AMERICAN BANKRUPTCY INSTITUTE

Annual Spring Meeting

Mediation of Consumer Bankruptcy Issues

Hosted by the Consumer Bankruptcy and Mediation Committees

Hannah W. Hutman, Moderator
Hoover Penrod PLC; Harrisonburg, Va.

Hon. Thomas J. Catliota
U.S. Bankruptcy Court (D. Md.); Greenbelt

Kara K. Gendron
Mott & Gendron Law; Harrisburg, Pa.

Stephen W. Sather
Barron & Newburger, P.C.; Austin, Texas

CONCURRENT SESSION

2024

American Bankruptcy Institute
Annual Spring Meeting
Washington, D.C.
April 20, 2024

MEDIATION OF CONSUMER BANKRUPTCY CASES

Hon. Thomas J. Catliota
U.S. Bankruptcy Court, District of Maryland
Greenbelt, Maryland

Kara K. Gendron
Mott & Gendron Law
Harrisburg, Pennsylvania

Stephen W. Sather
Barron & Newburger, P.C.
Austin, Texas

Hannah W. Hutman, Moderator
Hoover Penrod PLC
Harrisonburg, Virginia

Materials Included:

1. *Mediation in Consumer Bankruptcy Cases*, by Stephen W. Sather, Barron & Newburger, P.C.. Austin, TX
2. *Mediation in Consumer Bankruptcy Cases: Practical & Ethical Considerations*, by Hon. Cynthia A. Norton, U.S. Bankruptcy Court, W.D. Missouri
3. *Judge Says "Over My Dead Body" to Trustee's Mediation Plans*, by Stephen W. Sayer, A TEXAS BANKRUPTCY LAWYER'S BLOG, October 6, 2014.
4. 42 PA. CONS. STAT. ANN. § 5949, *Confidential Mediation Communications and Documents*
5. UNIFORM MEDIATION ACT, (*Last Revised or Amended in 2003*), drafted by the National Conference of Commissioners on Uniform State Laws, December 10, 2003
6. M.D. PA. LOCAL RULE 9019-2, *Alternative Dispute Resolution*
7. Bankruptcy Dispute Resolution Program, Appendix G
8. Model Standards of Conduct for Mediators, September 2005
9. Sample Confidential Information Form
10. Sample Agreement to Mediate

Mediation in Consumer Bankruptcy Cases

Stephen W. Sather
Barron & Newburger, P.C.
Austin, TX

TV lawyers are constantly heading into trial, sometimes after seeing the file for the first time that morning. On television, the clients never seem to worry about how they are going to pay their lawyers to go to trial. The reality is different in real life, especially when dealing with consumer bankruptcy cases. A consumer debtor seeks a fresh start because their finances are at their breaking point. When a litigation matter pops up, it stands in the way of the fresh start.

Consider the following scenarios:

- Chapter 13 debtor files bankruptcy to save the family homestead. The loan has gone through five different servicers in the past three years. The current servicer claims arrears of $20,000.00 while the Debtor swears that she is only two payments behind.

- A home remodeling contactor files bankruptcy. A customer files a non-dischargeability action claiming that hundreds of thousands of dollars were diverted to other projects. The contractor's records are less than pristine but he claims all of the funds went project and that it was the change orders that caused the job to go over budget.

- A debtor moves to Texas and invests $2.5 million in a lakefront home. 1,210 days later, his former attorney who he stiffed for hundreds of thousands of dollars in legal fees files an involuntary bankruptcy petition against him seeking to take advantage of the limitation on homesteads acquired within 1,215 days under 11 U.S.C. §522(p). The Debtor claims that he has more than twelve creditors so that a single creditor cannot put him into bankruptcy. However, a contractor who he stiffed on building his boat dock and the cable company join in the involuntary petition. The debtor disputes both of these debts.

- A once successful businessman becomes enmired in litigation after he kills a child in an accident that occurred when he looked down to send a text on his phone. His insurance carrier provides a defense but under a reservation of rights. As the litigation drags on, he sells off his non-exempt assets to business associates and relatives on favorable terms. He then agrees to a divorce where his wife gets the remainder of his valuable assets, and he is left with only over encumbered assets. The U.S. Trustee objects to the discharge under 11 U.S.C. §727.

These scenarios illustrate some common circumstances which arise when consumer cases are a good fit for mediation:

- One or both parties lack funds to litigate a case.
- The facts or the law do not allow for an easy resolution, such as submitting the case to the court on stipulated facts.
- The consequences of a loss may be devastating to one party or both.
- Collection may be difficult without the other party's cooperation.
- There may be overlapping business and consumer issues, such as when a business owner files bankruptcy after a business failure.
- There may be intense emotions involved such as when a consumer believes that they were swindled by a building contractor, or a loan servicer can't or won't account for payments made.

When is a consumer dispute appropriate for mediation?

Mediation is a possible means to avoid a trial. If a dispute can be easily resolved, there is not a strong need for mediation. There also need to be parties willing to bargain in good faith. Usually this means that both parties understand that there is an element of risk to the case. Sometimes it may be too early to mediate a case if both parties are convinced, they have a 100% chance of winning. Good lawyers can help to counsel their clients to prepare them for mediation. There are some difficulties with mediating an objection to discharge under section 727. Those will be discussed in a separate topic.

The special problem of section 727.

Mediating a complaint to deny or revoke a discharge requires special consideration. Some courts have held that an objection to discharge cannot be settled. As one early case stated:

> Nothing in the Bankruptcy Code authorizes a trustee to seek funds from a debtor or to release a non-debtor entity as a price for giving up on a discharge complaint. Discharges are not property of the estate and are not for sale. It is against public policy to sell discharges.

In re Vickers, 176 B.R. 287, 290 (Bankr. N.D. Ga. 1994). It is a violation of criminal law if a person "knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in a case under title 11." 18 U.S.C, §152(6). Thus, if a creditor brought a complaint to deny discharge and offered to dismiss the case if the debtor paid him $50,000, that would be a criminal act. The fact that the offer was made in the context of a mediation would not change that.

However, there are circumstances where a case can be settled at mediation after a complaint to deny discharge has been brought. The most common is where a creditor brings both a complaint to determine non-dischargeability and a complaint to deny discharge. If the creditor settles the non-dischargeability case, it will have little motivation to continue to pursue an objection to discharge for the benefit of the other creditors. In this instance, it is permissible for the original creditor to dismiss the objection to discharge provided that other creditors are given a reasonable opportunity to step in and pursue the complaint. *Hass v. Hass (In re Hass),* 273 B.R. 45 (Bankr. S.D. N.Y. 2002). Another court found that a trustee could compromise a claim to deny discharge where the trustee would have difficulty proving the complaint and the settlement was in the public interest. *In re Myers*, 2015 Bankr. LEXIS 2935 (Bankr. N.D. Ohio 2015). On the other hand, the court denied a proposed compromise where the allegations were serious and could be proven by the trustee. The Court stated:

> Compromises of § 727 claims are viewed with heightened scrutiny. Section "727(a) is directed toward protecting the integrity of the bankruptcy system by denying discharge to debtors who engaged in objectionable conduct that is of a magnitude and effect broader and more pervasive than a fraud on . . . a single creditor." Accordingly, some courts have held that § 727 claims may never be compromised. At the very least, courts view compromises of § 727 claims with heightened scrutiny.

In re Roquemore, 393 B.R. 474, 483-84 (Bankr. S.D. Tex. 2008).

Another way to settle a complaint to deny discharge is to deny the discharge with the agreement that the trustee would not object to a subsequent attempt to discharge the debt in chapter 13 if a significant amount was to be paid to creditors. A person who has been denied a discharge in chapter 7 would not be prohibited from seeking a discharge in a subsequent chapter 13 case as shown by the fact that the chapter 13 discharge does not contain an exception for debts excluded from discharge in a prior chapter 7 case. Under 11 U.S.C. §523(a)(10), the discharge does not extend to a debt that was or could have been listed or scheduled by the debtor in a case in which the debtor waived or was denied a discharge. The chapter 13 discharge under 11 U.S.C. §1328(a) excludes various debts from its scope, including debts which are non-dischargeable under 11 U.S.C. §523(a)(1), (2), (3), (4), (5), (8) and (9) but does not cover section 523(a)(10). *See In re Ault*, 271 B.R. 617 (Bankr. E. D. Ark. 2002)(holding that prior denial of discharge in chapter 7 was not grounds for denying confirmation of chapter 13 plan based on lack of good faith).

Is court approval necessary to conduct mediation?

As a general rule, private parties do not need court permission to mediate. A requirement to mediate may also be part of a scheduling order so that no further approval would be necessary. However, there are other circumstances where court approval is required. If the parties intend to use a sitting judge as a mediator, it will be necessary to obtain an order appointing a judicial mediator. If the trustee is going to be a party to a mediation, it is good practice to seek permission, especially if the trustee will be paying a share of the mediator's fee. The parties should also seek court permission to mediate if it requires changing an existing scheduling order. Finally, it is good practice to request permission to mediate if a particular judge is skeptical of mediation as occurred in the attached article "Over my dead body" bears out.

Selecting a mediator.

If the parties cannot afford to litigate, they may not be able to afford an expensive mediator. Additionally, when mediating bankruptcy issues, a good general litigator may be out of his depth. In many districts, sitting bankruptcy judges will agree to mediate for their colleagues. This has the advantage of providing a mediator for no additional charge since the judge is already receiving a federal salary. A sitting judge brings gravitas to the mediation. Also, in many cases, there is a strong need for a client to tell their story. Being able to tell your story to a judicial mediator may provide catharsis to a party and make settlement possible. If a bankruptcy judge is not available, an experienced and respected consumer practitioner may be willing to act as mediator on a pro bono basis.

There are some cases which may require a paid mediator. For example, in a national consumer class action against a sophisticated creditor, a highly skilled and well-paid mediator may be absolutely necessary. There are other circumstances where a client will take the mediation more seriously if they are paying something to mediate.

Preparing for the mediation.

The pre-mediation conference between the mediator and the attorneys and the mediation statement can be very helpful in preparing for mediation. Difficult lawyers and difficult clients can make for a difficult mediation. The mediator can use the pre-mediation conference to gauge the ability of the attorneys to work together cooperatively. While many attorneys like to use their mediation statement to litigate their case, this is of limited benefit to the mediator (other than perhaps revealing where one side has unrealistic expectations). Instead, a mediation statement which explores the strengths and weaknesses of the case as well as the personal dynamics of the parties will be much more useful.

The pre-mediation session is also useful in setting expectations for the mediation. If one party has childcare issues, it is better to have talked this through ahead of time rather than having one party leave midway through.

General Sessions.

Mediators differ on whether general sessions can be helpful. In a case where one attorney insists on posturing, a general session may cause the other side to become defensive and resistant to making a deal. One of the most difficult mediations I ever participated in involved a trustee's attorney who gave a two-hour PowerPoint explaining how the debtor had already lost the case and should prepare to give up while my client and I glared at him. Where there is a high level of animosity between the parties (or even the attorneys) putting them together in the same room may cause conflict and set back the ability to bargain.

There are some cases where a joint opening session may be useful. Where one party wishes to make a sincere apology and the other side is not likely to react with disgust or disbelief, a joint session may be helpful. The same may be true where the aggrieved party has a deep-seated need to tell the other party how they have been hurt and the harming party is willing to listen respectfully. Of course, this is fraught with peril and should require the consent of both lawyers. When in doubt it is better to skip the joint session.

Conducting the mediation.

In most respects consumer mediation is like any other mediation. A mediator will use the tools to their advantage to help the parties achieve a solution. Some of the skills a mediator may use include:

- Finding out the true interests. While the parties may lay out their goals in the mediation statement, this may not be the same as their interests. In a dispute between family members,

the aggrieved party's interest might be in repairing feelings that mom liked the black sheep son better and that a piece of jewelry given to the daughter-in-law may be highly emotional. In a case where the husband's liability is pretty certain, the husband's interest may be in protecting his wife (or vice versa).

- Setting expectations. If a creditor believes that a non-dischargeable judgment means that the judge will "make" the defendant pay, discussing what it means to have a judgment may be useful.
- Exploring BATNA. In any mediation, there is a choice between making a deal or not making a deal. This involves looking at the Best Alternative to No Agreement. If the creditor's best alternative to no agreement is foreclosing on a home with serious deferred maintenance in a bad neighborhood, it might be more inclined to make a deal where the debtor keeps the home. If a retiree's best alternative to no agreement is that the creditor will take a judgment that will be uncollectible because all of the debtor's assets are exempt and his income comes from social security, liquidating non-exempt property to avoid a judgment may not be a good bet.
- Exploring options. Parties entering a mediation may be laser focused on how the dispute can be resolved. However, if they start to hit dead ends, encouraging the parties to think creatively about other options may be helpful. Sometimes the parties or the attorneys may think of an option that wasn't apparent when the mediation started. Other times, the solution that one party thought was obvious might not interest their opponent and it may be necessary to consider other possibilities.
- Getting the parties to bargain. Mediation where the parties spend the first eight hours fuming at the mediator may not be a case that is going to settle. The sooner the parties can

begin exchanging offers, the sooner the mediator and the parties can tell how much ground they have to cover. There is a rhythm to mediation. When parties being exchanging offers, they may start to see the possibility of an agreement. A resolution that was unthinkable at 9:00 a.m. may be a possibility once the parties have covered some ground.

Writing up the agreement.

Writing up the agreement is the most important part of the mediation. As one mediator put it, "an agreement that's not in writing isn't worth the paper it isn't written on." Letting the parties leave the mediation with an agreement in principle is an invitation for seller's regret or bad faith attempts to retrade the deal.

Experienced mediators will often have a template for an agreement that can be filled in with the specific terms of the deal. There are some basics that will apply in all agreements, such as that the parties mediated, whether the agreement will be subject to court approval and what law will govern the agreement.

Once a draft agreement is prepared, all of the attorneys and parties need to take the time to review it and offer comments. Drafting the agreement will often bring to light details that the parties haven't thought about and need to discuss further in order to get a binding agreement. The mediator needs to take the agreement through as many drafts as it takes to get approval in writing from all of the parties.

One issue to consider in drafting an agreement is whether it will require court approval. An agreement to settle a non-dischargeability complaint in a chapter 7 case should not require court approval since it only involves claims between private parties. The following disputes will require court approval at a minimum:

- Any action to which the trustee is a party.

- Any action which affects the creditors generally, such as whether to grant or deny a discharge or allowance of exemptions.
- Any agreement which will be incorporated into a plan (although the plan approval process should be sufficient without a separate motion to compromise).

If an agreement requires court approval, the written settlement agreement should provide that the parties are bound to the agreement subject to court approval and that the parties are required to seek court approval. Otherwise, a bad faith actor could use the requirement of court approval to attempt to re-trade the deal.

Mediation in Consumer Bankruptcy Cases: Practical & Ethical Considerations

Committee: Consumer Bankruptcy

Hon. Cynthia A. Norton

U.S. Bankruptcy Court, W.D. Missouri; Kansas City, Mo.

Date Created: Wed, 2020-01-22 16:51

Let's face it: Effective consumer bankruptcy lawyers eschew litigation. Bankruptcy procedures promote compromise, and bankruptcy judges favor settlement. Many bankruptcy lawyers develop good settlement skills without ever participating in formal dispute-resolution processes. But occasionally, even effective lawyers can't settle a case on their own. In those cases, lawyers need to know when to request the assistance of a mediator and how to successfully participate in a mediation.

The Basics

Bankruptcy courts have authority to order mediation.[1] Mediation is a collaborative process in which a "neutral" guides the parties toward voluntary resolution.[2] The neutral may either be another bankruptcy judge or a trained mediator. The parties in a mediation may craft a resolution on terms a judge could never order. The process is confidential; the mediator may not reveal details of the mediation to the trial judge, and a party may not use information obtained through mediation against the other party at trial.[3]

Practical Considerations

- *Local Rules and Practices:* These vary widely by district and by judge. You should familiarize yourself with local rules and practices before requesting mediation in a consumer case.
- *Types of Disputes:* If the facts and the law are difficult or unsettled, or if the parties are highly emotional, parties have more difficulty assessing the risks of going to trial. A mediator can help parties understand those risks and overcome emotional obstacles. Family feuds, divorce-related disputes, stay and discharge violations and determinations of dischargeability are good examples, as are cases with *pro se* parties or parties unfamiliar with bankruptcy. Multi-party disputes with competing interests may also benefit from mediation (*e.g.*, a trustee with an interest in the property that is also the subject of a dispute between a debtor and a creditor). On the other hand, don't mediate a case if trying it will take less time. Also, objections to discharge are difficult to mediate successfully. A § 727 complaint cannot be dismissed without notice and court approval, meaning another creditor or party in interest has the right to pursue the complaint the settling party otherwise agreed to dismiss.[4]

- *Timing:* Mediation offers the advantage of settling without the expense of discovery and trial preparation, but this advantage is wasted if you wait until the eve of trial to request it. Plus, the trial judge may see it as a tactic and deny the request. But for a mediation to be productive, the parties must have shared a certain minimum amount of information needed to understand the claims and defenses. For example, a mediation involving emotional distress damages for a stay violation will likely not succeed unless the medical bills have been produced; the mediator and the parties will not be able to assess the trial risks. It is typically better, however, to let the judge know you are considering mediation earlier rather than later. Once each party has enough information to mediate meaningfully, ask the judge to abate other formal discovery and deadlines pending the outcome of the mediation to hold down litigation costs.
- *Judge vs. Private Mediator:* Many bankruptcy judges are willing to mediate for each other, even across district lines, and many are exceptionally skilled mediators. A judge mediator doesn't charge mediation fees, an important consideration in consumer cases. Some emotional or unsophisticated parties are more willing to listen to a judge, and a judge may offer helpful guidance about the likely legal result if the matter does not settle (known as "evaluative" mediation). Bankruptcy judges cannot, however, mediate purely state court matters[5] and may not have authority to compel necessary state court parties to participate. Some parties prefer just "to tell their story" (the "facilitative" method) rather than be told the likely result. If you choose a private mediator, prepare your client for the likely costs, although often a mediated settlement will include a provision requiring one side to pay the mediator fees.

Ethical Considerations

- *Preparing for Mediation:* If ordered to mediate, you have a duty to prepare and to prepare your client.[6] Bankruptcy courts have authority to sanction parties for "bad faith" participation in mediation.[7] A party's failure to settle is not necessarily bad faith. But you may be sanctioned for failure to comply with court-ordered deadlines,[8] failure to cooperate or to appear,[9] attendance without a representative with sufficient settlement authority[10] or for otherwise sabotaging the mediation.[11] It is also bad faith for a debtor to propose a chapter 13 plan reneging on a settlement agreed to in a previous mediation.[12]
- *Documenting the Settlement:* You have an ethical duty to abide by your client's settlement decisions.[13] But if your client agrees to settle, you must be sure to document it carefully and fully. Don't allow your clients to leave the mediation until the settlement has been reduced to writing signed by all parties or put on the record. Remember to include all key terms and all contingencies, such as if the settlement is contingent on court approval[14] or is subject to being reduced to a formal settlement agreement. Unlike in mediated commercial disputes, many consumer settlements may not need a formal settlement agreement and can be effectively implemented with an agreed order of dismissal with prejudice, but be sure to specify who will prepare the order and the deadline to submit it. If the settlement requires payment of money, the agreement should address when and how the money will be paid, including whether there are liens against the settlement funds to be satisfied. Bring the taxpayer ID and wire instructions for the account to which the funds will be paid. The last thing anyone wants after a settlement has been reached is further litigation about settlement terms.

Conclusion

Mediation can help parties craft a creative, win-win resolution without the expense of going to trial. This is as true in consumer cases as it is in commercial ones. The next time you can't settle a consumer dispute on your own, consider asking your bankruptcy judge to order mediation.

---

[1] *Matter of Sargeant Farms Inc.*, 224 B.R. 842 (Bankr. M.D. Fla. 1998); Fed. R. Bankr. P. 7016(a)(5).

[2] For an excellent introduction, *see ABI Guide to Bankruptcy Mediation, available at* store.abi.org.

[3] Fed. R. Evid. 408.

[4] Fed. R. Bankr. P. 7041.

[5] Code of Conduct for United States Judges, Canon 4(a)(4).

[6] *Richard v. Spradlin*, 2013 WL 1571059 (E.D. Ky. Apr. 12, 2013), *aff'd*, 572 F. App'x 420 (6th Cir. 2014).

[7] *Id.* at *3; Fed. R. Bankr. P. 7016 incorporating Fed. R. Civ. P. 16(c)(2)(I), (f).

[8] *In re President Casinos Inc.*, 397 B.R. 468 (B.A.P. 8th Cir. 2008) (claim disallowed for failure to submit timely mediation statement).

[9] *In re Tak*, 2019 WL 451225 (Bankr. C.D. Cal. Feb. 4, 2019) (defendant's answer stricken and default judgment awarded).

[10] *In re Hosking*, 528 B.R. 614 (Bankr. S.D.N.Y. 2015), *aff'd sub nom.* 2016 WL 128209 (S.D.N.Y. Jan. 11, 2016).

[11] *In re Halvorson*, 581 B.R. 610 (Bankr. C.D. Cal. 2018), *order vacated and remanded*, 2018 WL 6728484 (C.D. Cal. Dec. 21, 2018), appeal pending.

[12] *In re Williams*, 2017 WL 2120044 (Bankr. W.D. Mo. May 15, 2017).

[13] ABA Model Rules of Prof'l Conduct R. 1.2(a).

[14] Fed. R. Bankr. P. 9019.

A TEXAS BANKRUPTCY LAWYER'S BLOG

CASE UPDATES AND COMMENTARY FOR INSOLVENCY PROFESSIONALS IN TEXAS AND BEYOND.

MONDAY, OCTOBER 06, 2014

Judge Says "Over My Dead Body" to Trustee's Mediation Plans

The importance of alternate dispute resolution to resolve cases is enshrined in federal law, 28 U.S.C. §651(a), and is encouraged by most judges. However, one bankruptcy judge recently told lawyers in a case that they would mediate "over my dead body." While the court's ruling was triggered by the parties' failure to request permission to expend estate funds, his comments expressed a high level of skepticism toward mediation in general. The case is *In re Cody Smith*, No. 12-32096 (Bankr. S.D. Tex. 9/3/14).

What Happened

The Cody Smith case involves several different adversary proceedings. When the parties asked to abate various deadlines so that they could mediate, the following discussion took place. This is my attempt at transcription from the electronic recording of the proceeding. Any errors are unintentional.

The Court: As I understand it, the Second Joint Emergency Motion is being filed because you're going to mediate.

Mr. Wentworth (Trustee's attorney): That's correct, your Honor.

The Court: Did I give you permission to go to mediation?

...

NCBJ 2014: Hedging Your Bets, Examining an Expert...

NCBJ 2014: Fed Economist Says "I've Got to Admit ...

NCBJ 2014: Chapter 9, Closely Held Businesses, e-...

The Short Case for Venue Reform

Judge Says "Over My Dead Body" to Trustee's Mediat...

September's Bankruptcy and Related Decisions in th...

► September (2)

► August (3)

► July (3)

► June (4)

► May (3)

► March (4)

► February (5)

► January (4)

► 2013 (25)

► 2012 (26)

► 2011 (54)

► 2010 (54)

► 2009 (54)

► 2008 (41)

► 2007 (32)

► 2006 (24)

ABOUT ME

STEVE SATHER

Mr. Wentworth: Your Honor, maybe I'll defer to Mr. Lemmon on that. I didn't file any motion.

The Court: Mr. Lemmon, did I give the Trustee permission to mediate?

Mr. Lemmon (Trustee's Special Counsel): No, your Honor.

The Court: Does the Trustee have any intention of paying the mediator out of estate funds?

Mr. Lemmon: My firm is advancing . . . .

The Court: That's not my question, not who's advancing. Is the Trustee eventually going to be using estate funds to pay the mediator?

Male Speaker: I think that's what we had envisioned.

The Court: *Over my dead body. I do not like mediation. I think it is wasteful for the most part and you all needed to get my permission.* I assume counsel for the Trustee is going to the mediation and I assume counsel for the Trustee's going to ask me to approve those fees.

Mr. Lemmon: Yes, your Honor.

Male Speaker: For the mediatior . . .

The Court: *Aint gonna happen. Don't you ever do that again, Mr. Cage.*

Mr. Cage (the Trustee): Yes, your Honor.

The Court: I'm going to do a general order to put all my chapter 7 cases (on notice). You are not to mediate without my approval. Or if you're gonna do it, you're going to get my approval or if you're going to do it

I am a shareholder with Barron & Newburger in Austin, Texas and am Board Certified in Business Bankruptcy by the Texas Board of Legal Specialization and the American Board of Certification. My blog is A Texas Bankruptcy Lawyers Blog which looks for current cases or issues which are legally significant or just make for a good story. I can be reached at ssather@bn-lawyers.com. The opinions expressed in these blogs are solely my own and are not those of any organization with which I am affiliated.

VIEW MY COMPLETE PROFILE

(without my approval), I'm not going to allow attorneys to be paid. *I think for the most part mediation is a waste of time and money. You all are grown up big boy attorneys. You can talk settlement. You've been talking settlement. And I'm not going to allow more money to go to a mediator. Either you settle it or you don't. But don't ever do that again.*

Mr. Cage: Understood, your Honor.

Mr. Lemmon: This is Steve Lemmon. I am sorry your Honor. The idea of doing a mediation was my idea, so I apologize.

The Court: Mr. Lemmon, I*'ll grant you a lot of judges love mediation, but I don't. I think mediation is undercutting the jury trial system in this country and I think it is making lawyers lazy and judges lazy and I also think it's excess costs to pay for a mediator. Lawyers are supposed to do two things. They are supposed to get ready for trial and they are supposed to talk settlement professionally. And I think it is rare that I allow people to go to mediate so don't do it ever again. If you want to mediate, then file a motion and come in here and explain to me why, but I'm not going to allow a mediation, not in this case certainly, so I'm going to deny the Second Joint Emergency Motion and with that you all are free to go.*

Recording, 9/3/14, 3:04:01-3:07:22 (emphasis added).

My Perspective

I have not been involved in the Cody Smith case although I know most of the lawyers involved. None of them asked me to write this article. I heard about from an observer who

happened to be in the courtroom that day. However, I have heard Judge Bohm express similar comments informally. The fact that the judge made the comments on the record and expressed an intent to issue a general order on the subject made it an appropriate subject for a blog article in my mind.

I am a trained mediator, although I use that experience as a participant in mediations much more than as a mediator. More importantly, I practice with an attorney who is an artist when it comes to mediation and has successfully settled many difficult cases. All of this gives me a bias in favor of mediation.

On the other hand, I have no problem with trying cases. I enjoy trying cases although my work is in bankruptcy court where juries are forbidden absent consent. In nearly twenty-eight years of practice, I have been second chair on two jury trials and I served on a jury once. As a result, the jury system is something I have heard about more than I have experienced.

Why the Hostility to Mediation?

Judge Bohm has a legitimate point that parties wishing to use estate funds to mediate should request court permission. However, in most courts, that request would be met with enthusiasm. Indeed, federal policy encourages mediation. 28 U.S.C. §651(b) provides that:

> Each United States District Court shall authorize by local rule adopted under section 2071(a), the use of alternate dispute resolution processes i*n all civil actions, including adversary proceedings in bankruptcy* in accordance with this chapter . . . .

Southern District of Texas Local Rule 16.4 states that mediation is approved for use in bankruptcy proceedings and goes on to state that:

> If the parties agree upon an ADR method or provider, the judge will respect the parties' agreement unless the judge believes another ADR method or provider is better suited to the case and parties.

Local Rule 16.4C.

Let's look at the reasons given by Judge Bohm for his distaste for mediation.

1. Mediation is a waste of time and money. Judge Bohm expressed his opinion that "grown up big boy attorneys" should be able to "talk settlement professionally." If you follow Judge Bohm's logic, either the case should be able to settle, in which case the lawyers should be able to get there on their own, or it needs to go to trial, in which case mediation would be a waste of time. I think this logic is oversimplified. In my experience, there are plenty of cases where qualified, professional attorneys will be unable to settle a case without assistance from a third party. However, I do agree with Judge Bohm in part. Attempting to mediate with the wrong mediator at the wrong time can be a waste of time. As a result, it is important to carefully select a case for mediation and to pick the right mediator. I will give my opinions about which cases are good for mediation below.

2. Mediation undermines the jury system. This one baffles me. Judge Bohm is a bankruptcy judge. Juries are not allowed in bankruptcy without consent of both parties and are an extreme rarity. As a result, allowing mediation in bankruptcy cases could never have an effect on the jury system. However, beyond that, I wonder, what is so great about the jury system? I have to admit a bias here. No one ever comes to a Debtor's lawyer and says I need to file bankruptcy because the jury got it right. It is my personal opinion that the jury system today is often used for tactical reasons, such as to delay trial or increase costs, or in cases where emotion can be counted on to overwhelm the facts. While juries are intended as a protection for the accused, they convict innocent people often enough to cause concern. Having said that, the only jury that I served on voted to acquit. Even if you acknowledge that juries serve a valuable function, they are expensive and not every case needs one. If every civil and criminal case resulted in a jury trial, the system would quickly collapse.

3. Mediation makes lawyers and judges lazy. I can't speak for judges since I have never been one. However, in my experience, mediation does not make good lawyers lazy. Mediation forces a lawyer to prepare his case in order to persuade the other side that going to trial is a real option. It

also forces lawyers to examine the weaknesses in their case and to find ways around them. Mediation also allows lawyers to spend focused time with their client talking about the case. Mediation is about finding a better alternative than trial, not for the unprepared lawyer to avoid trial Some cases are really difficult and will inevitably lead to a bad outcome for both sides if they go to court. I have witnessed mediation resolve disputes that had festered for a decade or more. As a result, I believe that dedicated, hard-working attorneys can use mediation as a tool. Obviously, mediation can be used as a crutch by the unprepared or unwilling, but that is the fault of the lawyer rather than the procedure.

What Makes for a Good Mediation?

Economics teaches that an efficient market depends upon a willing buyer and a willing seller with access to complete information. Lawsuits are similar. In order to settle, there have to be parties who are willing to negotiate in good faith and have good information. Mediation can change a party's willingness to settle if the unwillingness was based on an unreasonable attorney or where the mediation process allows the party to save face. This is especially true where emotional considerations rather than money are driving the case. Otherwise, having an unwilling party probably means an unsuccessful mediation.

Mediation can be very successful when parties have been acting on incomplete information. Attorneys are supposed to be both counselors and advocates. However, the process of obtaining clients often depends on projecting strength and confidence rather than giving good counsel about the weaknesses of a case. Other times, a client will filter out information he doesn't want to hear. A combination of a good lawyer and a good mediator can help a difficult client evaluate his case more accurately and reach an agreement.

There are also cases involving difficult situations which require a lot of creativity to solve. While the parties could theoretically resolve these cases on their own, the presence of a neutral third party can help the attorneys and the parties consider solutions they would not have thought of otherwise in

a format allowing vigorous give and take. This is especially true of multi-party cases.

Finally, there are a few cases where both sides show up ready to make a deal and arrive at a sensible result within a short period of time. There is no reason that these cases should not have settled without mediation. However, sometimes the mediation process itself serves to focus a party's attention on settling better than a series of calls with counsel.

Final Thoughts

I can agree with Judge Bohm to a very limited extent. Mediation can be a waste of time and money if the parties are doing it for the wrong reasons or are not prepared. I can also agree with Judge Bohm that a lazy attorney may seek out mediation if he is not ready for trial and is trying to stall. However, when good attorneys tell the court that they favor mediation, the Court should defer to their judgment, as I believe is required by Local Rule 16.4C.

I agree that it is a good practice to seek court approval for mediation on any number of grounds. First, it helps to keep the Court informed and allow the Court to ask questions as to the reasons for the mediation. Good lawyers should be prepared to give good answers to those questions. Second, I agree with Judge Bohm that paying a mediator is an expense not in the ordinary course of business which should be approved in advance. I don't think it is necessary for attorneys who represent estates to get special permission to participate in a mediation. When an attorney is appointed in a case where litigation is involved, mediation is inherently part of that appointment. Finally, I think that mediation pursuant to court order is useful because it binds the parties to mediate in good faith. While the parties will ordinarily agree to mediation in advance, a court order makes it harder for parties to back out at the last minute to try to secure a tactical advantage. A court order also helps to impress the parties with the seriousness of the process.

Federal Rule of Civil Procedure 1 states that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." I believe that

mediation is a valuable tool to achieve these goals in appropriate cases.

I would encourage Judge Bohm to reconsider his hostility toward mediation, or at the very least, to discuss the issue in a public forum where a back and forth dialog can take place..

POSTED BY STEVE SATHER AT 9:55 AM

LABELS: JUDGE JEFF BOHM, MEDIATION

NO COMMENTS:

Post a Comment

Newer Post Home Older Post

Subscribe to: Post Comments (Atom)

§ 5949. Confidential mediation communications and documents.

(a) General rule.--Except as provided in subsection (b), all mediation communications and mediation documents are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process. Mediation communications and mediation documents shall not be admissible as evidence in any action or proceeding, including, but not limited to, a judicial, administrative or arbitration action or proceeding.

(b) Exceptions.--

(1) A settlement document may be introduced in an action or proceeding to enforce the settlement agreement expressed in the document, unless the settlement document by its terms states that it is unenforceable or not intended to be legally binding.

(2) To the extent that the communication or conduct is relevant evidence in a criminal matter, the privilege and limitation set forth in subsection (a) does not apply to:

(i) a communication of a threat that bodily injury may be inflicted on a person;

(ii) a communication of a threat that damage may be inflicted on real or personal property under circumstances constituting a felony; or

(iii) conduct during a mediation session causing direct bodily injury to a person.

(3) The privilege and limitation set forth under subsection (a) does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.

(4) Any document which otherwise exists, or existed independent of the mediation and is not otherwise covered by this section, is not subject to this privilege.

(c) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Mediation." The deliberate and knowing use of a third person by disputing parties to help them reach a resolution of their dispute. For purposes of this section, mediation commences at the time of initial contact with a mediator or mediation program.

"Mediation communication." A communication, verbal or nonverbal, oral or written, made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program.

"Mediation document." Written material, including copies, prepared for the purpose of, in the course of or pursuant to mediation. The term includes, but is not limited to, memoranda, notes, files, records and work product of a mediator, mediation program or party.

"Mediation program." A plan or organization through which mediators or mediation may be provided.

"Mediator." A person who performs mediation.

"Settlement document." A written agreement signed by the parties to the agreement.

(Feb. 7, 1996, P.L.7, No.3, eff. 60 days)

1996 Amendment. Act 3 added section 5949.

UNIFORM MEDIATION ACT

(Last Revised or Amended in 2003)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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

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

WITH PREFATORY NOTE AND COMMENTS

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

December 10, 2003

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS DRAFTING COMMITTEE ON UNIFORM MEDIATION ACT:

MICHAEL B. GETTY, 1560 Sandburg Terrace, Suite 1104, Chicago, IL 60610, *Chair*
PHILLIP CARROLL, 120 E. Fourth Street, Little Rock, AR 72201
JOSE FELICIANO, 3200 National City Center, 1900 E. 9th Street, Cleveland, OH 44114-3485, *American Bar Association Member*
STANLEY M. FISHER, 1100 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115-1475, *Enactment Coordinator*
ROGER C. HENDERSON, University of Arizona, James E. Rogers College of Law, Mountain and Speedway Streets, Tucson, AZ 85721, *Committee on Style Liaison*
ELIZABETH KENT, P.O. Box 2560, Honolulu, HI, 96804
RICHARD C. REUBEN, University of Missouri-Columbia School of Law, Hulston Hall, Columbia, MO 65211, *Associate Reporter*
NANCY H. ROGERS, Ohio State University, Michael E. Moritz College of Law, 55 W. 12th Avenue, Columbus, OH 43210, *National Conference Reporter*
FRANK E.A. SANDER, Harvard University Law School, Cambridge, MA 02138, *American Bar Association Member*
BYRON D. SHER, State Capitol, Suite 2082, Sacramento, CA 95814
MARTHA LEE WALTERS, Suite 220, 975 Oak Street, Eugene, OR 97401
JOAN ZELDON, D.C. Superior Court, 500 Indiana Ave., Washington, DC 20001

EX OFFICIO

JOHN L. McCLAUGHERTY, P.O. Box 553, Charleston, WV 25322, *President*
LEON M. McCORKLE, JR., P.O. Box 387, Dublin, OH 43017-0387, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

ROBERTA COOPER RAMO, Sunwest Building, Suite 1000, 500 W. 4th Street, NW, Albuquerque, NM 87102

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

ABA SECTION OF DISPUTE RESOLUTION
DRAFTING COMMITTEE ON UNIFORM MEDIATION ACT

THOMAS J. MOYER, *Co-Chair*, Supreme Court of Ohio, 30 E. Broad Street, Columbus, OH 43266

ROBERTA COOPER RAMO, *Co-Chair*, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Sunwest Building, Suite 1000, Albuquerque, NM 87102

JAMES DIGGS, PPG Industries, 1 PPG Place, Pittsburgh, PA 15272

JOSE FELICIANO, Baker & Hostetler, 3200 National City Center, 1900 East 9th St., Cleveland, OH 44114

MICHAEL B. GETTY, 1560 Sandburg Terrace, Suite 1104, Chicago, IL 60610, *NCCUSL Representative*

EMILY STEWART HAYNES, Supreme Court of Ohio, 30 E. Broad Street, Columbus, OH 43266, *Reporting Coordinator*

RICHARD C. REUBEN, University of Missouri-Columbia School of Law, Hulston Hall, Columbia, MO 65211, *Reporter*

NANCY H. ROGERS, Ohio State University, College of Law and Office of Academic Affairs, 203 Bricker Hall, 190 N. Oval Mall, Columbus, OH 43210, *Coordinator, Faculty Advisory Committee*

FRANK E.A. SANDER, Harvard Law School, Cambridge, MA 02138

JUDITH SAUL, Community Dispute Resolution Center, 120 W. State Street., Ithaca, NY 14850

ANNICE M. WAGNER, Court of Appeals of the District of Columbia, 500 Indiana Ave., NW, Washington, DC 20001

DRAFTING COMMITTEE TO AMEND THE UNIFORM MEDIATION ACT TO ADD A SECTION REGARDING INTERNATIONAL COMMERCIAL CONCILIATION

MICHAEL B. GETTY, 1560 Sandburg Terr., Suite 1104, Chicago, IL 60610, *Chair*
PHILLIP CARROLL, 120 E. Fourth St., Little Rock, AR 72201
STANLEY M. FISHER, 30100 Chagrin Boulevard, Suite 301, Cleveland, OH 44122
ELIZABETH KENT, Hawaii State Judiciary, Center for Alternative Dispute Resolution, 417 S. King St., Room 207, Honolulu, HI 96813
FRANCIS J. PAVETTI, 18 The Strand, Goshen Point, Waterford, CT 06385*, Enactment Plan Coordinator*
BYRON D. SHER, State Capitol, Suite 2082, Sacramento, CA 95814
JOAN ZELDON, Superior Court, 500 Indiana Ave. NW, Room 1640, Washington, DC 20001
NANCY H. ROGERS, Ohio State University, Moritz College of Law*,* 55 W. 12th Ave., Columbus, OH 43210, *Reporter*

EX OFFICIO

K. KING BURNETT, P.O. Box 910, Salisbury, MD 21803-0910, *President*
MARTHA LEE WALTERS, 245 E. Fourth St., Eugene, OR 97401, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

LAWRENCE D. W. GRAVES, 39 Central Square 173, Keene, NH 03431*, ABA Advisor*

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Alabama, School of Law, P.O. Box 870382, Tuscaloosa, AL 35487-0382, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

UNIFORM MEDIATION ACT

TABLE OF CONTENTS

UNIFORM MEDIATION ACT

PREFATORY NOTE

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

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

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

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

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

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

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

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

1. Promoting candor

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

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

regarding events in the past, as well as the parties' perceptions of and attitudes toward these events, and that mediators encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. *See*, *e.g.*, Lawrence R. Freedman and Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 Ohio St. J. Disp. Resol. 37, 43-44 (1986); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 Admin. L. Rev. 315, 323-324 (1989); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,* 1995 J. Disp. Resol. 1, 17; Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?,* 85 Marquette L. Rev. 79 (2001). For a critical perspective, *see generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Disp. Resol. 1 (1986); Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marquette L. Rev. 9 (2001). Such party-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges. *See*, *e.g.*, Unif. R. Evid. R. 501-509 (1986); *see generally* Jack B. Weinstein, et. al, Evidence: Cases and Materials 1314-1315 (9th ed.1997); *Developments in the Law – Privileged Communications*, 98 Harv. L. Rev. 1450 (1985); Paul R. Rice, Attorney-Client Privilege in the United States, Section 2/1-2.3 (2d ed. 1999). This rationale has sometimes been extended to mediators to encourage mediators to be candid with the parties by allowing the mediator to block evidence of the mediator's notes and other statements by the mediator. *See*, *e.g.*, Ohio Rev. Code Ann. Section 2317.023 (West 1996).

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

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

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

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

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

accordingly.

2. Encouraging resolution in accordance with other principles

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

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

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

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

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

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

3. Importance of uniformity.

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

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

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

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

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

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

4. Ripeness of a uniform law.

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

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

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

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

5. A product of a consensual process.

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

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

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

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

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

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

6. Drafting philosophy.

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

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

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

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

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

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

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

Prefatory Note

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

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

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

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

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

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

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

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

UNIFORM MEDIATION ACT

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

SECTION 2. DEFINITIONS. In this [Act]:

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

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

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

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

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

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

(7) "Proceeding" means:

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

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

(B) a legislative hearing or similar process.

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

(9) "Sign" means:

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

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

Comment

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

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

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

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

Or. Rev. Stat. Ann. Section 36.220 (1997); 42 Pa. Cons. Stat. Ann. Section 5949 (1996); R.I. Gen. Laws Section 9-19-44 (1992); S.D. Codified Laws Section 19-13-32 (1998); Va. Code Ann. Section 8.01-576.10 (1994); Wash. Rev. Code Section 5.60.070 (1993); Wis. Stat. Section 904.085(4)(a) (1997); Wyo. Stat. Ann. Section 1-43-103 (1991). The mere fact that a person attended the mediation - in other words, the physical presence of a person - is not a communication. By contrast, nonverbal conduct such as nodding in response to a question would be a "communication" because it is meant as an assertion; however nonverbal conduct such as smoking a cigarette during the mediation session typically would not be a "communication" because it was not meant by the actor as an assertion.

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

More specifically, communications include both statements and conduct meant to inform, because the purpose of the privilege is to promote candid mediation communications. *U.S. v. Robinson*, 121 F.3d 911, 975 (5th Cir., 1997). By analogy to the attorney-client privilege, silence in response to a question may be a communication, if it is meant to inform. *U.S. v. White*, 950 F.2d 426, 430 n.2 (7th Cir., 1991). Further, conduct meant to explain or communicate a fact, such as the re-enactment of an accident, is a communication. *See* Weinstein's Federal Evidence 503.14 (2000). Similarly, a client's revelation of a hidden scar to an attorney in response to a question is a communication if meant to inform. In contrast, a purely physical phenomenon, such as a tattoo or the color of a suit of clothes, observable by all, is not a communication.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 3. SCOPE.

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

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

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

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

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

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

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

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

(4) conducted under the auspices of:

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

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

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

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

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

Comment

1. In general.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Other scope issues.

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

SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.

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

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

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

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

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

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

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

Comment

1. In general.

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

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

2. The mediation privilege structure.

a. Rationale for privilege.

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

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

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

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

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

b. Communications to which the privilege attaches

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

c. Proceedings at which the privilege may be asserted.

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

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

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

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

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

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

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

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

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

a. The holders of the privilege.

1. In general.

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

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

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

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

a2. Parties as holders.

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

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

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

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

a3. Mediator as holders.

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

a4. Nonparty participants as holders.

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

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

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

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

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

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

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

SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

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

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

Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 6. EXCEPTIONS TO PRIVILEGE.

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

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

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

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

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

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

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

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

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

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

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

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

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

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

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

Comment

1. In general.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sometimes the issue arises whether anyone may provide evidence of professional misconduct or malpractice occurring during the mediation. *See In re Waller*, 573 A.2d 780 (D.C. App. 1990); *see generally* Pamela Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U.L. Rev. 715, 740-751. The failure to provide an exception for such evidence would mean that lawyers and fiduciaries could act unethically or in violation of standards without concern that evidence of the misconduct would later be admissible in a proceeding brought for recourse. This exception makes it possible to use testimony of anyone except the mediator in proceedings at which such a claim is made or defended. Because of the potential adverse impact on a mediator's appearance of impartiality, the use of mediator testimony is more guarded, and therefore protected by Section 6(c). It is important to note that evidence fitting this exception would still be protected in other types of proceedings, such as those related to the dispute being mediated.

Reporting requirements operate independently of the privilege and this exception. Mediators and other are not precluded by the Act from reporting misconduct to an agency or tribunal other than one that might make a ruling on the dispute being mediated, which is precluded by Section 8(a) and (b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

itself remains privileged for the pending divorce or other proceedings.

SECTION 7. PROHIBITED MEDIATOR REPORTS.

(a) Except as required in subsection (b), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(b) A mediator may disclose:

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

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

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

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

Comment

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

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

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

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

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

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

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

Comment

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

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

a. Party expectations of confidentiality outside of proceedings

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

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

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

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

Rogers & McEwen, supra, Section 9.24.

b. Restatement and affirmation of current law and practices

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

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

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

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

c. Legislative history

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

a. In general.

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

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

b. Reasonable duty of inquiry

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

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

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

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

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

c. Conflicts that must be disclosed

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

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

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

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

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

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

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

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

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

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

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

a. In general

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

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

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

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

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

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

c. Practical operation

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

45

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

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

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

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

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

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

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

SECTION 11. INTERNATIONAL COMMERCIAL MEDIATION.

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

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

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

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

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

Comment

1. Varying by Agreement/Choice of Law

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

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

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

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

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

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

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

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

2. Confidentiality

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

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

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

3. Conflict of Laws

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

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

4. Uniformity

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

5. Reports to the Court

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

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

6. Derogation from the Uniform Mediation Act

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

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

7. Interpretation of the Model Law

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

8. Incorporation by Reference

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

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

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

Comment

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

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

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

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

Comment

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

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

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

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

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

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

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

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

(1)

(2)

(3)

Comment

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

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

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

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

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

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

SECTION 17. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.

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

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

Comment

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

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

APPENDIX A

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

UNCITRAL Model Law on International Commercial Conciliation

Article 1. Scope of application and definitions

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

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

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

(4) A conciliation is international if:

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

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

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

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

---

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

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

(5) For the purposes of this article:

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

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

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

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

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

(9) This Law does not apply to:

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

(b) […].

Article 2. Interpretation

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

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

Article 3. Variation by agreement

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

Article 4. Commencement of conciliation proceedings[3]

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

Article X. Suspension of limitation period

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

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

Article 5. Number and appointment of conciliators

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

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

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

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

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

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

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

Article 6. Conduct of conciliation

---

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

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

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

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

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

Article 7. Communication between conciliator and parties

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

Article 8. Disclosure of information

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

Article 9. Confidentiality

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

Article 10. Admissibility of evidence in other proceedings

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

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

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

possible settlement of the dispute;

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

(d) Proposals made by the conciliator;

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

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

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

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

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

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

Article 11. Termination of conciliation proceedings

The conciliation proceedings are terminated:

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

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

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

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

Article 12. Conciliator acting as arbitrator

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

Article 13. Resort to arbitral or judicial proceedings

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

Article 14. Enforceability of settlement agreement[4]

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

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

Rule 9019-2 Alternative Dispute Resolution.

(a) ***Setting Mediation.*** The court may set a case for mediation provided consideration is given to any reasons advanced by the parties as to why such mediation would not be in the best interest of justice. Once set for mediation, the matter can be removed from mediation by the court or on application by the mediator.

(b) ***Request for Mediation.*** The parties may request a case be assigned by the court to mediation by completing and filing L.B.F. 9019-2.

(c) ***Assigning Matters and Cases.*** The court may assign to mediation any adversary proceeding or contested matter or any issue within such adversary proceeding or contested matter.

(d) ***Certification of Mediators.***

(1) The court may certify as many mediators as determined to be necessary under this rule.

(2) An individual may be certified to serve as a mediator if:

(A) he or she has been a member of the bar of the highest court of a state or the District of Columbia for a minimum of five (5) years;

(B) he or she is admitted to practice before this court;

(C) he or she has successfully completed a mediation training program established or recognized by the District Court or the Bankruptcy Court for the Middle District of Pennsylvania; and

(D) he or she has been determined by the appointing court to be competent to perform the duties of a mediator.

(3) The court will solicit qualified individuals to serve as mediators.

(4) Each individual certified as a mediator must take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as a mediator.

(5) The clerk must maintain a list of all persons certified as mediators.

(6) The appointing judge may remove anyone from the list of certified mediators for cause.

(7) Persons acting as mediators under this rule are assisting the court in performing its judicial function. They must be disqualified for bias or prejudice as provided by 28 U.S.C. § 144 and must disqualify themselves in any action in which they would be required under 28 U.S.C. § 455 to disqualify themselves if they were a justice or judge.

(e) ***Compensation and Expenses of Mediators.*** A mediator who accepts a case for mediation initially volunteers the time expended to prepare for and conduct a mediation conference or conferences lasting up to a total of four (4) hours. After completion of four (4) hours service, the mediator may either

(1) continue to volunteer the mediator's time; or

(2) give the mediation parties the option to agree to pay the mediator his prevailing hourly rate for bankruptcy services for the additional time spent on the mediation. The parties must each pay a *pro rata* share of the mediator's compensation, unless they agree among themselves to a different allocation. A motion to enforce a party's obligation to compensate a mediator is governed by F.R.B.P. 9014.

(f) ***Frequency of Service.*** An individual certified as a mediator will not be called upon more than twice in a twelve (12) month period to serve as a mediator without the prior approval of the mediator.

(g) ***Scheduling Mediation Conference.***

(1) Upon referral of a case to mediation, the court will serve the order of referral to the mediator, all counsel, and any unrepresented party directing the mediator to establish the date, place, and time of the mediation session. The order will include the address, telephone number, email address and facsimile number of the mediator, counsel, and unrepresented parties. The date of the mediation session must be a date within thirty (30) days from the date of the order of referral.

(2) The appointment is effective unless the designee rejects the appointment within seven (7) days.

(3) Upon docketing of the order of referral to mediation, the clerk must transmit to the mediator, either by email or regular mail, a copy of the docket sheet that reflects all filings to date. The mediator may identify to the clerk those filed documents which the mediator wishes to review for the mediation. Unless otherwise ordered by the court, the clerk will provide the mediator with electronic or paper copies of the requested documents free of charge.

(4) A mediator may change the date and time for the mediation session if the session takes place within forty-five (45) days of the date of the order of referral. Any continuance of the session beyond forty-five (45) days must be approved by the court.

(h) ***The Mediation Process.***

(1) Not later than seven (7) days before the initial conference, each party must deliver or send a facsimile or email to the mediator a mediation conference memorandum no longer than two (2) pages, summarizing the nature of the case and the party's position on:

(A) the major factual and legal issues affecting liability and damages;

(B) the relief sought by each party; and

(C) the position of the parties relative to settlement.

(2) The memoranda required by this subdivision are solely for use in the mediation process and are not to be filed with the clerk.

(i) ***The Mediation Session.***

(1) The mediation session must take place on the date and at the time set forth by the mediator. The mediation session must take place at a neutral setting as designated by the mediator that may include the mediator's office. A party must not contact or forward any document to the mediator unless the mediator requests the information or unless as otherwise provided under these rules.

(2) Counsel primarily responsible for the case and any unrepresented party must attend the mediation session. All parties or principals of parties with decision-making authority must attend the mediation session in person, unless attendance is excused by the mediator for good cause shown. Willful failure to attend the mediation conference must be reported to the court and may result in the imposition of sanctions. The participants must be prepared to discuss:

(A) all liability issues;

(B) all damage issues;

(C) all equitable and declaratory remedies if such are requested; and

(D) the position of the parties relative to settlement.

(3) Unless otherwise provided in this Rule, and as may be necessary to the reporting of or the processing of complaints about unlawful or unethical conduct, nothing communicated during the mediation process - including any oral or written statement made by a party, attorney, or other participant, and any proposed settlement figure stated by the mediator or on behalf of any party - may be placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission. No party may be bound by anything done or said during the mediation process except to enforce a settlement agreement or any other agreement achieved in that process.

(4) In the event the mediator determines that no settlement is likely to result from the mediation session, the mediator must terminate the session and promptly send a report to the court that there has been compliance with the requirements of these paragraphs, but that no resolution has been reached. In the event that a settlement is achieved at the mediation session, the mediator must send a written report to the judge to whom the case is assigned stating that a settlement has been achieved. The parties are responsible for the circulation of any required notice of settlement.

(5) Notwithstanding the above paragraph, the mediator must submit a written report to the court advising the court of the status of the mediation within sixty (60) days after the order of appointment of the mediator.

(6) No one may have a recording or transcript made of the mediation session, including the mediator, unless otherwise agreed to by the parties.

(7) The mediator cannot be called as a witness at trial.

(j) ***Neutral Evaluator.*** Anytime after an action or proceeding has been filed, the action may be referred to a neutral evaluator to be selected with the approval of the parties.

(k) ***Relationship to Other Procedures.*** Nothing in this Rule modifies the provisions of Fed.R.Civ.P. 16 and 26, or L.B.R. 7016-1 or any order of court, nor does it preclude the use of any kind of mediation outside of the mediation process established by this Rule or the use of any other means of alternative dispute resolution.

Part:

Part IX - General Provisions

APPENDIX G

BANKRUPTCY DISPUTE RESOLUTION PROGRAM

The Court's Bankruptcy Dispute Resolution Program ("BDRP") includes mediation, negotiation, early neutral evaluation, and settlement facilitation. The specific method employed must be determined by the mediator (hereinafter the "Mediator") and parties.

(a) Assignment of Matters to Mediation. The Court may refer a matter to mediation *sua sponte*, upon written stipulation, or upon motion by a party or the United States Trustee. See Local Bankruptcy Form J-1. Unless otherwise ordered by the Court, participation in mediation is voluntary.

(b) Matters Subject to Mediation. The Court may assign to mediation any dispute arising in an adversary proceeding or contested matter in a bankruptcy case, except those relating to employment of professionals, objections to discharge under 11 U.S.C. § 727, and matters involving contempt or sanctions.

(c) Mediator Qualifications. Absent Court order directing otherwise, the Mediator must have sufficient qualifications based on training or experience. For training, the Mediator must have successfully completed at least forty (40) hours of mediation training sponsored by a nationally recognized bankruptcy organization or at least forty (40) hours of basic mediation training in a program meeting the requirements of Maryland Rule 17-104 or former Maryland Rule 17-106. For experience, the Mediator must have ten (10) or more years of professional experience in the insolvency field and participated in five (5) or more mediations as mediator or attorney for a party.

(d) Selection of Mediator. The parties may select a mutually acceptable Mediator. If the parties cannot agree, the presiding judge must select a Mediator.

(e) Disqualification of Mediator. A Mediator must promptly determine and disclose all conflicts or potential conflicts. Any person selected as a Mediator must be disqualified where 28 U.S.C. § 455 would require disqualification if that person were a judge.

(f) Compensation. Unless otherwise agreed by the Court, the parties, and the Mediator, a Mediator must be compensated at the Mediator's normal and customary hourly rates or upon such rates as agreed to by the Mediator and the parties. The Mediator must also be reimbursed for any out of pocket expenses associated with the mediation. Unless otherwise agreed by the parties, all fees and expenses must be split equally among the parties to the mediation. If the Court determines that a party assigned to mediation cannot afford to pay the fees and costs of the Mediator, the Court may appoint the Mediator to serve pro bono as to that party. Court approval of the reasonableness of fees and reimbursement of expenses is required only if the estate is to be charged for some or all of the Mediator's compensation and the estate's portion exceeds $25,000, or if less than $25,000 but the estate representative objects to the fees sought from the estate.

(g) Deadlines. Unless otherwise ordered by the Court, the referral of a matter to mediation does not operate to stay, postpone, or extend any deadlines.

(h) Dispute Resolution Procedures. The Mediator must schedule a time and place for the mediation conference (or other dispute resolution method) that is acceptable to the parties and the Mediator. The Mediator must determine if a pre-mediation written submission (hereinafter the "Submission") by the parties is necessary or appropriate and must direct the parties as to the form and nature of any such Submission. All individual parties, and representatives with authority to negotiate and to settle the dispute on behalf of parties other than individuals, must attend the mediation conference unless excused by the

Mediator. If the parties resolve their dispute before or during the mediation conference, they must prepare an appropriate written stipulation, and where required by the Bankruptcy Code or other applicable law, they must promptly submit the fully executed stipulation to the Court for approval.

(i) Administration of BDRP. The Clerk of Court or his designee (the "BDRP Administrator") must administer the BDRP, track and compile BDRP results, and handle such other administrative duties as necessary.

(j) Confidentiality. All written and oral communications made in connection with or during any mediation conference, including any written Submissions, are subject to Federal Rule of Evidence 408. No such communication may be used in any proceeding for any purpose and may only be disclosed upon written agreement of all parties to the mediation and the Mediator.

(k) Report of Mediation. As soon as practicable, but no later than thirty (30) days after the conclusion of the mediation conference (or other alternative dispute resolution method), the Mediator must file with the Court a Report of Mediator, advising of the date(s) that the parties conducted the mediation, the parties in attendance at the mediation, and whether the parties resolved the matter (Local Bankruptcy Form J-2, "Report of Mediator"). In addition, the Mediator must submit to the BDRP Administrator only a report regarding the mediation conference (Local Bankruptcy Form J-3, "Report to BDRP Administrator"). The Report of BDRP Conference is confidential and must not be disclosed to the mediation participants or filed in the main bankruptcy case or adversary proceeding.

(l) Immunity. Aside from proof of actual fraud or other willful misconduct, the Mediator must be immune from claims arising out of acts or omissions incident or related to service as a Mediator appointed by the Court. Appointed Mediators are judicial officers, provided the same immunities as judges in Title 28 of the United States Code.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(ADOPTED AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators
September 2005

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

---

[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 revisions to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

   1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

   2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be

seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps

to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations,

modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

Confidential Information Form

For Use in Confidential Settlement Negotiations Only

In accordance with L.B.R. 9019-2(g), please provide the mediator with a mediation conference memorandum n**o later than seven (7) days prior to the scheduled date** of the mediation. The preferred method of receipt is via e-mail to Kara Gendron at karagendron@gmail.com **(Please be sure to mark as confidential and include the caption of the case in the subject line.)** In addition to addressing the items required under the above-referenced Local Rule, please address the following points if you believe they are applicable and/or to the extent that they are not otherwise addressed by the disclosures required by the Local Rule.

1. Please briefly summarize the facts that led to this dispute.

2. Please describe the legal issues that must be resolved in order to settle this case.

3. Please describe the substance and dynamics of your negotiations to date, including the most recent demand and offer.

4. Please describe what you consider to be the obstacles (legal and non-legal) to settling this case.

5. Please describe your legal theory(ies) of this case at this point and attach the 1-2 cases that you believe are most relevant.

6. If the mediation focuses on the legal strengths and weaknesses of your (and the other party's) case, will this be sufficient to help your client reach a complete resolution of his/her dispute? If not, what other non-legal or non-litigation issues need to be addressed? How could they be addressed?

7. List the names of the persons who will attend the mediation. If applicable, list the name and title of the individual who will represent a corporate/government party or insurer. (Please remember that L.B.R. 9019-2(h) requires the person(s) with decision-making authority to attend the mediation session).

8. Name of the person completing the form. (If the form is completed by an attorney, include the name of the litigant who is represented by the attorney.)

This form SHOULD NOT be served upon the other party(ies) or filed with the Court. It is intended to be and will be treated *as* a confidential communication with the Mediator.

Agreement to Mediate

The parties named below acknowledge and agree that they are willing to participate in a mediation process in an effort to reach a voluntary agreement to resolve the following case: ABC Corporation. v. Jane Smith, (Adversary Proceeding 1:24-ap-99999). The mediation will be conducted by Attorney Kara K. Gendron (the "Mediator"), of the law firm of Mott & Gendron Law.

The parties also acknowledge and agree to be bound by the following ground rules:

1. **Duty to meet.** The parties will attend the scheduled mediation session(s) unless attendance is excused pursuant to L.B.R. 9019-2(h)(b) of the Local Rules for the United States Bankruptcy Court, Middle District of Pennsylvania.

2. **Mediator.** The mediator does not represent any party. The mediator has no duty to provide advice or information to a party or to assure that a party has an understanding of the problem and the consequences of his/her actions. The function of the mediator is to promote and facilitate voluntary resolution of the matter. The mediator has no responsibility concerning the fairness or legality of the resolution.

3. **Mediator Impartiality, Disclosures.** No party knows of any circumstances that would cause reasonable doubt concerning the impartiality of the mediator. If the mediator has disclosed past or current relationships with one or more of the parties or their attorneys, the parties acknowledge the receipt of such disclosure(s) and consent to the mediator's service in this matter.

4. **Confidentiality.** The parties and the mediator agree to the following confidentiality provisions:

   a. All discussions, representations, and statements made during mediation will be privileged as settlement negotiations. The parties agree that they will not attempt to discover or use as evidence in any judicial, administrative or arbitration action or proceeding anything related to the mediation, including any communications or conduct or the thoughts, impressions or notes of the mediator. No document produced in mediation which is not otherwise discoverable will be admissible by any of the parties in any action or proceeding, including, but not limited to, a judicial, administrative or arbitration action or proceeding, except as provided in 42 Pa.C.S.A. §5949.

   b. The parties will not subpoena the mediator, or any records or documents of the mediator in any legal proceedings of any kind. (See L.R.B. 9019-2(h)(g)). If so called or subpoenaed, the mediator may refuse to testify or produce the requested documents. Should any party attempt to compel such testimony or production, such party shall be liable for, and shall indemnify the mediator against, any liabilities, costs or expenses, including reasonable attorneys' fees, which the mediator may incur in resisting such compulsion.

c. The mediator will not disclose any communications made during the mediation except as authorized by the parties, as required by law or other applicable professional codes, or as required by the report filed with the court as part of the mediation program of the United States Bankruptcy Court of the Middle District of Pennsylvania

d. The mediation commences at the time of initial contact with the mediator.

5. Voluntary Acknowledgment. The parties hereby voluntarily sign this Agreement to Mediate to affirm that they have read the Agreement and agree to be bound by its provisions as they attempt to reach resolution through mediation.

6. Professional Fees and Costs of Mediation. Pursuant to L.B.R. 9019-2, the first four hours of this mediation process are being provided by the Mediator *pro bono*. At the conclusion of four (4) hours of service in the mediation, the Mediator will conclude the mediation, unless the parties wish to retain the Mediator at his prevailing customary rate for bankruptcy services which is currently, $XXX.00 per hour. Further, unless the parties agree among themselves for a different allocation, any such costs must be born *pro rata* by each side. In the event that the Mediation continues past the *pro bono* timeframe, all parties should bring a checkbook to the Mediation.

Date: _____ _____

Kara K. Gendron, Mediator

ABC Corporation

Date: _____ **BY**:_____

Date: _____ _____

Jane Smith

Date: _____ **BY:**_____

Date: _____ _____

Jack Miller, Esquire

Faculty

Hon. Thomas J. Catliota is a U.S. Bankruptcy Judge for the District of Maryland in Greenbelt. Prior to his appointment in 2006, he was a partner in the firm of Pillsbury Winthrop Shaw Pittman and a member of its insolvency group, where he chaired its bankruptcy and insolvency practice for seven years, representing debtors, creditors and committees in bankruptcy courts across the country and focusing on all aspects of insolvency law, particularly in the real estate, health care, trucking, technology and food services industries. Judge Catliota lectures frequently on many bankruptcy topics, including landlord/tenant rights in bankruptcy, the acquisition of assets from a bankruptcy estate and the law of letters of credit in bankruptcy. From 1993-96, he was the co-editor of *The Fourth Circuit and District of Columbia Bankruptcy Court Reporter*, which contained the full text, synopses and summaries of bankruptcy court opinions published in the federal courts of the Fourth Circuit and the District of Columbia Circuit. Judge Catliota received his B.S. from Marquette University in 1977, his J.D. from Catholic University of America Columbus School of Law in 1983, where he was the recipient of the Faculty Award, among other academic awards, and his LL.M. in taxation from Georgetown University Law Center in 1985.

Kara K. Gendron is co-owner of Mott & Gendron Law in Harrisburg, Pa. She has been practicing bankruptcy law exclusively since 2001 and focuses her practice on representing individuals, farmers and small business owners in bankruptcy cases. Ms. Gendron is board certified in Consumer Bankruptcy Law and a certified bankruptcy court mediator. In addition to her private bankruptcy law practice, she is a chapter 7 trustee and a chapter 12 trustee. Ms. Gendron is the Membership Relations Director for ABI's Consumer Bankruptcy Committee and is an advisory board member for ABI's 2023 Consumer Practice Extravaganza (CPEX). She also is a board member of the National Association of Consumer Bankruptcy Attorneys (NACBA) and serves as NACBA's chair for the Circuit Leader Committee. Ms. Gendron is a director for the American Board of Certification (ABC), a board member of the Middle District Bankruptcy Bar Association (MDBBA), an advisory board member for the Middle District of Pennsylvania Bankruptcy Court, and an advisory board member for the *American Bankruptcy Law Journal*, published by the National Conference of Bankruptcy Judges (NCBJ). She also taught bankruptcy law for several years at the Widener School of Law. Ms. Gendron received her B.A. in 1997 from the University of Pennsylvania and her J.D. in 2001 from Pennsylvania State University Dickinson School of Law.

Hannah W. Hutman is a partner at Hoover Penrod, PLC in Harrisonburg, Va., where her practice focuses on representing both creditors and debtors in bankruptcy proceedings under chapters 7, 11, 12 and 13 and insolvency-related matters. In addition, she frequently represents creditors in collection matters, including restructuring obligations, asset liquidations and dispositions, and foreclosures. Ms. Hutman is a member of the panel of Chapter 7 Trustees for the Western District of Virginia, and she is a past chair of the Board of Governors of the Bankruptcy Law Section for the Virginia State Bar. She is a frequent presenter on a wide variety of insolvency-related topics and co-authored a chapter in the *Bankruptcy Practices in Virginia Handbook*. Ms. Hutman has been active in the Virginia network of the International Women's Insolvency & Restructuring Confederation and is AV-rated by Martindale-Hubbell, has routinely been listed in *Super Lawyers* as a "Rising Star" and selected as a member of Virginia's "Legal Elite," and was honored as one of ABI's "40 Under 40" in 2018. Ms. Hutman re-

ceived her B.A. *summa cum laude* from Columbia Union College in Takoma Park, Md., and her J.D. from the Marshall Wythe School of Law at the College of William and Mary in Williamsburg, Va.

Stephen W. Sather is a shareholder and director of Barron & Newburger, P.C. in Austin, Texas. He is Board Certified in Business Bankruptcy Law by the American Board of Certification and the Texas Board of Legal Specialization. Mr. Sather serves on the Texas Board of Legal Specialization's Bankruptcy Advisory Commission and on the board of the American Board of Certification. He is the author of A Texas Bankruptcy Lawyer's Blog, stevesathersbankruptcynews.blogspot.com, and he has been named a *Texas Super Lawyer* in the area of Bankruptcy and Creditors Rights since 2006. Mr. Sather has authored multiple *amicus* briefs, and he has been a subchapter V trustee since February 2020. He received his B.A. summa cum laude in 1983 from Texas Lutheran University and his J.D. with honors from the University of Texas Law School in 1986.