

To: Those Following the Uniform Mediation Act
From: Nancy Rogers and Richard Reuben, Reporters
Date: August 31, 2000

re: Revised Interim Draft of the Uniform Mediation Act

Please find attached a copy of the Revised Interim Draft of the Uniform Mediation Act. It represents what will be "the current draft" for purposes discussion and comment during the summer and fall of 2000. The next comprehensive draft will be released on or before November 1, 2000, and will incorporate comments by the public, the Act's Academic Advisory Faculty, and the Committee on Style of the National Conference of Commissioners on Uniform State Laws.

The Revised Interim Draft does not include Reporter's Working Notes, as these are still in the process of revision to reflect the evolution of the Act and public comments. Readers interested in the richer discussion of the issues that the Reporter's Working Notes provide should consult the relevant sections of the Reporter's Working Notes for the March 2000 Draft. Comments pertinent to current sections may be found after the sections in the March Draft as follows: Sections 5, 6, and 7 under Section 5; Section 8 under Section 6; Section 9 under Section 8; Section 10 under Sections 7(b) and 9; Section 11 under Section 9(c); and Section 12 under Section 10.

The Revised Interim Draft does, however, include several reports from Task Forces at the meeting of the Drafting Committees on March 31-April 2, 2000. Comments on those Task Force Reports are particularly welcome.

Comments should be received no later than November 1, 2000, for fullest consideration.

They should be sent to: Nancy H. Rogers, Reporter for the NCCUSL Drafting Committee and Coordinator for the Academic Advisory Faculty of the ABA Drafting Committee, Platt Professor of Law and Vice Provost, Ohio State University, Office of Academic Affairs, 203 Bricker Hall, 190 N. Oval Mall, Columbus, OH, 43210 (rogers.23@osu.edu; phone: 614-292-5881; fax: 614-292-3658) and Richard C. Reuben, Reporter for the ABA Drafting Committee, University of Missouri-Columbia School of Law, Hulston Hall, Columbia, Mo., 65211 (ReubenR@missouri.edu; phone: 573-884-5204; fax: 573-882-3343).

The next meeting of the Uniform Mediation Act Drafting Committees will be on December 1-3, 2000, in St. Petersburg Beach, Fla. These meetings are open to the public and will be held at the Trade Winds Hotel, 5500 Gulf Blvd., St. Petersburg Beach, Fla., 33706. Phone: 727-562-1240. Fax: 727-562-1215. For more information on the meeting, including modest travel discounts, as well as general information on the project, the members of the Drafting Committees, Frequently Asked Questions, etc., consult our web site at www.pon.harvard.edu/guests/uma.

DRAFT

FOR DISCUSSION ONLY

UNIFORM MEDIATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

REVISED INTERIM DRAFT
AUGUST 2000

UNIFORM MEDIATION ACT

With Prefatory Note and Reporter's Notes

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by

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this Draft, including the proposed statutory language and any comments or Reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They also have not been passed upon by the American Bar Association House of Delegates, the ABA Section of Dispute Resolution Drafting Committee, or any Section, Division, or subdivision of the American Bar Association. They do not necessarily reflect the views of the Conference and its Commissioners or its Drafting Committee and its Members and Reporter, or those of the ABA, its Drafting Committee, its Members and Reporter, or any Section, Division or Subdivision of the ABA. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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Uniform Mediation Act

Section 1. Title

Section 2. Application and Construction

Section 3. Definitions

Section 4. Scope

Section 5. Exclusion from Evidence and Discovery

Section 6. Party Privilege

Section 7. Mediator Privilege

Section 8. Waiver and Preclusion of Privilege

Section 9. Exceptions to Privilege

Section 10. [Disclosure and Non-Disclosure by the Mediator]

Section 11. Party Choice Regarding Accompanying Individual

[Section 12. Optional Summary Enforcement of Mediated Settlement Agreements]

[Section 13. Effect of Agreements; Non-Waivable Provisions]

Section 14. Severability Clause

Section 15. Effective Date

Section 16. Repeals

UNIFORM MEDIATION ACT

** Denotes provisions upon which Task Force recommendations may be found at end of the Draft.*

SECTION 1. TITLE.

This [Act] shall be cited as the Uniform Mediation Act.

SECTION 2. APPLICATION AND CONSTRUCTION.

In applying and construing this [Act], consideration must be given to:

(1) the policy of fostering the prompt, economical, and amicable resolution of disputes in accordance with the principles of the integrity of the mediation process and informed self-determination by the parties;

(2) the need to promote the candor of parties and mediators through the protection of confidentiality, subject only to the need for disclosure to accommodate specific and compelling societal purposes; and

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

SECTION 3. DEFINITIONS. In this [Act]:

(1) “Mediation” means a process in which a mediator facilitates communications and negotiations between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) “Party” means a person, other than a judicial official, who participates in a mediation and either has an interest in the outcome of the dispute that is the subject of the mediation or whose agreement is necessary to resolve the dispute.

* (3) “Mediator” means an individual, of any profession or background, who is

1 appointed by a court or government entity or engaged by parties through an agreement
2 evidenced by a record.

3 (4) “Mediation communication” means a statement made during a mediation or for
4 purposes of considering, initiating, continuing, or reconvening a mediation or retaining a
5 mediator.

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

10 (6) “Record” means information that is inscribed on a tangible medium or that is
11 stored in an electronic or other medium and is retrievable in perceivable form.

12 (7) “State” means a State of the United States, the District of Columbia, Puerto
13 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
14 jurisdiction of the United States.

15 16 **SECTION 4. SCOPE.**

17 (a) Except as otherwise provided in subsections (b) and (c), this [Act] applies to all
18 forms and types of mediations in which parties manifest their agreement to mediate in a
19 written record, or are directed or requested by a court or governmental entity, in a written
20 record, to participate in a mediation;

21 (b) This [Act] does not apply to the mediation of:

22 (1) disputes arising under, out of, or relating to a collective bargaining
23 relationship; or

24 (2) disputes involving minors that are conducted under the auspices of a
25 primary or secondary school.

26 **SECTION 5. EXCLUSION FROM EVIDENCE AND DISCOVERY.**

1 (a) A mediation communication is not subject to discovery or admissible in evidence in
2 a civil proceeding before a judicial, administrative, arbitration, or juvenile court or
3 tribunal, or in a criminal misdemeanor proceeding, if it is privileged under Section 6 or 7,
4 the privilege is not waived or precluded under Section 8, and there is no exception that
5 prevents its disclosure under Section 9.

6 (b) A mediation communication that is otherwise admissible or subject to discovery
7 does not become inadmissible or protected from discovery solely by reason of its use in a
8 mediation.

10 **SECTION 6. PARTY PRIVILEGE.**

11 * A party has a privilege to refuse to disclose, and to prevent any other person
12 from disclosing, mediation communications a civil proceeding before a judicial,
13 administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor
14 proceeding.

16 **SECTION 7. MEDIATOR PRIVILEGE.**

17 A mediator has a privilege to refuse to disclose, and to prevent any other person from
18 disclosing, a mediation communication of the mediator in a civil proceeding before a
19 judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal
20 misdemeanor proceeding. A mediator also has a privilege to refuse to disclose evidence of
21 mediation communications in such a proceeding.

1 **SECTION 8. WAIVER AND PRECLUSION OF PRIVILEGE.**

2 (a) The party privilege in Section 6 may be waived, but only if expressly waived by all
3 parties, either in a record or orally during a judicial, administrative, or arbitration
4 proceeding. A party who makes a representation about or disclosure of a mediation
5 communication that prejudices another person in a judicial, administrative, or arbitration
6 proceeding may be precluded from asserting the privilege, but only to the extent necessary
7 for the person prejudiced to respond to the representation or disclosure.

8 (b) The mediator's privilege in Section 7 may be waived, but only if expressly waived
9 by all parties and the mediator, either in a record or orally during a judicial,
10 administrative, or arbitration proceeding. A mediator who makes a representation about
11 or disclosure of a mediation communication that prejudices another person in a judicial,
12 administrative, or arbitration proceeding may be precluded from asserting the privilege,
13 but only to the extent necessary for the person prejudiced to respond to the representation
14 or disclosure.

15
16 **SECTION 9. EXCEPTIONS TO PRIVILEGE.**

17 (a) There is no privilege or prohibition against disclosure under Section 5, 6, or 7:

18 (1) for a record of an agreement between two or more parties;

19
20 * (2) for a mediation communication made during a mediation that is
21 required by law to be open to the public;

22
23 (3) for a threat made by a mediation participant to inflict bodily harm or
24 unlawful property damage;

1 (4) for a mediation participant who uses or attempts to use the mediation to
2 plan or commit a crime;

3
4 (5) for a mediation communication offered to prove or disprove abuse, or
5 neglect, abandonment, or exploitation in a judicial, administrative, or
6 arbitration proceeding in which a public agency is protecting the interests of
7 a child, disabled adult, or elderly adult protected by law.

8
9 (b) There is no privilege or prohibition under Section 5, 6, or 7 if a judicial,
10 administrative, or arbitration tribunal or court finds, after a hearing in camera, that the
11 party seeking discovery or the proponent of the evidence has shown that the evidence is not
12 otherwise available, that there is a need for the evidence that substantially outweighs the
13 importance of this [Act's] policy favoring the protection of confidentiality and:

14
15 (1) the evidence is introduced to establish or disprove a claim or complaint of
16 professional misconduct or malpractice filed against a mediator, a party or a
17 representative of a party based on conduct occurring during a mediation;

18
19 (2) the evidence is offered in a judicial, administrative, or arbitration
20 proceeding in which fraud, duress, or incapacity is in issue regarding the
21 validity or enforceability of an agreement evidenced by a record and reached
22 by the parties as the result of a mediation, but only if evidence is provided by
23 a person other than the mediator of the dispute at issue; or

24
25 (3) for a mediation communication that evidences a significant threat to
26 public health or safety.
27

1 **(c) If a mediation communication is admitted under subsection (a) or (b), only the**
2 **portion of the communication necessary for the application of the exception for**
3 **nondisclosure shall be admitted. The admission of particular evidence for the limited**
4 **purpose of an exception does not render that evidence, or any other mediation**
5 **communication, admissible for any other purpose.**

6
7 **SECTION 10. [DISCLOSURE, NON-DISCLOSURE BY THE**
8 **MEDIATOR.]**

9
10 **(a) Before commencing a mediation, a mediator shall make an inquiry that is**
11 **reasonable under the circumstances to determine whether there are any facts that a**
12 **reasonable person would consider likely to affect the impartiality of the mediator, including**
13 **a financial or personal interest in the outcome of the mediation and any existing or past**
14 **relationships with a party or foreseeable participant in the mediation. The mediator shall**
15 **disclose any such fact known or learned by the mediator to the parties as soon as is**
16 **practical.**

17 **(b) A mediator may not provide a report, assessment, evaluation, recommendation,**
18 **or finding regarding a mediation to a court, agency, or authority that may make a ruling**
19 **on or investigation into a dispute that is the subject of the mediation, other than whether**
20 **the mediation occurred, a report of attendance at mediation sessions, whether the**
21 **mediation has terminated, and whether settlement was reached, except as permitted under**
22 **Sections 8 and 9.**

23 **(c) If asked by a party, a mediator shall disclose the mediator’s qualifications to**
24 **mediate a dispute.**

1 **SECTION 11. PARTY CHOICE OF ACCOMPANYING INDIVIDUAL.**

2
3 A party has the right to have an attorney or other individual designated by the
4 party attend and participate in the mediation. A waiver of this right may be rescinded.
5

6 **[SECTION 12. OPTIONAL SUMMARY ENFORCEMENT OF**
7 **MEDIATED SETTLEMENT AGREEMENTS.**
8

9 (a) Parties entering into a mediated settlement agreement evidenced by a record
10 executed by the parties, their attorneys, and the mediator may petition the [...] court to
11 enter a judgment in accordance with the settlement agreement, provided that:

12 (1) All parties to the settlement agreement are represented by counsel at the
13 time of settlement;

14 (2) The settlement agreement contains a statement to the effect that the
15 parties are all represented by counsel and desire to seek summary enforcement of their
16 agreement,

17 (3) Notice is given to all parties within [30] days of the filing of this petition;

18 (4) The agreement does not relate to a divorce or dissolution; and

19 (5) No party to the agreement files an objection with the court within [30]
20 days of receipt of this notice.

21 (b) The court may enter judgment if:

22 (1) the provisions of subsection (a) are met;

23 (2) no party has filed an objection; and

24 (3) no party has made a showing of corruption, fraud, or duress.

25 (c) The judgment may be recorded, docketed and enforced as any other judgment
26 in a civil action.]
27

28 **[SECTION 13. EFFECT OF AGREEMENTS; NONWAIVEABLE**

1 **PROVISIONS.**

2
3 **(a) The parties cannot by agreement expand the scope of the [Act] defined in**
4 **Section 4.**

5 **(b) The parties and mediator cannot by agreement expand the protections of the**
6 **privileges provided in Sections 6 and 7.**

7 **(c) The parties and mediator can by agreement waive the mediation privilege**
8 **protections of Sections 6 and 7, as provided in Section 8.**

9 **(d) The parties cannot by agreement waive the exceptions to the mediation privilege**
10 **provided in Section 9.**

11 **(e) The parties and mediator can by agreement expand the nondisclosure of**
12 **mediation communications, except as disclosure is required by a court, administrative**
13 **agency, or arbitration under Sections 5, 6, 7, 8, and 9, or is required under contract law.**

14 **(f) The parties by agreement may vary the requirements of Sections 10(a) and (d),**
15 **but may not vary the requirements of subsection 10(c) and Section 11.]**

16
17 **SECTION 14. SEVERABILITY CLAUSE.**

18 **If any provision of this [Act] or its application to any person or circumstance is held**
19 **invalid, the invalidity does not affect other provisions or applications of this [Act] which**
20 **can be given effect without the invalid provision or application, and to this end the**
21 **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:

TASK FORCE PROPOSALS FOR CHANGES

Task Forces appointed by the Chair have suggested the changes listed below. The Drafting Committees have not yet acted on the proposed changes. After a brief discussion of the mission of the Task Force, the current black letter text is presented in bold-faced type, with Task Force recommended language included in italic type.

SECTION 3. DEFINITIONS

A Task Force appointed by the Chair recommends including the concept of mediator impartiality in the definitions section, both amending the definition of mediator to include the word “impartial” as follows, and in providing a separate new definition of impartial.

(3) “Mediator” means an *impartial* individual, of any profession or background, who is appointed by a court or government entity or engaged by parties through an agreement evidenced by a record.

(x) “Impartial” means freedom from favoritism or bias, either by word or by action, and a commitment to serve all parties.

The Reporter’s Working Notes for the new definition of impartiality would reflect that the language is substantially similar to the definition of mediation approved by the Society of Professionals in Dispute Resolution in another setting.

SECTION 6. PARTY PRIVILEGE

The Drafting Committees have been considering the addition of language to address two special situations. Subsection 2 makes the privilege applicable in juvenile or adult felony proceedings, but only if the mediation is conducted by a program that a state has designated as one deserving special protection. The bracketed statement alerts each state to designate the programs to be covered. Subsection 3 makes the privilege applicable in proceedings related to the protection of certain vulnerable persons. It should be read in connection with Section 9 (a) (5), which otherwise makes exception for these proceedings. The purpose is to allow states to provide for and encourage these special mediation programs while following the more typical state approach of leaving admissions of abuse admissible in such proceedings if made in other mediation settings. The following italicized language represents how the text of Section 6, Party Privilege, would read with provisions delineating these two specific contexts.

A party has a privilege to refuse to disclose, and to prevent any other person from disclosing, mediation communications in:

(1) a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding.

(2) a criminal or juvenile delinquency proceeding related to the matter mediated by [states to insert designated programs] unless a court determines after a hearing in camera that the evidence is otherwise unavailable and that an injustice would occur of such a magnitude as to outweigh the state's policy favoring confidentiality in mediation.

1 (3) *a judicial, administrative, or arbitration proceeding in which a public*
2 *agency is protecting the interests of a child, disabled adult, or elderly*
3 *adult protected by law, if*

4 (A) *the case is referred by a court [or possible insertion of other*
5 *officials];*

6 (B) *the public agency participates in the mediation; or*

7 (C) *the case being mediated involves allegations of abuse, neglect,*
8 *abandonment, or exploitation of these protected persons and the*
9 *mediation was conducted by a program supported by public funds*
10 *to mediate such cases.*

12 **SECTION 9. EXCEPTIONS TO THE PRIVILEGE.**

13 A. Section 9(a)(2) currently addresses so-called public policy mediations, i.e., mediations
14 that involve a governmental party. The Draft provision currently reads:

15
16 **(2) for a mediation communication made during a mediation that is required**
17 **by law to be open to the public;**

18
19 A Task Force appointed by the Chair has suggested that the Drafting Committees modify
20 the current language to read as follows:

21
22 *(2) for a mediation communication that is made in a session of a mediation that is*
23 *open to the public or pursuant to an open meeting or open records law.*

24
25 B. The Drafting Committees have been considering inclusion of language referring to
26 proposed Section 6. The revised section, with changes in italics, would read:

(5) for a mediation communication offered to prove or disprove abuse, or neglect, abandonment, or exploitation, *except as provided in Section 6 (3)*, in a judicial, administrative, or arbitration proceeding in which a public agency is protecting the interests of a child, disabled adult, or elderly adult protected by law.

SECTION 10. [DISCLOSURE, NON-DISCLOSURE BY THE MEDIATOR.]

A Task Force appointed by the Chair has recommended a provision that would complement Task Force recommendations regarding the use of the word “impartial” in the definition of “mediator,” and the related recommended definition of “impartial,” with the following new provision to address the consequences of a finding that a mediator was not “impartial.”

(x) The protections of this [Act] do not apply to a mediation if a mediator is not impartial, unless a party reasonably believed the mediator to be impartial. However, if a party reasonably believed the mediator to be impartial, then the party shall have the protections of the [Act].