DRAFT

FOR DISCUSSION ONLY

# MEDIATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

**APRIL 16, 1998**

# MEDIATION ACT

With Comments





**DRAFTING COMMITTEE ON**

## UNIFORM MEDIATION ACT



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

**Rationale for a Statute on Mediation Confidentiality**

Mediation serves to overcome barriers to negotiated settlement and therefore can contribute to an earlier resolution of disputes. The parties usually participate, often with their lawyers, in the mediation process, and therefore the process tends to increase their satisfaction and to lead to a result tailored to their needs.

Mediators typically promote a candid and informal exchange regarding events in the past and encourage people to suggest ways in which differences might be resolved. Mediators and commentators believe that candor and unguarded discussions help the parties reach earlier settlement and more satisfying results. According to this view, this frank exchange is achieved only if the mediator and participants know that what is said in the mediation will not be used to their detriment through court proceedings and other adjudicatory processes. Lawrence R. Friedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 43-44 (1986); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administration Settlements By Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 323-324 (1989); Alan Kirtley, *The Mediation Privilege Standard to Protect Mediation Participants, The Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 17. According to some authorities, public confidence in and voluntary use of mediation will expand if people have confidence in the impartiality of mediators and public acceptance will be eroded when people hear that mediators testify about exchanges in mediation. *See, e.g., NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 54 (9th Cir. 1980) ("We conclude that the public interest in maintaining the perceived and actual impartiality of federal mediators does outweigh the benefits derivable from

[the mediator's] testimony."). Chilling effects on public confidence may also follow a mediator's disclosure of mediation conversations to a judge or other officials in a position to affect the decision in a case. These rationales — promoting candor by protecting expectations and promoting increased use by maintaining public confidence — appear to be the strongest policies underlying statutes and rulings.

State policy seems to favor mediation confidentiality. More than three quarters of the states have enacted mediation privilege statutes for some kinds of disputes. Indeed, state legislatures have enacted over 200 mediation confidentiality statutes. *See* ROGERS & MCEWEN, *supra*, Appendices A and B. Scholarly commentary and articles by practitioners favor recognition of a privilege. For commentary favorable to a privilege, *see* 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; Jonathan M. Hyman, *The Model Mediation Confidentiality Rule*, 12 SETON HALL LEGIS. J. 17 (1988); Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986), NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 9 (2nd ed. 1994 & supp. 1997). For commentary opposed to mediation, *see* ERIC D. GREEN, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986).

At the same time, provisions expanding confidentiality are in derogation of policies making evidence available, *Jaffe v. Redmond,* 116 S. Ct. 1923 (1996) (recognizing a psychotherapist privilege), and openness in the public decision-making. A statutory privilege for mediation should be structured to limit intrusions into public policy to those necessary to achieve

the goals discussed above. Because privileges result in the loss of evidence, some justifications based on professional convenience or desires for privacy (outside the family context) put forward for privilege are generally rejected.

Mediation confidentiality provisions often include (1) evidentiary privileges and (2) prohibitions against other disclosures by mediators. Evidentiary privileges, sometimes called testimonial privileges, usually operate to allow a person to refuse to disclose and to prevent another from disclosing particular communications. *See* Uniform Rule of Evidence 502(b) (regarding attorney-client privilege). Prohibitions against disclosure, in contrast, prohibit and sanction voluntary disclosure.

To be effective in promoting effective communications, the contours of privilege should be clear to the parties at the time that they decide whether to be candid. This fact should be weighed as drafters determine exceptions to the privilege based on later behavior, such as whether one party claims that the other failed to negotiate in good faith. Also, this fact underscores the need for uniformity across jurisdictions because parties entering a mediation often cannot anticipate what court or administrative agency will later receive evidence about the dispute.

## Recommended Draft

(a) *Definitions*. As used in this statute:

(1) "Mediation" is a process through which an impartial person or persons assists parties to resolve a dispute but does not issue a ruling which binds the parties.

(2) A "mediator" is an impartial person or program who is appointed by a court or public agency or engaged by the parties to assist in the resolution of the dispute by the parties.

(3) A "mediation program" is a legal entity that regularly offers mediation services.

(4) A "party" to a mediation is a person participating in the mediation and either involved in the dispute or whose agreement is necessary to resolve the dispute.

(5) Mediation "begins" (a) after a court, public agency, or mediation program appoints a mediator or refers the parties to the mediator; (b) after the parties sign an agreement engaging a person or program to mediate the dispute; or (c) after one party calls a mediation program seeking mediation services.

(6) A mediation "communication" includes statements made after mediation begins and related to the course of mediation.

(b) *General Rule of Privilege*. A party to a dispute has a privilege to refuse to disclose and to prevent any other person from disclosing mediation communications. A mediator has a privilege to refuse to disclose and to prevent any other person from disclosing that mediator's communications during the mediation and to refuse to provide evidence of mediation communications.

(c) *Exceptions*. There is no privilege under this statute:

(1) *Furtherance of Crime*. If any party or the mediator attempts to use the mediation to commit or plan to commit a crime.

(2) *Written Agreement*. For the parties' written and signed agreements.

(3) *Criminal Proceedings*. In adult criminal proceedings. [See Reporter's Notes.]

(4) *Child Abuse or Neglect*. For communications evidencing child neglect or abuse.

(5) *Threats of Harm*. For explicit or implied threats to cause another to suffer substantial bodily harm or serious destruction of property.

(6) *Waiver by Parties*. For evidence provided by someone other than the mediator of communications by persons other than the mediator, if all parties waive the privilege.

(7) *Waiver by Mediator*. For evidence provided by the mediator and for evidence of communications by the mediator, if the mediator or a person authorized to speak on behalf of the mediator waives the privilege.

(8) *Otherwise Discoverable*. If information would otherwise be admissible or subject to discovery outside its use in a mediation, it does not become inadmissible or protected from disclosure solely by reason of its use in mediation.

(9) *Claims Against the Mediator*. To the degree ruled necessary by the court, if a party files a claim against the mediator on issues arising from the mediation.

(10) *Interests of Justice*. [See Reporter's Notes.]

(d) *General Rule of Non-Disclosure*. A mediator shall not disclose mediation communications other than the parties' written and signed agreement to others, including the judge or other appointing authority who may make rulings on or investigate the matters in dispute, unless compelled to testify. [*A court or agency may impose such legal, equitable, or administrative relief as will effectuate the purposes of the Act*.]

(e) *Exceptions to Non-Disclosure*. A mediator may disclose mediation communications in the following circumstances, but only as needed to achieve the purposes of the exception:

(1) *Threatened Harm*. The mediator learns of explicit or implied threats to cause another to suffer substantial bodily harm or serious destruction of property.

(2) *Reports of Crime*. Federal law or state law that a mediator reasonably believes to be applicable requires the mediator to report crimes to appropriate authorities.

(3) *Program Monitoring*. To the provision of statistical mediation effectiveness as long as the data cannot be attributed to a particular case or person.

(4) [*States should specify whether public records and public meetings laws take precedence over the non-disclosure provisions of this statute*.]

(5) *Conflict of Laws*. [See Reporter's Notes.]

## Reporter's Notes

*(a) Definitions*

The draft reflects lines drawn among competing considerations. The desire is to promote effective mediation in many contexts, not just in the courts and public agencies covered by most mediation privilege statutes. At the same time, under a broad definition of mediation, there may be misuse of the privilege. For example, persons could strategically claim to have been involved in a mediation if part of a group who were discussing an area of disagreement. It would be difficult to prove that the discussion leader was not a mediator because mediators are not licensed as are most professionals who enjoy the protection of privilege. The over-breadth might lead to a loss of evidence without serving the purposes underlying a mediation privilege. In other words, the broader the definition, the greater the flexibility in the development of mediation but also the greater the likelihood of abuse.

One approach might be to define mediation quite broadly but make it inapplicable where the loss of evidence would most damage the interests of justice, such as in criminal proceedings, thus establishing an absolute privilege subject to limited and defined exceptions. Another approach might be to define mediation broadly but make the privilege qualified, that is yielding when the court decides that the interests of justice outweigh the purposes served by maintaining confidentiality. A third approach might be to narrow the definition of mediation somewhat.

The draft combines some of each approach. It narrows the definition by requiring a triggering event -- the appointment or engagement of the mediator. This triggering event requirement in (a)(2) makes it more difficult later to label a discussion "mediation" when the persons involved never intended to be in a mediation process or believed that they were speaking

under the cloak of privilege. In addition, the draft makes the privilege inapplicable in adult criminal proceedings in (c)(3), a controversial exception discussed below. The draft provides alternative language in (c)(10) that would make the privilege qualified, as discussed later in the comments.

The breadth of the mediation definition in (a)(1) permits the privilege to be extended to processes sometimes given other names, such as neutral evaluation or facilitation. To narrow the definition would lead to undesirable attempts to thwart the privilege if the mediator was alleged to have given a judgment about the merits.

The term "statement" implies an intent to communicate which can be oral or written or through action or silence. *See* Federal Rule of Evidence 801(a).

*(b) General Rule of Privilege*

This is the evidentiary privilege; part (d) provides for non-disclosure. The language designates holders of the privilege. Some mediation statutes provide that the parties jointly hold the privilege. *See, e.g.,* Wash. Rev. Code sec. 5.60.070; Wyo. Stat. sec. 1-43-103. In other words, any party may assert the privilege, and waiver is effective only if all parties waive the privilege. The party-holder approach is analogous to the attorney-client privilege in which the client holds the privilege. Other statutes and rulings make the mediator the holder. *See, e.g., In re Marriage of Rosson,* 178 Cal. App.3d 1094, 224 Cal. Rptr. 250 (1986) (child custody mediation privilege held only by mediator). Still others designate the parties and mediator as holders; any party or the mediator may assert the privilege and disclosure occurs only if all waive. *See, e.g.,* Cal. Bus. & Prof. Code sec. 1122. This draft adopts an approach taken in a few statutes of bifurcating the holder. *See, e.g.,* Ohio Rev. Code sec. 2317.023.

The current range of statutory approaches reflects varying primary rationales for a mediation privilege. For some, the perceived neutrality and privacy of the mediation process is the key rationale, which leads them to suggest the mediator would be the holder. For others, the primary rationale is to protect the parties' reasonable expectations of confidentiality. Under this rationale, the parties would be the holders.

The draft approach gives weight to the primary concern of each rationale. If all parties agree, any party can be required to testify about what the parties said; the mediator cannot block them from doing so. At the same time, even if the parties agree to disclosure, the mediator can decline to testify and even can block the parties' testimony about what the mediator said as well as evidence of the mediator's notes.

*(c) Exceptions*

*(1) Furtherance of Crime*

Exception (1) for crime differs from the typical crime-fraud privilege exception in being limited to crime rather than including both crime and fraud. An exception for civil fraud on the part of any participant might be used to defeat the privilege whenever a participant allegedly lies (thereby perhaps securing an agreement based on a false premise) during mediation, a frequent occurrence in the midst of heated exchanges. In the mediation context, therefore, the civil fraud exception might swallow the rule.

*(2) Written Agreement*

Exception (2) is controversial only in what is not included -- oral settlements. The disadvantage of exempting oral settlements is that nearly everything said during mediation could bear on either whether the parties agreed or the content of the agreement. In other words, an

exception for oral agreements might swallow the rule. As a result, mediation participants might be less candid, not knowing whether a controversy later would erupt over an oral agreement. The primary disadvantage of creating no exception for oral settlements is that the naive party who is accustomed to the enforcement of oral settlements reached in *negotiations* might assume the admissibility of evidence of oral settlements reached in *mediation.* However, a number of statutes do not limit the confidentiality exception of signed written agreements and one would expect that mediators and others will soon incorporate knowledge of this into their practices.

*(3) Criminal Proceedings*

Some of the most difficult mediation privilege issues have arisen in the context of criminal proceedings. In one case, a defendant would have been precluded from presenting evidence that would bear on self-defense if the court would have recognized a mediation privilege as applying in the criminal context. *State v. Castellano*, 469 So.2d 480 (Fla. Dist. Ct. App. 1984). In another case, defense counsel alluded in opening statement to mediation communications as providing a basis for a defense and the court precluded the prosecutor from rebutting that inference because the matter was privileged. *People v. Snyder*, 129 Misc.2d 137, 492 N.Y.S.2d 890 (1985). There also is concern that, because of the broad statutory definition of mediation, criminal defendants will seek to preclude use of wiretaps, for example, on the grounds that one of the group was engaged as a mediator for their discussions and the discussions were not in furtherance of a crime (perhaps only discussing a past crime). The loss of evidence resulting from the privilege seems to exact the highest cost in terms of the administration of justice in criminal proceedings.

The rationale for the privilege applies with the greatest strength in civil and

administrative proceedings, because mediation concerns disputes that would be adjudicated through these proceedings if not settled. Also, in most instances the parties discuss the civil disputes candidly during the mediation while remaining on guard against admissions of crimes.

The rationale for excepting adult criminal proceedings does not apply with the same force in juvenile mediation contexts. The juveniles would be less likely to appreciate the consequences of making delinquency admissions and less astute at avoiding admissions. Also, there is stronger public policy support for settling gang, truancy, and other juvenile delinquency disputes through mediation than for settling adult criminal disputes other than through plea bargaining. Therefore, the draft privilege does apply to preclude use of mediation communications in juvenile proceedings.

This exception does not permit mediation communications regarding past crimes to be admitted in civil proceedings.

An alternate approach would be an exception only for criminal proceedings in which the charges involve violence. A second alternative would be to eliminate this exception and replace it with Alternate 10, below, an exception creating a qualified privilege.

*(4) Child Abuse or Neglect*

This is a sensible and common exception for divorce mediation privilege statutes because of the greater public policy desire to secure accurate determinations in proceedings that may represent continuing harm to children. There is no reason to limit the exception to divorce mediation because the same public policy concerns weigh in favor of admissibility if evidence of child abuse or neglect is revealed in the mediation of another kind of dispute.

*(5) Threats of Harm*

Parties do not need to be encouraged to threaten one another during mediation, so disclosure of such threats does little harm to the policies served by the privilege. Disclosure would serve public interests in terms of protecting others.

*(6) Waiver by Parties* and *(7) Waiver by Mediator*

These provisions incorporate the policies discussed under (b) above. What constitutes waiver has been defined for other communication privileges and no different considerations apply for a mediation privilege. The governing principle seems to be that one may waive by disclosure so that one party cannot benefit by breaching the trust of the other. Also, disclosure by a person acting in concert with a mediation party may be deemed to be disclosure by the party.

*(8) Otherwise discoverable information*

This is a common exception to mediation privilege statutes as well as to Federal Rule of Evidence 408 on compromise discussions. *See, e.g.,* Cal. Evidence Code 1120; Wyoming Stats. 1-43-103(c)(iv); Ohio Rev. Code sec. 2317.023(D).

*(9) Claims against the mediator*

This permits the mediator to defend, and the party to secure evidence, in the occasional suit against the mediator.

*[Alternate (10) Interests of Justice}*

*[Such an exception would transform the privilege from an absolute privilege to a qualified privilege. The Ohio statute, for example, provides:*

*Division (B) of this section does not apply in the following circumstances: . . . . (4) To the disclosure of a mediation communication if a court, after a hearing, determines that the disclosure does not circumvent Evidence Rule 408, that the disclosure is necessary in the*

*particular case to prevent a manifest injustice, and that the necessity for disclosure is of sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings. Ohio Rev. Code sec. 2317.023.*

*This alternative approach has been suggested as a means to avoid excepting criminal proceedings from coverage by the privilege. It makes confidentiality less predictable for the parties but also makes injustice less likely.]*

*(d) General Rule of Non-Disclosure*

Mediators are not licensed and therefore are not generally subject to discipline, as lawyers are, for voluntary disclosure. Mediator disclosures to the decision-maker would undermine the parties' candor and invade the judicial process. Therefore, a statutory prohibition seems important. *See, e.g.,* Fla. Stat. Ann. sec. 373.71, Article XIII (8). One would expect that the courts would be willing to award malpractice damages against the mediator for such a disclosure because disclosure violates the draft statute's standard of good practice. No greater sanction seems warranted, although one could authorize court or agency sanctions with the phrase allowing the court or agency to impose "such legal, equitable, or administrative relief as will effectuate the purposes of the Act."

The draft does not prohibit disclosure by the parties. Here, the parties are free to enter a secrecy agreement and presumably courts would award contract damages for breach of the secrecy agreement. Because the parties are often one-time participants in mediation, they might be unfairly surprised if the provision prohibited disclosure by them as it does for mediators and they were held liable for speaking about mediation with others, including a casual conversation with a friend or neighbor. The statutory silence leaves the parties free to agree to secrecy;

through the agreement they would be on notice of the duty to maintain secrecy.

Although the statute is silent on this point, the court could by rule or order prohibit disclosure of mediation communications by parties in a case in litigation. Violation of this order could lead to contempt or other sanctions by the court. *See, e.g., Paranzino v. Barnett Bank of South Florida,* 690 So.2d 725 (Fla. Dist. Ct. App. 1997) (striking pleadings for disclosing mediation communications despite prohibitions); *Bernard v. Galen Group, Inc.,* 901 F.Supp. 778 (S.D.N.Y. 1995) (fining lawyer for disclosure of mediation communications).

*(e) Exceptions to Non-Disclosure*

These are instances of either strong public interest in disclosure or, in the case of monitoring, of little intrusion into confidentiality. The exception for duties to report crimes does not make evidence of crimes admissible. The question of admissibility is covered under the testimonial privilege, parts (b) and (c).

Public records and meetings laws vary significantly by state. It is important for each state to determine whether this statute preempts the public record and meeting laws or vice versa. The competing policies may have greater strength in different states. Unlike the other provisions, the need for uniformity is not as great. The state where the mediation occurs or whose public officials are involved often is clear. In contrast, the forum at which evidence from a mediation will be needed is more often unclear at the time of the mediation.

*[(10) Conflict of Laws]*

*A section on conflicts may be added, depending on the development of the draft.*