D R A F T

FOR APPROVAL

UNIFORM MEDIATION ACT

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UNIFORM MEDIATION ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

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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 Nancy H. Rogers & Craig A. McEwen, Mediation: Law, Policy, Practice App. B (1997 and Cole et al. 2000 Supp.). Many States have also created state offices to encourage greater use of mediation. *See, e.g.*, Ark. Code Ann. § 16-7-101, *et seq.* (1995); Haw. Rev. Stat. § 613-1, *et seq.* (1989); Kan. Stat. Ann. § 5-501, *et seq.* (1996); Mass. Gen. Laws ch. 7, § 51 (1998); Neb. Rev. Stat. § 25-2902, *et seq.* (1991); N.J. Stat. Ann. § 52:27E-73 (1994); Ohio Rev. Code Ann. § 179.01, *et seq.* (West 1995); Okla. Stat. tit. 12, § 1801, *et seq.* (1983); Or. Rev. Stat. § 36.105, *et seq.* (1997); W. Va. Code § 55-15-1, *et seq.* (1990).

1. Role of law.

The law has a limited but important role to play in encouraging the effective use of mediation and maintaining its integrity, as well as the appropriate relationship 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. The primary focus of this Act is a limited one – to provide a privilege that assures confidentiality in legal proceedings. 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). 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).

The provisions in this Act reflect the intent of the drafters to further this public policy obligation, and are generally consistent with policies of the States. Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications. *See* Sections 5-8. Self-determination is encouraged by provisions that limit the potential for coercion of the parties to accept settlements, *see* Section 8(a), and that allow parties to have counsel or other support persons present during the mediation session. *See* Section 9. The Act promotes the integrity of the mediation process by suggesting model provisions that require the mediator to disclose conflicts of interest and be candid about qualifications. *See* Section 8(c), (d), and (e).

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. The Act establishes a privilege regarding legal proceedings, something the parties cannot accomplish by contract, but allows the parties to determine for themselves the circumstances and conditions under which mediation communications may be disclosed outside the context of legal proceedings. In addition, some provisions in the Act may be varied by party agreement, as specified in the comments to each section.

2. Importance of uniformity.

This Act is designed to simplify rather than complicate the law. Currently, legal rules affecting mediation can be found in more than 2,500 statutes. On average, for example, a State has five mediation confidentiality statutes, each applying in a different context. Many of these statutes can be replaced by the Act, which applies a generic approach to topics 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 approximately 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 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 administrative processes in another State. 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). 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.

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 confidentiality.

Third, absent uniformity, 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.

Finally, uniformity contributes to simplicity. Mediators and parties who do not have meaningful familiarity with the law or legal research 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, they 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.

3. 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 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.

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. § 12-2238 (West 1993); Ark. Code Ann. § 16-7-206 (1993); Cal. Evid. Code § 1115, *et seq.* (West 1997); Iowa Code § 679C.2 (1998); Kan. Stat. Ann. § 60-452 (1964); La. Rev. Stat. Ann. § 9:4112 (1997); Me. R. Evid. § 408 (1993); Mass. Gen. Laws ch. 233, § 23C (1985); Minn. Stat. Ann. § 595.02 (1996); Neb. Rev. Stat. § 25-2914 (1997); Nev. Rev. Stat. § 48.109(3) (1993); N.J. Rev. Stat. § 2A:23A-9 (1987); Ohio Rev. Code Ann. § 2317.023 (West 1996); Okla. stat. tit. 12, § 1805 (1983); Or. Rev. Stat. Ann. § 36.220 (1997); 42 Pa. Cons. Stat. Ann. § 5949 (1996); R.I. Gen. Laws § 9-19-44 (1992); S.D. Codified Laws § 19-13-32 (1998); Tex. Civ. Prac. & Rem. Code § 154.053 (c) (1999); Utah Code Ann. § 30-3-38(4) (2000); Va. Code Ann. § 8.01-576.10 (1994); Wash. Rev. Code § 5.60.070 (1993); Wis. Stat. § 904.085(4)(a) (1997); Wyo. Stat. Ann. § 1-43-103 (1991).

Another reason not to wait is that a uniform statute approved now will encourage mediation in areas not covered currently by a mediation privilege. There are many statutes, particularly older ones, which address confidentiality within the context of a specific program or area of regulation, such as farmer-lender mediation. In those States, unless a mediation falls within this subject-specific statute, it proceeds without any statutory protection whatsoever. *See*, *e.g.*, Ga. Code Ann. § 45-19-36(e) (1989) (fair employment); 775 Ill. Comp. Stat. § 5/7B-102(E)(3) (1989) (human rights); Vt. R. Civ. P., Rule 16.3 (1998) (general civil); W. Va. Code § 6B-2-4(r) (1990) (public employees).

4. A product of a consensual process.

The Mediation Act results from an historic collaboration. The Uniform Law Commission Drafting Committee, chaired by Judge Michael 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 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, they 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 thanks 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). Their work and that of the Drafting Committees was assisted through expert research coordination by Emily Haynes.

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 and Academy of Family Mediators), National Council of Dispute Resolution Organizations, American Arbitration Association, Federal Mediation and Conciliation Service, National Association of District Attorneys, Judicial Arbitration and Mediation Services, Inc. (JAMS), CPR Institute for Dispute Resolution, 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 Labor and Employment Law, American Bar Association Section of Litigation, American Bar Association Senior Law Division, American Trial Lawyers Association, Equal Employment Advisory Council, International Academy of Mediators, 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.

5. 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. 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. *See* Section 2.

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, fit this category. The drafters also recognized that some general standards were often better applied through those who administer ethical standards or local rules, where an advisory opinion might be sought to guide persons faced with 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, 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. 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.

To avoid unnecessary disruption, on the critical issue of confidentiality, the Act adopts the structure used by the overwhelming majority of these general application States: the evidentiary privilege. 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 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 14 which will be repealed and which will remain in force.

UNIFORM MEDIATION ACT

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

SECTION 2. APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration must be given to:

(1) the need 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;

(2) 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;

(3) the policy that the decision-making authority in the mediation process rests with the parties; and

(4) the need to promote uniformity of the law with respect to its subject matter among States that enact it.

Reporter's Notes

1. Section 2(1). Importance of candor.

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* Rogers & McEwen, *supra*, at apps. A and B. As discussed above, 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 specific substantive statutes. *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 encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange is 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. 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). 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). This rationale has sometimes been extended to mediators to encourage mediators to be candid with the parties by allowing them to block evidence of their notes and other mediation communications. *See, e.g.*, Ohio Rev. Code Ann. § 2317.023 (West 1996).

The drafters also recognized 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, 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, § 712(c) (1998) (employment discrimination); Fla. Stat. Ann. § 760.34(1) (1997) (housing discrimination); Ga. Code Ann. § 8-3-208(a) (1990) (housing discrimination); Neb. Rev. Stat. § 20-140 (1973) (public accommodations); Neb. Rev. Stat. § 48-1118 (1993) (employment discrimination); Cal. Evid. Code § 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 administrative 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 the courts have enforced court orders or rules regarding nondisclosure through orders striking pleadings and fining lawyers. *See 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). The contribution of a statute for this aspect of confidentiality would be to codify the common law. Promises, contracts, and court rules or orders are unavailing, however, with respect to discovery, deposition, 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.

It is important to note that these exceptions need not significantly hamper candor, particularly in a Uniform Act. 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. If they realize that they will be unable to show that another party lied during mediation, they will ask for corroboration of the statement made in mediation

prior to relying on the accuracy of it. 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.

2. Section 2(2). Public policy favoring the use of mediation.

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 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. Studies repeatedly confirm the satisfaction that individual participants have with mediation as an alternative to continued litigation. *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 Ohio St. J. on Disp. Resol. 885 (1998).

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. 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, and the popularity of mediation, and have publicly supported mediation through funding and statutory provisions that have expanded dramatically over the last twenty years. *See*, Nancy H. Rogers & Craig A. McEwen, Mediation Law, Policy, Practice

5:1-5:19 (2nd ed. 1994 & Sarah R. Cole, et al., supp. 1999) [hereinafter Rogers & McEwen]; 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* Rogers & McEwen, *supra* apps. A and B.

The primary guarantees of fairness within mediation are 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).

3. Section 2(3). Decision-making rests with the parties.

This section provides particular emphasis to the role of the parties, discussed in the last paragraph of the previous section.

4. Section 2(4). Need to promote uniformity.

As discussed in the preface, point 3, 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.

SECTION 3. DEFINITIONS. In this [Act]:

(1) "Court" means [designate a court of competent jurisdiction in this State].

(2) "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.

(3) "Mediation communication" means a statement, whether oral, in a record, verbal, or nonverbal, that is made or occurs during a mediation or for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(4) "Mediator" means an individual, of any profession or background, who conducts a mediation.

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

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

(7) "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.

(8) "Proceeding" means a legislative hearing or similar process, or a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery.

(9) "Record," except in the phrase "record of proceeding," 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.

(10) "Sign" includes to attach or logically associate an electronic sound, symbol, or process with a record with an intent to sign the record.

Reporter's Notes

1. Section 3(2). "Mediation."

The emphasis on negotiation in this definition is designed to exclude adjudicative processes, such as arbitration and factfinding, as well as counseling. It was 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 3(3). "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 5-8. 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 intended as an assertion. Ark. Code Ann. § 16-7-206 (1993); Cal. Evid. Code § 1119 (West 1997); Fla. Stat. Ann. § 44.102 (1999); Iowa Code Ann. § 679C.3 (1998); Kan. Stat. Ann. § 60-452a (1964) (assertive representations); Mass. Gen. Laws ch. 233, § 23C (1985); Mont. Code Ann. § 26-1-813 (1999); Neb. Rev. Stat. § 25-2914 (1997); Nev. Rev. Stat. § 25-2914 (1997) (assertive representations); N.C. Gen. Stat. 7A-38.1(1) (1995); N.J. Rev. Stat. § 2A:23A-9 (1987); Ohio Rev. Code Ann. § 2317.023 (West 1996); Okla. Stat. tit. 12, § 1805 (1983); Or. Rev. Stat. Ann. § 36.220 (1997); 42 Pa. Cons. Stat. Ann. § 5949 (1996); R.I. Gen. Laws § 9-19-44 (1992); S.D. Codified Laws § 19-13-32 (1998); Va. Code Ann. § 8.01-576.10 (1994); Wash. Rev. Code § 5.60.070 (1993); Wis. Stat. § 904.085(4)(a) (1997); Wyo. Stat. Ann. § 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. 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. Similarly, 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 during the mediation to clarify a point for other participants would be a "mediation communication," as would a memorandum prepared for the mediator by an attorney for a party.

The provision makes clear that conversations to initiate mediation and other non-session communications that are related to a mediation are considered "mediation communications." This would include mediation "briefs" prepared by the parties for the mediator. 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 3(3) is narrowly tailored to permit the application of the privilege to protect communications which 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." Protecting the confidentiality of such a communication 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 "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 § 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.

3. Section 3(4). "Mediator."

Several points are worth stressing with regard to the definition of mediator. First, the phrase "of any profession or background" is intended to make clear that one need not be a lawyer-mediator to qualify as a mediator under this Act.

Second, this definition should be read in conjunction with the model language in Section 8(d) and (e) on disclosures of conflicts of interest. The Drafting Committees considered whether to provide that the mediator must be impartial or neutral in this definition. The problem with adding these terms is the danger of meta-litigation over whether the mediator was in fact free from bias and therefore whether the information could be disclosed. This might be ameliorated by companion provisions regarding its non-use for these purposes, but that would create complexity. On balance, the Drafting Committees recommended addressing this issue through the more specific conflict provisions in Section 8(d) and (e), but add a legislative note to warn that such a provision might be added elsewhere, particularly if the State will use this definition for referral and qualifications statutes.

4. Section 3(5). "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 5(b)(4).

5. Section 3(6). "Party."

The Act defines "party" to be a person who participates in a mediation and has some stake in the resolution of the dispute, or 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. Drafters had previously used the word "disputant" to emphasize that mediation often involves individuals and entities that are not in litigation, but comments to earlier drafts suggested the term was too unfamiliar to be incorporated into a uniform law.

Because of these structural limitations on the definition of parties, participants who do not meet the definition of "party", such as a witness or expert on a given issue, do not hold the privilege, and do not have the rights under additional sections that are provided to parties. 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 party may participate in the mediation in person, by phone, or electronically. An entity 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 5-8.

6. Section 3(7). "Person" and Section 3(9). "Record."

Sections 3(7) and 3(9) adopt 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. Section 3(9) should be read together with Section 3(10).

7. Section 3(8). "Proceeding."

Section 3(8) was added to allow the drafters to delete repetitive language throughout the draft.

8. Section 3(10). "Sign."

This subsection read together with Section 3(9) makes clear that electronic signatures and documents are on the same footing as written ones. The section uses the standard language tentatively approved by the Standby Committee for the Uniform Electronic Transactions Act for the Conference, and will substitute new language when this is approved.

SECTION 4. SCOPE.

(a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which the parties agree in a record to mediate or are required by statute or referred by a court, governmental entity, or arbitrator to mediate.

(b) This [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 the collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with a public agency or court;

(3) involving parties who are all minors which is conducted under the auspices of a primary or secondary school or correctional institution; or

(4) conducted by a judicial officer who might make a ruling on the case or who is not prohibited by court rule from communicating with a court, agency or other authority as provided by Section 8(a).

(c) If the parties agree in advance that all or part of a mediation is not privileged, the privileges under Sections 5 through 7 do not apply to the mediation or part agreed upon. The agreement must be in a signed record or reflected in the record of a proceeding.

Reporter's Notes

1. Section 4(a). Mediations covered by Act; triggering mechanisms.

The Act is broad in its coverage of mediation, a departure from the typical state statute that applies 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. § 48-168 (1993) (worker's compensation); Iowa Code § 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. Because of the breadth of coverage, it is important to delineate the limits of what is covered. But specifying limits is difficult in many mediation contexts. For this reason, the Drafting Committees included a triggering mechanism.

The triggering requirement of appointment or engagement is designed to provide clarity as to which mediations are covered by the Act. The definition affects not only the breadth of the mediation privilege but also whether the mediator has the obligations regarding disclosure of conflict of interest, qualifications, and communications to courts, agencies and investigative authorities in Section 9 and requirements regarding accompanying individuals in Section 10. This triggering requirement is necessary, because, unlike other professionals – such as doctors, lawyers, and social workers – mediators are not licensed. The engagement should be clear, evidenced in recorded form. Otherwise, even a casual discussion over a backyard fence might later be deemed to have been a mediation, unfairly surprising those involved.

The Drafting Committees discussed whether the Act should cover the many cultural and religious practices that are similar to mediation and use a person similar to the mediator, as defined in these sections. 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 undesirable. On balance, the Drafting Committees decided that those involved should make the choice to be covered by the Act in those instances in which other requirements of Sections 3(2) and 3(3) are met by entering into an agreement to mediate reflected by a record or securing a court or agency referral. At the same time, these persons could avoid the Act's coverage by not using this triggering mechanism. This leaves a great deal of leeway, appropriately, with those involved in the practices.

For purposes of this subsection, the parties may agree in a signed record or in a record that is not signed, such as in oral statements during a court proceeding

that is recorded. In the latter case, the parties' words themselves must be recorded. A later note by one party that they agreed to mediate would not constitute a record of an agreement to mediate.

2. Section 4(b)(1) and (2). Exclusion of labor law.

Finally, the Act exempts certain classes of mediated disputes out of respect for the unique public policies that override the need for uniformity under the Act in those contexts. 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 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. The Drafting Committees intended the Act to cover employment discrimination disputes not arising under the collective bargaining agreement and employment disputes arising after the expiration of the collective bargaining agreement.

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

The Act also exempts school programs involving mediations between minors because the supervisory needs of schools toward minors, particularly in peer mediation, may not be consistent with the confidentiality provisions of the Act. *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).

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

This subsection excludes certain judicially conducted mediations from the Act. Difficult issues arise in mediations that are conducted by judges during the course of settlement conferences related to pending litigation. *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). Such 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. In situations in which a part of the function of judicial conferencing is case management, the parties hardly have an expectation of confidentiality in the proceedings, even though there may be settlement discussions initiated 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. The Act draws the line, first, to exclude those in which information from the mediation might be used indirectly in adjudication, because the judicial officer later rules or informs a ruling on the case. This distinction also makes clear that mediations conducted by retired judges, who may not make or inform rulings, are within the Act's scope. Second, the Act excludes judicially-hosted mediation if the court does not have a prohibition in an court rule, like that in Section 8(a), against disclosure to another judicial officer. In either situation, it would be unfair to the mediation party if the privilege blocked that party's attempt to refute the mediator's report or communication. The courts may still provide for confidentiality of other court mediation through local rule, though the local rule may not provide assurance of confidentiality if the mediation communications are sought in another jurisdiction and if the jurisdiction does not permit creation of privilege by local rule.

5. Section 4(c). Alternative of open mediation.

This subsection allows the parties to opt for a non-privileged mediation session. If they do so, the privilege sections of the Act do not apply. Parties may seek such an open mediation for public policy mediation, placing an emphasis on access rather than confidentiality. Parties may also use this option if they wish to rely on, and therefore use in evidence, statements made during the mediation, furthering principles of self-determination. It is the parties rather than the mediator who make this choice, although mediators could presumably refuse to mediate an open mediation 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 6. In this instance, however, the mediator and other participants can block the waiver in some respects. As a matter of good practice, the parties should inform the mediators or nonparty participants of this agreement.

6. 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. § 1-567.60 (1991); Cal. Civ. Pro. § 1297.401 (West 1988); Fla. Stat. Ann. § 684.10 (1986).

The non-privilege sections of the Act would cover all mediation occurring in the enacting State. The coverage for the privilege sections would mirror that of other privileges. As discussed in the comments to the preface, point 2, some courts apply privilege law to all cases arising in the courts of that State; others sometimes accord comity to a privilege statute where the mediation occurred.

SECTION 5. CONFIDENTIALITY OF MEDIATION COMMUNICATIONS; PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.

(a) A mediation communication is confidential and, if privileged, is not subject to discovery or admissible in evidence in a proceeding.

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

(1) A 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.

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

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

(c) Evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its 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 § 703.5 (West 1994).

Reporter's Notes

1. In general.

Sections 5 through 8 set forth the Uniform Mediation Act's general structure for protecting the confidentiality of mediation communications against disclosure in later legal proceedings. Section 5 sets forth the evidentiary privilege, which provides that disclosure of mediation communications cannot be compelled in designated proceedings 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 as well, unless within an exception delineated in Section 7 or waived under the provisions of Section 6. It further delineates the fora in which the privilege may be asserted. The term "proceeding" is defined in Section 3(8).

2. The privilege structure.

The privilege structure employed by the Act to protect confidentiality 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. § 12-2238 (West 1993); Ariz. Rev. Stat. Ann. § 16-7-206 (1997); Iowa Code § 679C.2 (1998); Kan. Stat. Ann. § 60-452 (1964); La. Rev. St. Ann. § 9:4112 (1997); Me. R. Evid. § 408 (1997); Mass. Gen. Laws ch. 233, § 23C (1985); Mont. Code ann. § 26-1-813 (1999); Nev. Rev. Stat. § 48.109(3) (1993); Ohio Rev. Code Ann. § 2317.023 (West 1996); Okla. stat. tit. 12, § 1805 (1983); Or. Rev. Stat. Ann. § 36.220 (1997); 42 Pa. Cons. Stat. Ann. § 5949 (1996) (general); R.I. Gen. Laws § 9-19-44 (1992); S.D. Codified Laws § 19-13-32 (1998); Tex. Civ. Prac. & Rem. Code § 154.053 (c) (1999); Utah Code Ann. § 30-3-38(4) (2000); Va. Code Ann. § 8.01-576.10 (1994); Wash. Rev. Code § 5.60.070 (1993); Wis. Stat. § 904.085(4)(a) (1997); Wyo. Stat. § 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 § 703.5 (West 1994) and Cal. Evid. Code §§ 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. § 2317.023 (West 1996); Fla. Stat. Ann. § 44.102 (1999); Wash. Rev. Code Ann. § 5.60.072 (West 1993); *see generally*, Rogers & McEwen, *supra*, at §§ 9:10-9:17. Moreover, States have been even more consistent in using the privilege structure for mediation offered by publicly funded entities. *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 25-381.16 (West 1977) (domestic court); Ark. Code. Ann. § 11-2-204 (Arkansas Mediation and Conciliation Service) (1979); Fla. Stat. Ann. § 44.201 (publicly established dispute settlement centers) (West 1998); 710 Ill. Comp. Stat . § 20/6 (1987) (non-profit community mediation programs); Ind. Code Ann. § 4-6-9-4 (West 1988) (Consumer Protection Division); Iowa Code Ann. § 216.15B (West 1999) (civil rights commission); Minn. Stat. Ann. § 176.351 (1987) (workers' compensation bureau); Cal. Evid. Code § 1119, *et seq.* (West 1997); Minn. Stat. Ann. § 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 communication 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. § 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).

3. Operation of the 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 § 72; *Developments in the Law – Privileged Communications*, 98 Harv. L. Rev. 1450 (1985). By narrowing the protection to such communications, these provisions allow for the enforcement of agreements to mediate, for example, by permitting evidence as to whether a mediation occurred, and who attended. Communications privileges also allow the use of other important evidence of actions taken, such as money received, during a mediation. The privilege structure safeguards against abuse by preventing those not involved in the mediation from taking advantage of the confidentiality, thereby foreclosing the availability of evidence without serving the purposes underlying the confidentiality. For example, if those involved in a divorce mediation draft a schedule of the couple's assets and their values, a stranger to the mediation cannot keep one of the mediation parties from using that document in later litigation.

This blocking function is critical to the operation of the privilege. Parties 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.

As a practical matter, the person who holds the 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 problems in the usual case in which the mediation party is one of the parties to the proceeding when a party seeks to obtain or use the evidence. 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* Reporter's Notes for Section 5; *see also* Paul R. Rice, et.

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

4. Holder of the privilege.

a. In general.

A critical component of the Act's general rule is its designation of the holder – i.e., the person who can 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. § 20/6 (1987) (community dispute resolution centers); Ind. Code § 20-7.5-1-13 (1987) (university employee unions); Iowa Code § 679.12 (1985) (general); Ky. Rev. Stat. Ann. § 336.153 (1988) (labor disputes); 26 Me. Rev. Stat. Ann. § 1026 (1999) (university employee unions); Mass. Gen. Laws ch. 150, § 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. § 11-2-204 (1979) (labor disputes); Fla. Stat. Ann. § 61.183 (1996) (divorce); Kan. Stat. Ann. § 23-605 (1999) (domestic disputes); N.C. Gen. Stat. § 41A-7(d) (1998) (fair housing); Or. Rev. Stat. Ann. § 107.785 (1995) (divorce) (providing that the parties are the sole holders) *with* Cal. Evid. Code § 1122 (West 1997) (general) Ohio Rev. Code Ann. § 2317.023 (West 1996) (general); Wash. Rev. Code Ann. § 7.75.050 (1984) (dispute resolution centers), all of which make 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. § 2317.023 (West 1996) (general); Wash. Rev. Code § 5.60.070 (1993) (general). In addition, the Act provides a limited privilege for nonparty participants, as discussed in subsection (c) below.

b. Parties as holders.

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because there are several parties whose interests conflict. On closer examination, however, it is analogous to

the attorney-client privilege. First, it is the mediation parties' candor that is the paramount justification for the mediation privilege, just as it is the client's candor that is the paramount justification for the attorney-client privilege. Second, the attorney-client privilege also sometimes applies in situations of differing interests among clients, notably 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). Another situation involving the attorney-client privilege and possible conflicting interests is seen 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). In mediation, the parties' interests also conflict, so it is natural to require waiver by both in order for the waiver to be effective.

c. 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. § 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.

5. Proceedings at which the privilege applies.

The privilege under Section 5 applies in most legal proceedings. If the privilege is raised in a criminal felony proceeding, it is subject to a special weighing process by Section 7(b)(1). Existing statutes 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 States reflect clashing policy interests. In most situations, the parties can speak candidly about the civil differences without getting into conversations that include discussions of criminal acts, and therefore the need for such coverage in criminal proceedings is not substantial. However, the prospect of an inaccurate decision because of unavailable evidence is of great importance in those proceedings that do include discussions of

criminal acts. At the same time, public policy supports the mediation of gang disputes and mediation of some criminal acts in specified contexts, and these programs may be less successful if the parties cannot discuss the criminal acts underlying the disputes. Cal. Penal Code § 13826.6 (West 1996) (mediation of gang-related disputes); Colo. Rev. Stat. § 22-25-104.5 (1994) (mediation of gang-related disputes). The public's decision to use or support mediation constitutes an acknowledgment that settlement, rather than correct determination, is the prevalent policy for these cases.

The reason for tying the Section 7(b)(1) exception to felony proceedings is to permit the courts to weigh both the rights of litigants and the policy favoring confidentiality of mediation communications. Even without an exception, the courts will sometimes 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). This provision extends the same right to evidence introduced by the prosecution, thus evening the playing field. In addition, it puts the parties on notice of this limitation on confidentiality.

The words "is not subject to discovery or admissible in evidence" 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 5, 6, and 7. It does not change the reach of the remainder of the section.

6. Section 5(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.

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. § 44.102 (1999) (general); Minn. Stat. Ann. § 595.02 (1996) (general); Ohio Rev. Code Ann. § 2317.023 (West 1996) (general); Wash. Rev. Code § 5.60.070 (1993) (general).

SECTION 6. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 5 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 5, 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 conceal an ongoing crime or criminal activity may not assert a privilege under Section 5.

[(d) A person that violates Section 8 [(d) through (f)] is not precluded by the violation from asserting a privilege under Section 5.]

Reporter's Notes

1. Section 6(a) and (b). Waiver and preclusion.

Section 6 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 recorded through a writing or electronic record or during the specified types of proceedings, or through estoppel, as described below. In this way, the provisions differ from the attorney-client privilege, which is waived by most disclosures. *See* Michael H. Graham, Handbook of Federal Evidence § 511.1 (4th ed. 1996). The rationale for requiring explicit waiver is to protect the practice, often salutary, of parties discussing their dispute and mediation with friends and relatives. In addition, in all of the settings described there is a sense of formality and awareness of legal rights. Most of the covered proceedings are conducted on the record, easing the difficulties of establishing what was said. In arbitration, which is sometimes conducted without an ongoing record, it will be important 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.

Read together with Section 5, the waiver operates as follows:

- For party mediation communications, a party or nonparty participant may testify or provide evidence only if all parties waive the privilege, and a mediator may testify if all parties and the mediator waive the privilege.

- For mediation communications by the mediator, a party, mediator, or nonparty participant may testify or provide evidence only if all parties and the mediator waive the privilege. Thus, a party may testify if all parties waive the privilege, but a mediator may testify or provide evidence only if all parties and the mediator waive the privilege.

- For nonparty participant mediation communications, a person may testify only if all parties and the nonparty participant waive the privilege, but the mediator may testify about this only if all parties, the nonparty participant, and the mediator waive the privilege.

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 to the Act an estoppel 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 causes prejudice. As under existing interpretations for other communications privileges, waiver through estoppel 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). The estoppel 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 admitted 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 continued recognition of the privilege, while the casual conversation would not. Thus, if A and B were the parties in a mediation, and A affirmatively stated in court that B admitted destroying evidence during the mediation, A would have effectively waived the protections of this statute regarding whether the statement was made during the mediation. In other words, A is estopped from asserting that A did not waive the privilege. If B decides to waive as well, evidence of A's and B'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.

2. Section 6(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. However, it narrows the preclusion to remove the confidentiality protection only when an actor uses or attempts to use the mediation to further the commission of a crime, rather than lifting the confidentiality protection more broadly to any discussion of crimes. This subsection should be read together with Section 7(a)(4), which applies to particular communications within a mediation which are used for the same purposes. This rationale is discussed more fully in the Reporter's Working Notes to Section 7(a)(4).

3. Section 6(d). Effects of violations of other provisions.

The individuals who think the mediation is privileged would be unfairly surprised if the privilege is precluded because the mediator violates a provision in Sections 8(d) through (f) and 9, and this provision makes clear that such a violation would not affect the privilege. This subsection is bracketed because it refers to bracketed subsections. Only those States adopting Section 8(d) through (f) should adopt Section 6(d).

SECTION 7. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege against disclosure under Section 5 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 [open records law] 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 to inflict bodily injury;

(4) intentionally used to plan, attempt to commit or commit a crime, or conceal an ongoing crime or criminal activity;

(5) 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; but this exception does not apply where a [child protection] case is referred by a court to mediation and a public agency participates [, or a public agency participates in the [child protection] mediation];

(6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or

(7) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, nonparty participant, or representative of a party based on conduct occurring during a mediation, except as otherwise provided in subsection (c).

(b) There is no privilege under Section 5 if a court, administrative agency, or arbitration panel 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 the mediation communication is sought or offered in:

(1) a court proceeding involving a felony; or

(2) a proceeding to prove a claim or defense to reform or avoid liability on a contract arising out of the mediation, except as otherwise provided in subsection (c).

(c) A mediator may not be compelled to provide evidence of a mediation communication that is not privileged under subsection (a)(7) 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.

Reporter's Notes

1. In general.

This section articulates exceptions to the broad grant of privilege provided to mediation communications in Section 5 and to the prohibition against disclosure Section 8(a) and (b). 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 7(a) apply regardless of the need for the evidence. In contrast, the exceptions under Section 7(b) would apply only in situations in which there is a hearing, and the proponent of the evidence meets a high standard of need that substantially outweighs other policies. The reason for the distinction is that the exceptions listed in (b) include situations that should remain confidential but for overriding concerns for justice.

2. Section 7(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 a mediated settlement 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 3(9) and 3(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 transcription 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. § 12-2238 (1993); Cal. Evid. Code § 1120(1) (West 1997) (general); Cal. Evid. Code § 1123 (West 1997) (general); Cal. Gov't. Code

§ 12980(i) (West 1998) (housing discrimination); Colo. Rev. Stat. § 24-34-506.5 (1993) (housing discrimination); Ga. Code Ann. § 45-19-36(e) (1989) (fair employment); 775 Ill. Comp. Stat. § 5/7B-102(E)(3) (1989) (human rights); Ind. Code § 679.2 (1998) (general); Iowa. Code Ann. § 216.15(B) (1999) (civil rights); Ky. Rev. Stat. Ann. § 344.200(4) (1996) (civil rights); La. Rev. Stat. Ann. § 9:4112(B)(1)(c) (1997) (general); La. Rev. Stat. Ann. § 51:2257(D) (1998) (human rights); 5 Me. Rev. Stat. Ann. § 4612(1)(A) (1995) (human rights); Md. Code 1957 Ann. Art. 49(B) § 28 (1991) (human rights); Mass. Gen. Laws. ch. 151B, § 5 (1991) (job discrimination); Mo. Rev. Stat. § 213.077 (1992) (human rights); Neb. Rev. Stat. § 43-2908 (1993) (parenting act); N.J. Stat. Ann. § 10:5-14 (1992) (civil rights); Or. Rev. Stat. Ann. § 36.220(2)(a) (1997) (general); Or. Rev. Stat. Ann. 36.262 (1989) (agricultural foreclosure); 42 Pa. Consol. Stat. § 5949(b)(1) (1996) (general); Tenn. Code Ann. § 4-21-303(d) (1996) (human rights); Tex. Gov't. Code Ann. § 2008.057 (1999) (Administrative Procedure Act); Vt. R. Civ. P., Rule 16.3 (1998) (general civil); Va. Code Ann. § 8.01-576.10 (1994) (general); Va. Code Ann. § 8.01-581.22 (1988) (general); Wash. Rev. Code § 5.60.070 (1)(e) and (f) (1993) (1993) (general); Wash. Rev. Code § 26.09.015(3) (1991) (divorce); Wash. Rev. Code § 49.60.240 (1995) (human rights); W.Va. Code § 5-11A-11(b)(4) (1992) (fair housing); W.Va. Code § 6B-2-4(r) (1990) (public employees); Wis. Stat. § 767.11(12) (1993) (family court); Wis. Stat. § 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. 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. § 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 § 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 §§ 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. However, confidentiality agreements reached in mediation, like those in other settlement situations, are subject to the need for evidence and public policy considerations. *See* Rogers & McEwen, *supra*, §§ 9.23, 9.25.

3. Section 7(a)(2). Meetings and records open by law, and public policy mediations.

Section 7(a)(2) makes clear that the privileges in Section 5 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 for a public policy 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 confidentiality 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 7(a)(3). Threats of bodily injury.

The policy rationales supporting the privilege do not support mediation communications that threaten bodily injury. To the contrary, in these cases

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

5. Section 7(a)(4). Communications used to plan or commit a crime.

The policies underlying this provision mirror those underlying Section 6(c), and are discussed there. This exception applies to particular communications used to plan or commit a crime, whereas Section 6(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. § 13-22-307 (1991) (general) (future felony); Fla. Stat. Ann. § .723.038(8) (mobile home parks) (ongoing or future crime or fraud); Iowa Code § 216.15B (1999) (civil rights); Iowa Code § 654A.13 (1990) (farmer-lender); Iowa Code § 679C.2 (1998) (general) (ongoing or future crimes); Kan. Stat. Ann. § 23-605(b)(3) (1989) (ongoing and future crime or fraud); Kan. Stat. Ann. § 44-817(c)(3) (1996) (labor) (ongoing and future crime or fraud); Kan. Stat. Ann. § 75-4332(d)(3) (1996) (public employment) (ongoing and future crime or fraud); 24 Me. Rev. Stat. Ann. § 2857(2) (1999) (health care) (to prove fraud during mediation); Minn. Stat. § 595.02(1)(a) (1996) (general); Neb. Rev. Stat. § 25-2914 (1994) (general) (crime or fraud); N.H. Rev. Stat. Ann. § 328-C:9(III) (1998) (domestic relations) (perjury in mediation); N.J. Stat Ann. § 34:13A-16(h) (1997) (workers' compensation) (any crime); N.Y. Lab. Laws § 702-a(5) (McKinney 1991) (past crimes) (labor mediation); Or. Rev. Stat. Ann. § 36.220(6) (1997) (general) (future bodily harm to a specific person); S.D. Codified Laws § 19-13-32 (1998) (general) (crime or fraud); Wyo. Stat. Ann. § 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. § 723.038(8) (1994) (mobile home parks) (communications made in furtherance of commission of crime or fraud); Kan. Stat. Ann. § 23-605(b)(3) (1999) (domestic relations) (ongoing crime or fraud); Kan. Stat. Ann. § 44-817(c)(3) (1996) (labor) (ongoing crime or fraud); Kan. Stat. Ann. § 60-452(b)(3) (1964) (general) (ongoing or future crime or fraud); Kan. Stat. Ann. § 75-4332(d)(3) (1996) (public employment) (ongoing or future crime or fraud); Neb. Rev. Stat. § 25-2914 (1994) (general) (crime or fraud); S.D. Codified Laws § 19-13-32 (1998) (general) (crime or fraud).

This exception does not cover mediation communications constituting admissions of past crimes, or past potential crimes, which remain privileged. Therefore, 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 note that this provision does not prohibit disclosures outside of proceedings, which could be governed by contract if the parties so agreed by tort law if assurances are provided, or by court rule or order. Thus, it does not prevent a party from calling the police.

6. Section 7(a)(5). 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. § 679c.3(4) (1998) (general); Kan. Stat. Ann. § 23-605(b)(2) (1999) (domestic relations); Kan. Stat. Ann. § 38-1522(a) (1997) (general); Kan. Stat. Ann. § 44-817(c)(2) (1996) (labor); Kan. Stat. Ann. § 72-5427(e)(2) (1996) (teachers); Kan. Stat. Ann. § 75-4332(d)(1)

(1996) (public employment); Minn. Stat. Ann. § 595.02(2)(a)(5) (1996) (general); Mont. Code Ann. § 41-3-404 (1999) (child abuse investigations) (mediator may not be compelled to testify); Neb. Rev. Stat. § 43-2908 (1993) (parenting act) (in camera); N.H. Rev. Stat. Ann. § 328-C:9(III)(c) (1998) (marital); N.C. Gen. Stat. § 7A-38.1(L) (1999) (superior court); N.C. Gen. Stat. § 7A-38.4(K) (1999) (district courts); Ohio Rev. Code Ann. § 3109.052(c) (West 1990) (child custody); Ohio Rev. Code Ann. § 5123.601 (West 1988) (mental retardation); Ohio Rev. Code Ann. § 2317.02 (1998) (general); Or. Rev. Stat. § 36.220(5) (1997) (general); Tenn. Code Ann. § 36-4-130(b)(5) (1993) (divorce); Utah Code Ann. § 30-3-38(4) (2000) (divorce) (mediator shall report); Va. Code Ann. § 63.1-248.3(A)(10) (2000) (welfare); Wis. Stat. § 48.981(2) (1997) (social services): Wis. Stat. § 904.085(4)(d) (1997) (general); Wyo. Stat. § 1-43-103(c)(iii) (1991) (general). *But see* Ariz. Rev. Stat. Ann. § 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 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 participant. The exception does not apply in private actions, such as divorce, because the need for the evidence is not as great, and is outweighed by the policy of promoting candor during mediation. Stronger policies favor disclosure in proceedings brought to protect against abuse and neglect, so that the harm can be stopped. For example, in a mediation between A and B who are seeking a divorce, B admits to sexually abusing a child. B'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 phrase makes 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 use of mediation in these contexts point to the need for privilege, and this phrase provides it. National Council of Juvenile and Family Court Judges, *Resource Guidelines: Improving the Child Abuse and Neglect Court Process*, 1995. The words "child 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. This exception only applies to cases referred by the court or public agency and so allegations already have been made in an official context. For example, in a mediation convened because of allegations that a parent failed to feed the child properly, statements by that parent admitting the allegation would be privileged. An admission by the parent to beating that child, in contrast, would not be privileged if not part of the referred case. 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.

7. Section 7(a)(6). Evidence of professional misconduct or malpractice by the mediator.

The rationale behind the exception is that disclosures may be necessary to make procedures for grievances against mediators function effectively, 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).

8. Section 7(a)(7). 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. The use of mediator testimony is more guarded, and therefore protected by Section 7(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).

9. Section 7(b). Exceptions requiring demonstration of need.

The exceptions under this subsection constitute unusual fact patterns that may sometimes justify carving an exception, but only when the need is strong, the evidence is otherwise unavailable, and these considerations outweigh the policies underlying the privilege and prohibitions from disclosure by mediators in Section 8(a) and (b). The evidence will not be disclosed absent a court finding on these points after an in camera hearing. Further, under Section 8(c) the evidence will be admitted only for that limited purpose.

10. Section 7(b)(1). Felony.

This subsection is discussed in the commentary to Section 6, point 5.

11. Section 7(b)(2). Validity and enforceability of settlement agreement.

This exception is designed to preserve specific contract defenses 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 that B denied having insurance, causing A 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 would not be privileged if the weighing requirements were met. This exception differs from the exception for a record of an agreement in Section 8(a)(1) in that Section 8(a)(1) only exempts the admissibility of the record of the agreement, while the exception in Section 8(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.

Section 7(c) allows the mediator to decline to testify or otherwise provide evidence that is deemed not to be privileged under this exception to protect against frequent attempts to use a tie-breaking witness. Nonetheless, the parties and others may testify or provide evidence.

12. Section 7(c). Mediator not compelled.

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

13. Section 7(d). Limitations on exceptions.

This subsection makes clear the limited use that may be made of mediation communications that are admitted under the exceptions delineated in Sections 7(a) and 7(b). For example, if a statement evidence child abuse in 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 8. DISCLOSURE BY MEDIATOR.

(a) A mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, agency, or other authority that may make a ruling on the dispute that is the subject of the mediation, but 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 7; or

(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(b) A communication made in violation of subsection (a) may not be considered by a court or other tribunal.

(c) Subsection[s] (a) [and (d) through (f)] do[es] not apply to an individual acting as a judicial officer.

[(d) 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 party or foreseeable participant in the mediation; and

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

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

[(f) A mediator shall disclose the mediator's qualifications to mediate a dispute, if requested to do so by a party.]

Reporter's Notes

1. Section 8(a). Disclosures by the mediator to an authority that may make a ruling on the dispute being mediated.

Section 8(a) prohibits communications by the mediator in prescribed circumstances. In contrast to the privilege, which gives a right to refuse to provide evidence, this subsection creates a prohibition against disclosure. It applies in the limited context of the communication to a judge, agency, or other authority that may make a ruling on the dispute that is the subject of the mediation, thereby not prohibiting mediators from reporting threatened harm to appropriate authorities, for example, if learned during a mediation to settle a civil dispute. Some States have already adopted similar prohibitions. *See, e.g.*, Cal. Evid. Code § 1121 (West 1997); Fla. Stat. Ann. § 373.71 (1999) (water resources); Tex. Civ. Prac. & Rem. Code § 154.053 (c) (West 1999) (general). Disclosures of mediation communications to a judge also would 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). In addition, seminal reports in the 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).

The communications by the mediator to the court or other authority are circumscribed narrowly. They 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. An earlier draft did not allow party waiver of this provision. It is not clear under current language whether this section can be waived. One instance in which it might be waived is the situation of a public policy mediation in which the judge may want, with the parties' permission, periodic reports from the mediator about whether the mediation should continue. On the other hand, a waiver provision might lead to pressure on the parties to waive this right. The reporters recommend that the waiver issue be clarified.

2. Section 8(b). Report in violation of Section 8(a) may not be considered.

This subsection makes clear one implication of a violation – the resulting report may not be considered.

3. Section 8(c). Judicial officer.

This subsection averts a legislative prohibition on certain judicial actions. If the court does not adopt a similar provision to Section 8(a) and (b), however, the Act will not render the mediation privileged because Section 4(b)(3) places the mediation outside the scope of the Act.

4. Sections 8(d) and 8(e). Disclosure of mediator's conflicts of interest. Model law provisions.

While regulations for mediator disclosure are common in professional practice and ethics rules, this is a somewhat novel statutory provision that imposes on mediators the conflict of interest disclosure requirements that are more typically required of arbitrators. *See* Proposed Revisions of the Uniform Arbitration Act, October 1999, Section 9; Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, Section 2(B) (1985) (required disclosures). The subsections are bracketed to signal that they are suggested as model provisions and need not be part of a Uniform Act. Section 9(b) makes clear that the duty to disclose is a continuing one.

The requirement extends to all mediators as defined in Section 3(4). Therefore, it applies to private mediators as well as those in publicly supported programs. It applies to volunteer as well as compensated mediators. The facts to be disclosed in any case will depend upon the circumstances. The goal of such a requirement is to protect the parties against a mediator who, unbeknownst to the parties, is not impartial. No sanctions are provided in the Act, but presumably the Act sets a standard that could be a basis of liability if a party suffers damage as a result of the mediator's failure to disclose conflicts.

2. Section 8(f). Mediator qualifications. Model law provisions.

The disclosure, upon request, of qualifications is a relatively novel requirement. The provision is bracketed to signal that it is suggested as a model provision and need not be part of a Uniform Act. In some situations, the parties may make clear that they care about the mediator's qualifications to conduct a particular approach to mediation and would want to know whether the mediator in the past has used a purely facilitative 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 3(4), 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* Rogers & McEwen, *supra*, § 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.

SECTION 9. NONPARTY PARTICIPATION IN MEDICATION. 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.

Reporter's Notes

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 § 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). 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.

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 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. § 42-810 (1997) (domestic relations) (counsel may attend mediation); N.D. Cent. Code § 14-09.1-05 (1987) (domestic relations) (mediator may not exclude counsel); Okla. Stat. tit. 12, § 1824(5) (1998) (representative authorized to attend); Or. Rev. Stat. § 107.600(1) (1981) (marriage dissolution) (attorney may not be excluded); Or. Rev. Stat. § 107.785 (1995) (marriage dissolution) (attorney may not be excluded); Wis. Stat. § 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 § 3182 (West 1993); Mont. Code Ann. § 40-4-302(3) (1997) (family); S.D. Codified Laws § 25-4-59 (1996) (family); Wis. Stat. § 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 bring 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, can terminate the mediation. The pre-mediation waiver, such as a mediation clause, can be rescinded, because the party may not have understood the implication. However, this provision can be waived once the mediation begins.

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

SECTION 10. ELECTRONIC RECORDS AND SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. The provisions of this [Act] governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. sec. 7002, and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.

[**SECTION 11. SUMMARY ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS.**

(a) Parties that have entered into a mediated settlement agreement evidenced by a record that has been signed by the parties and their attorneys may [move] the court to enter a judgment in accordance with the mediated settlement agreement, if:

(1) all parties to the mediated settlement agreement join in the [motion];

(2) no litigation is pending on the subject matter of the mediation;

(3) all parties to the mediated settlement agreement are represented by an attorney when the mediated settlement agreement is entered and the [motion] is filed;

(4) the mediated settlement agreement contains a statement to the effect that the parties are all represented by an attorney and desire to seek summary enforcement of their agreement;

(5) no party withdraws support for the [motion] before entry of judgment; and

(6) the mediated settlement agreement does not resolve an issue in a divorce or marital dissolution.

(b) If the requirements of subsection (a) are satisfied, the court may enter judgment. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.]

Reporter's Note: The Drafting Committees recommend against adoption of Section 11, which was drafted in response to a request from the National Conference of Commissioners on Uniform State Laws Conference in the Committee of the Whole at the Annual Meeting in Denver, Colorado, on July 30, 1999.]

Reporter's Notes

The Drafting Committees initially raised the idea of this section to the Conference of the Whole in 1999, and that body endorsed further investigation and drafting. The Committees then drafted Section 11. Subsequently, the Drafting Committees decided that, if circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation. Alternative methods include filing an action and immediately filing a consent judgment or making the settlement a part of an arbitration with a conciliated agreement. The commentary that follows could be used if the Committee of the Whole decided to include Section 11:

Section 11 expands the situations in which a settlement agreement may be given expedited enforcement. Currently, the courts will accord expedited enforcement to settlement agreements in the two situations. In the first such situation, agreements reached pending court or administrative proceedings that are incorporated into an order or judgment of that tribunal may be enforced through a variety of expedited processes, such as liens, attachment, and contempt. *See, e.g.*, Uniform Marriage and Divorce Act § 305; N.D. Cent. Code § 14-09.1-07 (1987);

Ind. Code § 22-9-1-6(p) (1987); *see also* Fla. Stat. § 73.015(3) (1999) (accords presuit mediation agreements enforcement after filing with administrative agency). Agreements reached pending arbitration proceedings that become a part of the arbitral award represent a second category. Some international commercial arbitration statutes specifically authorize conciliation agreements to be enforced as arbitration awards. *See, e.g.*, N.C. Gen. Stat. § 1-567.60 (1991); Cal. Civ. Pro. § 1297.401 (West 1988); Fla. Stat. Ann. § 684.10 (1986). This section is designed to be similar to this new trend in international commercial conciliation agreements.

Under this section, mediated agreements can be registered with a court, with the agreement of the parties, and thereby receive expedited enforcement. Such agreements are enforced currently as are other contracts, often through a contract action that may take months or years to reach judgment and then enforcement. *See* Rogers & McEwen, *supra*, § 4:13 and cases cited therein. This provision expedites that process by dispensing with the need to prove the validity of the agreement should an action arise later under its terms. Rather, the matter could move directly to the issues of whether a particular term had been breached or violated. Mediated agreements are thereby given a special procedural priority not afforded settlement agreements reached without the assistance of a mediator. The purpose in doing so is to provide special encouragement to use a mediator.

In drafting this section, the Drafting Committees were particularly concerned about the possibility that the expedited process for enforcement that it prescribes could be used by more sophisticated or more powerful parties to take advantage of those who might be less sophisticated or less powerful. This concern finds precedent in that a strong analogy may be drawn between the expedited enforcement of a mediated settlement agreement and the so-called "confessions of judgment," or *cognovit notes* that have become substantially discredited at law: both lead to the waiver of important trial rights, and due process protections, and are particularly susceptible to abuse in the absence of specific knowing agreement to their terms.

More particularly, confessions of judgment are a mechanism by which lenders recover sums due when borrowers default. Typically, when securing a loan using a *cognovit note*, the borrower signs an agreement that states that the lender can obtain a court judgment against the buyer in case of default, without further notification or consent by the borrower. The United States Supreme Court has held that confessions of judgment do not necessarily violate constitutional due process. *See Swarb v. Lennox*, 405 U.S. 191 (1972). However, the practice is disfavored by many courts, and there are both state and federal statutes which outlaw its use in particular contexts. The federal government has restricted the use of *cognovit notes* via the Federal Trade Commission's Credit Practices Rule as well as the Consumer Credit Protection Act of 1968. *See* 16 CFR § 444.2 (West 2000) ("In connection with the extension of credit to consumers in or affecting commerce, . . . it is an

unfair act or practice . . . for a lender or retail investment seller . . . to take or receive from a consumer an obligation that . . . [c]onstitutes or contains a *cognovit* or confession of judgment." 12 C.F.R. § 535.2 (West 2000) ("In connection with the extension of credit to consumers after January 1, 1986, it is an unfair act or practice . . . for a savings association . . . to enter into a consumer credit obligation that constitutes or contains . . . [a] *cognovit* or confession of judgment"). In addition, several States have restricted the practice. One scholar has determined that "seventeen States have abolished confession of judgment upon warrant of attorney before the commencement of action," and that many other States prohibit or limit its use by small loan companies. *See* Peter V. Letsou, *The Political Economy of Consumer Credit Regulation*, 44 Emory L.J. 587, 606 (1995).

Although a mediated settlement may be satisfactory to the parties involved, the drafters have recognized that attorney representation is a crucial prerequisite to any summary enforcement by the court. In addition, there may arise situations in which a party is unaware of a defense until they attempt to enforce a mediated settlement. Section 11(b) preserves these defenses, and precludes judicial enforcement of the agreement when there has been a showing of corruption, fraud, or duress. In addition, in Section 11(a), the Act requires that the parties agree to use the process, and that the agreement be expressed in writing. The mediator must sign the agreement, though only as a witness. Section 11(a)(3) sets a specific and short period of time in which to exercise this option by filing an appropriate application with a court of general jurisdiction, 30 days, to guard against the possibility of its surprising use after significant period of time has elapsed. Section 11(a)(3) also requires that formal notice be provided to all party signatories – that is, notice that would comply with relevant local or state court rules for the provision of legal notice of other motions or applications. *See, e.g.*, Fed. R. Civ. Proc. 5; Cal. Civ. Pro. § 1162 (1982). Section 11(a)(5) provides that the application may not be granted if any party objects for any reason. The objection would be filed as provided for filings under local court rules.

If any of these conditions fail, the court is barred from granting the application, and enforcement of the mediated settlement reverts back to the traditional system of contractual enforcement in public courts. On the other hand, if these conditions are satisfied, then the court must enter the agreement as a judgment, which is enforceable as any other court judgment.

SECTION 12. 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 13. EFFECTIVE DATE. This [Act] takes effect ..... .

SECTION 14. REPEALS. The following acts and parts of acts are hereby repealed:

(1)

(2)

(3)

Reporter's Notes

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 250 different privilege statutes among the States, and these can be repealed. In fact, to do otherwise would interfere with the uniformity of the Act. As noted after Section 5, those States that provide specially that mediators cannot testify and impose damages from wrongful subpoena may elect to retain such provisions. The States will also want to examine provisions dealing with the right to bring counsel to the mediation sessions and the prohibitions or authorizations for reports to the judge, as the Act may render these unnecessary or may conflict.

Many of the existing statutes, in contrast, deal with matters not covered by the Act and should not be repealed in order to provide uniformity. Common examples include mediator qualifications, authorization of mandatory mediation, standards for mediators, and funding for mediation programs.

SECTION 15. 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.