to their greater satisfaction in the process and results. Moreover, disputing parties often reach settlement earlier through mediation, because of the expression of emotions and exchanges of information that occur as part of the mediation process.

Society at large benefits as well when conflicts are resolved earlier and with greater participant satisfaction. Earlier settlements can reduce the disruption that a dispute can cause in the lives of others affected by the dispute, such as the children of a divorcing couple or the customers, clients and employees of businesses engaged in conflict. *See* generally, Jeffrey Rubin, Dean Pruitt and Sung Hee Kim, Social Conflict: Escalation, Stalemate and Settlement 68-116 (2d ed. 1994) (discussing reasons for, and manner and consequences of conflict escalation). When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. The public justice system gains when those using it feel satisfied with the resolution of their disputes because of their positive experience in a court-related mediation. Finally, mediation can also produce important ancillary effects by promoting an approach to the resolution of conflict that is direct and focused on the interests of those involved in the conflict, thereby fostering a more civil society and a richer discussion of issues basic to policy. *See* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. on Disp. Resol. 831 (1998); *see also* Frances McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, 3 Disp. Resol. Mag. 12-13 (1997); Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 Ohio St. J. on Disp. Resol. 715 (1999); Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community (2000) (discussion the causes for the decline of civic engagement and ways of ameliorating the situation).

State courts and legislatures have perceived these benefits, as well as the popularity of mediation, and have publicly supported mediation through funding and statutory provisions that have expanded dramatically over the last twenty years. *See*, Cole et al., *supra* 5:1-5:19; Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54 (Aug. 1996). The legislative embodiment of this public support is more than 2500 state and federal statutes and many more administrative and court rules related to mediation. *See* Cole et al, *supra* apps. A and B.

The primary guarantees of fairness within mediation are the integrity of the process and informed self-determination. Self-determination also contributes to party satisfaction. Consensual dispute resolution allows parties to tailor not only the result but also the process to their needs, with minimal intervention by the State. For example, parties can agree with the

mediator on the general approach to mediation, including whether the mediator will be evaluative or facilitative. This party agreement is a flexible means to deal with expectations regarding the desired style of mediation, and so increases party empowerment. Indeed, some scholars have theorized that individual empowerment is a central benefit of mediation. *See*, *e.g.*, Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation (1994).

Self-determination is encouraged by provisions that limit the potential for coercion of the parties to accept settlements, *see* Section 9(a), and that allow parties to have counsel or other support persons present during the mediation session. *See* Section 10. The Act promotes the integrity of the mediation process by requiring the mediator to disclose conflicts of interest, and to be candid about qualifications. *See* Section 9.

3. Importance of uniformity.

This Act is designed to simplify a complex area of the law. Currently, legal rules affecting mediation can be found in more than 2500 statutes. Many of these statutes can be replaced by the Act, which applies a generic approach to topics that are covered in varying ways by a number of specific statutes currently scattered within substantive provisions.

Existing statutory provisions frequently vary not only within a State but also by State in several different and meaningful respects. The privilege provides an important example. Virtually all States have adopted some form of privilege, reflecting a strong public policy favoring confidentiality in mediation. However, this policy is effected through more than 250 different state statutes. Common differences among these statutes include the definition of mediation, subject matter of the dispute, scope of protection, exceptions, and the context of the mediation that comes within the statute (such as whether the mediation takes place in a court or community program or a private setting).

Uniformity of the law helps bring order and understanding across state lines, and encourages effective use of mediation in a number of ways. First, uniformity is a necessary predicate to predictability if there is any potential that a statement made in mediation in one State may be sought in litigation or other legal processes in another State. For this reason, the UMA will benefit those States with clearly established law or traditions, such as Texas, California, and Florida, ensuring that the privilege for mediation communications made within those States is respected in other States in which those mediation communications may be sought. The law of privilege does not fit neatly into a category of either substance or procedure, making it difficult to predict what law will apply. *See*, *e.g.*, *U.S. v. Gullo*, 672 F.Supp. 99 (W.D.N.Y. 1987) (holding that New York mediation-arbitration privilege applies in federal court grand jury proceeding); *Royal Caribbean Corp. v. Modesto*, 614 So.2d 517 (Fla. App. 1992) (holding that Florida mediation privilege law applies in federal Jones Act claim brought in Florida court). Moreover, parties to a mediation cannot always know where the later litigation or administrative process may occur. Without uniformity, there can be no firm assurance in any State that a mediation is privileged. Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?,* 85 MARQUETTE L.REV.79 (2001).

A second benefit of uniformity relates to cross-jurisdictional mediation. Mediation sessions are increasingly conducted by conference calls between mediators and parties in different States and even over the Internet. Because it is unclear which State's laws apply, the parties cannot be assured of the reach of their home state's confidentiality protections.

A third benefit of uniformity is that a party trying to decide whether to sign an agreement to mediate may not know where the mediation will occur and therefore whether the law will provide a privilege or the right to bring counsel or support person. Uniformity will add certainty on these issues, and thus allows for more informed party self-determination.

Finally, uniformity contributes to simplicity. Mediators and parties who do not have meaningful familiarity with the law or legal research currently face a more formidable task in understanding multiple confidentiality statutes that vary by and within relevant States than they would in understanding a Uniform Act. Mediators and parties often travel to different States for the mediation sessions. If they do not understand these legal protections, participants may react in a guarded way, thus reducing the candor that these provisions are designed to promote, or they may unnecessarily expend resources to have the legal research conducted.

4. Ripeness of a uniform law.

The drafting of the Uniform Mediation Act comes at an opportune moment in the development of the law and the mediation field.

First, States in the past thirty years have been able to engage in considerable experimentation in terms of statutory approaches to mediation, just as the mediation field itself has experimented with different approaches and styles of mediation. Over time clear trends have emerged, and scholars and practitioners have a reasonable sense as to which types of legal standards are helpful, and which kinds are disruptive. The Drafters have studied this experimentation, enabling state legislators to enact the Act with the confidence that can only come from learned experience. *See Symposium on Drafting a Uniform/Model Mediation Act*, 13 Ohio St. J. on Disp. Resol. 787, 788 (1998).

Second, as the use of mediation becomes more common and better understood by policymakers, States are increasingly recognizing the benefits of a unified statutory environment for privilege that cuts across all applications. This modern trend is seen in about half of the States that have adopted statutes of general application, and these broad statutes provide guidance on effective approaches to a more general privilege. *See*, *e.g.*, Ariz. Rev. Stat. Ann. Section 12-2238 (West 1993); Ark. Code Ann. Section 16-7-206 (1993); Cal. Evid. Code Section 1115, *et seq.* (West 1997); Iowa Code Section 679C.2 (1998); Kan. Stat. Ann. Section 60-452 (1964); La. Rev. Stat. Ann. Section 9:4112 (1997); Me. R. Evid. Section 408 (1993); Mass. Gen. Laws ch. 233, Section 23C (1985); Minn. Stat. Ann. Section 595.02 (1996); Neb. Rev. Stat. Section 25-2914 (1997); Nev. Rev. Stat. Section 48.109(3) (1993); N.J. Rev. Stat. Section 2A:23A-9 (1987); Ohio Rev. Code Ann. Section 2317.023 (West 1996); Okla. stat.

tit. 12, Section 1805 (1983); Or. Rev. Stat. Ann. Section 36.220 (1997); 42 Pa. Cons. Stat. Ann. Section 5949 (1996); R.I. Gen. Laws Section 9-19-44 (1992); S.D. Codified Laws Section 19-13-32 (1998); Tex. Civ. Prac. & Rem. Code Section 154.053 (c) (1999); Utah Code Ann. Section 30-3-38(4) (2000); Va. Code Ann. Section 8.01-576.10 (1994); Wash. Rev. Code Section 5.60.070 (1993); Wis. Stat. Section 904.085(4)(a) (1997); Wyo. Stat. Ann. Section 1-43-103 (1991).

5. A product of a consensual process.

The Mediation Act results from an historic collaboration. The Uniform Law Commission Drafting Committee, chaired by Judge Michael B. Getty, was joined in the drafting of this Act by a Drafting Committee sponsored by the American Bar Association, working through its Section of Dispute Resolution, which was co-chaired by former American Bar Association President Roberta Cooper Ramo (Modrall, Sperling, Roehl, Harris & Sisk, P.A.) and Chief Justice Thomas J. Moyer of the Supreme Court of Ohio. The leadership of both organizations had recognized that the time was ripe for a uniform law on mediation. While both Drafting Committees were independent, they worked side by side, sharing resources and expertise in a collaboration that augmented the work of both Drafting Committees by broadening the diversity of their perspectives. *See* Michael B. Getty, Thomas J. Moyer & Roberta Cooper Ramo, *Preface to Symposium on Drafting a Uniform/Model Mediation Act*, 13 Ohio St. J. on Disp. Resol. 787 (1998). For instance, the Drafting Committees represented various contexts in which mediation is used: private mediation, court-related mediation, community mediation, and corporate mediation. Similarly, they also embraced a spectrum of viewpoints about the goals of mediation – efficiency for the parties and the courts, the enhancement of the possibility of fundamental reconciliation of the parties, and the enrichment of society through the use of less adversarial means of resolving disputes. They also included a range of viewpoints about how mediation is to be conducted, including, for example, strong proponents of both the evaluative and facilitative models of mediation, as well as supporters and opponents of mandatory mediation.

Finally, with the assistance of a grant from the William and Flora Hewlett Foundation, both Drafting Committees had substantial academic support for their work by many of mediation's most distinguished scholars, who volunteered their time and energies out of their belief in the utility and timeliness of a uniform mediation law. These included members of the faculties of Harvard Law School, the University of Missouri-Columbia School of Law, the Ohio State University College of Law, and Bowdoin College, including Professors Frank E.A. Sander (Harvard Law School); Chris Guthrie, John Lande, James Levin, Richard C. Reuben, Leonard L. Riskin, Jean R. Sternlight (University of Missouri-Columbia School of Law); James Brudney, Sarah R. Cole, L. Camille Hébert, Nancy H. Rogers, Joseph B. Stulberg, Laura Williams, and Charles Wilson (Ohio State University College of Law); Jeanne Clement (Ohio State University College of Nursing); and Craig A. McEwen (Bowdoin College). The Hewlett support also made it possible for the Drafting Committees to bring noted scholars and practitioners from throughout the nation to advise the Committees on particular issues. These are too numerous to mention but the Committees especially thank those who came to meetings at the advisory group's request,

including Peter Adler, Christine Carlson, Jack Hanna, Eileen Pruett, and Professors Ellen Deason, Alan Kirtley, Kimberlee K. Kovach, Thomas J. Stipanowich, and Nancy Welsh.

Their scholarly work for the project examined the current legal structure and effectiveness of existing mediation legislation, questions of quality and fairness in mediation, as well as the political environment in which uniform or model legislation operates. *See* Frank E.A. Sander, *Introduction to Symposium on Drafting a Uniform/Model Mediation Act*, 13 Ohio St. J. on Disp. Resol. 791 (1998). Much of this work was published as a law review symposium issue. *See Symposium on Drafting a Uniform/Model Mediation Act*, 13 Ohio St. J. Disp. Resol. 787 (1998).

Finally, observers from a vast array of mediation professional and provider organizations also provided extensive suggestions to the Drafting Committees, including: the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution, Academy of Family Mediators and CRE/Net), National Council of Dispute Resolution Organizations, American Arbitration Association, Federal Mediation and Conciliation Service, Judicial Arbitration and Mediation Services, Inc. (JAMS), CPR Institute for Dispute Resolution, International Academy of Mediators, National Association for Community Mediation, and the California Dispute Resolution Council. Other official observers to the Drafting Committees included: the American Bar Association Section of Administrative Law and Regulatory Practice, American Bar Association Section of Litigation, American Bar Association Senior Lawyers Division, American Bar Association Section of Torts and Insurance Practice, American Trial Lawyers Association, Equal Employment Advisory Council, National Association of District Attorneys, and the Society of Professional Journalists.

Similarly, the Act also received substantive comments from several state and local Bar Associations, generally working through their ADR committees, including: the Alameda County Bar Association, the Beverly Hills Bar Association, the State Bar of California, the Chicago Bar Association, the Louisiana State Bar Association, the Minnesota State Bar Association, and the Mississippi Bar. In addition, the Committees' work was supplemented by other individual mediators and mediation professional organizations too numerous to mention**.**

6. Drafting philosophy.

Mediation often involves both parties and mediators from a variety of professions and backgrounds, many of who are not attorneys or represented by counsel. With this in mind, the Drafters sought to make the provisions accessible and understandable to readers from a variety of backgrounds, sometimes keeping the Act shorter by leaving some discretion in the courts to apply the provisions in accordance with the general purposes of the Act, delineated and expanded upon in Section 1 of this Prefatory Note. These policies include fostering prompt, economical, and amicable resolution, integrity in the process, self-determination by parties, candor in negotiations, societal needs for information, and uniformity of law.

The Drafters sought to avoid including in the Act those types of provisions that should

vary by type of program or legal context and that were therefore more appropriately left to program-specific statutes or rules. Mediator qualifications, for example, are not prescribed by this Act. The Drafters also recognized that some general standards are often better applied through those who administer ethical standards or local rules, where an advisory opinion might be sought to guide persons faced with immediate uncertainty. Where individual choice or notice was important to allow for self-determination or avoid a trap for the unwary, such as for nondisclosure by the parties outside the context of proceedings, the Drafters left the matter largely to local rule or contract among the participants. As the result, the Act largely governs those narrow circumstances in which the mediation process comes into contact with formal legal processes.

Finally, the Drafters operated with respect for local customs and practices by using the Act to establish a floor rather than a ceiling for some protections. It is not the intent of the Act to preempt state and local court rules that are consistent with the Act, such as those well-established rules in Florida. *See*, for example, Fla.R.Civ.P. Rule 1.720; *see also* Sections 12 and 15.

Consistent with existing approaches in law, and to avoid unnecessary disruption, the Act adopts the structure used by the overwhelming majority of these general application States: the evidentiary privilege. However, many state and local laws do not conflict with the Act and would not be preempted by it. For example, statutes and court rules providing standards for mediators, setting limits of compulsory participation in mediation, and providing mediator qualifications would remain in force.

The matter may be less clear if the existing provisions relate to the mediation privilege. Legislative notes provide guidance on some key issues. Nevertheless, in order to achieve the simplicity and clarity sought by the Act, it will be important in each State to review existing privilege statutes and specify in Section 15 which will be repealed and which will remain in force.

2003 AMENDMENT TO THE UNIFORM MEDIATION ACT
SECTION 11. INTERNATIONAL COMMERCIAL MEDIATION

Prefatory Note

As currently approved, the Uniform Mediation Act (UMA) applies to both domestic and international mediation. The purpose of this Amendment is to facilitate state adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (set forth in Appendix A) that was adopted on November 19, 2002. Adoption of the amendment will encourage the use of mediation of commercial disputes among parties from different nations while maintaining the strong protections of the

Uniform Mediation Act regarding the use of mediation communications in legal proceedings.

There is broad international agreement that it is important to have a similar legal approach internationally for the mediation of international commercial disputes, so that the international parties will know the applicable law and feel comfortable using mediation. With this increased use of mediation, the parties will resolve more of their disputes short of arbitration and litigation. The stated purpose of the UNCITRAL Model Law is to "support the increased use of conciliation" for international commercial disputes, according to the Draft Guide issued by the UNCITRAL Secretariat. Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (November 14, 2002)("UNCITRAL Draft Guide"). The Draft Guide notes that parties in international commercial conciliation can agree to incorporate by reference existing conventions, such as the UNCITRAL Conciliation Rules, but often fail to make the reference. The UNCITRAL Draft Guide states, "The conciliation process might thus benefit from the establishment of non-mandatory legislative provisions that would apply when the parties mutually desired to conciliate but had not agreed on a set of conciliation rules. Moreover in countries where agreements as to the admissibility of certain kinds of evidence were of uncertain effect, uniform legislation might provide a useful clarification. In addition it was pointed out with respect to certain issues, such as facilitating enforcement of settlement agreements resulting from conciliations, that the level of predictability and certainty required to foster conciliation could only be achieved through legislation." UNCITRAL Draft Guide 4-5.

International consensus on the benefits on enacting the Model Law is strong, and the U.S. State Department has joined the consensus. UNCITRAL adopted the Model Law on June 28, 2002, and it was endorsed by the United Nations General Assembly on November 19, 2002. The negotiations leading to the Model Law draft represented a major international effort to harmonize competing legal approaches in order to adopt a common default law for international conciliation. Representatives of 90 countries participated in the drafting of the UNCITRAL Model Law over a two-year period. In addition, 12 intergovernmental organizations and 22 international non-governmental organizations took part in the discussions. The U.S. Department of State represented the United States in the drafting process. The U.S. delegation included advisors from NCCUSL, the American Bar Association, the American Arbitration Association, and the Maritime Law Association. Adoption of the UNCITRAL Model Law by U.S. States would help to achieve the desired international uniformity in a default law for international conciliation.

There also are strong reasons not to re-draft the UNCITRAL Model Law in substantial ways for enactment by the States. International lawyers may be hesitant to conciliate if they must retain domestic counsel to determine the effects of any changes in the U.S. draft. The UNCITRAL Model Law Draft Guide notes, "In order to achieve a satisfactory degree of harmonization and certainty, States should consider making as few changes as possible in incorporating the Model Law into their legal system, but, if changes are made, they should remain within the basic principles of the Model Law. A significant reason for adhering as much as possible to the uniform text is to make the national law as transparent and familiar as possible for foreign parties, advisers and conciliators who participate in conciliations in the enacting state." UNCITRAL Draft Guide 5.

This Amendment incorporates the existing version (Appendix A) of the UNCITRAL Model Law by reference in order to avoid the substantial re-drafting that would be necessary to comport with U.S. drafting conventions. The Legislative Note references important notes on interpretation from the UNCITRAL Secretariat, the Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (November 14, 2002).

The Amendment also makes clear that the protection to mediation communications should be as strong for international commercial mediation as it is for domestic mediation of all types under the Uniform Mediation Act. It also makes explicit how the parties can waive those protections.

The Amendment was drafted at two sessions that included broad observer participation, including representatives of the Association of Conflict Resolution, the U.S. State Department, and the American Bar Association. Professors Ellen Deason and Jim Brudney of the Ohio State University Moritz College of Law provided able counsel and assistance in the drafting process.

UNIFORM MEDIATION ACT

SECTION 1. TITLE. This [Act] may be cited as the Uniform Mediation Act.

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, 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.

(3) "Mediator" means an individual who conducts a mediation.

(4) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(5) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(7) "Proceeding" means:

(A) a judicial, administrative, arbitral, or other adjudicative process,

including related pre-hearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) "Sign" means:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

Comment

1. Section 2(1). "Mediation."

The emphasis on negotiation in this definition is intended to exclude adjudicative processes, such as arbitration and fact-finding, as well as counseling. It was not intended to distinguish among styles or approaches to mediation. An earlier draft used the word "conducted," but the Drafting Committees preferred the word "assistance" to emphasize that, in contrast to an arbitration, a mediator has no authority to issue a decision. The use of the word "facilitation" is not intended to express a preference with regard to approaches of mediation. The Drafters recognize approaches to mediation will vary widely.

2. Section 2(2). "Mediation Communication."

Mediation communications are statements that are made orally, through conduct, or in writing or other recorded activity. This definition is aimed primarily at the privilege provisions of Sections 4-6. It is similar to the general rule, as reflected in Uniform Rule of Evidence 801, which defines a "statement" as "an oral or written assertion or nonverbal conduct of an individual who intends it as an assertion." Most generic mediation privileges cover communications but do not cover conduct that is not intended as an assertion. Ark. Code Ann. Section 16-7-206 (1993); Cal. Evid. Code Section 1119 (West 1997); Fla. Stat. Ann. Section 44.102 (1999); Iowa Code Ann. Section 679C.3 (1998); Kan. Stat. Ann. Section 60-452a (1964) (assertive representations); Mass. Gen. Laws ch. 233, Section 23C (1985); Mont. Code Ann. Section 26-1-813 (1999); Neb. Rev. Stat. Section 25-2914 (1997); Nev. Rev. Stat. Section 25-2914 (1997) (assertive representations); N.C. Gen. Stat. 7A-38.1(1) (1995); N.J. Rev. Stat. Section 2A:23A-9 (1987); Ohio Rev. Code Ann. Section 2317.023 (West 1996); Okla. Stat. tit. 12, Section 1805 (1983);

Or. Rev. Stat. Ann. Section 36.220 (1997); 42 Pa. Cons. Stat. Ann. Section 5949 (1996); R.I. Gen. Laws Section 9-19-44 (1992); S.D. Codified Laws Section 19-13-32 (1998); Va. Code Ann. Section 8.01-576.10 (1994); Wash. Rev. Code Section 5.60.070 (1993); Wis. Stat. Section 904.085(4)(a) (1997); Wyo. Stat. Ann. Section 1-43-103 (1991). The mere fact that a person attended the mediation - in other words, the 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 would not be a "communication" because it was not meant by the actor as an assertion.

A mediator's mental impressions and observations about the mediation present a more complicated question, with important practical implications. *See Olam v. Congress Mortgage Co.*, 68 F.Supp. 2d 1110 (N.D. Cal. 1999). As discussed below, the mediation privilege is modeled after, and draws heavily upon, the attorney-client privilege, a strong privilege that is supported by well-developed case law. Courts are to be expected to look to that well developed body of law in construing this Act. In this regard, mental impressions that are based even in part on mediation communications would generally be protected by privilege.

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). By analogy to the attorney-client privilege, silence in response to a question may be a communication, if it is meant to inform. *U.S. v. White*, 950 F.2d 426, 430 n.2 (7th Cir., 1991). Further, conduct meant to explain or communicate a fact, such as the re-enactment of an accident, is a communication. *See* Weinstein's Federal Evidence 503.14 (2000). Similarly, a client's revelation of a hidden scar to an attorney in response to a question is a communication if meant to inform. In contrast, a purely physical phenomenon, such as a tattoo or the color of a suit of clothes, observable by all, is not a communication.

If evidence of mental impressions would reveal, even indirectly, mediation communications, then that evidence would be blocked by the privilege. *Gunther v. U.S.*, 230 F.2d 222, 223-224 (D.C. Cir. 1956). For example, a mediator's mental impressions of the capacity of a mediation participant to enter into a binding mediated settlement agreement would be privileged if that impression was in part based on the statements that the party made during the mediation, because the testimony might reveal the content or character of the mediation communications upon which the impression is based. In contrast, the mental impression would not be privileged if it was based exclusively on the mediator's observation of that party wearing heavy clothes and an overcoat on a hot summer day because the choice of clothing was not meant to inform. *Darrow v. Gunn*, 594 F.2d 767, 774 (9th Cir. 1979).

There is no justification for making readily observable conduct privileged, certainly not more privileged than it is under the attorney-client privilege. If the conduct is seen in the mediation room, it can also be observed, even photographed, outside of the mediation room, as well as in other contexts. One of the primary reasons for making mediation communications privileged is to promote candor, and excluding evidence of a readily observable characteristic is

not necessary to promote candor. *In re Walsh*, 623 F.2d 489, 494 (7th Cir., 1980).

The provision makes clear that conversations to initiate mediation and other non-session communications that are related to a mediation are considered "mediation communications." Most statutes are silent on the question of whether they cover conversations to initiate mediation. However, candor during these initial conversations is critical to insuring a thoughtful agreement to mediate, and the Act therefore extends confidentiality to these conversations to encourage that candor.

The definition in Section 2(2) is narrowly tailored to permit the application of the privilege to protect communications that a party would reasonably believe would be confidential, such as the explanation of the matter to an intake clerk for a community mediation program, and communications between a mediator and a party that occur between formal mediation sessions. These would be communications "*made for the purposes of* considering, initiating, continuing, or reconvening a mediation or retaining a mediator." This language protects the confidentiality of such a communication when doing so advances the underlying policies of the privilege, while at the same time gives the courts the latitude to restrict the application of the privilege in situations where such an application of the privilege would constitute an abuse. For example, an individual trying to hide information from a court might later attempt to characterize a call to an acquaintance about a dispute as an inquiry to the acquaintance about the possibility of mediating the dispute. This definition would permit the court to disallow a communication privilege, and admit testimony from that acquaintance by finding that the communication was not "*made for the purposes of* initiating considering, initiating, continuing, or reconvening a mediation or retaining a mediator."

Responding in part to public concerns about the complexity of earlier drafts, the Drafting Committees also elected to leave the question of when a mediation ends to the sound judgment of the courts to determine according to the facts and circumstances presented by individual cases. *See Bidwell v. Bidwell*, 173 Or. App. 288 (2001) (ruling that letters between attorneys for the parties that were sent after referral to mediation and related to settlement were mediation communications and therefore privileged under the Oregon statute). In weighing language about when a mediation ends, the Drafting Committees considered other more specific approaches for answering these questions. One approach in particular would have terminated the mediation after a specified period of time if the parties failed to reach an agreement, such as the 10-day period specified in Cal. Evid. Code Section 1125 (West 1997) (general). However, the Drafting Committees rejected that approach because it felt that such a requirement could be easily circumvented by a routine practice of extending mediation in a form mediation agreement. Indeed, such an extension in a form agreement could result in the coverage of communications unrelated to the dispute for years to come, without furthering the purposes of the privilege.

Finally, this definition would also include mediation "briefs" and other reports that are prepared by the parties for the mediator. Whether the document is prepared for the mediation is a crucial issue. For example, a tax return brought to a divorce mediation would not be a "mediation communication" because it was not a "statement made as part of the mediation," even though it

may have been used extensively in the mediation. However, a note written on the tax return to clarify a point for other participants would be a mediation communication. Similarly, a memorandum specifically prepared for the mediation by the party or the party's representative explaining the rationale behind certain positions taken on the tax return would be a "mediation communication." Documents prepared for the mediation by expert witnesses attending the mediation would also be covered by this definition. *See* Section 4(b)(3).

3. Section 2(3). "Mediator."

Several points are worth stressing with regard to the definition of mediator. First, this definition should be read in conjunction with Section 9(c), which makes clear that the Act does not require that a mediator have a special qualification by background or profession. Second, this definition should be read in conjunction with the model language in Section 9(a) through (e) on disclosures of conflicts of interest. Finally, the use of the word "conducts" is intended to be value neutral, and should not be read to express a preference for the manner by which mediations are conducted. *Compare* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Tactics: A Grid for the Perplexed*, 1 Harv. Neg. L. Rev. 7 (1996) *with Joseph B. Stulberg, Facilitative vs. Evaluative Mediator Orientations: Piercing the "Grid" Lock,* 24 Fla. St. U. L. Rev. 985 (1997)

4. Section 2(4). "Nonparty Participant."

This definition would cover experts, friends, support persons, potential parties, and others who participate in the mediation. The definition is pertinent to the privilege accorded nonparty participants in Section 4(b)(3), and to the ability of parties to bring attorneys or support persons in Section 10. In the event that an attorney is deemed to be a nonparty participant, that attorney would be constricted in exercising that right by ethical provisions requiring the attorney to act in ways that are consistent with the interests of the client. *See* Model Rule of Professional Conduct 1.3 (Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.); and Rule 1.6(a) (Confidentiality of Information. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).).

5. Section 2(5). "Mediation Party."

The Act defines "mediation party" to be a person who participates in a mediation and whose agreement is necessary to resolve the dispute. These limitations are designed to prevent someone with only a passing interest in the mediation, such as a neighbor of a person embroiled in a dispute, from attending the mediation and then blocking the use of information or taking advantage of rights meant to be accorded to parties. Such a person would be a non-party participant and would have only a limited privilege. *See* Section 4(b)(3). Similarly, counsel for a mediation party would not be a mediation party, because their agreement is not necessary to the resolution of the dispute.

Because of these structural limitations on the definition of parties, participants who do not meet the definition of "mediation party," such as a witness or expert on a given issue, do not have the substantial rights under additional sections that are provided to parties. Rather, these non-party participants are granted a more limited privilege under Section 4(b)(3). Parties seeking to apply restrictions on disclosures by such participants - including their attorneys and other representatives - should consider drafting such a confidentiality obligation into a valid and binding agreement that the participant signs as a condition of participation in the mediation.

A mediation party may participate in the mediation in person, by phone, or electronically. A person, as defined in Section 2(6), may participate through a designated agent. If the party is an entity, it is the entity, rather than a particular agent, that holds the privilege afforded in Sections 4-6.

6. Section 2(6). "Person."

Sections 2(6) adopts the standard language recommended by the National Conference of Commissioners of Uniform State Laws for the drafting of statutory language, and the term should be interpreted in a manner consistent with that usage.

7. Section 2(7). "Proceeding."

Section 2(7) defines the proceedings to which the Act applies, and should be read broadly to effectuate the intent of the Act. It was added to allow the Drafters to delete repetitive language throughout the Act, such as judicial, administrative, arbitral, or other adjudicative processes, including related pre-hearing and post-hearing motions, conferences, and discovery, or legislative hearings or similar processes.

8. Section 2(8). "Record" and Section 2(9). "Sign."

These Sections adopt standard language approved by the Uniform Law Conference that is intended to conform Uniform Acts with the Uniform Electronic Transactions Act (UETA) and its federal counterpart, Electronic Signatures in Global and National Commerce Act (E-Sign) (15 U.S.C 7001, etc seq. (2000).

Both UETA and E-Sign were written in response to broad recognition of the commercial and other use of electronic technologies for communications and contracting, and the consensus that the choice of medium should not control the enforceability of transactions. These Sections are consistent with both UETA and E-Sign. UETA has been adopted by the Conference and received the approval of the American Bar Association House of Delegates. As of December 2001, it had been enacted in more than 35 states. *See* also Section 11, Relation to Electronic Signatures in Global and National Commerce Act.

The practical effect of these provisions is to make clear that electronic signatures and documents have the same authority as written ones for purposes of establishing an agreement to

mediate under Section 3(a), party opt-out of the mediation privilege under Section 3(c), and participant waiver of the mediation privilege under Section 5(a).

SECTION 3. SCOPE.

(a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:

(1) 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;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

(b) The [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

(A) a primary or secondary school if all the parties are students or

(B) a correctional institution for youths if all the parties are residents of that institution.

(c) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges

under Sections 4 through 6 do not apply to the mediation or part agreed upon. However, Sections 4 through 6 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

Legislative Note: To the extent that the Act applies to mediations conducted under the authority of a State's courts, State judiciaries should consider enacting conforming court rules.

Comment

1. In general.

The Act is broad in its coverage of mediation, a departure from the common state statutes that apply to mediation in particular contexts, such as court-connected mediation or community mediation, or to the mediation of particular types of disputes, such as worker's compensation or civil rights. *See*, *e.g.*, Neb. Rev. Stat. Section 48-168 (1993) (worker's compensation); Iowa Code Section 216.15A (1999) (civil rights). Moreover, unlike many mediation privileges, it also applies in some contexts in which the Rules of Evidence are not consistently followed, such as administrative hearings and arbitration.

Whether the Act in fact applies is a crucial issue because it determines not only the application of the mediation privilege but also whether the mediator has the obligations regarding the disclosure of conflicts of interest and, if asked, qualifications in Section 9; is prohibited from making disclosures about the mediation to courts, agencies and investigative authorities in Section 7; and must accommodate requirements regarding accompanying individuals in Section 10.

Because of the breadth of the Act's coverage, it is important to delineate its scope with precision. Section 3(a) sets forth three different mechanisms that trigger the Act's coverage, and will likely cover most mediation situations that commonly arise. Section 3(b) on the other hand, carves out a series of narrow and specific exemptions from the Act's coverage. Finally, Section 3(c) provides a vehicle through which parties who would be mediating in a context covered by Section 3(a) may "opt out" of the Act's protections and responsibilities. The central operating principle throughout this Section is that the Act should support, and guide, the parties' reasonable expectations about whether the mediations in which they are participating are included within the scope of the Act.

2. Section 3(a). Mediations covered by Act; triggering mechanisms.

Section 3(a) sets forth three conditions, the satisfaction of any one of which will trigger the application of the Act. This triggering requirement is necessary because the many different forms, contexts, and practices of mediation and other methods of dispute resolution make it sometimes difficult to know with certainty whether one is engaged in a mediation or some other dispute resolution or prevention process that employs mediation and related principles. *See, e.g.*, Ellen J. Waxman & Howard Gadlin, *Ombudsmen: A Buffer Between Institutions, Individuals,* 4

Disp. Resol. Mag. 21 (Summer 1998) (describing functions of ombuds, which can at times include mediation concepts and skills); Janice Fleischer & Zena Zumeta, *Group Facilitation: A Way to Address Problems Collaboratively,* 4 Disp. Resol. Mag.. 4 (Summer 1998) (comparing post-dispute mediation with pre-dispute facilitation); Lindsay "Peter" White, *Partnering: Agreeing to Work Together on Problems*, 4 Disp. Resol. Mag. 18 (Summer 1998) (describing a common collaborative problem solving technique used in the construction industry). This problem is exacerbated by the fact that unlike other professionals - such as doctors, lawyers, and social workers - mediators are not licensed and the process they conduct is informal. If the intent to mediate is not clear, even a casual discussion over a backyard fence might later be deemed to have been a mediation, unfairly surprising those involved and frustrating the reasonable expectations of the parties. The first triggering mechanism, Section 3(a)(1), subject to exceptions provided in 3(b), covers those situations in which mediation parties are either required to mediate or referred to mediation by governmental institutions or by an arbitrator. Administrative agencies include those public agencies with the authority to prescribe rules and regulations to administer a statute, as well as the authority to adjudicate matters arising under such a statute. They include agricultural departments, child protective services, civil rights commissions and worker's compensation boards, to name only a few. Through this triggering mechanism, the formal court-referred mediation that many people associate with mediation is clearly covered by the Act.

Where Section 3(a)(1) focuses on publicly referred mediations, the second triggering mechanism, Section 3(a)(2), furthers party autonomy by allowing mediation parties and the mediator to trigger the Act by agreeing to mediate in a record that is signed by the parties and by the mediator. A later note by one party that they agreed to mediate would not constitute a record of an agreement to mediate. In addition, the record must demonstrate the expectation of the mediation parties and the mediator that the mediation communications will have a privilege against disclosure.

Yet significantly, these individuals are not required to use any magic words to obtain the protection of the Act. *See Haghighi v. Russian-American Broadcasting Co*., 577 N.W.2d 927 (Minn.1998). The lack of a requirement for magic words tracks the intent to be inclusive and to embrace the many different approaches to mediation. Moreover, were magic words required, party and mediator expectations of confidentiality under the Act might be frustrated, since a mediation would only be covered by the Act if the institution remembered to include them in any agreement.

The phrase "privileged against disclosure" clarifies the type of expectations that the record must demonstrate tin order to show an expectation of confidentiality in a subsequent legal setting. Mere generalized expectations of confidentiality in a non-legal setting are not enough to trigger the Act if the case does not fit under Sections 3(a)(1) or 3(a)(3). Take for example a dispute in a university between the heads of the Spanish and Latin departments that is mediated or "worked out informally" with the assistance of the head of the French department, at the suggestion of the university provost. Such a mediation would not reasonably carry with it party or mediator expectations that the mediation would be conducted pursuant to an evidentiary privilege, rights of disclosure and accompaniment and the other protections and obligations of

the Act. Indeed, some of the parties and the mediator may more reasonably expect that the mediation results, and even the underlying discussions, would be disclosed to the university provost, and perhaps communicated throughout the parties' respective departments and elsewhere on campus. By contrast, however, if the university has a written policy regarding the mediation of disputes that embraces the Act, and the mediation is specifically conducted pursuant to that policy, and the parties agree to participate in mediation in a record signed by the parties, then the parties would reasonably expect that the Act would apply and conduct themselves accordingly, both in the mediation and beyond.

The third triggering mechanism, Section 3(a)(3), focuses on individuals and organizations that provide mediation services and provides that the Act applies when the mediation is conducted by one who is held out as a mediator. For example, disputing neighbors who mediate with a volunteer at a community mediation center would be covered by the Act, since the center holds itself out as providing mediation services. Similarly, mediations conducted by a private mediator who advertises his or her services as a mediator would also be covered, since the private mediator holds himself or herself out to the public as a mediator. Because the mediator is publicly held out as a mediator, the parties may reasonably expect mediations they conduct to be conducted pursuant to relevant law, specifically the Act. By including those mediations conducted by private mediators who hold themselves out as mediators, the Act tracks similar doctrines regarding other professions. In other contexts, "holding out" has included making a representation in a public manner of being in the business or having another person make that representation. *See* 18A Am. Jur.2d Corporations Section 271 (1985).

Mediations can be conducted by ombuds practitioners. *See* Standards for the Establishment and Operation of Ombuds Offices (August 2001). If such a mediation is conducted pursuant to one of these triggering mechanisms, such as a written agreement under Section 3(a)(2), it will be protected under the terms of the Act. There is no intent by the Drafters to exclude or include mediations conducted by an ombuds a priori. The terms of the Act determine applicability, not a mediator's formal title.

Finally, on the issue of Section 3(a) inclusions into the Act, the Drafting Committees discussed whether it should cover the many cultural and religious practices that are similar to mediation and that use a person similar to the mediator, as defined in this Act. On the one hand, many of these cultural and religious practices, like more traditional mediation, streamline and resolve conflicts, while solving problems and restoring relationships. Some examples of these practices are Ho'oponopono, circle ceremonies, family conferencing, and pastoral or marital counseling. These cultural and religious practices bring richness to the quality of life and contribute to traditional mediation. On the other hand, there are instances in which the application of the Act to these practices would be disruptive of the practices and therefore undesirable. On balance, furthering the principle of self-determination, the Drafting Committees decided that those involved should make the choice to be covered by the Act in those instances in which other definitional requirements of Section 2 are met by entering into an agreement to mediate reflected by a record or securing a court or agency referral pursuant to Section 3(a)(1). At the same time, these persons could opt out the Act's coverage by not using this triggering

mechanism. This leaves a great deal of leeway, appropriately, with those involved in the practices.

3. Section 3(b)(1) and (2). Exclusion of collective bargaining disputes.

Collective bargaining disputes are excluded because of the longstanding, solidified, and substantially uniform mediation systems that already are in place in the collective bargaining context. *See* Memorandum from ABA Section of Labor and Employment Law of the American Bar Association to Uniform Mediation Act Reporters 2 (Jan. 23, 2000) (on file with UMA Drafting Committees); Letter from New York State Bar Association Labor and Employment Law Section to Reporters, Uniform Mediation Act 2-4 (Jan. 21, 2000) (on file with UMA Drafting Committees). This exclusion includes the mediation of disputes arising under the terms of a collective bargaining agreement, as well as mediations relating to the formation of a collective bargaining agreement. By contrast, the exclusion does not include employment discrimination disputes not arising under the collective bargaining agreement as well as employment disputes arising after the expiration of the collective bargaining agreement. Mediations of disputes in these contexts remain within the protections and responsibilities of the Act.

4. Section 3(b)(3). Exclusion of certain judicial conferences.

Difficult issues arise in mediations that are conducted by judges during the course of settlement conferences related to pending litigation, and this Section excludes certain judicially conducted mediations from the Act. Some have the concern that party autonomy in mediation may be constrained either by the direct coercion of a judicial officer who may make a subsequent ruling on the matter, or by the indirect coercive effect that inherently inures from the parties' knowledge of the ultimate presence of that judge. *See*, *e.g.*, James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them For Trial*, 6 Disp. Resol. Mag. 11 (Fall 1999), and Frank E.A. Sander, *A Friendly Amendment*, 6 Disp. Resol. Mag. 11 (Fall 1999).

This concern is further complicated by the variegated nature of judicial settlement conferences. As a general matter, judicial settlement conferences are typically conducted under court or procedural rules that are similar to Rule 16 of the Federal Rules of Civil Procedure, and have come to include a wide variety of functions, from simple case management to a venue for court-ordered mediations. *See* Mont. R. Civ. P., Rule 16(a). In situations in which a part of the function of judicial conferences is case management, the parties hardly have an expectation of confidentiality in the proceedings, even though there may be settlement discussions initiated or facilitated by the judge or judicial officer. In fact, such hearings frequently lead to court orders on discovery and issues limitations that are entered into the public record. In such circumstances, the policy rationales supporting the confidentiality privilege and other provisions of the Act are not furthered.

On the other hand, there are judicially-hosted settlement conferences that for all practical purposes are mediation sessions for which the Act's policies of promoting full and frank discussions between the parties would be furthered. *See* generally Wayne D. Brazil, *Hosting*

Settlement Conferences: Effectiveness in the Judicial Role, 3 Ohio St. J. on Disp. Resol. 1 (1987); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485 (1985).

The Act recognizes the tension created by this wide variety of settlement functions by drawing a line with regard to those conferences that are covered by the Act and those that are not covered by the Act. The Act excludes those settlement conferences in which information from the mediation is communicated to a judge with responsibility for the case. This is consistent with the prohibition on mediator reports to courts in Section 7. The term "judge" in Section 3(b)(3) includes magistrates, special masters, referees, and any other persons responsible for making rulings or recommendations on the case. However, the Act does not apply to a court mediator, or a mediator who contracts or volunteers to mediate cases for a court because they may not make later rulings on the case. Similarly mediations conducted by judges specifically and exclusively are assigned to mediate cases, so-called "buddy judges," and retired judges who return to mediate cases do not fall within the Section 3(b)(3) exemption because such mediators do not make later rulings on the case.

Local rules are usually not recognized beyond the court's jurisdiction, and may not provide assurance of confidentiality if the mediation communications are sought in another jurisdiction, and if the jurisdiction does not permit recognize privilege by local rule.

5. Section 3(b)(4)(A). Exclusion of peer mediation.

The Act also exempts mediations between students conducted under the auspices of school programs because the supervisory needs of schools toward students, particularly in peer mediation, may not be consistent with the confidentiality provisions of the Act. For example, school administrators need to be able to respond to, and in a proceeding verify, legitimate threats to student safety or domestic violence that may surface during a mediation between students. *See* Memorandum from ABA Section of Dispute Resolution to Uniform Mediation Act Reporters (Nov. 15, 1999) (on file with UMA Drafting Committees). The law has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969), *citing Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) and *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

This exemption does not include mediations involving a teacher, parent, or other non-student as such an exemption might preclude coverage of truancy mediation and other mediation sessions for which the privilege is pertinent.

6. Section 3(b)(4)(B). Exclusion of correctional institutions for youth.

The Act also exempts programs involving youths at correctional institutions if the mediation parties are all residents of the institution. This is to facilitate and encourage mediation

and conflict prevention and resolution techniques among those juveniles who have well-documented and profound needs in those areas. Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails,* 66 Ind. L.J. 999, 1021 (1991). Exempting these programs serves the same policies as are served by the peer mediation exclusion for non-incarcerated youths. The Drafters do not intend to exclude cases where at least one party is not a resident, such as a class action suit against a non-resident in which the parties mediate or attempt to mediate the case.

7. Section 3(c). Alternative of non-privileged mediation.

This Section allows the parties to opt for a non-privileged mediation or mediation session by mutual agreement, and furthers the Act's policy of party self-determination. If the parties so agree, the privilege sections of the Act do not apply, thus fulfilling the parties reasonable expectations regarding the confidentiality of that mediation or session. For example, parties in a sophisticated commercial mediation, who are represented by counsel, may see no need for a privilege to attach to a mediation or session, and may by express written agreement "opt out" of the Act's privilege provisions. Similarly, parties may also use this option if they wish to rely on, and therefore use in evidence, statements made during the mediation. It is the parties rather than the mediator who make this choice, although a mediator could presumably refuse to mediate a mediation or session that is not covered by this Act. Even if the parties do not agree in advance, the parties, mediator, and all nonparty participants can waive the privilege pursuant to Section 5. In this instance, however, the mediator and other participants can block the waiver in some respects.

If the parties want to opt out, they should inform the mediators or nonparty participants of this agreement, because without actual notice, the privileges of the Act still apply to the mediation communications of the persons who have not been so informed until such notice is actually received. Thus, for example, if a nonparty participant has not received notice that the opt-out has been invoked, and speaks during a mediation, that mediation communication is privileged under the Act. If, however, one of the parties or the mediator tells the nonparty participant that the opt-out has been invoked, the privilege no longer attaches to statements made after the actual notice has been provided, even though the earlier statements remain privileged because of the lack of notice.

8. Other scope issues.

The Act would apply to all mediations that fit the definitions of mediation by a mediator unless specifically excluded by the State adopting the Act. For example, a State may want to exclude international commercial conciliation, which is covered by specific statute in some States. *See*, *e.g.*, N.C. Gen. Stat. Section 1-567.60 (1991); Cal. Civ. Pro. Section 1297.401 (West 1988); Fla. Stat. Ann. Section 684.10 (1986).

SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Legislative Note: The Act does not supersede existing state statutes that make mediators incompetent to testify, or that provide for costs and attorney fees to mediators who are wrongfully subpoenaed. See, e.g., Cal. Evid. Code Section 703.5 (West 1994).

Comment

1. In general.

Sections 4 through 6 set forth the Uniform Mediation Act's general structure for protecting the confidentiality of mediation communications against disclosure in later legal proceedings. Section 4 sets forth the evidentiary privilege, which provides that disclosure of mediation communications generally cannot be compelled in designated proceedings or discovery and results in the exclusion of these communications from evidence and from

discovery if requested by any party or, for certain communications, by a mediator or nonparty participant as well, unless within an exception delineated in Section 6 applies or the privilege is waived under the provisions of Section 5. It further delineates the fora in which the privilege may be asserted. The term "proceeding" is defined in Section 2(7). The provisions of Sections 4-6 may not be expanded by the agreement of the parties, but the protections may be waived under Section 5 or under Section 3(c).

2. The mediation privilege structure.

a. Rationale for privilege.

Section 4(b) grants a privilege for mediation communications that, like other communications privileges, allows a person to refuse to disclose and to prevent other people from disclosing particular communications. *See generally* Strong, *supra*, at Section 72; *Developments in the Law - Privileged Communications*, 98 Harv. L. Rev. 1450 (1985). The Drafters considered several other approaches to mediation confidentiality - including a categorical exclusion for mediation communications, the extension of evidentiary settlement discussion rules to mediation, and mediator incompetency. Upon exhaustive study and consideration, however, each of these mechanisms proved either overbroad in that they failed to fairly account for interests of justice that might occasionally outweigh the importance of mediation confidentiality (categorical exclusion and mediator incompetency), underbroad in that they failed to meet the reasonable needs of the mediation process or the reasonable expectations of the parties in the mediation process (settlement discussions), or under-inclusive in that they failed to provide protection for all of those involved in the mediation process (mediator incompetency).

The Drafters ultimately settled on the use of the privilege structure, the primary means by which communications are protected at law, an approach that is narrowly tailored to satisfy the legitimate interests and expectations of participants in mediation, the mediation process, and the larger system of justice in which it operates. The privilege structure also provides greater certainty in judicial interpretation because of the courts' familiarity with other privileges, and is consistent with the approach taken by the overwhelming majority of legislatures that have acted to provide broad legal protections for mediation confidentiality. Indeed, of the 25 States that have enacted confidentiality statutes of general application, 21 have plainly used the privilege structure. Ariz. Rev. Stat. Ann. Section 12-2238 (West 1993); Ariz. Rev. Stat. Ann. Section 16-7-206 (1997); Iowa Code Section 679C.2 (1998); Kan. Stat. Ann. Section 60-452 (1964); La. Rev. St. Ann. Section 9:4112 (1997); Me. R. Evid. Section 408 (1997); Mass. Gen. Laws ch. 233, Section 23C (1985); Mont. Code Ann. Section 26-1-813 (1999); Nev. Rev. Stat. Section 48.109(3) (1993); Ohio Rev. Code Ann. Section 2317.023 (West 1996); Okla. stat. tit. 12, Section 1805 (1983); Or. Rev. Stat. Ann. Section 36.220 (1997); 42 Pa. Cons. Stat. Ann. Section 5949 (1996) (general); R.I. Gen. Laws Section 9-19-44 (1992); S.D. Codified Laws Section 19-13-32 (1998); Tex. Civ. Prac. & Rem. Code Section 154.053 (c) (1999); Utah Code Ann. Section 30-3-38(4) (2000); Va. Code Ann. Section 8.01-576.10 (1994); Wash. Rev. Code Section 5.60.070 (1993); Wis. Stat. Section 904.085(4)(a) (1997); Wyo. Stat. Section 1-43-103 (1991). At least one other has arguably used the privilege structure: *See Olam v. Congress Mortgage Co.*,

68 F.Supp. 2d 1110 (N.D. Cal. 1999) (treating Cal. Evid. Code Section 703.5 (West 1994) and Cal. Evid. Code Section 1119, 1122 (West 1997) as a privilege).

That these privilege statutes also tend to be the more recent of mediation confidentiality statutory provisions suggests that privilege may also be seen as the more modern approach taken by state legislatures. *See*, *e.g.*, Ohio Rev. Code. Ann. Section 2317.023 (West 1996); Fla. Stat. Ann. Section 44.102 (1999); Wash. Rev. Code Ann. Section 5.60.072 (West 1993); *see generally*, Cole et al., *supra*, at Section 9:10-9:17. Moreover, States have been even more consistent in using the privilege structure for mediation offered by publicly funded entities, such as court-connected and community mediation programs. *See*, *e.g.*, Ariz. Rev. Stat. Ann. Section 25-381.16 (West 1977) (domestic court); Ark. Code. Ann. Section 11-2-204 (Arkansas Mediation and Conciliation Service) (1979); Fla. Stat. Ann. Section 44.201 (publicly established dispute settlement centers) (West 1998); 710 Ill. Comp. Stat . Section 20/6 (1987) (non-profit community mediation programs); Ind. Code Ann. Section 4-6-9-4 (West 1988) (Consumer Protection Division); Iowa Code Ann. Section 216.15B (West 1999) (civil rights commission); Minn. Stat. Ann. Section 176.351 (1987) (workers' compensation bureau); Cal. Evid. Code Section 1119, *et seq.* (West 1997); Minn. Stat. Ann. Section 595.02 (1996).

The privilege structure carefully balances the needs of the justice system against party and mediator needs for confidentiality. For this reason, legislatures and courts have used the privilege to provide the basis for protection for other forms of professional communications privileges, including attorney-client, doctor-patient, and priest-penitent relationships. *See* Unif. R. Evid. R. 510-510 (1986); Strong, *supra*, at tit. 5. Congress recently used this structure to provide for confidentiality in the accountant-client context as well. 26 U.S.C. Section 7525 (1998) (Internal Revenue Service Restructuring and Reform Act of 1998). Scholars and practitioners have joined legislatures in showing strong support for a mediation privilege. *See*, *e.g.*, Kirtley, *supra*; Freedman and Prigoff, *supra*; Jonathan M. Hyman, *The Model Mediation Confidentiality Rule*, 12 Seton Hall Legis. J. 17 (1988); Eileen Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 Cap. U.L. Rev. 305 (1971); Michael Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 Seton Hall Legis. J. 1(1988). For a critical perspective, *see generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Disp. Resol. 1 (1986); Scott H. Hughes, *A Closer Look: The Case for a Mediation Privilege Has Not Been Made*, 5 Disp. Resol. Mag. 14 (Winter 1998).

b. Communications to which the privilege attaches

The privilege applies to a broad array of "mediation communications" including some communications that are not made during the course of a formal mediation session, such as those made for purposes of convening or continuing a mediation. *See* Comments to Section 2(2) for further discussion.

c. Proceedings at which the privilege may be asserted.

The privilege under Section 4 applies in most legal "proceedings" that occur during or after a mediation covered by the Act. *See* Section 2(7). If the privilege is raised in a criminal

felony proceeding, it is subject to a specialized treatment under Section 6(b)(1), and the Comments to that Section should be consulted for further clarification.

3. Section 4(a). Description of effect of privilege.

The words "is not subject to discovery or admissible in evidence" in Section 4(a) make explicit that a court or other tribunal must exclude privileged communications that are protected under these sections, and may not compel discovery of them. Because the privilege is unfamiliar to many using mediation, this Section provides a description of the effect of the privilege provided in Sections 4(b), 5, and 6. It does not change the reach of the remainder of the Section.

4. Section 4(b). Operation of privilege.

As with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular communications. *See generally* Strong, *supra*, at Section 72; *Developments in the Law - Privileged Communications*, 98 Harv. L. Rev. 1450 (1985).

This blocking function is critical to the operation of the privilege. As discussed in more detail below, parties have the greatest blocking power and may block provision of testimony about or other evidence of mediation communications made by anyone in the mediation, including persons other than the mediator and parties. The evidence may be blocked whether the testimony is by another party, a mediator, or any other participant. However, if all parties agree that a party should testify about a party's mediation communications, no one else may block them from doing so, including a mediator or nonparty participant.

Mediators may block their own provision of evidence, including their own testimony and evidence provided by anyone else of the mediator's mediation communications, even if the parties consent. Nonetheless, the parties' consent is required to admit the mediator's provision of evidence, as well as evidence provided by another regarding the mediator's mediation communications.

Finally, a nonparty participant may block evidence of that individual's mediation communication regardless of who provides the evidence and whether the parties or mediator consent. Once again, nonetheless, the nonparty participant may not provide such evidence if the parties do not consent. This is consistent with fixing the limits of the privilege to protect the expectations of those persons whose candor is most important to the success of the mediation process.

a. The holders of the privilege.

1. In general.

A critical component of the Act's general rule is its designation of the holder - i.e., the person who is eligible to raise and waive the privilege.

This designation brings both clarity and uniformity to the law. Statutory mediation privileges are somewhat unusual among evidentiary privileges in that they often do not specify who may hold and/or waive the privilege, leaving that to judicial interpretation. *See*, *e.g.*, 710 Ill. Comp. Stat. Section 20/6 (1987) (community dispute resolution centers); Ind. Code Section 20-7.5-1-13 (1987) (university employee unions); Iowa Code Section 679.12 (1985) (general); Ky. Rev. Stat. Ann. Section 336.153 (1988) (labor disputes); 26 Me. Rev. Stat. Ann. Section 1026 (1999) (university employee unions); Mass. Gen. Laws ch. 150, Section 10A (1985) (labor disputes).

Those statutes that designate a holder tend to be split between those that make the parties the only holders of the privilege, and those that also make the mediator a holder. *Compare* Ark. Code Ann. Section 11-2-204 (1979) (labor disputes); Fla. Stat. Ann. Section 61.183 (1996) (divorce); Kan. Stat. Ann. Section 23-605 (1999) (domestic disputes); N.C. Gen. Stat. Section 41A-7(d) (1998) (fair housing); Or. Rev. Stat. Ann. Section 107.785 (1995) (divorce) (providing that the parties are the sole holders) *with* Ohio Rev. Code Ann. Section 2317.023 (West 1996) (general); Wash. Rev. Code Ann. Section 7.75.050 (1984) (dispute resolution centers (making the mediator an additional holder in some respects).

The Act adopts an approach that provides that both the parties and the mediators may assert the privilege regarding certain matters, thus giving weight to the primary concern of each rationale. *See* Ohio Rev. Code Ann. Section 2317.023 (West 1996) (general); Wash. Rev. Code Section 5.60.070 (1993) (general). In addition, the Act provides a limited privilege for nonparty participants, as discussed in Section (c) below.

a2. Parties as holders.

The mediation privilege of the parties draws upon the purpose, rationale, and traditions of the attorney-client privilege, in that its paramount justification is to encourage candor by the mediation parties, just as encouraging the client's candor is the central justification for the attorney-client privilege. *See* Paul R. Rice, Attorney Client Privilege in the United States 2.1-2.3 (2d ed. 1999).

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because mediations involve parties whose interests appear to be adverse. However, the law of attorney-client privilege has considerable experience with situations in which multiple-client interests may conflict, and those experiences support the analogy of the mediation privilege to the attorney-client privilege. For example, the attorney-client privilege has been recognized in the context of a joint defense in which interests of the clients may conflict in part and yet one may prevent later disclosure by another. *See Raytheon Co. v. Superior Court*, 208 Cal. App.3d 683, 256 Cal. Rptr. 425 (1989); *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979), *cert denied*, 444 U.S. 898 (1979); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So.2d 437 (Fla. App. 1987); *but see Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769 (Tex. App. 1985) (refusing to apply the joint defense doctrine to parties who were not directly adverse); *see generally* Patricia Welles, *A Survey of Attorney-Client Privilege in*

Joint Defense, 35 U. Miami L. Rev. 321 (1981). Similarly, the attorney-client privilege applies in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. *Desriusseaux v. Val-Roc Truck Corp.*, 230 A.D.2d 704 (N.Y. Supreme Ct. 1996); Paul R. Rice, Attorney-Client Privilege in the United States, 4:30-4:38 (2d ed. 1999).

It should be noted that even if the mediator loses the privilege to block or assert a privilege, the parties may still come forward and assert their privilege, thus blocking the mediator who has lost the privilege from providing testimony about the affected mediation. This Section should be read in conjunction with 9(d) below.

a3. Mediator as holders.

Mediators are made holders with respect to their own mediation communications, so that they may participate candidly, and with respect to their own testimony, so that they will not be viewed as biased in future mediations, as discussed further in the Reporter's Prefatory Note. As noted above in Section 4(a)(2) above and in commentary to Section 9(d) below, even if the mediator loses the privilege to block or assert a privilege, the parties may still come forward and assert their privilege.

a4. Nonparty participants as holders.

In addition, the Act adds a privilege for the nonparty participant, though limited to the communications by that individual in the mediation. *See* 5 U.S.C. Section 574(a)(1). The purpose is to encourage the candid participation of experts and others who may have information that would facilitate resolution of the case. This would also cover statements prepared by such persons for the mediation and submitted as part of it, such as experts' reports. Any party who expects to use such an expert report prepared to submit in mediation later in a legal proceeding would have to secure permission of all parties and the expert in order to do so. This is consistent with the treatment of reports prepared for mediation as mediation communications. *See* Section 2(2).

a5. Contractual notice of intent to invoke the mediation privilege.

As a practical matter, a person who holds a mediation privilege can only assert the privilege if that person knows that evidence of a mediation communication will be sought or offered at a proceeding. This presents no problem in the usual case in which the subsequent proceeding arises because of the failure of the mediation to resolve the dispute because the mediation party would be one of the parties to the proceeding in which the mediation communications are being sought. To guard against the unusual situation in which a party or mediator may wish to assert the privilege, but is unaware of the necessity, the parties and mediator may wish to contract for notification of the possible use of mediation information, as is a practice under the attorney-client privilege for joint defense consultation. *See* Paul R. Rice, et.

al., *Attorney-Client Privilege in the United States* Section 18-25 (2d ed. 1999) (attorney client privilege in context of joint representation).

5. Section 4(c). Otherwise discoverable evidence.

This provision acknowledges the importance of the availability of relevant evidence to the truth-seeking function of courts and administrative agencies, and makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a mediation. For purposes of the mediation privilege, it is the communication that is made in a mediation that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is communicated in a mediation is subject to discovery, just as it would be if the mediation had not taken place.

There is no "fruit of the poisonous tree" doctrine in the mediation privilege. For example, a party who learns about a witness during a mediation is not precluded by the privilege from subpoenaing that witness. This is a common exemption in mediation privilege statutes, and is also found in Uniform Rule of Evidence 408. *See*, *e.g.*, Fla. Stat. Ann. Section 44.102 (1999) (general); Minn. Stat. Ann. Section 595.02 (1996) (general); Ohio Rev. Code Ann. Section 2317.023 (West 1996) (general); Wash. Rev. Code Section 5.60.070 (1993) (general).

SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 4 may be waived in a record or orally during a proceeding 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.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

Comment

1. Section 5(a) and (b). Waiver and preclusion.

Section 5 provides for waiver of privilege, and for a party, mediator, or nonparty participant to be precluded from asserting the privilege in situations in which mediation communications have been disclosed before the privilege has been asserted. Waiver must be express and either recorded through a writing or electronic record or made orally during specified types of proceedings. These rules further the principle of party autonomy in that mediation participants may generally prefer not to waive their mediation privilege rights. However, there may be situations in which one or more parties may wish to be freed from the burden of privilege, and the waiver provision permits that possibility. *See, e.g., Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110, 1131-33 (N.D. Cal. 1999).

Significantly, these provisions differ from the attorney-client privilege in that the mediation privilege does not permit waiver to be implied by conduct. *See* Michael H. Graham, Handbook of Federal Evidence Section 511.1 (4th ed. 1996). The rationale for requiring explicit waiver is to safeguard against the possibility of inadvertent waiver, such as through the often salutary practice of parties discussing their dispute and mediation with friends and relatives. In contrast to these settings, there is a sense of formality and awareness of legal rights in all of the proceedings to which the privilege may be waived if the waiver is oral. They generally are conducted on the record, easing the difficulties of establishing what was said.

Read together with Section 4, the waiver operates as follows:

- For testimony about mediation communications made by a party, all parties are the holders and therefore all parties must waive the privilege before a party or nonparty participant may testify or provide evidence; if that testimony is to be provided by a mediator, all parties and the mediator must waive the privilege.

- For testimony about mediation communications that are made by the mediator, both the parties and the mediator are holders of the privilege, and therefore both the parties and the mediator must waive the privilege before a party, mediator, or nonparty participant may testify or provide evidence of a mediator's mediation communications.

- For testimony about mediation communications that are made by a nonparty participant, both the parties and the nonparty participants are holders of the privilege and therefore both the parties and the nonparty participant must waive before a party or nonparty

participant may testify; if that testimony is to be offered through the mediator, the mediator must also waive.

Earlier drafts included provisions that permitted waiver by conduct, which is common among communications privileges. However, the Drafting Committees deleted those provisions because of concerns that mediators and parties unfamiliar with the statutory environment might waive their privilege rights inadvertently. That created the anomalous situation of permitting the opportunity for one party to blurt out potentially damaging information in the midst of a trial and then use the privilege to block the other party from contesting the truth.

To address this anomaly, the Drafters added Section 5(b), a preclusion provision to cover situations in which the parties do not expressly waive the privilege but engage in conduct inconsistent with the assertions of the privilege, and that cause prejudice. As under existing interpretations for other communications privileges, waiver through preclusion would not typically constitute a waiver with respect to all mediation communications, only those related in subject matter. *See generally* Unif. R. Evid. R. 510 and 511 (1986).

Critically, the preclusion provision applies only if the disclosure prejudices another in a proceeding. It is not intended to encompass the casual recounting of the mediation session to a neighbor that is not admissible in court, but would include disclosure that would, absent the exception, allow one party to take unfair advantage of the privilege. For example, if one party's attorney states in court that the other party admitted destroying evidence during mediation, that party should not be able to block the use of testimony to refute that statement later in that proceeding. Such advantage-taking or opportunism would be inconsistent with the policy rationales that support continued recognition of the privilege, while the casual conversation would not. Thus, if Andy and Betty were the parties in a mediation, and Andy affirmatively stated in court that Betty admitted destroying evidence during the mediation, Andy is precluded from asserting that A did not waive the privilege. If Betty decides to waive as well, evidence of Andy's and Betty's statements during mediation may be admitted.

Analogous doctrines have developed regarding constitutional privileges, *Harris v. New York*, 401 U.S. 222, 224 (1971) (shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances), and the rule of completeness in Rule 106 of the Uniform Rules of Evidence, which states that if one party introduces part of a record, an adverse party may introduce other parts when to do otherwise would be unfair.

Finally, it is worth noting that in arbitration, which is sometimes conducted without an ongoing record, it will be important for waiving parties to ask the arbitrator to note the waiver. Any individual who wants notice that another has received a subpoena for mediation communications or has waived the privilege can provide for notification as a clause in the agreement to mediate or the mediated agreement.

2. Section 5(c). Preclusion for use of mediation to plan or commit crime.

This preclusion reflects a common practice in the States of exempting from confidentiality protection those mediation communications that relate to the ongoing or future commission of a crime, as discussed in the Comments to Section 6(a)(4). However, it narrows the preclusion, thus retaining broader confidentiality, and removes the privilege protection only when an actor uses or attempts to use the mediation itself to further the commission of a crime, rather than lifting the confidentiality protection more broadly to any discussion of crimes. For example, it would preclude gang members from claiming that a meeting to plan a drug deal was really a mediation that would privilege those communications in a later criminal or civil case.

This Section should be read together with Section 6(a)(4), which applies to particular communications within a mediation which are used for the same purposes. The two differ on the purpose of the mediation: Section 5(c) applies when the mediation itself is used to further a crime, while Section 6(a)(4) applies to matters that are being mediated for other purposes but which include discussion of acts or statements that may be deemed criminal in nature. Under Section 5(c), the preclusion applies to all mediation communications because the purpose of the mediation frustrates public policy. Under Section 6(a)(4), the preclusion only applies to those mediation communications that have a criminal character; the privilege may still be asserted to block the introduction of other communications made during the mediation. This rationale is discussed more fully in the comments to Section 6(a)(4).

SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

(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 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, unless the

[Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

(b) There is no privilege under Section 4 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) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Legislative Note: If the enacting state does not have an open records act, the following language in paragraph (2) of subsection (a) needs to be deleted: "available to the public under [insert statutory reference to open records act] or".

Comment

1. In general.

This Section articulates specific and exclusive exceptions to the broad grant of privilege provided to mediation communications in Section 4. As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the Act contemplates that a court will hold an in camera proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended. *See*, *e.g.*, Rinaker v. Superior Court, 74 Cal. Rptr.2d 464, 466 (Ct. App. 1998); *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110, 1131-33 (N.D. Cal. 1999) (discussing whether an in camera hearing is necessary).

The exceptions in Section 6(a) apply regardless of the need for the evidence because society's interest in the information contained in the mediation communications may be said to categorically outweigh its interest in the confidentiality of mediation communications. In contrast, the exceptions under Section 6(b) would apply only in situations where the relative strengths of society's interest in a mediation communication and mediation participant interest in confidentiality can only be measured under the facts and circumstances of the particular case. The Act places the burden on the proponent of the evidence to persuade the court in a non-public hearing that the evidence is not otherwise available, that the need for the evidence substantially outweighs the confidentiality interests and that the evidence comes within one of the exceptions listed under Section 6(b). In other words, the exceptions listed in 6(b) include situations that should remain confidential but for overriding concerns for justice.

2. Section 6(a)(1). Record of an agreement.

This exception would permit evidence of a signed agreement, such as an agreement to mediate, an agreement regarding how the mediation should be conducted -- including whether the parties and mediator may disclose outside of proceedings, or, more commonly, written agreements memorializing the parties' resolution of the dispute. The exception permits such an agreement to be introduced in a subsequent court proceeding convened to determine whether the terms of that settlement agreement had been breached.

The words "agreement evidenced by a record" and "signed" refer to written and executed agreements, those recorded by tape recorded and ascribed to by the parties on the tape, and other electronic means to record and sign, as defined in Sections 2(9) and 2(10). In other words, a participant's notes about an oral agreement would not be a signed agreement. On the other hand, the following situations would be considered a signed agreement: a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement.

Written agreements are commonly excepted from mediation confidentiality protections, permitting the Act to embrace current practices in a majority of States. *See* Ariz. Rev. Stat. Ann. Section 12-2238 (1993); Cal. Evid. Code Section 1120(1) (West 1997) (general); Cal. Evid. Code Section 1123 (West 1997) (general); Cal. Gov't. Code Section 12980(i) (West 1998) (housing discrimination); Colo. Rev. Stat. Section 24-34-506.5 (1993) (housing discrimination); Ga. Code Ann. Section 45-19-36(e) (1989) (fair employment); 775 Ill. Comp. Stat. Section 5/7B-102(E)(3) (1989) (human rights); Ind. Code Section 679.2 (1998) (general); Iowa. Code Ann. Section 216.15(B) (1999) (civil rights); Ky. Rev. Stat. Ann. Section 344.200(4) (1996) (civil rights); La. Rev. Stat. Ann. Section 9:4112(B)(1)(c) (1997) (general); La. Rev. Stat. Ann. Section 51:2257(D) (1998) (human rights); 5 Me. Rev. Stat. Ann. Section 4612(1)(A) (1995) (human rights); Md. Code 1957 Ann. Art. 49(B) Section 28 (1991) (human rights); Mass. Gen. Laws. ch. 151B, Section 5 (1991) (job discrimination); Mo. Rev. Stat. Section 213.077 (1992) (human rights); Neb. Rev. Stat. Section 43-2908 (1993) (parenting act); N.J. Stat. Ann. Section 10:5-14 (1992) (civil rights); Or. Rev. Stat. Ann. Section 36.220(2)(a) (1997) (general); Or. Rev. Stat. Ann. 36.262 (1989) (agricultural foreclosure); 42 Pa. Consol. Stat. Section 5949(b)(1) (1996) (general); Tenn. Code Ann. Section 4-21-303(d) (1996) (human rights); Tex. Gov't. Code Ann. Section 2008.057 (1999) (Administrative Procedure Act); Vt. R. Civ. P., Rule 16.3 (1998) (general civil); Va. Code Ann. Section 8.01-576.10 (1994) (general); Va. Code Ann. Section 8.01-581.22 (1988) (general); Wash. Rev. Code Section 5.60.070 (1)(e) and (f) (1993) (1993) (general); Wash. Rev. Code Section 26.09.015(3) (1991) (divorce); Wash. Rev. Code Section 49.60.240 (1995) (human rights); W.Va. Code Section 5-11A-11(b)(4) (1992) (fair housing); W.Va. Code Section 6B-2-4(r) (1990) (public employees); Wis. Stat. Section 767.11(12) (1993) (family court); Wis. Stat. Section 904.085(4)(a) (1997) (general).

This exception is noteworthy only for what is not included: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a mediation session could bear on either whether the parties came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule of privilege. As a result, mediation participants might be less candid, not knowing whether a

controversy later would erupt over an oral agreement. Unfortunately, excluding evidence of oral settlements reached during a mediation session would operate to the disadvantage of a less legally sophisticated party who is accustomed to the enforcement of oral settlements reached in negotiations. Such a person might also mistakenly assume the admissibility of evidence of oral settlements reached in mediation as well. However, because the majority of courts and statutes limit the confidentiality exception to signed written agreements, one would expect that mediators and others will soon incorporate knowledge of a writing requirement into their practices. *See Vernon v. Acton*, 732 N.E.2d 805 (Ind., 2000) (citing draft Uniform Mediation Act); *Ryan v. Garcia*, 27 Cal. App.4th 1006, 1012 (1994) (privilege statute precluded evidence of oral agreement); *Hudson v. Hudson*, 600 So.2d 7,9 (Fla. App. 1992) (privilege statute precluded evidence of oral settlement); Ohio Rev. Code Ann. Section 2317.023 (West 1996). For an example of a state statute permitting the enforcement of oral agreements under certain narrow circumstances, *see* Cal. Evid. Code Section 1118, 1124 (West 1997) (providing that oral agreement must be memorialized in writing within 72 hours).

Despite the limitation on oral agreements, the Act leaves parties other means to preserve the agreement quickly. For example, parties can agree that the mediation has ended, state their oral agreement into the tape recorder and record their assent. *See Regents of the University of California v. Sumner*, 42 Cal. App. 4th 1209, 1212 (1996). This approach was codified in Cal. Evid. Code Section 1118, 1124 (West 1997).

The parties may still provide that particular settlements agreements are confidential with regard to disclosure to the general public, and provide for sanctions for the party who discloses voluntarily. *See* Stephen A. Hochman, *Confidentiality in Mediation: A Trap for the Unwary,* SB41 ALI-ABA 605 (1995). However, confidentiality agreements reached in mediation, like those in other settlement situations, are subject to the need for evidence and public policy considerations. *See* Cole et al., *supra*, Section 9.23, 9.25.

3. Section 6(a)(2). Mediations open to the public; meetings and records made open by law.

Section 6(a)(2) makes clear that the privileges in Section 4 do not preempt state open meetings and open records laws, thus deferring to the policies of the individual States regarding the types of meetings that will be subject to these laws. In addition, it provides an exception when the mediation is opened to the public, such as a televised mediation.

This exception recognizes that there should be no after-the-fact confidentiality for communications that were made in a meeting that was either voluntarily open to the public - such as a workgroup meeting in a federal negotiated rule making that was made open to the general public, even though not required by Federal Advisory Committee Act (FACA) to be open - or was required to be open to the public pursuant to an open meeting law. For example, the Act would provide no privilege if an agency holds a closed meeting but FACA would require that it be open. This exception also applies if a meeting was properly closed but an open record law requires that the meeting summaries or other documents - perhaps even a transcript - be made

available under certain circumstances, e.g. the Federal Sunshine Act (5 U.S.C. 552b (1995). In this situation, only the records would be excepted from the privilege, however.

4. Section 6(a)(3). Threats of bodily injury or to commit a crime of violence.

The policy rationales supporting the privilege do not support mediation communications that threaten bodily injury or crimes of violence. To the contrary, in cases in which a credible threat has been made disclosure would serve the public interest in safety and the protection of others. Because such statements are sometimes made in anger with no intention to commit the act, the exception is a narrow one that applies only to the threatening statements; the remainder of the mediation communication remains protected against disclosure.

State mediation confidentiality statutes frequently recognize a similar exception. *See* Alaska Stat. Section 47.12.450(e) (1998) (community dispute resolution centers) (admissible to extent relevant to a criminal matter); Colo. Rev. Stat. Section 13-22-307 (1998) (general) (bodily injury); Kan. Stat. Ann. Section 23-605(b)(5) (1999) (domestic relations) (mediator may report threats of violence to court); Or. Rev. Stat. Section 36.220(6) (1997) (general) (substantial bodily injury to specific person); 42 Pa. Cons. St. Ann. Section 5949(2)(I) (1996) (general) (threats of bodily injury); Wash. Rev. Code Section 7.75.050 (1984) (community dispute resolution centers) (threats of bodily injury); Wyo. Stat. Section 1-43-103 (c)(ii) (1991) (general) (future crime or harmful act).

5. Section 6(a)(4). Communications used to plan or commit a crime.

The policies underlying this provision mirror those underlying Section 5(c), and are discussed there. This exception applies to particular communications used to plan or commit a crime, whereas Section 5(c) applies when the mediation is used for these purposes. It includes communication intentionally used to conceal an ongoing crime or criminal activity.

Almost a dozen States currently have mediation confidentiality protections that contain exceptions related to a commission of a crime. Colo. Rev Stat. Section 13-22-307 (1991) (general) (future felony); Fla. Stat. Ann. Section 723.038 (mobile home parks) (ongoing or future crime or fraud); Iowa Code Section 216.15B (1999) (civil rights); Iowa Code Section 654A.13 (1990) (farmer-lender); Iowa Code Section 679C.2 (1998) (general) (ongoing or future crimes); Kan. Stat. Ann. Section 23-605(b)(3) (1989) (ongoing and future crime or fraud); Kan. Stat. Ann. Section 44-817(c)(3) (1996) (labor) (ongoing and future crime or fraud); Kan. Stat. Ann. Section 75-4332(d)(3) (1996) (public employment) (ongoing and future crime or fraud); 24 Me. Rev. Stat. Ann. Section 2857(2) (1999) (health care) (to prove fraud during mediation); Minn. Stat. Section 595.02(1)(a) (1996) (general); Neb. Rev. Stat. Section 25-2914 (1994) (general) (crime or fraud); N.H. Rev. Stat. Ann. Section 328-C:9(III) (1998) (domestic relations) (perjury in mediation); N.J. Stat Ann. Section 34:13A-16(h) (1997) (workers' compensation) (any crime); N.Y. Lab. Laws Section 702-a(5) (McKinney 1991) (past crimes) (labor mediation); Or. Rev. Stat. Ann. Section 36.220(6) (1997) (general) (future bodily harm to a specific person); S.D. Codified Laws Section 19-13-32 (1998) (general) (crime or fraud); Wyo. Stat. Ann. Section 1-

43-103(c)(ii) (1991) (future crime).

While ready to exempt attempts to commit or the commission of crimes from confidentiality protection, the Drafting Committees declined to cover "fraud" that would not also constitute a crime because civil cases frequently include allegations of fraud, with varying degrees of merit, and the mediation would appropriately focus on discussion of fraud claims. Some state statutes do exempt fraud, although less frequently than they do crime. *See*, *e.g.*, Fla. Stat. Ann. Section 723.038(8) (1994) (mobile home parks) (communications made in furtherance of commission of crime or fraud); Kan. Stat. Ann. Section 23-605(b)(3) (1999) (domestic relations) (ongoing crime or fraud); Kan. Stat. Ann. Section 44-817(c)(3) (1996) (labor) (ongoing crime or fraud); Kan. Stat. Ann. Section 60-452(b)(3) (1964) (general) (ongoing or future crime or fraud); Kan. Stat. Ann. Section 75-4332(d)(3) (1996) (public employment) (ongoing or future crime or fraud); Neb. Rev. Stat. Section 25-2914 (1994) (general) (crime or fraud); S.D. Codified Laws Section 19-13-32 (1998) (general) (crime or fraud).

Significantly, this exception does not cover mediation communications constituting admissions of past crimes, or past potential crimes, which remain privileged. Thus, for example, discussions of past aggressive positions with regard to taxation or other matters of regulatory compliance in commercial mediations remain privileged against possible use in subsequent or simultaneous civil proceedings. The Drafting Committees discussed the possibility of creating an exception for the related circumstance in which a party makes an admission of past conduct that portends future bad conduct. However, they decided against such an expansion of this exception because such past conduct can already be disclosed in other important ways. The other parties can warn others, because parties are not prohibited from disclosing by the Act. The Act permits the mediator to disclose if required by law to disclose felonies or if public policy requires.

It is important to emphasize that the Act's limited focus as an evidentiary and discovery privilege, rather than a broader rule of confidentiality means that this privilege provision would not prevent a party from calling the police, or warning someone in danger.

Finally, it should be noted that this exception is intended to prevent the abuse of the privilege as a shield to evidence that might be necessary to prosecute or defend a crime. The Drafters recognize that it is possible that the exception itself could be abused. Such unethical or bad faith conduct would continue to be subject to traditional sanction standards.

6. Section 6(a)(5). Evidence of professional misconduct or malpractice by the mediator.

The rationale behind the exception is that disclosures may be necessary to promote accountability of mediators by allowing for grievances to be brought against mediators, and as a matter of fundamental fairness, to permit the mediator to defend against such a claim. Moreover, permitting complaints against the mediator furthers the central rationale that States have used to reject the traditional basis of licensure and credentialing for assuring quality in professional practice: that private actions will serve an adequate regulatory function and sift out incompetent

or unethical providers through liability and the rejection of service. *See*, *e.g.*, W. Lee Dobbins, *The Debate Over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?*, U. Fla. J. L. & Pub. Pol'y 95, 96-98 (1995).

7. Section 6(a)(6). Evidence of professional misconduct or malpractice by a party or representative of a party.

Sometimes the issue arises whether anyone may provide evidence of professional misconduct or malpractice occurring during the mediation. *See In re Waller*, 573 A.2d 780 (D.C. App. 1990); *see generally* Pamela Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U.L. Rev. 715, 740-751. The failure to provide an exception for 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. Because of the potential adverse impact on a mediator's appearance of impartiality, the use of mediator testimony is more guarded, and therefore protected by Section 6(c). It is important to note that evidence fitting this exception would still be protected in other types of proceedings, such as those related to the dispute being mediated.

Reporting requirements operate independently of the privilege and this exception. Mediators and other 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).

8. Section 6(a)(7). Evidence of abuse or neglect.

An exception for child abuse and neglect is common in domestic mediation confidentiality statutes, and the Act reaffirms these important policy choices States have made to protect their citizens. *See*, *e.g.*, Iowa. Code Ann. Section 679c.3(4) (1998) (general); Kan. Stat. Ann. Section 23-605(b)(2) (1999) (domestic relations); Kan. Stat. Ann. Section 38-1522(a) (1997) (general); Kan. Stat. Ann. Section 44-817©)(2) (1996) (labor); Kan. Stat. Ann. Section 72-5427(e)(2) (1996) (teachers); Kan. Stat. Ann. Section 75-4332(d)(1) (1996) (public employment); Minn. Stat. Ann. Section 595.02(2)(a)(5) (1996) (general); Mont. Code Ann. Section 41-3-404 (1999) (child abuse investigations) (mediator may not be compelled to testify); Neb. Rev. Stat. Section 43-2908 (1993) (parenting act) (in camera); N.H. Rev. Stat. Ann. Section 328-C:9(III)(c) (1998) (marital); N.C. Gen. Stat. Section 7A-38.1(L) (1999) (superior court); N.C. Gen. Stat. Section 7A-38.4(K) (1999) (district courts); Ohio Rev. Code Ann. Section 3109.052(c) (West 1990) (child custody); Ohio Rev. Code Ann. Section 5123.601 (West 1988) (mental retardation); Ohio Rev. Code Ann. Section 2317.02 (1998) (general); Or. Rev. Stat. Section 36.220(5) (1997) (general); Tenn. Code Ann. Section 36-4-130(b)(5) (1993) (divorce); Utah Code Ann. Section 30-3-38(4) (2000) (divorce) (mediator shall report); Va. Code Ann. Section 63.1-248.3(A)(10) (2000) (welfare); Wis. Stat. Section 48.981(2) (1997) (social

services): Wis. Stat. Section 904.085(4)(d) (1997) (general); Wyo. Stat. Section 1-43-103(c)(iii) (1991) (general). *But see* Ariz. Rev. Stat. Ann. Section 8-807(B) (West 1998) (child abuse investigations) (rejecting rule of disclosure).

By referring to "child and adult protective services agency," the exception broadens the coverage to include the elderly and disabled if that State has protected them by statute and has created an agency enforcement process. It should be stressed that this exception applies only to permit disclosures in public agency proceedings in which the agency is a party or nonparty participant**.** The exception does not apply in private actions, such as divorce, because the need for the evidence is not as great as in proceedings brought to protect against abuse and neglect so that the harm can be stopped, and is outweighed by the policy of promoting candor during mediation. For example, in a mediation between Husband and Wife who are seeking a divorce, Husband admits to sexually abusing a child. Husband's admission would not be privileged in an action brought by the public agency to protect the child, but would be privileged in the divorce hearings.

The last bracketed phrases make an exception to the exception to privilege of mediation communications in certain mediations involving such public agencies. Child protection agencies in many States have created mediation programs to resolve issues that arise because of allegations of abuse. Those advocating the use of mediation in these contexts point to the need for privilege to promote the use of the process, and these alternatives provide it. National Council of Juvenile and Family Court Judges, *Resource Guidelines: Improving the Child Abuse and Neglect Court Process*, 1995. These alternatives are bracketed and offered to the states as recommended model provisions because of concerns raised by some mediators of such cases that mediator testimony sometimes can be necessary and appropriate to secure the safety of a vulnerable party in a situation of abuse. *See* Letter from American Bar Association Commission on Mental and Physical Disability Law, November 15, 2000 (on file with Drafting Committees).

The words "child or adult protection" are bracketed so that States using a different term or encouraging mediation of disputes arising from abuse of other protected classes can add appropriate language.

Each state may chose to enact either Alternative A or Alternative B. The Alternative A exception only applies to cases referred by the court or public agency. In this situation, allegations already have been made in an official context and a court has made the determination that settlement of that case is in the public interest by referring it to mediation. In Alternative B exception, no court referral is required. A state enacting Alternative B would be adopting a policy that it is sufficient that the public agency favors settlement of a particular case by its participation in the mediation.

The term "public agency" may have to be modified in a State in which a private agency is charged by law to assume the duties to protect children in these contexts.

9. Section 6(b). Exceptions requiring demonstration of need.

The exceptions under this Section constitute less common fact patterns that may sometimes justify carving an exception, but only when the unique facts and circumstances of the case demonstrate that the evidence is otherwise unavailable, and the need for the evidence outweighs the policies underlying the privilege. Thus, Section 6(b) effectively places the burden on the proponent to persuade the court on these points. The evidence will not be disclosed absent a finding on these points after an in camera hearing. Further, under Section 6(d) the evidence will be admitted only for that limited purpose.

10. Section 6(b)(1). Felony [and misdemeanors].

As noted in the commentary to Section 6, point 5, the Act affords more specialized treatment for the use of mediation communications in subsequent felony proceedings, which reflects the unique character, considerations, and concerns that attend the need for evidence in the criminal process. States may also wish to extend this specialized treatment to misdemeanors, and the Drafters offer appropriate model language for states in that event.

Existing privilege statutes are silent or split as to whether they apply only to civil proceedings, apply also to some juvenile or misdemeanor proceedings, or apply as well to all criminal proceedings. The split among the States reflects clashing policy interests. One the one hand, mediation participants operating under the benefit of a privilege might reasonably expect that statements made in mediation would not be available for use in a later felony prosecution. The candor this expectation promotes is precisely that which the mediation privilege seeks to protect. It is also the basis upon which many criminal courts throughout the country have established victim-offender mediation programs, which have enjoyed great success in misdemeanor, and, increasingly, felony cases. *See* generally Nancy Hirshman, *Mediating Misdemeanors: Big Successes in Smaller Cases*, 7 Disp. Resol Mag. 12 (Fall 2000); Mark S. Umbreit, The Handbook of Victim Offender Mediation (2001). Public policy, for example, specifically supports the mediation of gang disputes, and these programs may be less successful if the parties cannot discuss the criminal acts underlying the disputes. Cal. Penal Code Section 13826.6 (West 1996) (mediation of gang-related disputes); Colo. Rev. Stat. Section 22-25-104.5 (1994) (mediation of gang-related disputes).

On the other hand, society's need for evidence to avoid an inaccurate decision is greatest in the criminal context - both for evidence that might convict the guilty and exonerate the innocent -- because the stakes of human liberty and public safety are at their zenith. For this reason, even without this exception, the courts can be expected to weigh heavily the need for the evidence in a particular case, and sometimes will rule that the defendant's constitutional rights require disclosure. *See Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 466 (Ct. App. 1998) (juvenile's constitutional right to confrontation in civil juvenile delinquency trumps mediator's statutory right not to be called as a witness); *State v. Castellano*, 460 So.2d 480 (Fla. App. 1984) (statute excluding evidence of an offer of compromise presented to prove liability or absence of liability for a claim or its value does not preclude mediator from testifying in a criminal proceeding regarding alleged threat made by one party to another in mediation). *See also Davis v. Alaska*, 415 U.S. 308 (1974).

After great consideration and public comment, the Drafting Committees decided to leave the critical balancing of these competing interests to the sound discretion of the courts to determine under the facts and circumstances of each case. It is drafted in a manner to ensure that both the prosecution and the defense have the same right with respect to evidence, thus assuring a level playing field. In addition, it puts the parties on notice of this limitation on confidentiality.

11. Section 6(b)(2). Validity and enforceability of settlement agreement.

This exception is designed to preserve traditional contract defenses to the enforcement of the mediated settlement agreement that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications. A recent Texas case provides an example. An action was brought to enforce a mediated settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to permit him to leave because of chest pains and a history of heart trouble, and that the mediator had refused to let him leave the mediation session. *See Randle v. Mid Gulf, Inc.*, No. 14-95-01292, 1996 WL 447954 (Tex App. 1996) (unpublished). The exception might also allow party testimony in a personal injury case that the driver denied having insurance, causing the plaintiff to rely and settle on that basis, where such a misstatement would be a basis for reforming or avoiding liability under the settlement. Under this exception the evidence will not be privileged if the weighing requirements are met. This exception differs from the exception for a record of an agreement in Section 6(a)(1) in that Section 6(a)(1) only exempts the admissibility of the record of the agreement itself, while the exception in Section 6(b)(2) is broader in that it would permit the admissibility of other mediation communications that are necessary to establish or refute a defense to the validity of a mediated settlement agreement.

12. Section 6(c). Mediator not compelled.

Section 6(c) allows the mediator to decline to testify or otherwise provide evidence in a professional misconduct and mediated settlement enforcement cases to protect against frequent attempts to use the mediator as a tie-breaking witness, which would undermine the integrity of the mediation process and the impartiality of the individual mediator. Nonetheless, the parties and others may testify or provide evidence in such cases.

This Section is discussed in the comments to Sections 6(a)(7) and 6(b)(2). The mediator may still testify voluntarily if the exceptions apply, or the parties waive their privilege, but the mediator may not be compelled to do so.

13. Section 6(d). Limitations on exceptions.

This Section makes clear the limited use that may be made of mediation communications that are admitted under the exceptions delineated in Sections 6(a) and 6(b). For example, if a statement evidencing child abuse is admitted at a proceeding to protect the child, the rest of the mediation communications remain privileged for that proceeding, and the statement of abuse

itself remains privileged for the pending divorce or other proceedings.

SECTION 7. PROHIBITED MEDIATOR REPORTS.

(a) Except as required in subsection (b), a mediator may not make a 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.

(b) A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under Section 6; 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.

(c) A communication made in violation of subsection (a) may not be considered by a court, administrative agency, or arbitrator.

Comment

1. Section 7. Disclosures by the mediator to an authority that may make a ruling on the dispute being mediated.

Section 7(a) prohibits communications by the mediator in prescribed circumstances. In contrast to the privilege, which gives a right to refuse to provide evidence in a subsequent legal proceeding, this Section creates a prohibition against disclosure.

Some states have already adopted similar prohibitions. *See*, *e.g.*, Cal. Evid. Code Section 1121 (West 1997); Fla. Stat. Ann. Section 373.71 (1999) (water resources); Tex. Civ. Prac. & Rem. Code Section 154.053 (c) (West 1999) (general). Disclosures of mediation communications

to a judge also could run afoul of prohibitions against ex parte communications with judges. *See* Code of Conduct for Federal Judges, Canon 3(A)(3), 175 F.R.D. 364, 367 (1998); American Bar Association Model Code of Conduct of Judicial Conduct at 9. The purpose of this Section is consistent with the conclusions of seminal reports in the mediation field condemn the use of such reports as permitting coercion by the mediator and destroying confidence in the neutrality of the mediator and in the mediation process. *See* Society for Professionals in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991); Center for Dispute Settlement, National Standards for Court-Connected Mediation Programs (D.C. 1992).

Importantly, the prohibition is limited to reports or other listed communications to those who may rule on the dispute being mediated. While the mediators are thus constrained in terms of reports to courts and others that may make rulings on the case, they are not prohibited from reporting threatened harm to appropriate authorities, for example, if learned during a mediation to settle a civil dispute. In this regard, Section 7(b)(3) responds to public concerns about clarity and makes explicit what is otherwise implied in the Act, that mediators are not constrained by this Section in their ability to disclose threats to the safety and well being of vulnerable parties to appropriate public authorities, and is consistent with the exception for disclosure in proceedings in Section 6(a)(7). Similarly, while the provision prohibits mediators from making these reports, it does not constrain the parties.

The communications by the mediator to the court or other authority are broadly defined. The provisions would not permit a mediator to communicate, for example, on whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. Section 7(b)(1), however, does permit disclosure of particular facts, including attendance and whether a settlement was reached. For example, a mediator may report that one party did not attend and another attended only for the first five minutes. States with "good faith" mediation laws or court rules may want to consider the interplay between such laws and this Section of the Act.

SECTION 8. CONFIDENTIALITY. Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

Comment

The evidentiary privilege granted in Sections 4-6 assures party expectations regarding the confidentiality of mediation communications against disclosures in subsequent legal proceedings. However, it is also possible for mediation communications to be disclosed outside of

proceedings, for example to family members, friends, business associates and the general public. Section 8 focuses on such disclosures.

a. Party expectations of confidentiality outside of proceedings

Party expectations regarding such disclosures outside of proceedings are complex. On the one hand, parties may reasonably expect in many situations that their mediation communications will not be disclosed to others, that the statements they make in mediation "will stay in the room." This is often the tenor of confidentiality discussions during the initial phases of mediations, when ground rules regarding confidentiality and other issues are being established. See e.g., Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 156 (2nd ed. 1996); Kimberly Kovach, Mediation: Principles and Practice 109 (2nd ed. 2000). Indeed, parties may choose to resolve their disputes through mediation in order to assure this kind of privacy concerning their dispute and related communications. On the other hand, those same parties may also reasonably expect that they can discuss their mediations with spouses, family members and others without the risk of civil liability that might accompany an affirmative statutory duty prohibiting such disclosures. Such disclosures often have salutary effects-such as bringing closure on issues of conflict and educating others about the benefits of mediation or the underlying causes of a dispute.

The tension between these reasonable but contradictory sets of party expectations presented a difficult drafting challenge for the Committees. Confidentiality is viewed by many as the lynchpin of mediation proceedings, and the confidentiality of mediation communications against disclosures outside of proceedings may be as important to the integrity of the mediation process for some as the protection against disclosures of mediation communications in subsequent proceedings that is assured by the privilege.

The Act takes an approach of restraint. In providing an evidentiary privilege, it established statutory law when statutory law is necessary and uniformity is appropriate: the discoverability and admissibility of mediation communications. A statute is necessary in this context because parties by private contract cannot agree to keep evidence from the courts; uniformity is appropriate because it promotes certainty about the treatment of mediation communications in the courts and other formal proceedings, thus allowing the parties to guide their conduct as appropriate.

By contrast, uniformity is not necessary or even appropriate with regard to the disclosure of mediation communications outside of proceedings. In some situations, parties may prefer absolute non-disclosure to any third party, in other situations, parties may wish to permit, even encourage, disclosures to family members, business associates, even the media. These decisions are best left to the good judgment of the parties, to decide what is appropriate under the unique facts and circumstances of their disputes, a policy that furthers the Act's fundamental principle of party self-determination. Such confidentiality agreements are common in law, and are enforceable in courts. See e.g., Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (1977); Stephen A. Hochman, Confidentiality in Mediation: A Trap for the Unwary, SB41 ALI-ABA 605 (1996);

Rogers & McEwen, supra, Section 9.24.

b. Restatement and affirmation of current law and practices

Section 8's language "mediation communications are confidential to the extent agreed upon by the parties" restates the general rule in the states regarding the confidentiality of mediation communications outside the context of proceedings: It is a matter of party choice through private contract. However, the language "or provided by other law or rule of this State" also acknowledges that some jurisdictions may have engrafted upon their statutes strong cultural norms discouraging disclosures outside of proceedings, cultural norms that have resulted from consistent practice by trained mediators to establish this ground rule early in the mediation by contractual agreement, and from many professionals' interpretation of state law to impose such a requirement. See e.g., Tex. Civ. Prac. & Rem. Code, Sec. 154.073 (a) (arguably imposing a duty of non-disclosure outside the context of proceedings). This language makes clear that the Act does not preempt current court rules or statutes that may be understood or interpreted to impose a duty of confidentiality outside of proceedings, or otherwise interfere with local customs, practices, interpretations, or understandings regarding the disclosure of mediation communications outside of proceedings.

Significantly, Section 8's language "or provided by other law or rule of this State" also puts parties on notice that the parties' capacity to contract for this aspect of confidentiality, while broad, is subject to the limitations of existing State law. This recognizes the important policy choices that the State already has made through its various mechanisms of law. For example, such a contract would be subject to the rule in some states that would permit or require a mediator to reveal information if there is a present and substantial threat that a person will suffer death or substantial bodily harm if the mediator fails to take action necessary to eliminate the threat. See, e.g., Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976) (en banc) (permitting action against psychotherapist who knows of a patient's dangerousness and fails to warn the potential victim). The mediator in such a case may first wish to secure a determination by a court, in camera, that the facts of the particular case justify or indeed dictate divulging the information to prevent reasonably certain death or substantial bodily harm. See, for example, ABA Rule 1.6(b)(1) and accompanying commentary; 5 U.S.C. Section 574(a)(4)(C). This result is consistent with the ABA/AAA/SPIDR Model Standards of Conduct for Mediators, and the American Bar Association's revised the Standards of Conduct for Attorneys. In addition, under contract law the courts may make exceptions to enforcement for public policy reasons. See, e.g., Equal Employment Opportunity Commision v. Astra USA, 94 F.3d 738 (1st Cir. 1996). Such agreements are typically not enforceable by nonsignatories. They are also not enforceable if they conflict with public records requirements. See, e.g. Anchorage School Dist. V. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989); Pierce v. St. Vrain Valley School District, 1997 WL 94120 (Colo. Ct. App. Div. 1 1997).

To avoid misunderstandings about the extent of confidentiality, it is wise for mediation participants to consider whether to enter into a confidentiality agreement at the outset of mediation for purposes of guiding their expectations with respect to the disclosure of mediation

communications outside of legal proceedings. Even in the absence of such discussions, the privilege for mediation communications within legal proceedings in Section 4-7 remains intact, and the signatories of a confidentiality agreement cannot expand the scope of the privilege.

c. Legislative history

Section 8 was the culmination of efforts in several drafts to understand and manage the reasonable expectations of mediation participants regarding disclosures outside of proceedings. Reflecting deeply felt values among mediators, early drafts were criticized by some in the mediation community for failing to impose an affirmative duty on mediation participants not to disclose mediation communications to third persons outside of the context of the proceedings at which the Section 4 privilege applies.

In several subsequent drafts, the Drafters attempted to establish a comprehensive rule that would prohibit such disclosures, but found it impracticable to do so without imposing a severe risk of civil liability on the many unknowing mediation participants who might discuss their mediations with others for any number of reasons. The Drafters were deeply concerned about their capacity to develop a truly comprehensive list of legitimate and appropriate exceptions. Some exceptions were obvious, such as for the education and training of mediators, for the monitoring evaluation and improvement of court-related mediation programs, but some were more subtle, such as for the reporting of threats to police and abuse to public agencies - and each draft drew forth more calls for legitimate and appropriate exceptions. As the drafts grew in length and complexity, the Drafters became concerned about the intelligibility and accessibility of the statute, which is particularly important given the important role of non-lawyer mediators and the many people who participate in medations without counsel or knowledge of the law.

Similarly, efforts to create a simpler rule with fewer exceptions but with greater judicial discretion to act as appropriate on a case-by-case basis to prevent "manifest injustice" also met severe resistence from many different sectors of the mediation community, as well as a number of state bar ADR communities.

In the end, the Drafters ultimately chose to draw a clear line, and to follow the general practice in the states of leaving the disclosure of mediation communications outside of proceedings to the good judgment of the parties to determine in light of the unique characteristics and circumstances of their dispute.

SECTION 9. MEDIATOR'S DISCLOSURE OF CONFLICTS OF INTEREST; BACKGROUND.

(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person that violates subsection [(a) or (b)][(a), (b), or (g)] is precluded by the violation from asserting a privilege under Section 4.

(e) Subsections (a), (b), [and] (c), [and] [(g)] do not apply to an individual acting as a judge.

(f) This [Act] does not require that a mediator have a special qualification by background or profession.

[(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.]

Comment

1. Sections 9(a) and 9(b). Disclosure of mediator's conflicts of interest.

a. In general.

This Section provides legislative support for the professional standards requiring mediators to disclose their conflicts of interest. *See, e.g,* American Arbitration Association, American Bar Association & Society of Professionals in Dispute Resolution, Model Standards of Conduct for Mediators, Standard III (1995); Model Standards of Practice for Family and Divorce Mediation, Standard IV (2001); National Standards for Court-Connected Mediation Programs, Standard 8.1(b) (1992). It is consistent with the ethical obligations imposed on other ADR neutrals. *See* Revised Uniform Arbitration Act (2000) Section 12; Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, Section 2(B) (1985) (required disclosures).

Sections 7(a)(2) and 7(b) make clear that the duty to disclose is a continuing one.

b. Reasonable duty of inquiry

The phrase in Section 9(b)(1) "make an inquiry that is reasonable under the circumstances" makes clear that the mediator's burden of inquiry into possible conflicts is not absolute, but rather is one that is consistent with the purpose of the Section: to make the parties aware of any conflict of interest that could lead the parties to believe that the mediator has an interest in the outcome of the dispute. Such disclosure fulfills the reasonable expectations of the parties, and furthers the Act's core principles of party self-determination and informed consent by assuring the parties that they will have sufficient information about the mediator's potential conflicts of interests to make the determination about whether that mediator is acceptable for the dispute at hand.

One may reasonably anticipate many situations in which parties are willing to waive a conflict of interest; indeed, depending upon the dispute, the very fact that a mediator is familiar to both parties may best qualify the mediator to mediate that dispute. That choice, however, properly belongs to the parties after informed consent, and in preserving this autonomy, this provision not only confirms the integrity of the individual mediator, but also supports the integrity of the mediation process by providing a visible, fundamental, and familiar safeguard of public protection.

Critically, the reasonable inquiry language is also intended to convey the Drafters' intent to exclude inadvertent failures to disclose that would result in the loss of the mediator privilege. The duty of reasonable inquiry is specific to each mediation, and such an inquiry always would discover those conflicts that are sufficiently material as to call for disclosure. For example, stock ownership in a company that is a party to an employment discrimination matter that is being mediated would likely be identified under a reasonable inquiry, and should be disclosed to both parties under Section 9(a). On the other hand, less substantial or merely arguable conflicts of interest may not be discoverable upon reasonable inquiry and that may therefore result in inadvertent nondisclosure. In the foregoing hypothetical, for example, the mediator may not be aware, or have any reason to be aware, that he or she has membership in the same country club as an officer or board member of the company. The failure to disclose this arguable conflict would

be inadvertent, not a violation of Section 9(a) or (b), and therefore not subject to the loss of privilege sanction in Section 9(d).

The reasonable inquiry also depends on the circumstances. For example, if a small claims court refers parties to a mediator who has a volunteer attorney standing in court, the parties would not expect that mediator to check on conflicts with all lawyers in the mediator's firm in the five minutes between referral and mediation. Presumably, only conflicts known by the mediator would affect that mediation in any event.

c. Conflicts that must be disclosed

Section 9 (a)(1) and 9(b) expressly state that mediators should disclose financial or personal interests, and personal relationships, that a "reasonable person would consider likely to affect the impartiality of the mediator." One aspect of this would be whether the conflict is material to the matter being mediated. Further, the Drafters chose the word "including" to convey their intent that these types of conflicts not be viewed as an exclusive list of that which must be disclosed.

Again, the standard is one of reasonableness under the circumstances, given the Sections purpose in furthering informed consent and the integrity of the mediation process.

It should be stressed that the Drafters recognize that it is sometimes difficult for the practitioner to know precisely what must be disclosed under a reasonableness standard. Prudence, professional reputation, and indeed common practice would compel the practitioner to err on the side of caution in close cases. Moreover, mediators with full-time or otherwise extensive mediation practices may wish to avail themselves of the common technologies used by law firms to identify conflicts of interest. Finally in this regard, it is worth underscoring that this duty to disclose conflicts of interest is intended to further party self-determination and the integrity of the mediation process, and is not intended to provide a cover or vehicle for bad faith litigation tactics, such as fishing expeditions into a mediator's professional or personal background. Such conduct would continue to be subject to traditional sanction standards.

2. Section 9(c) and (f). Disclosure of mediator's qualifications

Sections 9(c) and (f) address the issue of mediator qualifications, and, like the conflicts of interest provision, are intended to further principles of party autonomy and informed consent. In particular, these Sections do not require mediators to have certain qualifications, specifically including a law degree; nor, unlike the conflicts of interest provision, do they impose an affirmative duty on the mediator to disclose qualifications. Rather, the mediator's obligation is responsive: if a party asks for the mediator's qualifications to mediate a particular dispute, the mediator must provide those qualifications.

In some situations, the parties may make clear that they care about the mediator's substantive knowledge of the context of the dispute, or that they want to know whether the mediator in the past has used a purely facilitative mediation process or instead an evaluative

approach. *Compare* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negotiation L. Rev. 7 (1996) *with* Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing The "Grid" Lock*, 24 Fla. State Univ. L. Rev. 985 (1997); *see generally Symposium*, Fla. State Univ. L. Rev. (1997). Experience mediating would seem important to some parties, and indeed this is one aspect of the mediator's background that has been shown to correlate with effectiveness in reaching settlement. *See*, *e.g.*, Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results, in Divorce Mediation: Theory and Practice*, 429, 436 (Folberg & Milne, eds., 1988); Roselle L. Wissler, *A Closer Look at Settlement Week*, 4 Disp. Resol. Mag. 28 (Summer 1998).

It must be stressed that the Act does not establish mediator qualifications. No consensus has emerged in the law, research, or commentary as to those mediator qualifications that will best produce effectiveness or fairness. As clarified by Section 9(f), mediators need not be lawyers. In fact, the American Bar Association Section on Dispute Resolution has issued a statement that "dispute resolution programs should permit all individuals who have appropriate training and qualifications to serve as neutrals, regardless of whether they are lawyers." ABA Section of Dispute Resolution Council Res., April 28, 1999.

At the same time, the law and commentary recognize that the quality of the mediator is important and that the courts and public agencies referring cases to mediation have a heightened responsibility to assure it. *See generally* Cole et al., *supra*, Section 11.02 (discussing laws regarding mediator qualifications); Center for Dispute Settlement, National Standards for Court-Connected Mediation Programs (1992); Society for Professionals in Dispute Resolution Commission on Qualifications, Qualifying Neutrals: The Basic Principles (1989); Society for Professionals in Dispute Resolution Commission on Qualifications, Ensuring Competence and Quality in Dispute Resolution Practice (1995); Society for Professionals in Dispute Resolution, Qualifying Dispute Resolution Practitioners: Guidelines for Court-Connected Programs (1997).

The decision of the Drafting Committees against prescribing qualifications should not be interpreted as a disregard for the importance of qualifications. Rather, respecting the unique characteristics that may qualify a particular mediator for a particular mediation, the silence of the Act reflects the difficulty of addressing the topic in a uniform statute that applies to mediation in a variety of contexts. Qualifications may be important, but they need not be uniform. It is not the intent of the Act to preclude a statute, court or administrative agency rule, arbitrator or contract between the parties from requiring that a mediator have a particular background or profession; those decisions are best made by individual states, courts, governmental entities, and parties.

3. Section 9(d). Violation of disclosure [and impartiality] requirements.

a. In general

This provision makes clear that the mediator who violates the disclosure requirements of Sections 9(a) or (b) may not refuse to disclose a mediation communication or prevent another person from disclosing a mediation communication of the mediator, pursuant to Section 4(b)(2). If a state adopts the impartiality provision of Section 9(f), a violation of that provision triggers

the same denial of the privilege. Only those states adopting the impartiality provision should adopt the second bracket [(a), (b), or (g)]; all other states should adopt the first bracket [(a) or (b)]. States that do not want to adopt either bracketed option, and prefer other remedies for violations of the duties prescribed in Sections 9(a) and (b) [and 9(g)], such as roster delisting, civil, criminal, or other sanctions, would simply delete the current language of 9(d), and insert as the new 9(d) appropriate reference to such preferred alternative remedy.

b. Only mediator privilege lost; party, nonparty participant privileges remain intact

Crucially, while the mediator who fails to comply with the Act's conflicts of interest and impartiality requirements loses the privilege for purpose of that mediation, the parties and the non-party participants retain their privilege for that mediation. Thus, in a situation in which the mediator has lost the privilege, for example, the parties may still come forward and assert their privilege, thus blocking the mediator who has lost the privilege from providing testimony about the affected mediation. Similarly, to the extent the mediator's purported testimony would be about the mediation communications of a nonparty participant, the nonparty participant may block the testimony if the mediator has lost the privilege.

The only person prejudiced by the violation is the mediator who failed to disclose a conflict [or who had a bias in the dispute], and as such the loss of privilege provides an important but narrowly tailored measure of accountability. Section 9(d) makes clear that mediators cannot avoid testifying in such situations.

The Drafters considered other sanctions for mediators who failed to disclose conflicts [or who were partial], such as criminal and civil sanctions. However, it rejected specifically providing for those options because of the possibility of discouraging people from becoming mediators, and because the loss of privilege sanction was deemed to be tailored to the precise harm caused by the violation.

c. Practical operation

The loss of privilege in this narrow context raises important practical questions with regard to how a party or a nonparty participant would know that the mediator may lose, or has lost, the privilege with respect to a particular mediation. This is significant because they should have the opportunity to decide whether they wish to assert their own privilege and block the mediator's testimony to the extent permitted by the privilege, or to permit the testimony, consistent with the Act's underlying premises of party autonomy and informed consent.

As a practical matter, notice is not likely to be a concern in the typical case in which the mediation communications evidence is being sought in an action to set aside the mediated settlement agreement, or in a professional misconduct proceeding or action, arising out of the conflict of interest. The parties would be aware of the loss of privilege, and indeed, the loss of the privilege is consistent with the exceptions permitting such testimony in cases to establish the validity of the settlement agreement or professional misconduct. *See* Sections 6(a)(6) and 6(b)(2).

However, in the more remote situation in which these exceptions would not be applicable, and the mediator's testimony is sought under a claim that the privilege has been lost by virtue of the mediator's failure to disclose a conflict of interest, the notice issue becomes more problematic. It may be expected that the mediator would give notice to the other mediation participants who may be affected by such a request. It may also be expected under usual customs and practices that the party seeking the privileged testimony would move the matter before a court and provide notice to all interested persons who would have the right to assert the privilege. For a challenge to the mediation privilege, those interested parties would be the mediator, parties, and nonparty participants. In any event, mediation participants are advised to consider including notice provisions in their agreements to mediate that call for participants who receive subpoenas for privileged testimony to provide notice to the other participants of such a request.

As with the exceptions recognized under this Act, the Act anticipates that the question of whether a privilege has been lost would typically be decided by courts in an in camera proceeding that would preserve the confidentiality of the mediation communications that may be necessary to establish the validity of the loss of privilege claim. The materiality of the failure to disclose is not likely to be in issue in the more common situations in which the mediator's testimony is being sought in a case other than to establish the invalidity of a mediated settlement agreement or professional misconduct arising from the failure to disclose. However, in those rare other situations in which the mediator's testimony is being sought, the proponent of the evidence may also need to establish the materiality of the failure to disclose.

4. Section 9(e). Individual acting as a judge.

This Section averts a legislative prohibition on certain judicial actions, and defers to other more appropriate regulation of the judiciary. It extends the principles embodied in Section 3(b)(3), which places mediations conducted by judges who might make a ruling on the case outside the scope of the Act. The rationales described therein apply with equal force in this context.

5. [Section 9(g). Mediator impartiality.]

This provision is a bracketed to signal that it is suggested as a model provision and need not be part of a Uniform Act. "Impartiality" has been equated with "evenhandedness" in the Model Standards of Practice approved by the American Bar Association, American Association of Arbitrators, and the Society of Professionals in Dispute Resolution (now Association for Conflict Resolution). The mediator's employment situation may present difficult issues regarding impartiality. A mediator who is employed by one of the parties is not typically viewed as impartial, especially if the person who mediates also represents a party. In the representation situation, the mediator's overriding responsibility is toward a single party. For example, the parties' legal counsel would not be an impartial mediator. Ombuds often are obligated by ethical standards to be impartial, although they are employed by one of the parties.

While few would argue that it is almost always best for mediators to be impartial as a matter of practice, including such a requirement into a uniform law drew considerable controversy. Some mediators, reflecting a deeply and sincerely felt value within the mediation community that a mediator not be predisposed to favor or disfavor parties in dispute, persistently urged the Drafters to enshrine this value in the Act; for these, the failure to include the notion of impartiality in the Act would be a distortion of the mediation process. Other mediators, service providers, judges, mediation scholars, however, urged the Drafters not to include the term "impartiality" for a variety of reasons.

At least three are worth stressing. One pressing concern was that including such a statutory requirement would subject mediators to an unwarranted exposure to civil lawsuits by disgruntled parties. In this regard, mediators with a more evaluative style expressed concerns that the common practice of so-called "reality checking" would be used as a basis for such actions against the mediator. A second major concern was over the workability of such a statutory requirement. Scholarly research in cognitive psychology has confirmed many hidden but common biases that affect judgment, such as attributional distortions of judgment and inclinations that are the product of social learning and professional culturation. *See generally*, Daniel Kahneman and Amos Tversky, Choices, Values, and Frames (2000); Scott Plous, The Psychology of Judgment and Decision Making (1993). Similarly, mediators in certain contexts sometimes have an ethical or felt duty to advocate on behalf of a party, such as long-term care ombuds in the health care context. Third, some parties seek to use a mediator who has a duty to be partial in some respects--such as a domestic mediator who is charged by law to protect the interests of the children. It has been argued that such mediations should still be privileged.

For these and other reasons, the Drafting Committees determined that impartiality, like qualifications, was an issue that was important but that did not need to be included in a uniform law. Rather, out of regard for the gravity of the issue, the Drafting Committees determined that it was enough to flag the issue for states to consider at a more local level, and to provide model language that may be helpful to states wishing to pursue the issue.

If this Section is adopted, the state should also chose the bracketed option with this Section in Section (d), so that a mediator who is not impartial is precluded from asserting the privilege. Section (e) makes this inapplicable to an individual acting as a judge, whose impartiality is governed by judicial cannons.

SECTION 10. PARTICIPATION IN MEDIATION. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

Comment

The fairness of mediation is premised upon the informed consent of the parties to any agreement reached. *See Wright v. Brockett*, 150 Misc.2d 1031 (1991) (setting aside mediation agreement where conduct of landlord/tenant mediation made informed consent unlikely); *see generally*, Joseph B. Stulberg, *Fairness and Mediation*, 13 Ohio St. J. on Disp. Resol. 909, 936-944 (1998); Craig A. McEwen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995). Some statutes permit the mediator to exclude lawyers from mediation, resting fairness guarantees on the lawyer's later review of the draft settlement agreement. *See*, *e.g.*, Cal. Fam. Code Section 3182 (West 1993); McEwen, et al., 79 Minn. L. Rev., *supra*, at 1345-1346. At least one bar authority has expressed doubts about the ability of a lawyer to review an agreement effectively when that lawyer did not participate in the give and take of negotiation. Boston Bar Ass'n, Op. 78-1 (1979). Similarly, concern has been raised that the right to bring counsel might be a requirement of constitutional due process in mediation programs operated by courts or administrative agencies. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1095 (April 2000).

Some parties may prefer not to bring counsel. However, because of the capacity of attorneys to help mitigate power imbalances, and in the absence of other procedural protections for less powerful parties, the Drafting Committees elected to let the parties, not the mediator, decide. Also, their agreement to exclude counsel should be made after the dispute arises, so that they can weigh the importance in the context of the stakes involved.

The Act does not preclude the possibility of parties bringing multiple lawyers or translators, as often is common in international commercial and other complex mediations. The Act also makes clear that parties may be accompanied by a designated person, and does not require that person to be a lawyer. This provision is consistent with good practices that permit the *pro se* party to bring someone for support who is not a lawyer if the party cannot afford a lawyer.

Most statutes are either silent on whether the parties' lawyers can be excluded or, alternatively, provide that the parties can bring lawyers to the sessions. *See*, *e.g.*, Neb. Rev. Stat. Section 42-810 (1997) (domestic relations) (counsel may attend mediation); N.D. Cent. Code Section 14-09.1-05 (1987) (domestic relations) (mediator may not exclude counsel); Okla. Stat. tit. 12, Section 1824(5) (1998) (representative authorized to attend); Or. Rev. Stat. Section 107.600(1) (1981) (marriage dissolution) (attorney may not be excluded); Or. Rev. Stat. Section 107.785 (1995) (marriage dissolution) (attorney may not be excluded); Wis. Stat. Section 655.58(5) (1990) (health care) (authorizes counsel to attend mediation). Several States, in contrast, have enacted statutes permitting the exclusion of counsel from domestic mediation. *See* Cal. Fam. Code Section 3182 (West 1993); Mont. Code Ann. Section 40-4-302(3) (1997) (family); S.D. Codified Laws Section 25-4-59 (1996) (family); Wis. Stat. Section 767.11(10)(a) (1993) (family).

As a practical matter, this provision has application only when the parties are compelled to participate in the mediation by contract, law, or order from a court or agency. In other

instances, any party or mediator unhappy with the decision of a party to be accompanied by an individual can simply leave the mediation. In some instances, a party may seek to bring an individual whose presence will interfere with effective discussion. In divorce mediation, for example, a new friend of one of the parties may spark new arguments. In these instances, the mediator can make that observation to the parties and, if the mediation flounders because of the presence of the nonparty, the parties or the mediator can terminate the mediation. The pre-mediation waiver of this right of accompaniment can be rescinded, because the party may not have understood the implication at that point in the process. However, this provision can be waived once the mediation begins. Limitations on counsel in small claims proceedings may be interpreted to apply to the small claims mandatory mediation program. If so, the States may wish to consider whether to provide an exception for mediation conducted within these programs.

The right to accompaniment does not operate to excuse any participation requirements for the parties themselves.

SECTION 11. INTERNATIONAL COMMERCIAL MEDIATION.

(a) In this section, "Model Law" means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on 28 June 2002 and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002, and "international commercial mediation" means an international commercial conciliation as defined in Article 1 of the Model Law.

(b) Except as otherwise provided in subsections (c) and (d), if a mediation is an international commercial mediation, the mediation is governed by the Model Law.

(c) Unless the parties agree in accordance with Section 3(c) of this [Act] that all or part of an international commercial mediation is not privileged, Sections 4, 5, and 6 and any applicable definitions in Section 2 of this [Act] also apply to the mediation and nothing in Article 10 of the Model Law derogates from Sections 4, 5, and 6.

(d) If the parties to an international commercial mediation agree under Article 1, subsection (7), of the Model Law that the Model Law does not apply, this [Act] applies.

Legislative Note. The UNCITRAL Model Law on International Commercial Conciliation may be found at www.uncitral.org/en-index.htm. Important comments on interpretation are included in the Draft Guide to Enactment and Use of UNCITRAL Model Law on International Commercial Conciliation. The States should note the Draft Guide in a Legislative Note to the Act. This is especially important with respect to interpretation of Article 9 of the Model Law.

Comment

1. Varying by Agreement/Choice of Law

This Amendment allows parties to international commercial mediation to take advantage of the privilege protections of the Uniform Mediation Act, which typically are broader than the evidentiary exclusions of the UNCITRAL Model Law. A number of choices are available to the mediation participants:

(1) *If the participants prefer to have the mediation covered by the privilege protections of the Uniform Mediation Law, which are typically broader than the evidentiary exclusions of the UNCITRAL Model Law*: This is the default situation under this Amendment to the Uniform Mediation Act. This result is reached by reading subsections (a) and (c) together. No additional agreement is necessary.

(2) *If the participants prefer not to have the mediation covered by the provisions of the UNCITRAL Model Act but want the mediation covered by the Uniform Mediation Act*: The parties should agree, pursuant to Article 1, subsection (7) of the UNCITRAL Model Law to exclude the applicability of the Model Law. In this situation, subsection (d) of the Amendment provides that the default is that the mediation is covered by the Uniform Mediation Act.

(3) *If the participants prefer the narrower protections for the use of mediation communications provided by the UNCITRAL Model Law and do not want to be covered by the privilege provisions of the Uniform Mediation Act*: The participants should agree, in a record (written or other electronic form), that the privileges under Sections 4 through 6 of the Uniform Mediation Act do not apply to the mediation or part agreed upon. It is important to note that this agreement does not preclude the raising of the privilege by a participant who does not know of the agreement before making the statement that is the subject of the privilege. Section 3(c) provides:

> If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections 4 through 6 do not apply to the mediation or part agreed upon. However, Sections 4 through 6 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

If the participants so agree, the UNCITRAL Model Law provision on the use of mediation communications, Article 10, will be the default position.

(4) *If the parties would like to have an open mediation*, *with mediation communications being available for later proceedings*: The parties should enter the agreement described in point (3) and also agree that they exclude the applicability of Articles 9 and 10 of the UNCITRAL Model Law.

(5) *If the parties would like to have the mediation covered by another law*: They should designate in their agreement to mediate what law that will cover the international commercial mediation, in addition to taking the steps listed in point (4). They should realize, however, that a court may be unwilling to import a law of privilege because the court might deem privilege to be an aspect of procedure governed by the forum state's law. In addition, if the parties seek to import a mediation privilege law that is broader than that of the forum state, the court might view the agreement as an attempt to keep evidence from the tribunal and against public policy and therefore unenforceable.

2. Confidentiality

Article 9 of the UNCITRAL Model Law is consistent with Section 8 of the Uniform Mediation Act, which indicates that mediation communications are confidential to extent agreed upon by the parties or provided in state law, when Article 9 is read together with the notes on interpretation in the to Draft Guide to Enactment and Use of UNCITRAL Model Law on International Commercial Conciliation. The Draft Guide makes clear that the violation of Article 9 should not be a basis for sanctions unless the party disclosing understood that the mediation was governed by the confidentiality rule. The Draft Guide also makes clear that a participant may warn or disclose in the public interest despite the prohibitions. This is the current state of U.S. contract law regarding secrecy agreements as discussed in the Reporter's Notes to Section 8. The pertinent portion of the Draft Guide states:

> The Working Group agreed that an illustrative and non-exhaustive list of possible exceptions to the general rule on confidentiality would more appropriately be provided in the Guide to Enactment. Examples of such laws may include laws requiring the conciliator or parties to reveal information if there is a reasonable threat that a person will suffer death or substantial bodily harm if the information is not disclosed and laws requiring disclosure if it is in the public interest. For example to alert the public about a health or environmental or safety risk. It is the intent of the drafters that, in the event a court or other tribunal is considering an allegation that a person did not comply with article 9, it should include in its consideration any evidence of conduct of the parties that shows whether they had, or did not have, an understanding that a conciliation existed and consequently an expectation of confidentiality. When enacting the Model Law, certain States may wish to clarity article 9 to reflect that interpretation.

It is important that a reference to the Draft Guide be included in the Legislative Note, so that the courts will understand the intent of the UNCITRAL Model Law drafters.

3. Conflict of Laws

The drafters intend the privilege provisions to be widely applied by courts so that the mediation participants will know the breadth of the mediation communications privilege when they are engaged in the mediation, even though they may not anticipate all of the nations or states where the mediation communications might be sought or introduced. Nonetheless, the mediation participants should realize that choice of law rules in other nations and states vary and those rules may result in application of law other than that of the state where the mediation took place. *See, e.g.,* Asten, Inc. v. Wagner Systems Corp., No. C.A. 15617, 1999 WL 803965 (Del. Ch. Sept 23, 1999) (applying South Carolina law to dispute arising out of Florida mediation of South Carolina court litigation between parties incorporated in Delaware because South Carolina had the most significant relationship to the transaction). In addition, courts in other nations and states may consider mediation privilege provisions to be procedural in nature, rather than substantive, and therefore apply the forum's privilege law rather than the law where the mediation occurred. Even within the United States, the courts have acted inconsistently with respect to mediation privileges that apply where the mediation was held. *See, e.g., United States v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987) (applying a state privilege in a federal grand jury proceeding concerning communications made during mediation in state program); *In re March, 1995 – Special Grand Jury*, 897 F. Supp. 1170 (S.D. Ind. 1995) (refusing to apply state court mediation privilege in a federal grand jury proceeding concerning communications made during mediation in state court mediation program); *In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d 487 (5th Cir. 1998) (refusing to apply state privilege in a federal grand jury proceeding concerning mediation conducted in federally-funded mediation program operated by state).

The choice of law rules in many jurisdictions in the United States recognize party autonomy to select the law that will govern their transactions. For this reason, the drafters believe that courts in the United States will be most likely to apply this law to international commercial mediations occurring in other nations or states that later become the subject of a suit in the United States if the parties to the mediation have specified that it will be governed by the Uniform Mediation Act.

4. Uniformity

This Amendment is recommended. Nonetheless, a State may decide to adopt the Uniform Mediation Act without this amendment without losing the designation that it represents a Uniform State Law.

5. Reports to the Court

Whenever mediation occurs as part of a legal proceeding, the parties would be especially aggrieved if, in absence of full settlement, the mediator could make reports to the judge who will rule on the dispute being mediated. Such reports are specifically prohibited by Section 7 of the Uniform Mediation Act.

The drafters believe that Articles 9 and 10 of the UNCITRAL Model Law achieve the same result as Section 7 of the Uniform Mediation Act. Article 10(1) prohibits disclosures by a mediator and Article 10(3) prohibits a court or arbitral tribunal from ordering disclosures. When Article 9, which broadly requires confidentiality for all mediation information, is read in conjunction with these prohibitions, it should be interpreted to include a narrower confidentiality requirement that prohibits mediator reports, including recommendations of a specific outcome, to a judge or arbitrator. This interpretation maintains the reasonable expectations of the parties regarding confidentiality and avoids a situation in which the mediator could pressure settlement by threatening to make an unwelcome report to the person who will rule in the event that the mediation does not result in settlement.

6. Derogation from the Uniform Mediation Act

The Amendment, subsection (c), provides that "nothing in Article 10 of the Model Law *derogates* from Section 4, 5 or 6." Black's Law Dictionary indicate that one law derogates another law if it "limits the scope or impairs its utility and force." The drafters intend that the Uniform Mediation Act purposes should be achieved. For example, under the Uniform Mediation Act, a mediation communication includes any mediator statement whereas the Model Law protects only mediator proposals. This provision directs to court to protect mediator statements that were not proposals so that the protections of the Uniform Mediation Act are given full force. As a further example, the Uniform Mediation Act applies to discovery process, while the Model Law does not mention discovery. Under this provision, the court should accord a privilege during the discovery phase in order to avoid limiting the force of the Uniform Mediation Act.

The provision that the Model Law does not derogate also would apply to exceptions to the Uniform Mediation Act that are not recognized in the Model Act. For example, the Uniform Mediation Act excepts from the privilege a mediation communication that is a threat to commit a crime of violence, but the Model Law does not. The derogation provision makes clear that the court should give effect to the exception for the threat, because to do otherwise would frustrate the purposes of the Uniform Mediation Act.

7. Interpretation of the Model Law

The Model Law was drafted jointly by an international group. Therefore, the courts should use the interpretation guide referenced in the Legislative Note rather than drafting conventions of U.S. law as they interpret the Model Law.

8. Incorporation by Reference

It is important to note that the Amendment incorporates by reference a specific version of the Model Law, that adopted on June 22, 2002 (included in Appendix A). An amendment of the Model Law will not change this Section.

Some state legislatures may hesitate to incorporate by reference and may prefer to enact the Model Law. In that situation, the State can achieve uniformity by enacting this Amendment as well as the Model Law, changing the internal references accordingly.

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [Act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but this [Act] does not modify, limit, or supersede Section 101(c) of that Act or authorize electronic delivery of any of the notices described in Section 103(b) of that Act.

Comment

This Section adopts standard language approved by the Uniform Law Conference that is intended to conform Uniform Acts with the Uniform Electronic Transactions Act (UETA) and its federal counterpart, Electronic Signatures in Global and National Commerce Act (E-Sign) (15 U.S.C 7001, etc seq. (2000).

Both UETA and E-Sign were written in response to broad recognition of the commercial and other use of electronic technologies for communications and contracting, and the consensus that the choice of medium should not control the enforceability of transactions. These Sections are consistent with both UETA and E-Sign. UETA has been adopted by the Conference and received the approval of the American Bar Association House of Delegates. As of December 2001, it had been enacted in more than 35 states.

The effect of this provision is to reaffirm state authority over matters of contract by making clear that UETA is the controlling law if there is a conflict between this Act and the federal E-sign law, except for E-sign's consumer consent provisions (Section 101(c) and its notice provisions (Section 103(b) (which have no substantive impact on this Act). Among other things, such clarification assures that agreements related to mediation - such as the agreement to mediate and the subsequently mediated settlement agreement - may not be challenged on the basis of a conflict between this Act and the federal E-sign law. Such challenges should be dismissed summarily by the courts.

SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration should be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

Comment

One of the goals of the Uniform Mediation Act is to simplify the law regarding mediation. Another is to make the law uniform among the States. In most instances, the Act will render unnecessary the other hundreds of different privilege statutes among the States, and these can be repealed. In fact, to do otherwise would interfere with the uniformity of the law.

However, the Drafters contemplate the Act as a floor in many aspects, rather than a ceiling, one that provides a uniform starting point for mediation but which respects the diversity in contexts, cultures, and community traditions by permitting states to retain specific features that have been tried and that work well in that state, but which need not necessarily be uniform. For example, as noted after Section 4, those States that provide specially that mediators cannot testify and impose damages from wrongful subpoena may elect to retain such provisions. Similarly, as discussed in the comments to Section 8, States with court rules that have confidentiality provisions barring the disclosure of mediation communications outside the context of proceedings may wish to retain those provisions because they are not inconsistent with the Act.

As discussed in the preface, point 5, the constructive role of certain laws regarding mediation can be performed effectively only if the provisions are uniform across the States. *See generally* James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 Ohio St. J. on Disp. Resol. 795 (1998). In this regard, the law may serve to provide not only uniformity of treatment of mediation in certain legal contexts, but can serve to help define what reasonable expectations may be with regard to mediation. The certainty that flows from uniformity of interpretation can serve to promote local, state, and national interests in the expansive use of mediation as an important means of dispute resolution.

While the Drafters recognize that some such variations of the mediation law are inevitable given the diverse nature of mediation, the specific benefits of uniformity should also be emphasized. As discussed in the Prefatory Notes, uniform adoption of the UMA will make the law of mediation more accessible and certain in these key areas. Practitioners and participants will know where to find the law, and they and courts can reasonably anticipate how the statute will be interpreted. Moreover, uniformity of the law will provide greater protection of mediation than any one state has the capacity to provide. No matter how much protection one state affords confidentiality protection, for example, the communication will not be protected against compelled disclosure in another state if that state does not have the same level of protection. Finally, uniformity has the capacity to simplify and clarify the law, and this is particularly true with respect to mediation confidentiality. Where many states have several different confidentiality provisions, most of them could be replaced with an integrated Uniform Mediation Act. Similarly, to the extent that there may be confusion between states over which state's law would apply to a mediation with an interstate character, uniformity simplifies the task of those

involved in the mediation by requiring them to look at only one law rather than the laws of all affected states.

SECTION 14. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 15. EFFECTIVE DATE. This [Act] takes effect ..... .

SECTION 16. REPEALS. The following acts and parts of acts are hereby repealed:

(1)

(2)

(3)

Comment

The Uniform Mediation Act was drafted such that it can be integrated into the fabric of most state legal regimes with minimal disruption of current law or practices. In particular, it is not the intent of the UMA to disrupt existing law in those few states that have well-established mediation processes by statute, court rules, or court decisions. For example, its privilege structure, exceptions, etc., is consistent with most of the hundreds of privilege statutes currently in the states.

Many of these can simply be repealed, and this Section provides the vehicle for so doing. However, states should take care not to repeal additional provisions that may be embedded within their state laws that may be desirable and which are not inconsistent with the provisions of the Act. An Act is still uniform if it provides for mediator incompetency or provides for costs and attorneys fees to mediators who are wrongfully subpoenaed. For example, in Ohio the Act would

seem to replace the need for the generic privilege statute, O.R.C. 2317.023, and that part of the domestic mediation statute O.R.C. 3109.052 relating to privilege, but not the public records exception, O.R.C. 149.43 or failure to report a crime, O.R.C. 3109.052.

In contrast, Alabama has fewer statutes that would be subsumed by the Act. For example, the Act would seem to replace the need for the confidentiality provision in Ala. Code 24-4-12 (communications during conciliation sessions of complaints brought under Fair Housing Law are confidential unless parties waive in writing). The Act would also subsume certain sections of Ala.. Code 6-6-20, such as the definition of mediation and the provision permitting attorneys or support persons to accompany parties, but would not replace the provisions authorizing courts to refer cases to mediation under certain conditions and defining sanctions.

Many of the existing statutes deal with matters not covered by the Act and need not be repealed in order to provide uniformity because they would not be superceded by the Act. Common examples include authorization of mandatory mediation, standards for mediators, and funding for mediation programs. Similarly, the Act would not supercede statutes relating to mediator qualifications, such as O.R.C. 3109.052(A)(permitting local courts to establish mediator qualifications) and O.R.C. 4117.02(E)(authorizing state employment relations board to appoint mediators according to training, practical experience, education, and character). In such situations, an abundance of caution may counsel in favor of noting specifically in this Section which provisions of current state laws are not being repealed, as well as which ones are being repealed.

On the other hand, in those relatively few instances where the Act directly conflicts, or may directly conflict, with existing state law, states will want to consider the relationship between their current law and the Act. The most prominent examples include those states that have provisions barring attorneys from attending and participating in mediation sessions, and those states that current permit or require mediators to make reports to judges who may make rulings on the case.

SECTION 17. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.

(a) This [Act] governs a mediation pursuant to a referral or an agreement to mediate made on or after [the effective date of this [Act]].

(b) On or after [a delayed date], this [Act] governs an agreement to mediate whenever made.

Comment

Section 17 is designed to avert unfair surprise, by setting dates that will make it likely that the mediation participants took the Act into account in setting up the mediation. Subsection (a) precludes application of the Act to mediations pursuant to pre-effective date referral or agreement on the assumption that most of those making these referrals or agreements did not take into account the changes in law. If parties to these mediations seek to be covered by the Act , they can sign a new agreement to mediate on or after the effective date of the Act.

Subsection (b) is based on the assumption that persons involved in mediation are likely to know about the Act and would therefore be more surprised by the non-application of the Act than the application of the Act after that point. Each legislature can specify a year or another likely period for dissemination of the news among those involved in mediation.

APPENDIX A

(Model Law as adopted by the United Nations Commission on International Trade Law -- UNCITRAL at its 35th session in New York on 28 June 2002 and approved by the United Nations General Assembly on November 19, 2002)

UNCITRAL Model Law on International Commercial Conciliation

Article 1. Scope of application and definitions

(1) This Law applies to international[1] commercial[2] conciliation.

(2) For the purposes of this Law, "conciliator" means a sole conciliator or two or more conciliators, as the case may be.

(3) For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

(4) A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

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[1] States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:
- Delete the word "international" in paragraph (1) of article 1; and
- Delete paragraphs (4), (5) and (6) of article 1.

[2] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(5) For the purposes of this article:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

(6) This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.

(7) The parties are free to agree to exclude the applicability of this Law.

(8) Subject to the provisions of paragraph (9) of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

(9) This Law does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) […].

Article 2. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Variation by agreement

Except for the provisions of article 2 and article 6, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Law.

Article 4. Commencement of conciliation proceedings[3]

[3] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

(1) Conciliation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in conciliation proceedings.

(2) If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

Article 5. Number and appointment of conciliators

(1) There shall be one conciliator, unless the parties agree that there shall be two or more conciliators.

(2) The parties shall endeavour to reach agreement on a conciliator or conciliators, unless a different procedure for their appointment has been agreed upon.

(3) Parties may seek the assistance of an institution or person in connection with the appointment of conciliators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(4) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, where appropriate, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

(5) When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 6. Conduct of conciliation

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(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.
(2) Where the conciliation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.

(1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

Article 7. Communication between conciliator and parties

The conciliator may meet or communicate with the parties together or with each of them separately.

Article 8. Disclosure of information

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

Article 9. Confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 10. Admissibility of evidence in other proceedings

(1) A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) Views expressed or suggestions made by a party in the conciliation in respect of a

possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the conciliation proceedings;

(d) Proposals made by the conciliator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;

(f) A document prepared solely for purposes of the conciliation proceedings.

(2) Paragraph (1) of this article applies irrespective of the form of the information or evidence referred to therein.

(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (1) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

(4) The provisions of paragraphs (1), (2) and (3) of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

(5) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.

Article 11. Termination of conciliation proceedings

The conciliation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Article 12. Conciliator acting as arbitrator

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 13. Resort to arbitral or judicial proceedings

Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

Article 14. Enforceability of settlement agreement[4]

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... *[the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]*.

[4] When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory.

Sample Summary of Significant Differences Between UMA and Current California Statutes

by Ron Kelly

Area of Significant Difference	Uniform Mediation Act	Current California Statutes
1. Structure of protection	Privilege (with 3 differing levels); UMA Section 4	Communications inadmissible Ev. C. 1119
	Parties may assert full privilege, mediator may refuse to disclose communications and block own statements, others attending may only block own statements 4	All communications inadmissible unless all participants expressly agree otherwise 1122
2. Neutrality of mediator	Optional section requiring impartiality 9(g)	Must be neutral third party 1115(a)
3. Scope	Excludes labor/management, and peer mediation in schools and youth correctional institutions 3(b)	Covers labor/management and peer mediations 1117
4. Confidentiality opt-outs	Parties can opt to make any session on-the-record 3(c)	All participants must expressly agree to remove confidentiality 1122
5. No privilege or protection:	- If knowingly use mediation for criminal act 5(c), 6(a)(4) - For threats to inflict bodily injury 6(a)3 - For evidence of abuse, neglect, etc. in proceedings where child or adult protective agency is a party (except if agency was in the mediation) 6(a)(7) - In mediation session open to the public 6(a)2 - For claims of mediation professional misconduct against attorney, representative, expert, or mediator 6(a)(6)&(7)	In later criminal process or trial 1119 Covers public sessions 1117 Mediation communications inadmissible (no exception for malpractice claims)
6. After in camera hearing and necessity findings -- court, agency, etc. may admit evidence, compel testimony	- In proceeding for enforcement or reform of settlement agreement 6(b)2 - In criminal proceedings 6(b)1	Mediation communications not admissible in later fights over settlement agreement 1123 No protection in criminal proceedings 1119

7. Representation, support	Right to bring attorney, rape counselor, support 10	Silent (barred in Family Court "mediations")
8. Conflicts disclosure requirement	Disclosure of known conflicts 9	Silent
9. Mediator testimony	May testify, but may not be compelled in later settlement fights or professional misconduct claims 6(c)	Mediators not competent to testify in later civil proceedings except contempt 703.5
10. When mediation ends	Silent	Ends with settlement, written withdrawal, or ten days after last communication 1125
11. Wrongful subpoenas	Silent	Attorneys fees to mediator 1127
12. Wrongful references to mediation communications in later proceedings	Prejudiced person may respond 5(c)	Grounds for mistrial, vacatur of award 1128
13. General interstate uniformity	Would provide if many states adopt	California-specific
14. Predictability of legislative enactment and court interpretations	Uncertain legislative amendments and adoption Courts required to try to follow decisions of all other state courts where UMA adopted, if enacted 12	Current sections 1115-1128 adopted unanimously by Calif. Legislature - upheld by unanimous Calif. Supreme Court (Foxgate, Rojas)

The grease that oils the machine of mediation

By Jeffrey M. Bases

In a time when we see our savings accounts diminish, widespread unemployment, volatile world markets, political unrest, mass protests, and general unpredictability about the future, we should all strive to resolve conflicts.

Mediation affords parties and practitioners a uniquely confidential setting to communicate to the opposing side. In court and in business, everything said is potential fodder for attack. There are transcripts in court; there are minutes kept in business.

Mediation, however, is ideally designed to be a safe-zone for communication. The communications made are not recorded and used later. If somebody hypes their case, overstates or understates damages, argues facts based on hearsay, so be it. The other party's lawyer and the mediator are there to check facts and law.

Good mediators are cognizant of the facts and law, and thoroughly question the attorneys on each side. Typically, chaff falls by the way side. Mediators are not judges, but are conductors of mediation. They control tempo and tone, which are key to establishing the safe-zone environment.

Good lawyers counsel and admonish their clients about speaking openly. But if a mediator can instill trust in the participants, then he can be very effective in acquiring and transmitting substantive information critical to opening the door to settlement. It is this give and take — mixed with negotiation and argument — that is the grease that oils the machine of mediation. Sometimes a party is secretly willing to take some responsibility, but has been too afraid to say anything because of potential or unknown liability.

Litigation is so much about the zero-sum game of win or lose that communication between parties conducive to resolution is often all but nonexistent, except for within a mediation context. Parties that want closure and are willing to accept some responsibility may find a dignified path to resolution in mediating.

A good lawyer discusses these aspects of litigation as well as the merits, challenges, costs, risks, and practicalities of the case with his client.

Mediations typically involve negotiations about money, but hopefully, something else takes place as well: the resolution of a conflict. When mediations are successful, parties go on with their lives. Regardless of the case, hopefully, the parties obtain a sense of closure. That is a big deal.

As a mediator that has conducted countless mediations, I understand the priority-stand the state Supreme Court made in *Cassel v. Superior Court (Wasserman, Comden, Casselman & Pearson LLP)* (2011) 51 Cal. 4th 113, 244. Making a "judicial exception" to allow attorney statements in mediation into evidence might beg the question of what context the statements were made. In answering that question, the Court would likely be faced with whether further "judicial exceptions" to allow the attorney his defense are necessary, e.g., statements by parties, other attorneys, or the mediator. Private facts revealed may be in jeopardy of disclosure. The obvious risk is a chilling effect on communications in mediation.

Recourse for lawyer malpractice is a concern, but cannot be the overriding concern. Typically, lawyers bring a sense of rational thinking to mediations and assist their clients with the difficult decision-making process and analysis involved in making a settlement. Lawyers commonly work jointly with the mediator in providing the tough, hard facts and advice sometimes necessary to convince a client to settle. Lawyers do this fundamentally because it is in the best interests of their clients.

Further, good lawyers prepare their clients prior to the mediation. Parties should be aware of the value of the case, the costs and risks involved in going forward, and the practicalities at hand. Contrary to the bad press lawyers often get, most lawyers take their role as legal counsel seriously and conduct themselves ethically and professionally. Granted, some are better advocates than others, some are sharper on the law, and some are clearly inexperienced and less professional, but these issues are really not central in *Cassel*.

The *Cassel* decision presumes that the lawyers are doing their job, i.e., keeping their clients informed, providing competent legal advice and advocating their client's position. Mediations are neither depositions nor discovery expeditions. There should not be any settlement entered into without informed participants making intelligent decisions. If a party needs more facts before he can intelligently decide on a settlement, then he should not enter into a settlement. If a lawyer needs to do more legal research before he can give competent advice to settle, then he should continue the mediation to a time when he will be prepared. Mediations can and often are continued until after certain depositions are conducted or other discovery is obtained.

The *Cassel* ruling does nothing to suggest that a lawyer's duty is in any way relaxed. Rather, it fosters a more respectful, free flow of open communication from a lawyer to her client and vice versa that is sometimes necessary and appropriate in advising a client with his decision to settle. It also allows the mediator more freedom to be creative, without concern of a breach in the confidential process.

Modern legal ethics dictate that lawyers *sufficiently* inform their clients about mediation confidentiality, i.e., that communications made in connection with the mediation are confidential and protected from disclosure by the mediation confidentiality statutes, including those between the client and his or her own counsel. The mediator should likewise explain the nature of the mediation confidentiality laws to all parties at the outset of the mediation to set the tone of fairness, as well as to conduct the process in a balanced, informed and safe manner for all involved.

We all know that litigation is fraught with peril and is unpredictable. A good lawyer discusses these aspects of litigation as well as the merits, challenges, costs, risks, and practicalities of the case with his client. Mediation allows the client to be directly involved in the process of resolution, but it requires the client to take responsibility for his or her decisions regarding settlement. Of course, there are some that experience a certain "buyer's remorse" phenomenon, but most parties get over that after the dust has settled and they have thought it through.

Life is short, and closure is a valuable thing — even to the party that might otherwise have wanted to sue his lawyer for recommending that he settle for a "lower" sum than what he thought the case was worth.

Jeffrey M. Bases *brings to his mediation practice extensive experience in complex commercial, real estate and business litigation. Since 2003, he has been an appointed mediator to the Los Angeles County Superior Court Panel of Mediators. He currently practices out of his offices at Bases & Bases PC in Encino.*

EX 93

Time to roll back the mediation privilege

By Allen B. Grodsky

Over the years, the Legislature and the California Supreme Court have expanded the mediation privilege far beyond what it needs to be to serve its purpose — that is, to encourage the candor necessary for a successful mediation. The last straw was *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), in which the state Supreme Court interpreted the mediation privilege to cover confidential communications between a lawyer and client at the mediation, and prevented a client from using those communications to prove clear malpractice by the lawyer.

In *Cassel*, the Supreme Court affirmed a trial court's decision in a legal malpractice case that evidence of confidential discussions between a lawyer and client at the mediation of the underlying matter was nondiscoverable and inadmissible, thereby preventing the client from proving that his lawyer had committed malpractice. The Supreme Court reached this conclusion through a simple analysis: that's the plain meaning of the statute, and it is not our job to rewrite it.

So the ball is now in the Legislature's court, and it is time for the Legislature to take action. The absurdity of the holding of *Cassel* can be demonstrated in just a few examples.

For example, imagine two parties and their counsel are at a mediation and the mediation goes into the wee hours of the morning, because the mediator insists that "this is our only chance to settle and we're going to stay here — no matter how tired or hungry anybody is — until we get it done." At 2:00 a.m., the exhausted and hungry participants reach an agreement: defendant will pay plaintiff $2,000,000 in 30 days. Naturally the mediator insists that they need a written agreement right then and there; it can't wait until everybody gets a good night's sleep because somebody may change their mind. So the bleary-eyed lawyers draft a settlement agreement. Unfortunately, none of the tired participants notices a critical mistake in the settlement agreement. The agreement reads that the money must be paid by April 1, 2015 — not April 1, 2013. The next day, defendant wakes up and has second thoughts about the deal. Then he reads the agreement and is thrilled when he realizes that, under the express terms of the written agreement which everybody signed, he can wait *two years* to pay the money. The other party, the other lawyer, and the mediator are all furious. The mediator even calls and reads the riot act to the defendant's lawyer. But nothing will change the defendant's mind. He makes clear that he is going to hold on to the $2,000,000 for two years.

Most lawyers might say: What's the problem? Plaintiff can file an action for reformation of the contract, put on pretty much uniform evidence about the parties' intent and negotiations and fix this problem. Not so fast. Under *Cassel*, no testimony about *anything that was said or written at the mediation* can come into evidence. There is absolutely no way plaintiff can prove that the written agreement does not reflect the parties' actual intent.

Let's make things worse. Let's say that defendant and his lawyer decide at the mediation to try to "slip in" the April 2015 date, figuring that nobody will notice. Their scheme works. Now we are not talking about malpractice; we have an intentional tort. Too bad! Unless the district attorney decides to bring a criminal proceeding (the mediation privilege does not protect disclosure in criminal proceedings), the plaintiff cannot do anything about it. He cannot bring any civil action based on what was said during the mediation. He cannot sue plaintiff and his lawyer, nor can he sue his own lawyer for malpractice in failing to notice the incorrect date in the settlement agreement.

> [T]he state Supreme Court interpreted the mediation privilege to cover confidential communications between a lawyer and client at the mediation.

Here is another example: In another mediation, after many hours of discussion, the mediator proposes a very complex financial transaction that could resolve both side's concerns. But plaintiff is concerned about the tax consequences. Her lawyer — not a tax lawyer, but desperate to get the case over with because he's not getting paid — tells his client that he's sure the transaction will get favorable tax treatment. Plaintiff goes along with it, signs a settlement agreement, and learns to her dismay some months later that the transaction does not get favorable tax treatment and that she's worse off than before the settlement. Most lawyers would think she could sue her lawyer for malpractice. Wrong again. Under the express holding of *Cassel*, none of what was discussed during the mediation (including her lawyer's insistence that there would be no tax problems) is discoverable or admissible.

Finally, in yet another mediation, the parties come to a settlement which provides that defendant has a one-year period to sell off certain goods in certain territories, but otherwise may not sell any of plaintiff's goods. But the written agreement (signed at the mediation) is vague about which particular goods can be sold off. Plaintiff sues defendant for breach of the agreement. But when defendant tries to put on evidence of what the parties specifically discussed during the mediation with respect to the goods that could be sold off, the court finds that evidence inadmissible. With *any other contract*

it would be fair game to use negotiation discussions to help interpret the contract; but with a mediation settlement, it's off limits, and that's simply not fair to the parties.

Obviously, then, we have a big problem. And it's a problem that the Legislature could easily fix. We need to go back to the purpose of the mediation privilege — to foster candor in mediation discussions that will help lead to settlement. Why does confidentiality help foster openness? Because parties are legitimately concerned that if the case does not settle, what they say or admit will be used against them somehow. So when a case does not settle, it makes perfect sense that anything anybody says at a mediation should remain privileged.

But when a mediation results in a full and complete settlement, there is no longer any fear that what was said at the mediation could prove harmful to the case because the case is over. There is no conceivable reason that negotiations at the mediation should not be admissible in cases involving ***interpretation*** of the settlement agreement, just like evidence of negotiations is used to interpret any other contract. It should be in the interest of all parties to have the settlement agreement interpreted in such a way as to reflect the parties' intent. Cutting off this critical evidence, which can demonstrate the parties' intent, makes no sense.

Similarly, there is no reason that mediation should provide a "get out of jail free" card for lawyers who commit malpractice in a mediation, in particular during confidential communications with the client. None of the purposes of the mediation privilege are served by letting lawyers escape from the consequences of malpractice.

I am not proposing that mediators can be compelled to testify in these situations. Carving exceptions out of the mediation privilege will not change a mediator's immunity from having to testify. Under Evidence Code Section 703.5, mediators are, as a matter of law, ***not competent*** to testify about any statement or conduct that occurred during a mediation (except criminal acts).

Bottom line, the mediation privilege has gone too far. It is time to reel it in and return to a sensible privilege that does not infringe on parties' rights.

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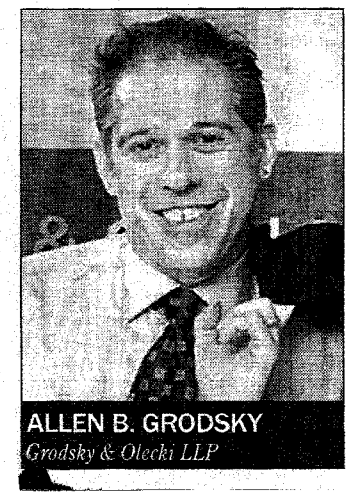

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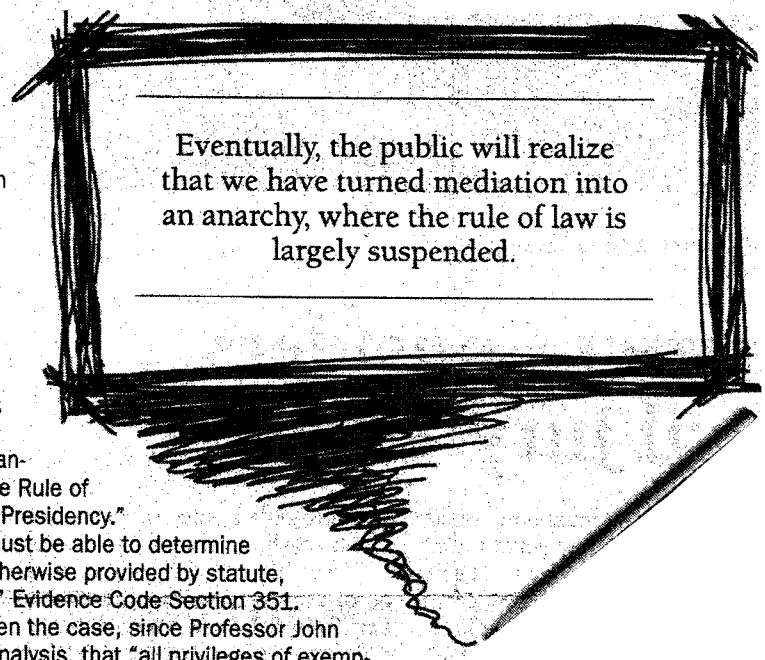
Mediation, Confidentiality and Anarchy: The California Nightmare

By Jeff Kichaven

Mediation confidentiality has gone too far.

In *Cassel v. Superior Court*, 2011 DJDAR 658 (Jan. 13), the state Supreme Court faithfully construed the mediation confidentiality statute, Evidence Code Section 1119, to exclude evidence of what a lawyer said at a mediation, when offered to prove that lawyer's alleged malpractice. A lawyer who may have damaged a client therefore skates without a trier of fact ever considering the case on the merits. Other torts that may take place in mediation, including mediator malpractice and insurance bad faith, will go without redress as well.

This rule spits in the eye of basic American values, mocks the rule of law, and will ultimately scare the public away from mediation. As Justice Ming W. Chin noted in reluctant concurrence, "This is a high price to pay to preserve total confidentiality in the mediation process."



At heart, the rule of law is simply the principle that for every wrong — every breach of contract, violation of statute and tort — the legal system provides a remedy. Our basic American values have always emphasized the rule of law. Indeed, on Jan. 21, 2009, his first full day in office, President Barack Obama announced that "Transparency and the Rule of Law will be the touchstones of this Presidency." To enforce the rule of law, courts must be able to determine the truth. That's why, "Except as otherwise provided by statute, all relevant evidence is admissible." Evidence Code Section 351.

That is also why it has always been the case, since Professor John Henry Wigmore first set down the analysis, that "all privileges of exemption from this duty (to give relevant evidence) are exceptional, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence.... The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice." 8 Wigmore on Evidence Section 2192 (McNaughton ed. 1961)

Plainly, California's mediation confidentiality statute provides just such an "obstacle to the administration of justice." If we care about the rule of law, we must ask: Is there "good reason, plainly shown," for this degree of mediation confidentiality?

Conventional wisdom says "yes." That conventional wisdom is well-expressed at page 28 of the *Cassel* opinion: "The Legislature decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to that process, even where this protection may sometimes result in the unavailability of valuable civil evidence."

Let's be cautious, though, about "conventional wisdom." Consider Steven Levitt and Stephen Dubner's critique in their 2005 blockbuster, *"Freakonomics"*: "It was John Kenneth Galbraith, the hyperliterate economic sage, who coined the phrase 'conventional wisdom.' He did not consider it a compliment.... Economic behaviors,...'are complex, and to comprehend their character is mentally tiring. Therefore we adhere, as to a raft, to those ideas which represent our understanding.' So the conventional wisdom in Galbraith's view must be simple, convenient, comfortable and comforting — though not necessarily true. It would be silly to argue that the conventional wisdom is *never* true. But noticing where the conventional wisdom may be false — noticing, perhaps, the contrails of sloppy or self-interested thinking — is a nice place to start asking questions." So, let's start asking, and see what we notice.

Does the empirical evidence support the Legislature's supposed conclusion that the encouragement of mediation requires such broad confidentiality? To adopt Wigmore's classic test: Do we have the rules of mediation confidentiality "within the narrowest limits required by (the) principle," of encouraging mediation? The answers are clear. "No" and "no."

As U.S. Supreme Court Justice Louis Brandeis taught us, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), Brandeis, J., dissenting.

California has the benefit of this happy incident from which to learn. Without risk to California, at least 10 courageous states and the District of Columbia have experimented with a different mediation confidentiality law, under which Michael Cassel's proffered testimony of his lawyer's alleged malpractice would have been admitted in evidence. What is that law? How does it work? Most critically — does it discourage mediation? If not, then it is hard to justify our contrary California law.

The statute is the Uniform Mediation Act, created by the National Conference of Commissioners on Uniform State Laws (www.nccusl.org). The American Bar Association has approved it. The states that have adopted it include major commercial centers, such as Illinois, Ohio and Washington.

Here's how it works, in a nutshell: Section 4(a) provides that "mediation communication is privileged." Section 6(a)(6) provides that "There is no privilege under Section 4 for a mediation communication that is...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." Voila, Cassel's testimony comes in.

Has this regime discouraged the use of mediation? How can we tell? Well, if the Uniform Mediation Act has discouraged mediation, its reporters likely would have heard. Have they? The National Conference reporter of the Uniform Mediation Act is Professor Nancy Rogers of the Moritz College of Law at Ohio State. She has also served as dean of that law school, attorney general of Ohio and president of the American Association of Law Schools. The associate reporter is Professor Richard C. Reuben of the University of Missouri Law School. His background is equally distinguished. He was the William and Flora Hewlett Senior Fellow in Dispute Resolution at Harvard Law School, he is co-author of one of the country's leading casebooks on alternative dispute resolution and, early in his career, he was a staff writer for this newspaper. These high-profile people are easy to find. What do they say? Rogers said: "I am in a [Uniform Mediation Act] state and have not heard people hesitate to mediate because of the [Uniform Mediation Act], but I do not know of any empirical evidence on mediation privilege and willingness to mediate."

Reuben said: "I also have not heard of any problems with people being willing to mediate in [Uniform Mediation Act] states, and am unaware of any research on the point or on the relationship between confidentiality and willingness to mediate more generally."

So we have thwarted the rule of law with no empirical evidence that it is necessary to promote mediation.

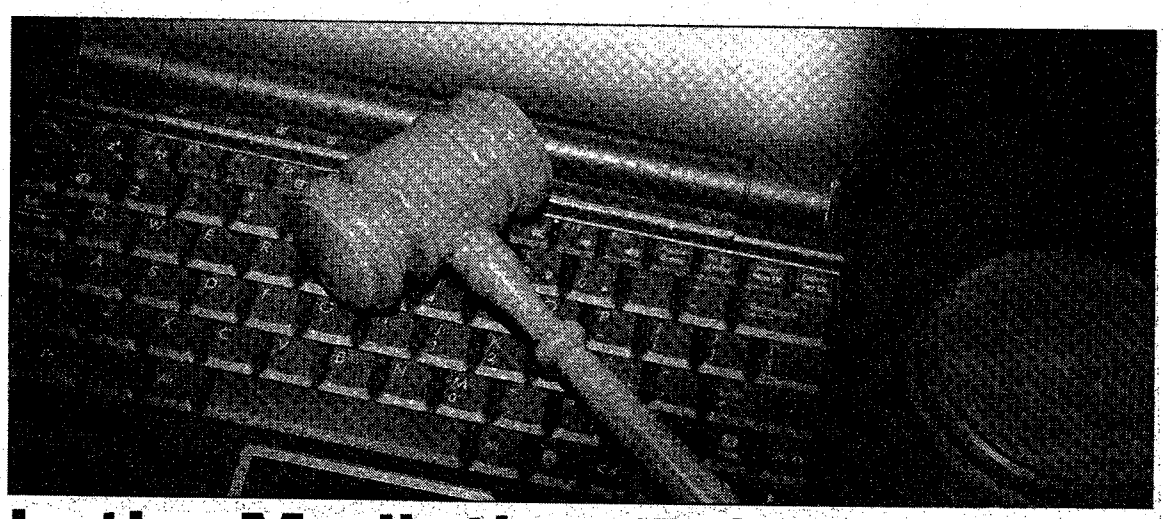
It is no surprise that courts have urged reexamination of these rules. And the *Cassel* majority invites the Legislature to do so. Chin goes further and observes, "I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability."

Eventually, the public will realize that we have turned mediation into an anarchy, where the rule of law is largely suspended and attorney malpractice (as well as mediator malpractice and insurance bad faith, among other torts) go without redress. Will clients continue to shop here?

Already, there is backlash. In 2008, California Rule of Court 3.1380 was adopted, expanding the availability of "settlement conferences," which are not subject to the lawlessness of the mediation confidentiality statute. Under previous Rule 222, it appeared that only a sitting judge could conduct such a settlement conference. Now, anyone who is not concurrently conducting a mediation can do it. We can expect to see increased recourse to this rule in coming months.

There is no perfect option. But our current mediation confidentiality statute is so far from the best that there is little reason to keep it. Is it still possible to save mediation? Sure. All it takes is a renewed commitment to the rule of law and a fresh look at the rules of mediation confidentiality. It is time for responsible members of the mediation community to step up and demand a change.

Jeff Kichaven is a commercial mediator with a nationwide practice. In 2007, he taught the Master Class for Mediators for his alma mater, Harvard Law School. He can be contacted at jk@jeffkichaven.com.



Is the Mediation 'Privilege' the Last Bastion of Confidentiality?

By Michael H. Leb

Are you concerned about the erosion of personal privacy and confidentiality attributable in large part to the amount of information in "cyberspace" and the increasing ability to aggregate and publish the information? If not, you should be. For a sobering glimpse at how little privacy an individual really has, take a look at the Web site Spokeo. Enter the name of someone you know and, at no cost, you can obtain the person's address, phone number, approximate age, value of their house (with a Google Street view photo) marital status, and spouse's name. For a mere $2.95 per month you can obtain additional information about the person including: e-mail address, hobbies, photos and "social profile" (pulled from Facebook, Linked-In etc.). Pretty scary stuff whether you are an ardent civil libertarian or not.

Privacy and confidentiality issues in the law have made headlines recently. A prominent law firm is accused of ethics violations for publishing comments from a listserve used by plaintiffs' employment lawyers. The listserve is available only to members of the organization, one of whom allegedly provided the postings to the law firm.

Whatever your personal view on the merits of the Holmes decision, it clearly delimits the circumstances under which a communication between attorney and client will be subject to the attorney-client privilege.

In addition, many recent cases have found compelling governmental or employer interests outweigh individual privacy rights. In *City of Ontario v. Quon*, the 9th U.S. Circuit Court of Appeals held that a police officer had an absolute right of privacy in text messages sent using his work pager during business hours. In reversing the 9th Circuit, the U.S. Supreme Court acknowledged the police officer's right of privacy but found that his employer's (Ontario Police Department) search of his text messages was entirely reasonable, and did not violate his rights.

More recently, in another rebuke of the 9th Circuit, the U.S. Supreme Court issued a unanimous ruling in *National Aeronautics and Space Administration v. Nelson*, finding that questions contained in background checks NASA conducted on independent contractors are reasonable, employment-related inquiries that further the government's interests in managing its internal operations. The background check questions at issue dealt with drug use, treatment and counseling, and also included open-ended questions directed to the employees' designated references, asking about the employee's "honesty or trustworthiness" and requesting "adverse information." The Supreme Court punted on the issue of whether the questions implicated a constitutional privacy interest. As in *Quon*, the Court held that whatever the scope of any privacy interest, the inquiries were reasonable, in light of the government's role "as proprietor" and manager of its internal affairs, to ensure the security of its facilities and employ a competent, reliable workforce. The Court also relied on its view that any privacy interest was sufficiently protected because the government is legally prohibited from disclosing the results of its background investigation under the Privacy Act of 1974.

A California appellate court also recently came down on the employer's side of the privacy issue. In *Holmes v. Petrovich Development Co.*, e-mails to an attorney that clearly would otherwise have been privileged were found not to qualify as a "confidential communication between client and lawyer" within the meaning of California Evidence Code Section 952. In this case, the employee had used a company computer to send e-mails to her lawyer despite being informed of the company's policy that its computers were to be used only for company business; being warned that the company might "inspect all files and messages...at any time;" and being explicitly advised that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message."

The Court held that under these circumstances, the e-mails "were akin to consulting her attorney in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him." The Court found irrelevant the employee's erroneous beliefs that the use of a private password protected the confidentiality of her e-mails, and that the company did not, in fact, randomly monitor employee e-mails.

Again, whatever your personal view on the merits of the *Holmes* decision, it clearly delimits the circumstances under which a communication between attorney and client will be subject to the attorney-client privilege, a privilege which the state Supreme Court, in *Mitchell v. Superior Court*, referred to as the "hallmark of American jurisprudence for over 400 years."

In contrast to the cases discussed above, the state Supreme Court has, in *Cassel v. Superior Court*, broadly interpreted the so-called "mediation privilege" set forth in Evidence Code Section 1119 to prevent a client who claims he got bad advice from his lawyers from basing a malpractice claim on private communications between him and his attorneys prior to and during a mediation.

In this case, Michael Cassel agreed to a settlement during mediation. He then sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. His complaint alleged that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.

Prior to trial, the attorneys moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants' efforts to persuade petitioner to reach a settlement in the mediation. The trial court granted the motion, but the Court of Appeal vacated the trial court's order.

The appellate court majority reasoned that the mediation confidentiality statutes are intended to prevent the damaging use against a mediation disputant of tactics employed, positions taken, or confidences exchanged in the mediation — not to protect attorneys from the malpractice claims of their own clients.

The state Supreme Court reversed, holding that the "plain language" of the statute protected the communications at issue from use in any subsequent civil proceeding. The Court specifically declined to opine on "whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy." Similarly, the Court dismissed petitioner's argument "that application of the mediation confidentiality statutes to private attorney-client communications creates a difficult line-drawing problem because, when such discussions occur near the time of a mediation proceeding but in a broader litigation context, it may be 'almost impossible' to determine whether the discussions were 'exclusively' mediation related. Nor would the Court "decide in this case the precise parameters of the phrase 'for the purpose of, in the course of, or pursuant to, a mediation.' " Simply put, the Court held that the language of the statute brooked no other interpretation.

The *Cassel* decision thus bucks the trend of these recent court decisions limiting privacy rights and narrowing the definition of "confidential communication." *Cassel* broadly interprets the mediation privilege, affording absolute protection to mediation-related communications. Such a degree of confidentiality is increasingly rare in the Facebook/YouTube age. The *Cassel* decision, therefore, should provide both attorneys and litigants an additional reason to turn mediation to resolve disputes.

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Mediating Behind Closed Doors

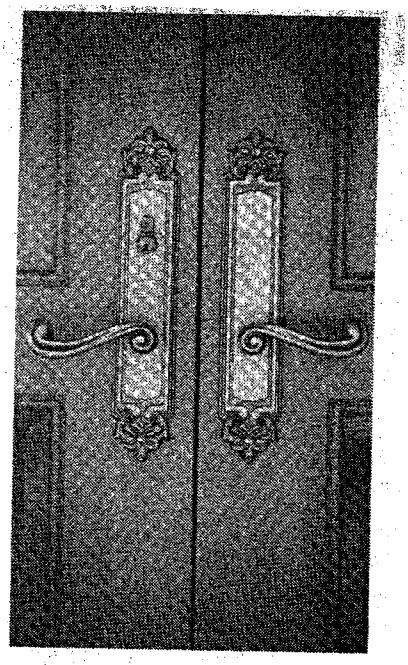
By Michael D. Marcus

The facts in *Cassel v. Superior Court*, 2011 DJDAR 658 (S178914, filed Jan. 13, 2011), presented the California Supreme Court with two clear options — continue to hold that mediation confidentiality is to be liberally construed despite the surrounding circumstances, or find that confidentiality should not be used to shield negligent attorneys from malpractice suits. The Court chose to stay the course and held that mediation confidentiality has few exceptions. In *Cassel*, the petitioner filed a complaint against his former attorneys for breaching their professional, fiduciary and contractual duties because they had used allegedly bad advice, deception and coercion at a mediation to force him to settle the case. Petitioner wanted to use his conversations with the attorneys immediately preceding, and at the mediation, to prove his case. The trial court ruled that discussions between petitioner and the lawyers two days and one day before the mediation, in which mediation strategy and settlement amounts were discussed, and all communications and conduct at the mediation between petitioner and the lawyers, were inadmissible. A majority of the Court of Appeal granted mandamus relief, reasoning that mediation confidentiality statutes are not intended to prevent a client from using communications with his or her lawyer outside the presence of all other mediation participants in a legal malpractice case against that lawyer.

> For the short term, *Cassel's* extensive analysis of mediation confidentiality should foreclose further lower court attempts to carve exceptions to such confidentiality.

Cassel began with a review of both the Evidence Code's mediation statutes and the cases interpreting them to establish that the Legislature had provided only express waiver by the participants as an exception to mediation confidentiality, and that the only judicially crafted exceptions were where "due process is implicated" and "literal construction would produce absurd results, thus clearly violating the legislature's presumed intent." The Court also reminded that *Foxgate Homeowners' Association Inc. v. Bramalea California Inc.* (2001) 26 Cal.4th 1 held that confidentiality prevents a mediator from reporting a party's failure to participate in good faith to the trial court; *Rojas v. Superior Court* (2003) 33 Cal.4th 407 extends confidentiality to all writings prepared for or made during a mediation; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189 allows the disclosure of written settlement agreements reached in mediation if the agreement directly expresses the parties' intent to be bound by the executed document and *Simmons v. Ghaderi* (2008) 44 Cal.4th 570 provides that equitable estoppel and implied waiver are not valid exceptions for the disclosure and admissibility of oral settlement agreements arrived at in mediation.

With *Foxgate, Rojas, Fair* and *Simmons* as a foundation, *Cassel* held that the purpose of Evidence Code Section 1119(a), which provides that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation... is admissible or subject to discovery..." extends to all oral communications at a mediation, even if they only take place between parties and their own attorneys.



The appellate court majority in *Cassel* had also held that a party to a mediation and his or her attorney are a single mediation participant and, thus, their communications are not within the intended purview of mediation confidentiality. The Supreme Court rejected that approach, concluding that the term "participants" in the mediation statutes includes attorneys as well as the parties or disputants. Thus, the Court refused to accept the proposition that an attorney, even if a participant in a mediation, could unilaterally block the discovery of a mediation communication.

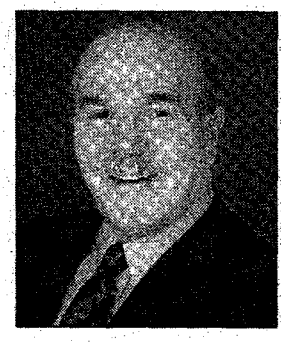
Cassel further holds that petitioner's discussions with his attorneys before the mediation concerning mediation strategy and settlement were confidential because Section 1119 (a) and (b) apply to all utterances and writings "for the purpose of, in the course of, or pursuant to, a mediation." Instead of attempting to create a bright line test for establishing when a pre- or post-mediation utterance or writing is mediation related, and thus confidential, *Cassel* simply

found that petitioner's discussions with his attorneys came within the statute because they "concerned the settlement strategy to be pursued at an immediately pending mediation...(and) were closely related to the mediation in time, context, and subject matter..."

Cassel noted that the mediation confidentiality statutes, unlike Evidence Code Section 958, which eliminates confidentiality protections otherwise afforded by the attorney-client privilege in suits between clients and their lawyers, has no exception for legal malpractice actions. The Court reasoned that the attorney-client and mediation confidentiality statutes achieve separate and unrelated purposes; the former "allows the client to consult frankly with counsel on any matter, without fear that others" may use these confidences whereas the latter "serve[s] the public policy of encouraging the resolution of disputes by means short of litigation."

The Supreme Court then discussed the non-applicability of the two judicially crafted exceptions to mediation confidentiality to the instant facts. Due process was not a factor because "the mere loss of evidence" in a lawsuit for civil damages does not implicate a fundamental interest. Nor did the result produced by applying the plain terms of the statutes to the facts of the case create a result that was absurd or clearly contrary to legislative intent.

In sum, *Cassel* reversed the appellate court judgment and left petitioner with the inability to introduce evidence of his attorneys' alleged misconduct immediately prior to and at the mediation. For the short term, *Cassel*'s extensive analysis of mediation confidentiality should foreclose further lower court attempts to carve exceptions to such confidentiality. Its impact, however, may not be lengthy because, while the Court chose not to take the fork in the road that would allow clients to use communications with their attorneys at mediations in subsequent malpractice actions, it unambiguously invited the Legislature to reconsider that issue. "Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys." The Court's less than subtle invitation may be hard for the Legislature to ignore; especially, if it also considers Justice Ming W. Chin's reluctant concurrence that shielding attorneys from being held accountable for their incompetent or fraudulent actions during mediation "is a high price to pay to preserve total confidentiality in the mediation process."



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Dear ADR Participants: Are Your Secrets Really Safe With Me?

By Jan Frankel Schau

One of the key principles of mediation in California is that the participants can feel free to communicate those sticky details, which often drive the ultimate settlement of the case without fear that these private communications will ever see the light of a courtroom. They are held strictly confidential under California Evidence Code Sections 1115-1128 with only a few narrowly drawn exceptions. In fact the mediator herself is deemed "incompetent" to testify in any subsequent civil proceeding under Section 703.5 of the California Evidence Code. But not so in the federal courts.

In cases arising out of diversity, the federal court will apply California law. But what happens when federal common law applies? California courts have repeatedly disapproved of "judicially created exceptions" to mediation confidentiality with the notable exceptions of *Cassell v. Superior Court* (2009) 179 Cal. App. 4th 152, and *Porter v. Wyner*, BC211398, both of which are now before the Supreme Court for review. For mediators, this gave us a level of comfort knowing that we would never be called upon to "take sides" on a dispute that came before us, and that we would never be asked to accurately recall all that was said — most of which is not memorialized in writing.

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This creates a confusing analysis that begins with Federal Rule of Evidence 501, which essentially limits the federal court's duty to recognize state privileges (including the mediation privilege) to those cases in which "[s]tate law provides the rule of decision." Otherwise, the federal courts are free to develop rules of privilege on a case-by-case basis...and to leave the door open to change. The irony is that as pro-ADR (alternative dispute resolution) as California has become, there is still no "mediation privilege" under federal common law. To the contrary, under the U.S. Supreme Court case of *Jaffee v. Redmond* (1996) 518 U.S. 1, federal courts are guided primarily by the general rule that the public is entitled to every person's evidence and that testimonial privileges are disfavored. This leaves both mediators and disputants in an uncomfortable position. How much can you reveal in mediation without fear that it will be subject to later disclosure?

I learned the hard way that mediators may be compelled to testify in federal court actions. After a failed mediation in a civil rights action against a municipality, the matter proceeded to a verdict in favor of the plaintiffs. When plaintiffs' counsel submitted his post-trial attorney's fees bill, it was met with loud protests by the defense — who contended that they would have paid the amount awarded by the jury at the time of the mediation six months (and hundreds of billable hours) before. They both came to their mediator to request a declaration indicating the demands and the offers that were communicated during the mediation. The attorneys had both agreed to waive the confidentiality privilege and asked the mediator to also agree.

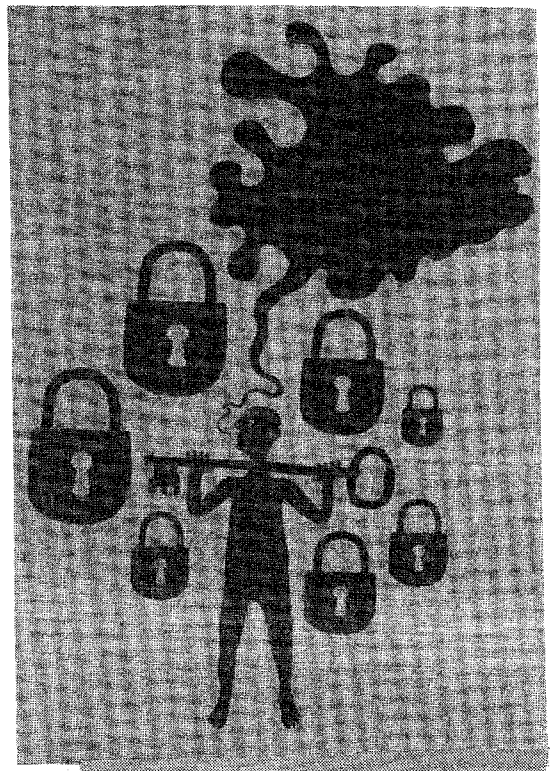
There is no question but that in a state court action in California the Evidence Code would protect such evidence from being compelled by a court. I can assure the parties that come before me that they need not fear of my divulging any information with regard to offers and demands, or worse yet, the discussions that were not communicated to the other side about the zone of possible agreement in the case. But in federal court, the magistrate had the discretion to compel me to divulge the information over my objection. While I did not maintain notes that may have been compelled, I did recall the positions the parties had taken. Most of the communication that I wanted to protect was never communicated as an offer or demand to the other side. (For those curious about the result of this request, the mediator first refused and then contacted her insurance carrier, who, under a special "rider" prepared to bring a motion to quash. Evidently, this was sufficient for the parties to find a way to work out the dispute and the subpoena never issued.)

Congress adopted the ADR Act in 1998 with a view towards expressing a strong federal interest in protecting the confidentiality of communications that occur in federal court mediations. Unfortunately, as noted in *Olam v. Congress Mortgage Co.* (1999) 68 F. Supp. 2d 1110, it didn't provide directly for the protection of confidential ADR communications or prescribe specifically what the protection should consist of. Instead, the ADR Act required that each district court adopt it's own provisions for confidentiality under 28 U.S.C. Section 652. The Central District's Local Rule 16-15.8 broadly states: "All settlement proceedings shall be confidential. No part of a settlement proceeding shall be reported, or otherwise recorded, without the consent of the parties, except for any memorialization of a settlement and the Clerk's minutes of the proceeding."

The U.S. District Court has long acknowledged that rules protecting the confidentiality of mediation proceedings and the actual or perceived impartiality of mediators serve the same ultimate purpose: encouraging parties to attend mediation and communicate openly and honestly in order to facilitate successful alternative dispute resolution. (See *Folb v. Motion Picture Industry Pension & Health Plans* (1998) 16 F. Supp. 2d 1164). For that reason, it seems that it's a great time for our federal judges and magistrates to develop and adhere to a local rule that affords this protection — instead of leaving both mediators and disputants to wonder what, if anything, said or done will be subject to later disclosure.

U.S. Magistrate Judge Wayne Brazil wrote the opinion in the *Olam v. Congress Mortgage Co.* with a great deal of thought and obvious appreciation for what many have deemed the promise, and even on occasion, the magic of mediation. He acknowledged, for example, that the possibility that a mediator might be forced to testify over objection could harm the capacity of mediators in general to create the environment of trust that they feel maximizes the likelihood that constructive communication will occur during the mediation session. What's more, it is inconsistent with California law, which sometimes applies, under Federal Rule 501, and sometimes does not.

As Magistrate Brazil aptly noted, many mediators measure their success by whether or not the parties reach a settlement. For that reason, there is a vested psychological interest in supporting the finality of the agreement, rather than undermining it. Indeed, the recent exceptions to the confidentiality statutes have all arisen in California courts (*Cassel v. Superior Court*, *Wimsatt v. Superior Court* and *Porter v. Wyner*) out of an argument that the parties' lawyer, not the mediator, unfairly exerted pressure or inaccurately communicated the facts to their own clients, causing them to agree to a settlement that was allegedly not in their best interest. The issues each arose upon an attempt to enforce an agreement that one of the parties wished to set aside or in a subsequent action against their own counsel.



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Nonetheless, in California, not only must the parties waive confidentiality, but the mediator also must be willing to waive the privilege. In *Rinaker v. Superior Court* (1998) (62 Cal. App. 4th 155), the court compelled testimony from the mediator in a juvenile delinquency proceeding only after an in camera consideration of what the testimony would be and a determination by the trial judge that the testimony might well promote the public interest in preventing perjury and thus, the defendant's fundamental right to a fair judicial process. In making it's determination, the trial judge was asked to weigh all the competing interests, including the values that would be threatened not by public disclosure of mediation communications, but by ordering the mediator to appear at an in camera proceeding. The *Olam* court largely followed the two-prong test outlined and employed in *Rinaker,* while being extremely deferential to the attributes of the mediator's deep commitment to being and remaining neutral, non-judgmental and to building and preserving relationships with parties.

In the more recent case of *Molina v. Lexmark International Inc.* (2008) 77 Federal Reporter 905, Judge Margaret Morrow astutely noted that no circuit court had ever adopted or applied a federal common law mediation privilege. Accordingly, she permitted testimony of discussions during mediation for the limited purpose of establishing the amount in controversy while drawing an interesting distinction between confidentiality (as between the parties) and privilege (from disclosure to a third party). It may have been clear to Judge Morrow, but it certainly leaves the rest of us to wonder under what circumstances the general rule of confidentiality that we've come to rely upon in state actions in California will be applied in federal actions.

At least for this mediator's part, it would appear to be a good moment after 10 years of struggling with this, for the Central District of the U.S. District Court to attempt to strike a balance or at least refrain from adopting a privilege whose contours may be in disagreement with California law. The local rules should be modified in accordance with the analysis in *Olam* and consistent with California law. That way, perhaps we could answer the question raised at the outset: "Is your secret really safe with me?"

Tuesday, October 30, 2012

The wisdom of mediation confidentiality is up for debate

One proposal would make attorney-client discussion admissable in legal malpractice actions

By Alexandra Schwappach

For some legal observers, when it comes to alternative dispute resolution, silence is anything but golden.

The state's mediation confidentiality law, according to the California Evidence Code, mandates that anything said in the course of a mediation consultation or during the course of the mediation is not admissible as evidence in any follow-on litigation. To its critics, the law gives clients few options to litigate cases of attorney malpractice.

A mediator can't be sued for malpractice, "no matter how serious the consequence," said Los Angeles-based mediator Jeffrey G. Kichaven. He is one of many who think the current statute needs a second look.

'Mediators ought to be held liable. As it is now, clients have no options if they feel as if their attorney has engaged in misconduct.' - Jeffrey G. Kichaven

"Mediators ought to be held liable," he said. "As it is now, clients have no options if they feel as if their attorney has engaged in misconduct," Kichaven said.

Proposed reforms include AB 2025, which states that attorney-client communications during mediation should be admissible in an action for legal malpractice. Introduced to the state Legislature in February, it passed the state Assembly with a requirement that the California Law Revision Commission conduct a study on the current statute. Lawrence Doyle, a lobbyist representing the Conference of California Bar Associations, a group that sponsored the bill, said confidentiality in mediation is a topic that needs a careful approach.

"It's clearly an area that needs attention," he said. "I have a feeling the California Law Revision Commission will get to it sooner rather than later."

Other states have adopted the Uniform Mediation Act, what Kichaven said is the most comprehensive of mediation confidentiality statutes. The statute allows confidentiality exceptions that prevent attorney malpractice and abuse and has been adopted in 10 states.

Richard C. Reuben, a professor at University of Missouri School of Law who helped

draft the UMA, said confidentiality exceptions were viewed "in particularity" while drafting the act.

"We didn't want mediation to be perceived as a place where wrongdoing could be condoned," he said. "And so we were very cautious about that."

The act includes confidentiality exceptions, such as the use of evidence in the case of malpractice, for example if clients were forced to sign something under duress. It also includes exceptions for the abuse of vulnerable parties, such as children and the elderly.

Reuben said the majority of the opposition to the bill came from mediators.

"A real source of tension with the mediation community in particular," he said. "What the mediators wanted was a cocoon in which nothing got out."

Glenn M. Gottlieb of L.A.-based Gottlieb Mediations said it would be unwise to make confidentiality exceptions in mediation. He said it isn't fair for a client to put his or her attorney through a malpractice claim if they have "buyer's remorse." He said the point of mediation is to avoid litigation but opening up confidentiality exceptions would only lead to more.

"A client should be held responsible for a settlement they enter into," he said. "A lawyer can recommend something, but they can't force their client to sign anything."

Others who are critical of changes argue that a lower standard of confidentially would destroy mediation or lead to so much follow-on litigation that clients would be discouraged from using mediation.

But Kichaven said what ultimately drives people away from mediation is the fear that if they do experience malpractice, their claims will not be addressed in court, he said. He sited the last three cases in the state Supreme Court regarding mediation confidentiality that were rejected - *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 163, *Cassel v. Superior Court*, 2011 DJDAR 658 (2011) and most recently *Hadley v. The Cochran Firm*, S205358 (2012).

"In all three cases, the plaintiffs were denied their claim in court. Maybe they were just claims, but we'll never really know because they go unaddressed," he said. "They will never be judicated."

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Mediation in California, Now Officially A Safe Haven for Attorney Malpractice

By J. Daniel Sharp

You may not know this, but in 1997 the California Legislature decided that putting up with a few acts of fraud and duress is an acceptable price to pay for the benefits of mediation. It is a safe wager that none of our legislators are aware that they intended to immunize tortious conduct; however, such is the result dictated by the "plain meaning" of the Evidence Code, at least in the eyes of the state Supreme Court.

Recently the Court held that Evidence Code 1119 precludes a client who is actually harmed by his attorney's fraudulent representations, negligent advice, and other wrongdoing during the course of a mediation from introducing evidence in court of the attorney's tortious conduct, even where the evidence pertained to attorney-client communications that occurred outside the presence of other participants in the mediation. (*Cassel v. Superior Court*, 2011 DJDAR 658, Jan. 13.) This unhappy result was widely anticipated and the decision is a discouraging reflection on the judicial process for reasons that go beyond the facts of the particular case.

Cassel shows that, with respect to the mediation confidentiality statutes, the Court has adopted a view of the Legislature's 'presumed intent' that does not work together very well with traditional notions of fairness and accountability.

Those facts are discouraging in themselves, at least as alleged in the complaint: Michael Cassell, a businessman selling a line of clothes under a trademark license agreement, was hit with a preliminary injunction by the licensor because his attorneys failed to oppose it. The attorneys then persuaded Cassel to violate the injunction by selling the clothes through a business partly owned by one of the attorneys and run by his son. The son, it turned out, was selling counterfeit goods, exposing the client to further trademark liability. When a mediation was scheduled with the licensor, the attorneys falsely agreed to discount their $188,000 bill if Cassel capitulated to a settlement, "threatened to abandon him at the pending trial, misrepresented certain significant terms of the proposed settlement, and falsely assured him" they could recoup any shortfall in the settlement amount. After 14 hours, "increasingly tired, hungry, and ill," with "no way to find new counsel before trial, and believing he had no choice," Cassel was coerced to sell the license for $750,000 less than it was worth.

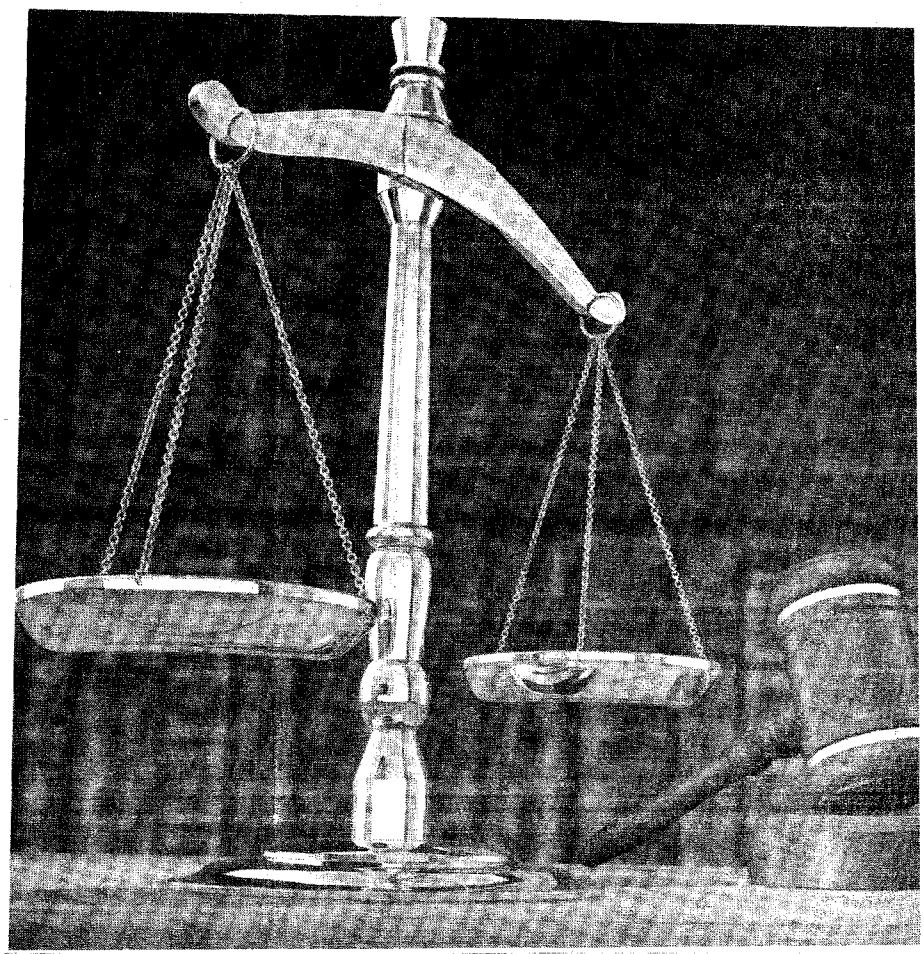
As alleged by Cassel, the attorneys' conduct in the mediation amounts to outright fraud as well as a breach of fiduciary duties imposed on members of the Bar. This is serious stuff. Yet the state Supreme Court held that evidence regarding the attorneys' tortious conduct is inadmissible. The Court's rationale is simple: "the plain language of the mediation confidentiality statutes controls our result." Evidence Code Section 1119 states that "[n]o evidence of anything said or any admission made *for the purpose of, in the course of, or pursuant to* a mediation...is admissible" in any civil action. It was the Legislature's "presumed intent" that courts would apply these words "in strict accordance with their plain terms."

Justice Marvin R. Baxter, writing for the majority, characterized the impact on the abused client as "the mere loss of evidence pertinent to the prosecution of a lawsuit." This description trivializes the result, which actually immunizes tortious conduct from judicial scrutiny. Fraud, duress, and professional negligence can be committed by uttering words that influence the actions of another party with respect to a business transaction. The goal of mediation is to accomplish such a

business transaction, i.e., to make a contractual agreement that resolves pending claims. There is no other context in which similar acts of fraud and serious wrongdoing are immunized from judicial scrutiny. The closest analogy would be prosecutorial or judicial immunity, but the actions of judges and prosecutors are subject to review as part of the judicial process, and judges and prosecutors are not fiduciaries to individual clients.

Justice Ming W. Chin wrote a short concurrence, stating that he was "just barely" persuaded to join the majority, as he was "not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability this way." Justice Chin's word choice was charitable, as no evidence suggests that the California Legislature remotely anticipated that courts would apply mediation confidentiality to preclude an abused client from presenting evidence of things his attorney said and did in private meetings. The Legislature held no debate over mediation confidentiality. The legislation was sent pre-packaged from the California Law Revision Commission, along with a 30-page report describing the primary purpose of the statutes as "to eliminate ambiguities" in existing law. *"Mediation Confidentiality,"* 26 Cal. L. Revision Comm'n Reports 407, 410 (1996).

Neither the Commission Report nor any other piece of legislative history addresses the application of mediation confidentiality to disputes between a mediation participant and his own attorney. No member of the Legislature has ever expressed the "presumed intent" ascribed by the Court's opinion, saying in effect: "While ordinarily courts exercise judicial power to afford remedies for wrongful acts, we want the courts to turn a blind eye when wrongful acts occur 'for the purpose of, in the course of, or pursuant to a mediation,' because we've decided the policy of encouraging mediation is more important than providing a remedy for fraud or other injustices that occur in the mediation process."



The Court's opinion includes the disclaimer that "we pass no judgment on the wisdom of the mediation confidentiality statutes," going only so far as to apply the "plain terms" of the statute. It is this aspect of the opinion that is most discouraging. Our courts are a co-equal branch of the government vested with judicial power, which includes the responsibility to exercise judgment and achieve substantial justice in the interpretation and application of statutes. The first volume of the *"California Reports"* contains an 1850 report by the Senate Judiciary Committee that is an impassioned plea for the state to choose a common law system rather than civil law, observing that "[t]o undertake, by statute or by code, to establish a just and accurate rule for every contingency of human avarice and of human passions, and for all the endless phases of varied life, is to essay a task which never yet was accomplished [and] must forever remain impracticable and absurd." (1 Cal. 591.) Our legal system relies on judges to recognize when unforeseen facts are beyond the contemplation and stated purpose of a statute. In the words of Civil Code Section 3510, "When the reason of a rule ceases, so should the rule itself."

In a profile of former Supreme Court Justice John Paul Stevens, *New Yorker* writer Jeffrey Toobin related a story that Stevens had shared

about the relationship of the courts and the legislature in applying statutes. The young Stevens had been a staff member for the House Judiciary Committee. He was responsible for analyzing proposed antitrust legislation, the effect of which was opaque. "I remember explaining one of the tricky problems in the statute to one of the members of the committee," Stevens recalled. "I got all through it, and he said, 'Well, you know, let's let the judges figure that one out.'" The experience made Stevens realize that "the legislature really works with the judges — contrary to the suggestion that the statute is a statute all by itself," Stevens said. "There is an understanding that there are areas of interpretation that are going to have to be filled in later on, and the legislators rely on that. It's part of the whole process. And you realize that they're not totally separate branches of government — they're working together."

Cassel shows that, with respect to the mediation confidentiality statutes, the Court has adopted a view of the Legislature's "presumed intent" that does not work together very well with traditional notions of fairness and accountability. Perhaps it is time for the Legislature to consider adoption of the Uniform Mediation Act. The Act treats mediation confidentiality as an evidentiary privilege much like the attorney-client privilege, which is subject to waiver and cannot be invoked to immunize tortious conduct. It is clear, though, that it will now take legislative action to get there.

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Critical differences in federal and state mediation privilege

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It is imperative that all practicing attorneys understand the differences between the California and the federal mediation privilege. Whether information exchanged in connection with a mediation is admissible will differ greatly depending on if the matter is pending in a California superior court or in a federal courthouse.

In California, the evidence code contains a broad statutory frame work that prevents opposing attorneys from introducing information disclosed in mediation into evidence. In its simplest terms, the California Evidence Code broadly precludes the use of any statement made in connection with a mediation in any subsequent preceding.

In federal court, there is no corresponding rule of evidence. Instead, federal courts have relied on Federal Rules of Evidence, Rule 501, which allows federal courts to define new privileges based on common law principles. As Judge Margaret M. Morrow noted in her unpublished decision, *Molina v. Lexmark Intern., Inc.*, 2008 WL 4447678 (C.D. Cal. 2008), "[n]o Circuit court has ever adopted or applied [the mediation] privilege." As a result, federal courts do not apply the mediation privilege as stringently or as uniformly as California state courts. Although federal district courts have enacted local rules to control the admissibility of information exchanged in connection with a mediation, circuit courts have called into question the ability to alter the evidence code through local rules.

Naturally, these two very different approaches to the mediation privilege lead to widely differing results where you or opposing counsel seeks to admit information into evidence that was obtained in connection with a mediation. California courts have continued to confirm the breadth of the privilege. Most recently, California has held that in a malpractice case, a plaintiff may not rely on statements made by his or her own former attorney (i.e., the defendant) during a mediation in support of the underlying malpractice case. Similarly, in an enforcement action, an oral agreement to settle is not admissible where it is not in writing and executed pursuant to California's statutory framework. Examples of California courts' willingness to protect mediation communications are numerous.

Naturally, these two very different approaches to the mediation privilege lead to widely differing results where you or opposing counsel seeks to admit information into evidence that was obtained in connection with a mediation.

Federal courts, on the other hand, have recognized numerous exceptions to the mediation privilege. Some examples of evidence that federal courts have relied upon in making decisions include: (1) considering a demand made at mediation in determining whether the case met the Class Action Fairness Act's minimum amount in controversy for permitting removal; (2) statements made relating to the mediation that occurred the following day where no mediator was present; (3) statements concerning employee's position made during the mediation were admissible against a company because it did not directly relate to the subject matter of the mediation; (4) information exchanged at an informal mediation, where the mediator was a friend of one of the parties; and (5) communications at a mediation relied upon to demonstrate that the settlement agreement was reached as a result of duress and coercion.

One way to guarantee the confidentiality of your next mediation, is to consider executing a confidentiality agreement at the very outset of the process. In *Facebook Inc. v. Pacific Northwest Software*, 2011 DJDAR 6987 (2011), the 9th U.S. Circuit Court of Appeals relied on a confidentiality agreement to preclude the admission of evidence where a party opposing a settlement reached in mediation attempted to introduce evidence of what was discussed in mediation to demonstrate the settlement agreement was not enforceable due to fraud. The *Facebook* decision confirms that in order to avoid having something stated in mediation used against an attorney or client, the best practice is to execute a confidentiality agreement at the outset of the mediation.

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Has Mediation Been Hijacked?

2/8/11

By Nancy Neal Yeend and Stephen Gizzi

In 2004, Michael Cassel participated in mediation. In early 2005, he filed a malpractice action against the law firm that represented him, alleging that just before the mediation, his attorney unilaterally communicated a lowered settlement demand to the opposing counsel without Cassel's knowledge or consent.

In the lawsuit, Cassel offered evidence of the disclosure along with that of communications that occurred solely between Cassel and his attorney outside the presence of the mediator and other mediation participants. The trial court granted the defendant's motion to exclude "all evidence of private attorney-client discussions immediately preceding and during the mediation..."

The Court of Appeal reversed the trial court, stating that "when a mediation disputant sues his own counsel for malpractice in connection with the mediation, the attorneys — already freed, by reason of the malpractice suit, from the attorney-client privilege — cannot use mediation confidentiality as a shield to exclude damaging evidence of their own entirely private conversations with the client."

On Jan. 13, 2011, the state Supreme Court, by unanimous decision, reversed the Court of Appeal decision stating, "We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose...even though they may compromise petitioner's ability to prove his claim of legal malpractice."

> Did the state Supreme Court overlook the practicalities of mediation?

The Court supports its conclusion by stating: "We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected." It addressed the legislative intent regarding confidentiality in the relevant sections of the Evidence Code, and cited the California Law Revision Commission's comment, "...this provision was intended to *broaden* the protection..."

Now that *Cassel* broadens Evidence Code 1119(a): "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation...is admissible or subject to discovery...," what is the practical effect of such a "broadening?" What could mediations look like?

Scenario 1: An attorney represents her client in mediation, the negotiations have been going on for over 15 hours, and everyone is very tired. During a private caucus with only the attorney and client in the room, the attorney says, "Take their offer, it's a good one and I'm withdrawing from the case if you don't take it. That means if you go to trial, you're going to have to find a new attorney who will certainly charge you a bigger retainer than I did. You'll still need money for all of the discovery that's required, and you better have enough left for a three-week trial. The client resists, the attorney keeps up the pressure, and finally the client succumbs. At a later time, the client attempts to refute the settlement, citing duress from her counsel. The evidence is disallowed based on a *Cassel* argument. Has *Cassel* lowered the ethical bar?

Scenario 2: The mediator has a contract with the parties — $400 per hour with the fee divided equally between the parties and an estimate the mediation would take 10 hours. After five hours, the mediator learns in caucus that the defense side will pay up to $400,000 to settle the case. The mediator then caucuses with the plaintiff's side and discovers the client will settle for $100,000 — down from the original $700,000 demand. The mediator says to plaintiff, "If I can get you more than $100,000 tonight, I want 10 percent of the gross settlement." The plaintiff agrees. The mediator goes to the defense and says, "They're holding firm to the $700,000, but I'll work on them. If I can get you a settlement under $400,000, I want you to agree to pay me 10 percent of any amount you save." Defendant agrees. The case settles for $250,000. The mediator collects $25,000 from plaintiff and an additional $15,000 from the defendant, for a total of $40,000, for a case origi-

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nally expected to generate about $4000 for the mediator. Under *Cassel*, the mediator avoids an ethics violation. Is this consistent with the legislative intent? Does this scenario "...violate due process, or is it an *absurd* result?"

Will attorney/client agreements now include a disclosure, placing the client on notice that the attorney is exempt from complaints regarding malpractice during mediation? Should they? Does *Cassel* mean that mediators no longer have to be ethical in their conduct? What if the mediator violates confidentiality and tells the other side something that was disclosed in confidence?

After *Cassel*, one could conclude that a mediator is protected from claims involving unethical conduct, malpractice, breaching confidentiality, and a host of other contentions. Did the Legislature *really* intend for this statute to protect attorneys from legal malpractice liability? Would it be "absurd" to think so? How subjective is "absurd?" Or, is it like "obscene," as defined in the 1964 quote by Supreme Court Justice Potter Stewart: "I shall not today attempt further to define (it)...[b]ut I know it when I see it..."? If the state Supreme Court did not believe that the application of the statute to this set of facts produced an "absurd" result inconsistent with the legislative intent, then precisely how "absurd" do the facts have to be?

Did the state Supreme Court overlook the practicalities of mediation? Attorneys and clients usually discuss a case, plan negotiation strategies, outline possible settlement options and numerous other issues in anticipation of mediation. In most circumstances, it would be malpractice *not* to. During the mediation, the attorney and client are often left alone while the mediator is with the other party. *Cassel* has determined that those private attorney/client discussions are subject to mediation confidentiality statutes simply because of when and where they occurred — not based on content. Whereas, the same conversation taking place a week earlier or later would not be subject to similar restrictions.

Perhaps the only way to keep mediation from being hijacked is to create legislative exceptions addressing ethical conduct and other malpractice issues associated with both attorney and mediator conduct. But then maybe the Legislature also needs to consider insurance representatives, witnesses in attendance and others? What if the client wants to sue his or her insurance company, but is hamstrung by *Cassel*? What if a spouse, in attendance wants to sue his or her spouse? Is this the Pandora's box the court feared opening?

The state Supreme Court has concluded that communications between mediation "participants" now include private attorney/client conversations occurring during *and* before mediation. It has essentially ruled that anything short of criminal conduct taking place at a time surrounding, or during the course of a mediation cannot be entered into evidence. The net result of this broadened view of confidentiality statutes opens the door for unskilled and unethical attorneys and mediators to "game" the system with no fear of oversight or repercussions for malpractice or unethical conduct.

If following *Cassel* means we must live with: "...the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice," then it appears that *all* mediation participants must be placed on notice that *caveat emptor* rules the day and they are precluded from proving claims of unethical conduct or malpractice. Mediation will now really become the Wild West, the net effect of which will be to *discourage* rather than *encourage* participation in mediation and "candid discussion and information exchange." When this occurs, it will seem that the Court's simplistic approach to this statute's interpretation actually resulted in thwarting the Legislature's intent rather than ensuring that it was carried out.

Tuesday, August 6, 2013

Influential agency begins studying possible exceptions to mediation confidentiality laws

Critics blast law that anything said during proceeding is confidential

By Emily Green

In 2005, Michael Cassel sued his former attorneys, alleging they threatened to abandon him two weeks before trial in a trademark dispute that had gone to mediation unless he agreed to settle for $1.25 million.

The case spurred a major dispute in the legal community over whether communications in mediation - including those between a lawyer and his client - could serve as the basis of malpractice lawsuits and disciplinary proceedings.

Siding with Cassel's attorneys in 2011, the state Supreme Court held that anything said in mediation is confidential and can't be used in litigation later. *Cassel v. Superior Court, 51 Cal. 4th 113.*

Two years later, the effort by some bar associations and legislators to roll back that decision continues. Last week, the California Law Revision Commission, an influential state agency that recommends changes to the law, began studying the relationship under current law between mediation confidentiality and attorney malpractice at the Legislature's directive.

Mediation has taken on an increasingly outsized role in the court system as budget woes have led to massive delays in setting trials. Retired judges frequently take on lucrative jobs as private mediators. But as mediation has become commonplace, concerns have grown that the confidentiality in the process means lawyers who don't adequately represent their clients get a free pass.

This is not the first time the 10-member commission has addressed the question of confidentiality in mediations. In 1997, it recommended near-total confidentiality in mediation except when the parties expressly agree in writing to disclosure of communication. It reasoned that, "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

The commission's recommendations led to passage of the law governing mediation that served as the basis for the state Supreme Court's decision in *Cassel.* This time, the fallout from that ruling and the pressure to address perceived problems in mediation could lead the commission to make more controversial recommendations.

A number of groups across the ideological spectrum opposed legislation introduced last year to address *Cassel.* The legislation, AB 2025, would have allowed communication between a client and his attorney to be admissible in an action for legal malpractice or a State Bar disciplinary action.

At the time, the California Lawyers for the Arts called the bill a "dangerous step towards eroding the long-established firewall of mediation." The Association of Dispute Resolution for Northern California wrote, "On balance, more is achieved by a large number of individuals participating in mediation than is lost by some number of individuals agreeing to ill-advised resolutions."

San Francisco County Superior Court Judge James McBride, who long headed the court's civil division, opposed the bill. He wrote to the Assembly Judiciary Committee that it "poses a serious threat that mediation would become a less successful method of reducing the number of cases brought to resolution by our courts."

On the other side of the debate are the Beverly Hills Bar Association and the Conference of California Bar Associations, a group of attorneys from bar associations across the state. They say the changes are needed because otherwise, the so-called *Cassel* doctrine would impair the attorney-client relationship and create a chilling effect on the use of mediations.

"The way it is now is the attorney can commit malpractice up the tin-tan and do whatever he or she wants at the mediation and it would never come back to bite him," said Los Angeles mediator Elizabeth Moreno, who helped draft the bill, which failed to pass.

"Is that fair to the client or the consumer who hired the attorney? No, it's not."

Moreno said she frequently sees lawyers ill-advise their clients in mediations, particularly in small dollar cases. "You will see a lot of attorneys, especially the smaller the dollar amount, just don't do anything on the case - nothing at all - except when they get to mediation and they do whatever they want because they are protected."

Ten states have adopted the Uniform Mediation Act, a statute that allows confidentiality exceptions that prevent attorney malpractice and abuse.

There is no timetable for the commission to come out with its study and recommendations. Director Brian Hebert projected the study would take at least a year to complete. Whatever the commission finds will likely prove influential, as 90 percent of its recommendations become law.

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