APPENDIX PRESENTING ALTERNATIVE DRAFT PROVISIONS

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A. ALTERNATIVE STRUCTURAL APPROACHES TO CONFIDENTIALITY PROVISIONS

The Drafting Committees instructed the Reporters to provide alternative drafting language for the confidentiality provisions of Sections 2 and 3, according to different structures: an evidentiary exclusion, an evidentiary exclusion combined with a privilege, a Rule of Evidence 408 approach, and an approach which gives the disputant a duty not to disclose within a proceeding without agreement. Each of these options, with discussion, is reported below.

Alternative I: Evidentiary Exclusion and Discovery Limitation

The confidentiality provisions of Section 2 and 3 may be structured as a categorical evidentiary exclusion and discovery limitation for communications made during the mediation process. The exclusion/discovery limitation can be employed by any party to future litigation, even by strangers to the mediation. Conversely, mediation disputants who are not parties to the litigation could not prevent disclosure if the litigation parties stipulate to discoverability or admissibility. Under the rules of evidence, aside from "plain errors" affecting the substantive rights of a party, error may only be predicated on the failure to exclude the evidence only if a party objects. See, e.g., Fed. R. Evidence 103.

A simple provision would state that no evidence of a mediation communication is admissible or subject to discovery in any civil or non-felony criminal proceeding in which evidence can be compelled. It would have the exceptions in Section 3(c).

Alternatively, a combined privilege and evidentiary exclusion, such as the approach employed by California in Cal. Ev. Code sec. 1119, might look as follows (with October changes to exceptions noted in bold):

> (X) Except as otherwise provided in this Section, no evidence of a mediation communication is admissible or subject to discovery in any civil or non-felony criminal proceeding in which evidence can be compelled.
>
> (x) A mediation communication is not made inadmissible by this Section if, as to the mediator's testimony or evidence provided by the mediator, the mediator makes a record of agreement to disclose the mediation communication or, as to the disputant's or other evidence of mediation communications, all disputants make a record of agreement to disclose the mediation communication.

This would then be followed by the exceptions in Section 2(c).

The advantages of the evidentiary exclusion approach include:

An evidentiary exclusion could be raised by a stranger to the mediation who is a party to later litigation and therefore might preserve greater mediation secrecy.

. An evidentiary exclusion is less complex than a privilege because it does not distinguish on the basis of holders for purposes of assertion, though the combined exclusion/privilege does distinguish for waiver.

An evidentiary exclusion would be broadly noticed by both the bench and bar, particularly if adopted within the Rules of Evidence, rather than by statute.

The disadvantages of the evidentiary exclusion include:

The broad sweep of an evidentiary exclusion may result in the preclusion of relevant evidence without serving a larger goal of public policy.

An evidentiary exclusion differs in kind from the protections for confidentiality offered by the law to all other professional relationships, including lawyer-client, doctor-patient, and priest-penitent, which means that court interpretation is less predictable.

An evidentiary exclusion's inconsistency with the privilege approach taken by a majority of jurisdictions that have offered confidentiality protection could make legislatures hesitant to embrace a uniform Act using such a structure.

An evidentiary exclusion does not authorize a disputant who is not a litigant to appear to block the use of the evidence, whereas a privilege does.

2. Alternative II: Rule 408 Approach

Another way to structure the protection would be to extend Uniform Rule of Evidence 408 (and related federal and state laws) to mediation. See generally Stephen A. Hochman, Confidentiality Provisions Under the Proposed Uniform Mediation Act: A Partial Dissent, 4 Conflict Management/ABA Litigation, Spring 1999, at 1. Such a provision could simply be amended to the Uniform Rule of Evidence as follows:

> **RULE 408. COMPROMISE AND OFFERS TO COMPROMISE**. Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which that was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim, or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. **Compromise negotiations encompass mediation.**

The advantages of the Rule 408 approach include:

Rule 408 affords disputants protection against statements, including apologies, which they may make in mediated settlement negotiations from being used against them because such statements may not be admitted in evidence to prove liability for a claim, or the invalidity of the claim, or its amount. Rule 408 also prohibits the admission into evidence of any settlement proposals which may be made in the course of settlement discussions, irrespective of whether or not a mediator is involved. However, Rule 408 permits statements made in the course of settlement discussions to be admitted for other purposes, such as impeaching sworn testimony of a disputant which denies that such statements were made, or to prove bias or prejudice of a witness.

> A Rule 408 type of evidentiary exclusion for mediation communications
> has the advantage of simplicity and is likely to be enacted by most states because:
>
> (a) it is not controversial because Rule 408 and similar state evidentiary rules are presently accepted as the state of the law applicable to unmediated settlement discussions;

(b) the Rule 408 approach avoids the need to craft the numerous controversial exceptions to the privilege approach which are currently enumerated in Section 2© of the Draft;

(c) if the parties desire a greater degree of confidentiality in mediation outside the setting of a court they can so provide a mediation agreement or by incorporating mediation rules containing more extensive confidentiality provisions. Within court proceedings, their confidentiality agreement would be unavailing.

(d) there is no evidence that anyone has been deterred from participating in a mediation because of the lack of an evidentiary exclusion broader than the protections afforded by Rule 408.

The disadvantages of a Rule 408 approach are discussed more fully in the body of the Draft. They include:

It would provide narrow protections for the confidentiality of mediation communications because Rule 408 does not apply to discovery; only privileged information is exempted from discovery

It would provide confidentiality protections that are uncertain at the time of mediation because it does not require the exclusion of evidence being offered for "another purpose," such for purposes of impeachment.

It would provide weak protections for confidentiality because it would not apply to proceedings not governed by the Rules of Evidence, which include administrative hearings, legislative hearings, and some civil hearings. Also, the weight of authority is that Rule 408 does not apply in criminal proceedings.

It would not cover mediation sessions focused on disputes that were not legal in nature or in which the disputants agreed on what was owed but were negotiating over the means to complete the payments.

It would lead to ambiguity and satellite litigation over the question of whether a discussion was a settlement negotiation for purposes the application of the Rule.

Alternative 3: DUTY NOT TO DISCLOSE WITHIN PROCEEDINGS

If the privilege is augmented by a duty, it might appear like this:

(a) The disputants and mediator have a duty not to disclose mediation communications within a proceeding in which evidence may be compelled, unless, as to the disputants' testimony, all disputants have agreed in writing to the disclosure and, as to the mediator's testimony, all disputants and the mediator have agreed to disclosure.

The remainder of the section would follow Section 2.

Section 4 would be affected as follows:

1. The Drafters might want to provide a duty to inform the disputants of the duty of non-disclosure.
2. The duty would not be enforceable if the mediator or disputants are immune from liability.

The advantage of this approach is that it increases the likelihood that little will be disclosed. For example, if A and B mediate before C and then subsequently D sues B, B would not be able to use mediation communications against D without getting the agreement of A. A disadvantage clearly follows. Suppose rather than A only, B mediated with 50 other people. It is very unlikely, B could obtain written agreements from all 50 in order to defend against D, even if the 50 did not care very much about the disclosure in a setting not involving them.

A similar result could be achieved by contract of the disputants, in which they could agree to notify each other if requested or planning to disclose and could include liquidated damages for violations of the agreement. The contract approach has the advantage of putting the disputants on notice and obviating the need for another mediator duty.

One could, instead, create an affirmative defense to liability for a disputant or mediator who is unaware of the duty.

B. ALTERNATIVE FOR REDRAFTING SECTION 3

The Drafting Committees asked the Reporters to redraft Section 3 in three ways: incorporated into Section 2, (see Section A above):

(a) A disputant has a privilege to refuse to disclose, and to prevent any other person from disclosing, mediation communications in a civil, juvenile, criminal misdemeanor, arbitration, or administrative proceeding. Those rights may be waived, but only if waived by all disputants expressly. A person who makes a representation about or disclosure of a mediation communication that affects another person in a proceeding may, to the extent necessary to respond to the representation or disclosure, be estopped from asserting the protections of the privilege.

(b) Except as limited by agreement or court or administrative order, a disputant may disclose mediation communications outside of civil, juvenile, criminal misdemeanor, arbitration, or administrative proceedings.

(c) A mediator has a privilege to [refuse to disclose, and to prevent any other person from disclosing, the mediator's mediation communications and may] refuse to provide evidence of mediation communications in a civil, juvenile, criminal misdemeanor, arbitration, or administrative proceeding. Those rights may be waived, but only if waived by all disputants and the mediator expressly. A person who makes a representation about or disclosure of a mediation communication that affects another person in a proceeding may, to the extent necessary to respond to the representation or disclosure, be estopped from asserting the protections of the privilege.

(d) A mediator may not disclose mediation communications, including a report, assessment, evaluation, recommendation or finding regarding a mediation, to anyone, including disclosure to a judge or to an agency or authority that refers the matter to mediation or employs that mediator and that may make rulings on or investigations into the dispute that is the subject matter of the mediation.

(e) There is an exception to the prohibition in subsection (d) if:

1. The parties agree to the disclosure,
2. For public policy reasons,
3. A mediator [reasonably] believes that disclosure is required by law or professional reporting requirements, or
4. An exception is provided in section 2(f).

(f) There is **no privilege** under subsections (a) and (c) of this section nor prohibition against disclosure under subsections (d) and (e)(Note: boldface refers to changes approved by the Drafting Committees):

(1) for a record of an agreement **between** two or more disputants;

(2) for mediation communications that threaten to cause bodily injury or unlawful property damage;

(3) for a disputant or mediator who uses or attempts to use the mediation to plan or commit a crime;

(4) in a proceeding **in which a public agency is protecting the interests of a child, disabled adult, or elderly adult protected by law,** for **mediation** communications offered to prove abuse or neglect;

(5) if a court determines, after a hearing **with consideration of the mediation communications occurring only under seal**, that the **proponent has shown that the evidence is not otherwise available and there is overwhelming need for disclosure to present a** manifest injustice of such a magnitude as to **substantially** outweigh the importance of protecting the confidentiality of mediation communications;

[(6) in a report required to be made to an entity charged by law to oversee professional misconduct for **mediation** communications evidencing professional misconduct **that occurs during the mediation session**.]

[(7) to the extent found necessary by a court, arbitrator, or agency if the disputant files a claim or complaint against a mediator or mediation program **alleging misconduct arising from the mediation**.]

[(8) **as to evidence provided by the disputants, to the extent found necessary by a court, arbitrator, or agency** in a proceeding **in which defenses of fraud or duress are raised regarding** an agreement evidenced by a record and reached by the disputants as the result of the mediation.]

[(9) to the extent found necessary by a court or administrative agency hearing officer if a person who is not a disputant and to whom a disputant owes a duty files a claim or complaint against the disputant related to the disputants' conduct in the mediation.]

[**(10) for the sessions of a mediation that must be open to the public under the law or that the disputants agree to make open to the public and in which the disputants discuss changing decisions of government agencies that have general applicability and future effect.]**

(**g**) Information otherwise admissible or subject to discovery does not become inadmissible or protected from **discovery** solely by reason of its use in mediation.

[in either black letter or comments] Nothing in this section shall prevent the gathering of information for research or educational purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, mediation service, or dispute resolution program, or for training mediators, so long as the disputants and the circumstances of the parties' controversy are not identified or identifiable.

C. ALTERNATIVE REDRAFTING FOR SECTION 4

(a) Before accepting appointment, or as soon as practical, a person who is requested to serve as a mediator shall make an inquiry that is reasonable under the circumstances of the mediation, and disclose any facts learned that a reasonable person would consider likely to affect the impartiality of the mediator, including any

–financial or personal interest in the outcome of the mediation, and

–existing or past relationships with the disputants, their counsel or designated representatives.

(b) Mediators shall disclose information related to the mediator's qualifications to mediate if requested by a disputant or representative of a disputant. Mediators do not need to be attorneys.

D. ALTERNATIVES FOR THE ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS

1. Alternative 1. Contract model (based on Minn. Stat. Ann. 572.35)

This alternative essentially provides explicit recognition of the enforceability of a mediated settlement agreement as a binding contractual agreement. Bracketed provisions are included that condition enforceability on the satisfaction of certain due process requirements.

x. Effect of mediated settlement agreement

(1) The effect of a mediated settlement agreement shall be determined under principles of law applicable to contract. [A mediated settlement agreement is not binding unless: (1) it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and © they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; or

(2) the parties were otherwise advised of the conditions in clause (1).]

2. Alternative II. Stipulation Model (based on Colo. Stat. 13-22-308).

This model permits the parties to agree to have their mediated settlement agreement entered as a court order.

x. Enforceability as a Court Order

(1) If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

3. Alternative III. Confirmation Model: Confirmation Procedure for Mediated Settlement Agreement that Parallels RUAA Approach, But is Tailored to Mediation Process[1]

A. CONFIRMATION OF MEDIATED SETTLEMENT AGREEMENT. A disputant may apply to a court for an order confirming a mediated settlement agreement arising from a mediation in which said disputant participated, at which time the court shall issue such an order unless it may not be enforced pursuant to Section 5(B) or the mediated settlement agreement is modified or corrected pursuant to Section 5 (C).

B. INELIGIBILITY FOR CONFIRMATION. Upon motion of a disputant, a court shall refuse to confirm a mediated settlement agreement if:

(1) the settlement was procured by corruption, fraud, or other undue means;

(2) there was evident partiality, corruption or misconduct by a mediator that prejudiced

[1] The RUAA provides:

SECTION 19. CONFIRMATION OF AWARD. After receipt of notice of an award, a party to an arbitration may apply to the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected pursuant to Section 17 or the award is vacated, modified, or corrected pursuant to Sections 20 and 21.

SECTION 20. VACATING AN AWARD.

(a) Upon motion of a party, the court shall vacate an award if:

(1) the award was procured by corruption, fraud, or other undue means;

(2) there was evident partiality by an arbitrator appointed as a neutral or corruption or misconduct by any of the arbitrators prejudicing the rights of a party;

(3) an arbitrator refused to postpone the hearing upon sufficient cause being shown for postponement, refused to consider evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of Section 12, as to prejudice substantially the rights of a party;

(4) an arbitrator exceeded the arbitrator's powers; or

(5) there was no arbitration agreement, unless the party participated in the arbitration proceeding without having raised the objection not later than the commencement of the arbitration hearing.

(b) One of the following alternatives *(opt-in review provision; stricken at First Read)*

the rights of a disputant;

(3) a mediator refused to postpone the hearing upon sufficient cause being shown for postponement, or otherwise so conducted the hearing as to prejudice substantially the rights of a party.

C. MODIFICATION OR CORRECTION OF MEDIATED SETTLEMENT AGREEMENT

(a) Upon motion by a disputant, a court may modify or correct the mediated settlement agreement if:

(1) there was an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) the award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If a motion made under subsection (a) is granted, the court shall modify or correct the settlement agreement so as to effect its intent and shall confirm the mediated settlement agreement as so modified or corrected. Otherwise, the court shall confirm the mediated settlement agreement as made.

(c) A motion to modify or correct a mediated settlement agreement may be joined, in the alternative, with a motion to vacate the agreement.