DRAFT

FOR DISCUSSION ONLY

UNIFORM MEDIATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM MEDIATION ACT

With Prefatory Note and Reporter's Notes

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Uniform Mediation Act (2000)

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 disputants to negotiate a settlement that is

specifically tailored to their needs and interests. This 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. Many states have also created new state offices to encourage greater use of mediation. *See, e.g.*, ARK. CODE ANN. §§ 16-7-101, *et seq*; NEB. REV. STAT. §§ 25-2902, *et seq.*; OHIO REV. CODE ANN. §§179.01, *et seq.*; OR. REV. STAT. §§ 36.105, *et seq.* ; W. VA. CODE § 55-15-1, *et seq.*

1. Role of law.

The law has a limited but important role to play in encouraging the effective use of mediation and maintaining its integrity, as well as the appropriate relationship with the justice system. In particular, the law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated. In addition, the law can help assure their expectations regarding the integrity of the mediation process as well as their assurance that the process is fundamentally fair because their knowing consent will be preserved. *See* Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP.RESOL. 909 (1998). In some limited ways, the law can also encourage the use of mediation as part of the policy to promote the private resolution of disputes through informed self-determination. *See* discussion in Section 2; *see also Denburg v. Paker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1000 (N.Y. 1993).

The provisions in this Act reflect the intent of the Drafters to fulfill this fundamental obligation, and are consistent generally with policies of the states. Candor during mediation is encouraged by maintaining the disputants' and mediators' expectations regarding confidentiality of mediation communications. *See* Sections 5-8. Self-determination is assured by provisions that limit the potential for coercion of the disputants to accept settlements, *see*

Section 7, and that allows disputants to have counsel or other support persons present during the mediation session, *see* Section 9.

The Act promotes the integrity of the mediation process by requiring the mediator to disclose conflicts of interest and to answer honestly about qualifications to mediation. *See* Section 9. Finally, the enhances the attractiveness of mediation by expediting enforcement of mediated agreements. *See* Section 10.

2. Importance of uniformity.

While the law has the capacity to promote the use and effectiveness of mediation, it also has the very real potential to undermine the use of mediation. One of the virtues of mediation is the freedom of the process from the constraints of the complex web of laws that surround the litigation and administrative processes, a virtue that should be respected. However, mediation does not exist apart from law. Indeed, legal rules affecting mediation can be found in more than 2,500 statutes.

Existing statutory provisions frequently vary both by state and, within a given state in several different and meaningful respects. Confidentiality provides an important example. Virtually all states have adopted some form of confidentiality protection, reflecting a strong public policy favoring confidentiality in mediation. However, this policy is effected through approximately 250 different state statutes, and common differences among them 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).

Despite their considerable differences, these statutes may generally be divided into three different types. The modern trend is reflected by those states that have adopted statutes of general application, that is which apply to mediations within a number of venues and

dispute contexts; there are twenty-five such states with what could be roughly characterized as generic statutes: ARIZ. REV. STAT. ANN. § 12-2238 (West 1997);ARIZ. REV. CODE ANN. § 16-7-206 (1997); CAL. EVID. CODE § 1119, *et seq.* (West 1998); IOWA CODE § 679C.2(4) (1998); KAN. STAT. ANN. § 60-452 (1998); LA. REV. ST. ANN. § 9:4112 (West 1998); ME. R. EVID. §408 (1998); MASS. GEN. L. ch.233, §23C (1998); MINN. STAT. § 595.02 (1998); MO. REV. STAT. § 435.014 (1998); MONT. CODE ANN. § 26-1-811 (1997); NEB. REV. STAT. § 25-2914 (1998); NEV. REV. STAT. § 48.109(3) (1997); N.J. REV. STAT. § 23A:23A-9 (1998); OHIO REV. CODE ANN. § 2317 (Baldwin 1998); OKLA. STAT. tit. 12, § 1805 (1998); OR. REV. STAT. § 36.220 (1998); 42 PA. CONS. STAT. ANN. § 5949 (1998) (general); R.I. GEN. LAWS § 9-19-44 (1998); S.D. CODIFIED LAWS ANN. § 19-13-32 (1998); TEX. CIV. PRAC. & REM. CODE § 154.053 (c) (West 1998); UTAH CODE ANN. § 30-3-58(4) (1998);VA. CODE ANN. § 8.01-576.10 (Michie 1998); WASH. REV. CODE § 5.60.070 (1998); WIS. STAT. § 904.085(4)(a) (1998); WYO. STAT. § 1-43-103 (1998).

A second approach, found particularly in older statutes, addresses confidentiality within the context of a specific program or area of regulation, such as farmer-lender mediation. In those states, unless a mediation falls within this subject-specific statute, it proceeds without any statutory protection whatsoever. *See, e.g.,* COLO. REV. STAT. §24-34-506.53 (1998) (housing discrimination); GA. CODE ANN. § 45-19-36(e) (1998) (fair employment); ILL. REV. STAT. ch. 775, para. 5/7B-102(E)(3) (1998) (human rights); VT. STAT. ANN. tit. 9, § 4555 (1998) (landlord/tenant); WASH. REV. CODE § 26.09.015(5) (West 1998) (divorce); W.VA. CODE §§ 6B-2-4(r) (1998) (public ethics) (1998) (fair housing); WIS. STAT. § 767.11(12) (1998) (family court).

Finally, many states have both, protecting the confidentiality of mediation in both statutes of general application and in specific contexts. *See, e.g.,* Cal.Ev.Code §1115 et seq,(noting exemption for domestic courts); CAL. GOV'T. CODE § 12980(I) (West 1998)

(housing discrimination); KAN. STAT. ANN. § 60-452 (1998) (general); KAN. STAT. ANN. § 75-4332 (1998) (labor); WIS. STAT. § 904.085(4)(a) (1998) (general); WIS. STAT. § 767.11(12) (1998) (family court). Across the board, these statutes further vary in terms of the precision of their language, and the extent of their reach, making the task of understanding the applicable law more challenging – especially for the many mediators and disputants who do not have meaningful familiarity with the law or legal research.

Moreover, mediations often have a multistate character for a number of different reasons. With the advance of technology, mediations are increasingly being conducted over the Internet, or over the phone in conference calls between mediators and disputants in different states. The common law and statutory rules regarding which law would govern such a mediation, or any disputes that might arise under or be appurtenant to it, are undeveloped and ambiguous. Finally, mediators often have practices that extend beyond the borders of a single state. In such cases, careful practice, and in the case of lawyer-mediators, professional responsibility, would require the mediator to master the law of each state in which they mediate.

The cross-jurisdictional character of both litigation and mediation make uniformity important. A mediator acting in a state with a mediation privilege, for example, cannot assure the parties of confidentiality because of the possible pertinence of those communications in a matter that may arise in another state. Indeed, it is frequently difficult for even the conscientious mediator or mediation participant to know what law applies to the mediation. Such difficulties are problems that a uniform mediation law can help resolve.

3. Ripeness of a uniform law.

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

First, states in the past twenty-five 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 what types of legal standards are helpful, and what kind are disruptive. The Drafters have studied this experimentation, enabling state legislators to enact the Act with the confidence that can come from learned experience..

At the same time, as the use of mediation becomes more common and better understood by policymakers, states are increasingly recognizing the benefits of a unified statutory environment that cuts across all applications, and the uniform act may provide the means for doing do. Shared standards and understandings will ease the practice of mediation for both mediators and disputants, helping to shape and reinforce reasonable expectations of participants in those processes.

While states have begun moving in this direction, this is still a relatively young trend. Only half of the states have enacted such general legislation, many of them fairly recently. As a result, the law interpreting the statutes in these states has not yet begun to develop, minimizing the potential for disruption of current law and practices, and maximizing the potential for uniformity in the areas contemplated by the Act. Moreover, on the critical issue of confidentiality, the Act adopts the structure used by the overwhelming majority of these general application states, the evidentiary privilege. Because of the great variety among these statutes, the Act will serve the additional salutary function of truly unifying differing laws that have shared goals, while also providing greater clarity, precision, and guidance for mediators, disputants, and courts.

4. A product of a consensual process.

A final measure of the timeliness of the Uniform Mediation Act may be seen in the historic collaboration that led to its promulgation. The Uniform Law Commission was joined in the drafting of this Act by a Drafting Committee sponsored by the American Bar Association, working through its Section of Dispute Resolution, which was co-chaired by former American Bar Association President Roberta Cooper Ramo (Modrall, Sperling, Roehl, Harris & Sisk, P.A.) and Chief Justice Thomas Moyer of the Ohio Supreme Court. The ABA Drafting Committee also included Chief Judge Annice Wagner of the District of Columbia Court of Appeals, James Diggs (Vice President and General Counsel for PPG Industries), Jose Feliciano (Baker & Hostetler), Harvard Law School Professor Frank E.A. Sander, and Judith Saul (a former co-chair of the National Association of Community and Family Mediators).

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 powerfully augmented the work of both Drafting Committees by substantially 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 one, they represented various contexts in which mediation is used: private mediation, court-related mediation, community mediation, and corporate mediation. Similarly, they also embraced a spectrum of viewpoints about the goals of mediation – efficiency for the parties and the courts, the enhancement of the possibility of fundamental reconciliation of the parties, and the enrichment of society through the use of less adversarial means of resolving disputes. They also included a range of viewpoints about how mediation is to be conducted, including, for example, strong proponents of both the evaluative and

facilitative models of mediation, as well as supporters and opponents of mandatory mediation.

Finally, with the assistance of a grant from the William and Flora Hewlett Foundation, both Drafting Committees had substantial academic support for their work by many of mediation's most distinguished scholars, who volunteered their time and energies out of their belief in the utility and timeliness of a uniform mediation law. These included members of the faculties of Harvard Law School, the University of Missouri-Columbia School of Law, the Ohio State University College of Law, and Bowdoin College, namely Professors Frank E.A. Sander (Harvard Law School); Leonard L. Riskin, James Levin, Chris Guthrie, Richard C. Reuben, 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 School of Nursing); and Craig A. McEwen (Bowdoin College). The Hewlett grant also made it possible for the Drafting Committees to bring noted scholars and practitioners from throughout the nation to advise the Committees on particular issues. These are too numerous to mention but the Committees especially thanks those who came to meetings at the advisory group's request, including Peter Adler, Christine Carlson, Jack Hanna, Eileen Pruett, and Professors Kimberlee K. Kovach, Alan Kirtley, Ellen Deason, Tom 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 it 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 Society of Professionals in Dispute Resolution, National Council of Dispute Resolution Professional Organizations, American Arbitration Association, JAMS, CPR Institute for Dispute Resolution, Academy of Family Mediators, National Association of Family and Community Mediators, and the California Dispute Resolution Council. Other Official Observers to the Drafting Committees included: the American Bar Association Section of Administrative Law and Regulatory Practice, American Bar Association Section of Labor and Employment Law, American Bar Association Section of Litigation, American Bar Association Senior Law Division, American Trial Lawyers Association, Equal Employment Advisory Council, International Academy of Mediators, and the Society of Professional Journalists.

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

5. Drafting Philosophy.

Mediation often involves both disputants and mediators from a variety of professions and backgrounds, who are not attorneys or represented by counsel. With this in mind, the Drafters sought to make the provisions understandable to readers from a variety of backgrounds, sometimes keeping the Act shorter by leaving some discretion in the courts to apply the provisions in accordance with the general purposes of the Act. These policies include fostering prompt, economical, and amicable resolution, integrity in the process, self-determination by disputants, candor in negotiations, societal needs for information, and uniformity of law. *See* Section 2.

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:

(a) the policy of fostering the prompt, economical, and amicable resolution of disputes in accordance with the principles of integrity of the process and informed self – determination by the disputants,

(b) the need to promote the candor of disputants and mediators through the protection of confidentiality, subject only to overwhelming need for disclosure to accommodate compelling and specific societal purposes, and

(c) the need to promote uniformity of the law with respect to its subject matter.

Reporter's Working Notes

1. Public policy favoring the use of mediation.

Mediation is a consensual process, in which the disputing parties decide the resolution of their dispute themselves, with the help of a mediator, rather than having a ruling imposed upon them. The disputants' participation in mediation, often accompanied by counsel, allows them to reach results that are tailored to their needs, and leads to their greater satisfaction in the process and results. Moreover, disputing parties often reach settlement earlier through mediation, because of the expression of emotions and exchanges of information that occur as part of the mediation process. Studies repeatedly confirm the satisfaction that individual participants have with mediation as an alternative to litigation and trial. *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998).

Society at large benefits as well when conflicts are resolved earlier and with greater participant satisfaction. Earlier settlements can reduce the disruption that a dispute can cause in the lives of others affected by the dispute, such as the children of a divorcing couple or the customers, clients and employees of businesses engaged in conflict. When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. The public justice system gains when those using itDisp 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 democracy. *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); GABRIEL ALMOND & SIDNEY VERBA, THE CIVIC CULTURE (1963) (arguing that cultural factors shape political institutions); ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN ITALY 165-85 (1993) (comparing effective and ineffective regional democratic governments in Italy since the devolution of most powers to regional governments in 1970).

State courts and legislatures have perceived these benefits, and the popularity of mediation, and have publicly supported mediation through funding and statutory provisions that have expanded dramatically over the last twenty years. *See,* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION LAW, POLICY, PRACTICE 5:1-5:19 (2nd ed. 1994 & Sarah R. Cole, ET AL., supp. 1999) [hereinafter ROGERS & MCEWEN]; Richard C. Reuben, *The Lawyer Turns Peacemaker,* 82 A.B.A. J. 54 (Aug. 1996). The legislative embodiment of this public support is more than 2000 state and federal statutes and court rules related to mediation. *See* ROGERS & MCEWEN, *supra,* apps. A and B.

The purposes also underscore the importance of self-determination in mediation, and make clear why some matters are left to the agreement of the parties. Consensual dispute resolution allows the process to be tailored to the needs of the disputants, with minimal intervention by the state. 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). Moreover, agreement is a flexible means to deal with desires to have a particular style of mediation, an approach that continues the encouragement of the diverse approaches which are the hallmarks of the mediation process, but permits practice preference for particular persons and areas of practice. They can agree with the mediator on the general approach to mediation, including whether the mediator will be evaluative or facilitative. The Act should be construed in a manner consistent with the principles of individual self-determination and institutional encouragement of the use of mediation.

2. Candor Crucial to Mediation.

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 confidentiality statutes. *See* ROGERS & MCEWEN, *supra,* at apps. A and B. As discussed above, half of the states have enacted confidentiality protections that apply generally to mediations in the state, while the other half include confidentiality protection within the provisions of specific substantive statutes. *Supra.*

Mediators typically promote a candid and informal exchange regarding events in the past, as well as the disputants' perceptions of and attitudes toward these events, and encourage disputants to think constructively and creatively about ways in which their

differences might be resolved. This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. *See, e.g.,* Lawrence R. Freedman and Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection,* 2 OHIO ST. J. DISP. RESOL. 37, 43-44 (1986); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 323-324 (1989); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,* 1995 J. DISP. RESOL. 1, 17. Such disputant-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. EV. 501-509; *see generally* JACK B. WEINSTEIN, ET. AL, EVIDENCE: CASES AND MATERIALS 1314-1315 (9th ed.1997); *Developments in the Law – Privileged Communications,* 98 HARV. L. REV. 1450 (1985). This rationale has sometimes been extended to mediators to encourage mediators to be candid with the disputants by allowing them to block evidence of their notes and other mediation communications. *See, e.g.,* OHIO REV. CODE ANN. § 2317.023 (Baldwin 1998).

The drafters also recognized that public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes. The public confidence rationale has been extended to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable disputants. *See, e.g., NLRB v. Macaluso,* 618 F.2d 51 (9th Cir. 1980) (public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator's testimony). To maintain public confidence in the fairness of mediation, a number of states prohibit a mediator from disclosing mediation communications to a judge or other officials in a position to affect the decision in a case. DEL. CODE ANN. TIT. 19, § 712(c) (1998) (employment discrimination); FLA. STAT. ANN. § 760.34(1) (West 1998) (housing discrimination); GA. CODE ANN. § 8-3-208(a) (1998) (housing discrimination); NEB. REV. STAT. § 20-140 (1998) (public accommodations); NEB. REV. STAT. § 48-1118(a) (1998) (employment discrimination); CAL.EV.CODE § 703.5 (1998). This justification also is reflected in standards against the use of a threat of disclosure or recommendation to pressure the disputants 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).

3. Importance of Uniformity.

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). Existing statutory provisions vary both by state and, within a given state, by type of program and subject matter of the dispute. For example, the parameters for confidentiality of domestic disputes differ from one state to the next. (*Compare, e.g.,* CONN. GEN. STATE. § 46b-53a (1998) (all communications confidential, unless parties otherwise agree) *with* KAN STAT. ANN. § 23-605 (all communications confidential, except for information reasonably necessary to investigate ethical violations of mediators, information subject to mandatory reporting requirements, information reasonably necessary to prevent ongoing or future crime or fraud, information sought of mediator by a court order, or reports to a court of threats of physical violence made during the proceeding).

Further, a given state often delineates different boundaries for mediation confidentiality in environmental and civil rights cases, and yet other boundaries for court-annexed mediation. Although all states provide for mediation confidentiality for some disputes, most do not cover all types of mediation; these statutes form a patchwork of "hit or miss" coverage. *Compare* NEB. REV. STAT. §§ 25-2902 -25-2921(1998) (dealing with most, but not all publicly-approved mediation programs, though not completely of general application); TEX. CIV. PRAC. & REM. CODE §§152.001-152.004 (generally covering dispute resolution programs) with statutes included within specific substantive laws and applying to them, such as COLO. REV. STAT. § 14-12-105 (1998)(domestic relations); FLA. STAT. ch. 681.1097 (1998) (motor vehicle sales warranties); Iowa Code § 13.4 (1998) (farm assistance program); *and with* states that have both comprehensive and subject-specific mediation provisions such as CAL. EVID. CODE § 1119 (West 1998) (mediation confidentiality generally); CAL. GOV'T CODE § 12984 (West 1998) (housing discrimination mediation). As a result, a disputant in one state who decides whether to be candid during mediation does not know whether the statements made during mediation will be admitted into evidence in the courts of another state. *See* Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws,* 10 OHIO ST. J. ON DISP. RESOL. 157 (1994).

Further, absent uniformity, a disputant trying to decide whether to sign an agreement to mediate may not know where the mediation will occur and therefore whether the law will ensure against conflict of interest or the right to bring counsel. As electronic communication grows, those taking part in telephonic and electronic mediation across states will not know what law affects the conduct of that session.

SECTION 3. DEFINITIONS.

(a) "Disputant" means a person who participates in mediation and:

(1) has an interest in the outcome of the dispute or whose agreement is necessary to resolve the dispute, and

(2) is asked by a court, governmental entity, or mediator to appear for

mediation or entered an agreement to mediate that is evidenced by a record.

(b) "Mediation" means a process in which disputants in a controversy, with the assistance of a mediator, negotiate toward a resolution of the conflict that will be the disputants' decision.

(c) "Mediation communication" means a statement made as part of a mediation. The term may also encompass a communication for purposes of considering, initiating, continuing, or reconvening a mediation or retaining a mediator.

(d) "Mediator" means an impartial individual of any profession or background, who is appointed by a court or government entity or engaged by disputants through an agreement evidenced by a record.

(e) "Public policy mediation" means a mediation in which a governmental entity is a participant, and which leads to a decision by the entity that has general application and prospective effect.

(f) "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.

(g) "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.

(h) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Reporter's Working Notes

1. Subsection 3 (a). "Disputant."

The Act defines "disputant" to be a person who participates in a mediation and has some stake in the resolution of the dispute, as delineated in subsection 3(a)(1), and who either has been asked to attend or has entered an agreement, in writing or electronically, to mediate, as delineated in subsection 3(a)(2). 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 disputants**.** Drafters had previously used the word "party," but replaced it with "disputant" to emphasize that mediation often involves individuals and entities that are not in litigation.

Because of the structural limitations on the definition of disputants, participants who do not meet the definition of "disputant" do not hold the privilege, such as a witness or expert on a given issue, and do not have the rights under additional sections that are provided to disputants. Mediation participants who are not disputants also do not assume new obligations under this Act as a result of attending a mediation session, meaning this Act places no obligation upon such a participant to maintain the confidentiality of mediation communications in any context. Disputants 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 their participation in the mediation. A disputant may participate in the mediation in person, by phone, or electronically. An entity may attend through a designated agent. If the disputant is an entity, it is the entity, rather than a particular agent, that holds the privilege afforded in Sections 5-8.

2. Subsection 3(b). "Mediation."

The emphasis on negotiation in this definition is designed to exclude adjudicative processes, not 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 provisions in subsections (b) and (d) provides three characteristics to distinguish mediation from other dispute resolution processes: (1) that a mediator is not aligned with a disputant, (2) that the mediator assists the disputants with their own negotiated resolution of the dispute, without the authority to issue a binding decision, and (3) the mediator is appointed by an appropriate authority or engaged by the disputants.

3. Subsection 3(c). "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 confidentiality provisions of Sections 5-8. It tracks 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."

The mere fact that a person attended the mediation – in other words, the physical presence of a person – is not a communication. By contrast, nonverbal conduct such as

nodding in response to a question would be a "communication" because it is meant as an assertion. Nonverbal conduct such as smoking a cigarette during the mediation session typically would not be a "communication" because it was not meant by the actor as an assertion. Similarly, a tax return brought to a divorce mediation would not be a "mediation communication" because it was not a "statement made as part of the mediation," even though it may have been used extensively in the mediation. However, a note written on the tax return during the mediation to clarify a point for other participants would be a "mediation communication," as would a memorandum prepared for the mediator by an attorney for a disputant.

The second sentence in subsection 3(c) makes clear that conversations to initiate mediation and other non-session communications that are related to a mediation typically should be considered "mediation communications." However, it uses conditional language to reflect the potential ambiguity of the disputants' or participants' reasonable expectations of those communications and to leave courts with the discretion to limit application of the privilege if the communication did not relate to the mediation. This construct is intended to signal to courts general drafting intent while at the same time providing for the discretion necessary when considering a variety of factors to ensure that the application of the statute is consistent with its purposes. Most statutes are silent on the question of whether they cover conversations to initiate mediation.

The Drafters decided not to introduce a new term, as done through a California statute, which makes privileged a "mediation consultation," defined as "a communication between a person and a mediator for the purposes of initiating, considering, or reconvening a mediation or retaining the mediator" and with detailed provisions because this would add to the length and complexity of the Act. CAL.EVID.CODE §1115(c)(West 1998) (general). They were also concerned about the potential for confusion that can accompany the introduction of new terms into a statute intended for adoption by many different states that have become accustomed to a simpler approach.

The definition in subsection 3(c) is narrowly tailored to permit the application of the privilege to protect communications about a dispute in which a disputant 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 disputant that occurs between formal mediation sessions. Protecting the confidentiality of such a communication advances the underlying policies of the privilege, while at the same time giving the courts the latitude to restrict the application of the privilege in situations where the 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.

Responding in part to public concerns about the complexity of earlier drafts, the Drafting Committees also elected to leave the questions of when a mediation begins and ends to the sound judgment of the courts to determine according to the facts and circumstances presented by individual cases. 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 disputants failed to reach an agreement, such as the 10-day period specified in CAL. EVID. CODE § 1125 (West 1998) (general). However, the Drafting Committees rejected that approach because they 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.

4. Subsection 3 (d). "Mediator."

The Drafting Committees selected the term "impartial" instead of "neutral" or "not involved in the dispute." The term "impartial" reflects a mediator who is not aligned with one of the disputants over the other. In contrast, the term "neutral" might be construed to exclude a mediator in a court program, for example, who is charged by statute to look out for the best interests of the children because this mediator is not neutral as to the result. At the same time, this type of mediation should be encouraged by providing confidentiality as long as the mediator is impartial as between the particular disputants. Also, the Drafting Committees preferred the term "impartial" to "not involved in the dispute" because the former appropriately includes, for example, the university mediation program for student disputes that, if not resolved, might be a basis for university disciplinary action. The term should be read in conjunction with Subsection 9(a) on disclosure of conflicts of interest. If the contract or referral is to a mediation entity, such as a community dispute resolution center or a law school mediation clinic, then that entity becomes the mediator. This is particularly important because of the possibility that information will necessarily be shared among members of this entity.

5. Subsection 3(e). "Public policy mediation."

This definition focuses on a particular type of mediation, one in which a governmental entity participates and ultimately makes a decision and public policies are being mediated. It should be read in conjunction with subsection 8(a)(2), which provides for an exception to the privilege and nondisclosure provisions if the mediation participants do not expect the mediation to be confidential.

Public policy mediation is often related to the work of public agencies. For example, the routing of a public highway or the means of dealing with airport noise are frequently the subjects of public policy mediations, and may be conducted by or include as a disputant a state transportation agency. Agencies also engage in mediations, or negotiated rulemaking, with respect to the establishment of administrative policies. *See, e.g.,* FLA. STAT. § 120.54; NEB. REV. CODE § 89-919.01, *et seq.*; IDAHO CODE § 67-5206(3)(e), 67-5220.

Such public dialogues serve an important democracy-enhancing function, assuring public participation in and oversight of decisions made by the government. This principle of openness has been recognized in several other statutes, such as the Federal Advisory Committee Act and the Federal Government in Sunshine Act. *See* 5 U.S.C. App. 10(d) (1996) (FACA) (requiring meetings of federal advisory committees to be open); 5 U.S.C. §

552(b) (Sunshine Act) (requiring meetings of the government to be open to the public). It also has been embraced by the Model State Administrative Procedure Act. *See* Model State Administrative Procedure Act § 3-204(b) (NCCUSL 1981).

The definition of "public policy mediation" is potentially broad because many disputes can reasonably be characterized as affecting public policy. For example, a multi-billion dollar dispute between two oil companies may have a dramatic effect on stock prices of those companies, in turn affecting millions of stockholders. *See Pennzoil Co. v. Texaco Oil Co.*, 481 U.S. 1 (1987).

To avoid such a broad reach, the Act takes several narrowing steps. It first limits its application to situations in which a governmental entity is a participant, and ultimately makes a decision involving the subject matter of the mediation. Significantly, this effectively excludes from the definition of public policy mediations those components of a public policy mediation that do not include the government in a decisional role, such as the private caucus sessions between a mediator and a particular disputant or participant, including the government. In other words, to promote the credibility of the public policy decisions with those affected, the joint sessions of public policy mediations are often open to the public; there is no intention to maintain their confidentiality. *See generally* LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 246-247 (1984); Lawrence Susskind & Connie P. Ozawa, *Mediated Negotiation in the Public Sector: Mediator Accountability and the Public Interest Problem*, 27 AM. BEHAV. SCIENTIST 255 (1983); WILLIAM R. POTAPCHUK & CAROLINE G. POLK, BUILDING THE COLLABORATIVE COMMUNITY (National Institute for Dispute Resolution 1994).

Second, the Act limits its application to matters that will have "general application" and "future effect." These are terms that are familiar to courts, agencies and others that frequently engage in public policy mediations for purposes of drawing the line between agency adjudications (which are essentially decisions made by agencies in individual cases) and agency rulemaking (which involves agency determinations about large classes of people or entities). *See* 5 U.S.C. §551(4); Model State Administrative Procedure Act § 1-102(10) (NCCUSL 1981); *compare* Londoner v. Denver, 210 U.S. 373 (1908) (property owners individually affected by a tax levy have right to individualized hearing on application of the tax) *with* Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (property owners do not have right to challenge property tax of general applicability).

Finally, read with subsection 8(a)(2), the operative principle is that the general sessions of public policy mediations are open to the public and therefore not confidential under the Act. On the other hand, the privilege does apply to caucuses or private sessions with one or more, but not all, of the disputants. This approach is consistent with that of the federal Administrative Procedure Act. *See* 5 U.S.C. § 574 (1996).

6. Subsection 3(f). "Person."

The Act adopts the standard language recommended by the National Conference of Commissioners on Uniform State Laws for the drafting of statutory language, and the term should be interpreted in a manner consistent with that usage.

7. Subsection 3(g). "Record."

The Act adopts the standard language recommended by the National Conference of Commissioners on Uniform State Laws for the drafting of statutory language, and the term should be interpreted in a manner consistent with that usage.

8. Subsection 3(h). "State."

The Act adopts the standard language recommended by the National Conference of Commissioners on Uniform State Laws for the drafting of statutory language, and the term should be interpreted in a manner consistent with that usage.

SECTION 4. SCOPE.

(a) Except as provided in subsection (b), this [Act] extends to all forms and types of mediation.

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

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

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

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The Act is broad in its coverage of mediation, a departure from the typical state statute which applies to mediation in particular contexts, such as court-connected mediation or community mediation, or to the mediation of particular types of disputes, such as worker's compensation or civil rights. *See, e.g.*, NEB. REV. STAT.§48-168 (1998) (worker's compensation); IOWA CODE §216.15 (1998)(civil rights). Still, the Act exempts certain classes of mediated disputes out of respect for the unique public policies that override the need for uniformity under the Act in those contexts.

Collective bargaining disputes are excluded because of the longstanding, solidified, and substantially uniform mediation systems that already are in place in the collective bargaining context. *See* Memorandum from ABA Section of Labor and Employment Law of the American Bar Association to Uniform Mediation Act Reporters 2 (Jan. 23, 2000) (on file with UMA Drafting Committees); Letter from New York State Bar Association Labor and Employment Law Section to Reporters, Uniform Mediation Act 2-4 (Jan. 21, 2000); (on file with UMA Drafting Committees). In addition, the Act also exempts school programs involving mediations between students and between students and teachers

because the supervisory needs of schools may not be consistent with the confidentiality provisions of the Act. *See* Memorandum from ABA Section of Dispute Resolution to Uniform Mediation Act Reporters (Nov. 15, 1999) (on file with UMA Drafting Committees).

SECTION 5. EXCLUSION FROM EVIDENCE AND DISCOVERY; PRIVILEGE.

(a) Mediation communications are not subject to discovery or admissible in evidence in a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding, if they are privileged under subsections (c) and (d), the privilege is not waived or estopped under Section 6, and there is no exception under Section 8.

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

(c) A disputant 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 if:

(i) a court or law enforcement official referred that case to mediation; or

(ii) the mediation was done by a program supported by public funds to mediate criminal or juvenile cases,

[unless a court determines after a hearing in camera that the evidence is

otherwise unavailable and that a miscarriage of justice would occur of such a magnitude as to substantially outweigh the state's policy favoring confidentiality in mediation.]

[(3) a proceeding in which a public agency is protecting the interests of a child, disabled adult, or elderly adult protected by law, if

(i) the case is referred by the court,

(ii) the public agency participates in the mediation, or

(iii) the case involves allegations of abuse, neglect, abandonment or exploitation and is mediated by an entity that is charged by law or a court to mediate such cases.]

(d) A mediator has a privilege to refuse to disclose, and to prevent any other person from disclosing, the mediator's mediation communications, in a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding. A mediator may also refuse to provide evidence of mediation communications in such a proceeding.

Legislative Note

The Act does not supersede existing state statutes that provide the additional mediator protections, such as those which make mediators incompetent to testify, or that provide for costs and attorney fees to mediators who are wrongfully subpoenaed. *See, e.g.*, CAL. EV. CODE § 703.5 (1998).

Reporter's Working Notes

1. In general.

This Section sets forth the evidentiary privilege, which provides that disclosure of mediation communications cannot be compelled in designated proceedings and results in the exclusion of these communications from evidence and from discovery if requested by any disputant or, for certain provisions, by a mediator as well, unless within an exception delineated in Section 8 or waived under the provisions of Section 6.

2. Relationship to confidentiality agreements by the disputants.

The disputants and the mediator can waive the privilege under the provisions of Section 6. If all the persons who hold the privilege waive it, this Act does not preclude the use of mediation communications in proceedings. However, the disputants cannot expand the privilege by agreement, because agreements to keep evidence from a public tribunal are void as against public policy. *See* JOHN W. STRONG, ET AL, 1 MCCORMICK ON EVIDENCE § 184 (5th ed. 1999) (presumption of admissibility of relevant evidence); E. ALLAN FARNSWORTH, CONTRACTS §§5.1-5.2 (1982) (prohibition on enforcement of contracts in violation of public policy); 14 WILLISTON ON CONTRACTS 881, 885 (3rd ed. 1972); *Employment Opportunity Commission v. Astra USA*, 94 F.3d 738 (1st Cir. 1996). Disputants and mediators may, however, contract for broader confidentiality outside of evidentiary and discovery proceedings, and such agreements will be enforced. *See* Section 7.

3. Rationales for a mediation confidentiality privilege.

The privilege structure employed by the Act to protect confidentiality is consistent with the approach taken by the overwhelming majority of legislatures that have acted to provide legal protections for mediation confidentiality. Indeed, of the 25 states that have enacted confidentiality statutes of general application, 21 have plainly used the privilege structure. ARIZ. REV. STAT. ANN. § 12-2238 (West 1997); ARIZ. REV. CODE ANN. § 16-7-206 (1997); IOWA CODE § 679C.2(4) (1998); KAN. STAT. ANN. § 60-452 (1998); LA. REV. ST. ANN. § 9:4112 (West 1998); ME. R. EVID. §408 (1998); MASS. GEN. L. ch.233, §23C (1998); MO. REV. STAT. § 435.014 (1998); MONT. CODE ANN. § 26-1-811 (1997); NEV. REV. STAT. § 48.109(3) (1997); OHIO REV. CODE ANN. § 2317 (Baldwin 1998); OKLA. STAT. tit. 12, § 1805 (1998); OR. REV. STAT. § 36.220 (1998); 42 PA. CONS. STAT. ANN. § 5949 (1998) (general); R.I. GEN. LAWS § 9-19-44 (1998); S.D. CODIFIED LAWS ANN. § 19-13-32 (1998); TEX. CIV. PRAC. & REM. CODE § 154.053 (c) (West 1998); UTAH CODE ANN. § 30-3-58(4) (1998); VA. CODE ANN. § 8.01-576.10 (Michie 1998); WASH. REV. CODE § 5.60.070 (1998); WIS. STAT. § 904.085(4)(a) (1998); WYO. STAT. § 1-43-103 (1998). Three of the four others have arguably used the privilege structure: *See* CAL. EVID. CODE § 1119, *et seq.* (West 1998); MINN. STAT. § 595.02 (1998); NEB. REV. STAT. § 25-2914 (1998).

That these privilege statutes also are the more recent of mediation confidentiality statutory provisions, suggests that privilege may also be seen as the more modern approach taken by state legislatures. *See e.g.*, OHIO REV. CODE. ANN. §2317.023 (Baldwin 1998); FLA. STAT. ch. 44.102 (1998); WASH. REV. CODE ANN. § 5.60.072. (West 1998); *see generally*, ROGERS & MCEWEN, *supra*, at §§ 9:10-9:17. Moreover, states have been even more consistent in using the privilege structure for mediation offered by publicly funded entities. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-381.16 (West 1997) (domestic court); ARK. CODE. ANN. § 11-2-204 (Arkansas Mediation and Conciliation Service) (Michie 1998); FLA. STAT. ANN. § 44.201 (publicly established dispute settlement centers) (West 1998); 710 ILL. REV. STAT ANN. § 20/6 (non-profit community mediation programs); IND. CODE ANN. § 4-6-9-4 (Burns 1998) (Consumer Protection Division); IOWA CODE ANN. § 216.B(West 1998)

(civil rights commission); MINN. STAT. ANN. § 176.351 (West 1998) (workers' compensation bureau).

The privilege structure carefully balances the needs of the justice system against disputant and mediator needs for confidentiality. For this reason, legislatures and courts have used the privilege to provide the basis for confidentiality protection for other forms of professional privileges, including attorney-client, doctor-patient, and priest-penitent relationships. *See* UNIF. R. EVID. 510-510*;* STRONG, *supra,* at tit. 5. Congress recently used this structure to provide for confidentiality in the accountant-client context, as well. 26 U.S.C. § 7525 (1998) (Internal Revenue Service Restructuring and Reform Act of 1998).

Scholars and practitioners have joined legislatures in showing strong support for a mediation confidentiality 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).].

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

The Drafters carefully considered other approaches that some states have used to protect mediation confidentiality – the categorical evidentiary exclusion, the settlement discussion model (Uniform Rule of Evidence 408), and the testamentary incapacity approach – but concluded each of them were inadequate to provide adequate protection.

a. The limitations of the settlement discussions approach.

The Drafters considered whether the settlement discussions exclusion in Uniform Rule of Evidence 408 and comparable state provisions provide sufficient protection for the confidentiality of mediation communications.

While this approach has the advantage of familiarity, it also has been generally discredited as a vehicle for protecting the confidentiality of mediation communications, primarily because the scope of the protection is severely constrained. *See, e.g., Kirtley,*

supra; Freedman and Prigoff, supra. Rule 408, for example, only applies to hearings in which the tribunal is required to apply the Rules of Evidence. Such a limited scope would mean that the confidentiality of mediation communications would not be protected in some key fora, such as discovery proceedings, some administrative hearings, arbitration hearings, and some pre- and post-trial court proceedings. In addition, the protections of Rule 408 are sharply limited by its exclusions, particularly those permitting for the use of settlement discussions to prove matters other than liability or amount. Its application to mediation would mean that mediation communications could be introduced at trial for many purposes, including impeachment or to show the bias of a witness, as well as knowledge and intent, motive, conspiracy, mitigation of damages, to name just a few examples. *See* ROGERS & MCEWEN, *supra,* § 9:06 and cases cited therein.

In addition, some courts have ruled that settlement discussions are not excluded from criminal trials. *Mako v. United States,* 87 F.3d 50, 54 (2d Cir. 1996); *United States v. Gonzalez,* 748 F.2d 74, 78 (2d Cir. 1984). Some courts would not exclude mediation communications regarding a criminal charge. *See United States v. Peed,* 714 F.2d 7, 9 (4th Cir. 1981); *United States v. Gilbert,* 668 F.2d 94, 97 (2nd Cir. 1981)(admitting civil consent decree to show criminal defendant's knowledge of SEC's reporting requirement*); State v. Burt,* 249 NW2d 651, 652 (Iowa 1977); *Commonwealth v. Melnyczenko,* 238 Pa. Super. 203 (1976) (admitting evidence of offer to make restitution). *Carter v. State*, 161 Tenn. 698, 701 (1931); *but see* United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976) (approving exclusion of evidence under Federal Rule of Evidence 408 that the government offered a witness leniency in exchange for testimony)

Similarly, some portions of settlement discussions have been said to be sufficiently unrelated to settlement to be excluded from Federal Rule of Evidence 408, including an unconditional offer to reinstate the plaintiff. *Thomas v. Resort Health Related Facility*, 539 F.Supp. 630 (E.D.N.Y. 1982) (alternative basis for ruling). Further, mediation over nonlegal disputes, such as family tranquility, would not be excluded by Rule 408. *Crues v. KFC Corp.*, 768 F.2d 230 (8th Cir. 1985)(excluding offers to franchiser before legal claim arose). Nor would the rule exclude mediation communications regarding how to resolve a claim not disputed in validity or amount, such as discussions of how to pay. *See In Re B.D. International Discount Corp*., 701 F.2d 1071, *cert den.* 464 U.S. 830; *Tindal v. Mills,* 265 N.C. 716 (1965) (offer to give a series of notes in discharge of a debt was admissible when the defendant did not dispute the amount due).

Finally, the protection of the settlement discussion often may be raised and waived only by the parties to the pertinent litigation, whereas the privilege allows the mediation disputants to raise and waive the protections.

These reasons have led most state legislatures away from using the settlement discussion model. For exceptions, *see, e.g.*, ME. R. EVID. 408 (b) (1998); VT. EVID. R. 408 (1998).

b. The uncertainty of the categorical exclusion approach.

The Drafting Committees also considered and rejected a third alternative for the protection of mediation confidentiality that has been adopted by a small handful of states: the

general evidentiary exclusion and discovery limitation on mediation communications. *See e.g.*, CAL. EV. CODE § 1119; ARIZ. REV. CODE ANN. § 16-7-206 (1997); MO. REV. STAT. § 435.014 (1998).

This categorical approach has the attractiveness of simplicity, but in practice some court have been hesitant to enforce these provisions in a way that eliminates a whole category of evidence. California's categorical evidentiary exclusion has been construed in three recent rulings by appellate courts. In all three instances, the court has interpreted it in a way that did not preclude the use of testimony about mediation communications in general, and testimony by the mediator in particular, despite explicit statutory provisions rendering the evidence inadmissible and the mediator incompetent to testify, CAL. EV. CODE § 1119 (mediation communications inadmissible) CAL. EV. CODE § 703.5 (mediator incompetent to testify). *See Rinaker v. Superior Court*, 62 Cal.App.4th 155 (1998) (juvenile's constitutional right to confrontation in civil juvenile delinquency trumps mediator's statutory right not to be called as a witness); *Olam v. Congress Mortgage Co.*, 68 F.Supp. 2d 1110 (1999) (construing California statutory scheme as establishing a mediation privilege, and ruling that the mediator's right to testify gives way when both disputants agree to waive the privilege, and the court determines it needs the evidence to decide the disputants' claims); *Foxgate Homeowners Association v. Bramalea California, Inc.*, 2000 WL 218353 (Cal. App. 2 Dist.) (2000) (portions of a mediator's report about sanctionable conduct, along with evidence of statements made during the mediation relating to that conduct, may be considered by a court when ruling on the sanctions motion).

The reasons for judicial reticence to construe a statute purporting to exclude an entire class of evidence is understandable. STRONG, *supra*, at tit. 5. The use of a broad evidentiary exclusion as a vehicle for protecting the confidentiality of communications is uncommon for professional relationships. Traditionally, the categorical exclusion of relevant evidence on policy grounds has been limited to situations involving exclusion of certain facts demonstrating interests that the law has a strong policy in encouraging – such as the fact of subsequent remedial repairs, liability insurance, compromise discussions, juvenile delinquency records, and the payment of medical expenses. In such situations, the law has made the policy determination that, in addition to the substantive policies, the danger of unfair prejudice substantially outweighs the probative value of the otherwise relevant evidence. The same concerns would mitigate against the categorical exclusion of mediation communications as a class of evidence. While public policy favors mediation confidentiality, it can hardly be said as a categorical matter that its admission into evidence would create undue prejudice or otherwise interfere with a court's truth-finding function. It is a fundamental principle of law that relevant evidence is presumptively admissible, STRONG, supra at § 184. As such, the courts would expect that the restriction in the use of mediation communications would be tailored as narrowly as possible to the purposes served.

The categorical evidentiary exclusion/discovery limitation is a potentially powerful weapon of abuse, because it can be employed by any party to future litigation, even strangers to the mediation, such that the evidence is lost without regard to the policies that justify the exclusion of evidence that the law would otherwise make as available and admissible. Moreover, despite its breadth, the evidentiary exclusion/discovery limitation still has

substantial weaknesses. For example, it does not permit the provision of relevant evidence in situations in which disputants do not expect confidentiality and in fact have opened up the mediation to the public, as in public policy mediation. Similarly, if strictly a categorical evidentiary exclusion with no privilege incorporated into it, mediation disputants who are not parties to the litigation could not prevent disclosure if the litigation parties stipulate to discoverability or admissibility. The evidentiary exclusion/discovery limitation approach also has the detriment of being limited to proceedings governed by the rules of evidence, permitting broad disclosure in other types of contexts.

Because of the legal uncertainty over the validity of a categorical evidentiary exclusion, its unusual theoretical underpinnings, and its potential overbreadth and under-inclusiveness, the Drafting Committees elected to follow the traditional means of protecting professional communications and rejected the evidentiary exclusion/discovery limitation approach in favor of the privilege structure.

c. The constraint of the testamentary incapacity approach.

The Drafters finally considered and rejected an alternative structural approach to the protection of mediation confidentiality, that of making the mediator incompetent as a witness. *See, e.g.*, MINN. STAT. § 595.02 (1998); NEV. REV. STAT. § 48.109(3) (1997); N.J. REV. STAT. § 23A:23A-9 (1998). This testimonial incapacity approach addresses a primary concern with regard to confidentiality – the potential for the mediator to disclose mediation communications against the will of the disputants. However, it is inadequate as a vehicle to provide comprehensive protection for the mediation process, and thus meet the reasonable expectations of the participants, because it does not affect the ability of the disputants to make such disclosures, thus defeating the parties reasonable expectations in the confidentiality of mediation communications. Moreover, courts are justifiably reluctant to create categorical exclusions of potentially relevant evidence. *See e.g., In Re Sealed Case,* 148 F.3d.1073 (D.C. Circuit 1998) *cert denied sub nom Rubin v. United States,* 119 S.Ct. 461 (1998)(Breyer and Ginsburg, JJ., dissenting) (president's secret service detail not privileged to refuse to testify in matters involving the president); *In Re Bruce Lindsey,* 158 F.3d 1268 (1998) (deputy White House counsel could not assert government attorney-client privilege to avoid responding to grand jury if he possessed information relating to possible criminal violations).

Testamentary incapacity is a form of such exclusion that is traditionally reserved for situations of incapacity that impede the reliability of the evidence to serve the truth-seeking function of the courts, such as age. *See generally* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 92-93 (3rd ed. 1996).

These and other anomalies with witness incompetency approaches may help explain why the approach has been used so sparingly. In fact, the interests served by older witness incompetency statutes have been served modernly through the enaction of privilege statutes. *See generally* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 92-93 (3d ed. 1996).

4. Subsection 5(a). Effect of Privilege.

This Section serves to make clear the effect of the mediation communications privilege defined in subsections 5(c) and 5(d). A tribunal must exclude privileged communications that are protected by subsections (c) and (d) and may not compel discovery of them. The Section delineates the applicable proceedings, which omits felony criminal proceedings. *See* subsection 5(c)(2) and the discussion connected with that subsection.

The privilege is not self-executing, meaning a disputant would need to know of the necessity of asserting its protections. This presents no problems in the usual case in which the proponent of mediation communications is one of the disputants seeking to do so in a subsequent or simultaneous proceeding arising out of the same transaction or occurrence. However, subsequent or simultaneous proceedings in which a party who was not a participant to the mediation seeks to discover or introduce evidence of mediation communications presents the possible anomalous situation in which a disputant or mediator may wish to assert the privilege, but is unaware of the necessity.

To guard against this possibility, the disputants 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* discussion in Section 6; *see also* PAUL R. RICE, ET. AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §§ 18-25 (2nd ed. 1999) (attorney client privilege in context of joint representation).

5. Subsection 5(b). Otherwise discoverable evidence.

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

This is a common exemption in mediation privilege statutes, as well as in Uniform Rule of Evidence 408. *See, e.g.*, FLA. STAT. ch. 44.102 (1998) (general); MINN. STAT. § 595.02 (1998) (general); OHIO REV. CODE ANN. § 2317.023 (Baldwin 1998) (general); WASH. REV. CODE § 5.60.070 (1998) (general).

6. Subsection 5 (c).

a. In general.

This subsection states the mediation communications privilege for disputants and mediators.

The privilege provides statutory authority to disputants and mediators, in separate provisions, to refuse to disclose mediation communications, and to affirmatively prevent someone else from disclosing mediation communications. It further delineates the fora in which the privilege may be asserted.

The blocking function is critical to the operation of the privilege. Disputants may block provision of testimony about or other evidence of mediation communications by anyone, including persons other than the mediator and disputants. Further, the evidence may

be blocked whether those communications are by another disputant, a mediator, or any other participant. However, a person who attends the mediation but is neither a mediator nor a disputant, as defined in Section 2, does not hold the privilege under the Act. In other words, if all disputants (and if related to mediator communication or evidence, the mediator) agree to use of the evidence, the other persons who attended the mediation cannot block the use. 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.

If all disputants agree, any disputant, representative of a disputant, or mediation participant can be required to disclose what these persons said; the mediator cannot block them from doing so. At the same time, under subsection 5(d), even if the disputants, representatives of a disputant, or mediation participants agree to disclosure, the mediator can decline to testify and protect against disclosure of the mediator's communications**.**

b. Holder of the privilege.

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

This designation brings both clarity and uniformity to the law. Statutory mediation privileges are somewhat unusual among evidentiary privileges in that they often do not specify who may hold and/or waive the privilege, leaving that to judicial interpretation. *See, e.g.*, 710 ILL. REV. STAT. ch. 20, para. 6 (1998) (community dispute resolution centers); IND. CODE § 20-7.51-13 (1998) (university employee unions); IOWA CODE § 679.12 (1998) (general); KY. REV. STAT. ANN. § 336.153 (Baldwin 1998) (labor disputes); ME. REV. STAT. ANN. tit. 26 § 1026 (West 1998) (university employee unions); MASS. GEN. LAWS ch. 150, § 10A (West 1998) (labor disputes).

Those statutes that designate a holder tend to be split between those that make the disputants the only holders of the privilege, and those that also make the mediator a holder. *Compare* ARK. CODE ANN. § 11-2-204 (Michie 1998) (labor disputes); FLA. STAT. ANN. § 61.183 (West 1998) (divorce); KAN. STAT. ANN. § 23-606 (1998) (domestic disputes); N.C. GEN. STAT. § 41A-7 (1998) (fair housing); OR. REV. STAT. § 107.785 (1998) (divorce) (providing that the disputants are the sole holders) with CAL. EV. CODE § 1122 (West 1998) (general) (which make the mediator an additional holder in some respects); OHIO REV. CODE ANN. § 2317.023 (Baldwin 1998) (general); WASH. REV. CODE ANN. § 7.75.050 (West 1998) (dispute resolution centers).

The Act adopts a bifurcated approach, providing that both the disputants and the mediators may assert the privilege regarding certain matters. *See* OHIO REV. CODE ANN. § 2317.023 (Baldwin 1998) (general); WASH. REV. CODE § 5.60.070 (1998) (general). Under subsection 5(c), the disputants jointly hold the privilege and any disputant can raise the privilege as to any mediation communication. At the same time, under subsection 5(d), the mediator may both raise and prevent waiver regarding the mediator's own testimony, or the mediator's mediation communications. This approach gives weight to the primary concern of each rationale.

i. Subsection 5(c). Disputants as holders.

The analysis for disputants as holders is analogous to the attorney-client privilege in which the client holds the privilege. It resembles particularly the attorney-client privilege applied in the context of a joint defense, in which interests of the clients may conflict in part and 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 this doctrine to parties who were not directly adverse); *see generally* Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981). Another situation involving the attorney-client privilege and possible conflicting interests is seen in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. *Desriusseaux v. Val-Roc Truck Corp.*, 230 A.D.2d 704 (N.Y. Supreme Ct. 1996).

ii. Subsection 5(d). Mediators as holders.

On the other hand, the mediator-holder approach tracks those privileges, such as the executive privilege, which are designed to protect the institution rather than the client's expectations. The differences among statutes reflect varying rationales for the mediation privilege. For some, the perceived neutrality of the mediator is a key justification for the privilege, which leads to the conclusion that the mediator should be a holder of the privilege. For others, the primary justification is to protect the disputants' reasonable expectations of confidentiality. Under this rationale, the disputants would be joint holders of the privilege.

c. Subsection 5(c). Proceedings at which the privilege applies.

Under subsection 5(c)(1), the privilege applies in most proceedings, with the exception of felony and juvenile delinquency proceedings.

Subsection 5(c)(2) extends the Act to criminal felony and juvenile delinquency proceedings in governmental and community programs for the mediation of criminal and juvenile delinquency matters. It is currently bracketed to indicate that the Drafters have not adopted it In most situations, the disputants can speak candidly about the civil differences without getting into conversations that include discussions of criminal acts, and therefore the need for such coverage in criminal and juvenile delinquency proceedings is not substantial. Conversely, the prospect of an inaccurate decision because of unavailable evidence is of great importance in these proceedings. At the same time, public policy supports the mediation of gang disputes, criminal acts, and neglect and dependency in some limited contexts, and these mediation programs may be less successful if the disputants cannot discuss the criminal acts. The public agency support for mediation constitutes an acknowledgment that settlement, rather than correct determination, is the prevalent policy for these cases. The Act covers such proceedings only if there has been a public decision to support mediation in that context. This subsection is more limited than (a) in two ways. First, the mediator does not separately hold this privilege; only the disputants do. Thus, it promotes the primary rationale for a privilege – the reasonable expectation of a disputant is protected.

Second, the exclusion in this context is qualified by a weighing to protect against

egregious situations of injustice. The phrase "miscarriage of justice" is relatively common in the criminal law, referring in various formulations to a high standard criminal defendants often must meet on appeal in order to get their convictions reversed on evidentiary grounds. *See, e.g., People v. Watson*, 46 Cal.2d 818 (1956); *State v. Evans*, 639 SW.2d 820 (Mo. 1982); *Bean v. State*, 81 Nev 25 (1965); *see generally* 23A CORPUS JURIS SECUNDUM, CRIMINAL LAW §1445 (1989) (miscarriage of justice as standard for which courts are to sparingly review findings of fact by juries in criminal cases). The courts will accord criminal and juvenile defendants the rights to use evidence in certain egregious situations even without such an exception. *David v. Alaska*, 415 U.S. 308 (1974); *Rinaker v. Superior Court*, 62 Cal.App.4th 155 (1998).

This provision codifies this narrow right of judicial discretion so that disputants are made aware of it and extends right to the prosecution. Such discretion is particularly important because some of the most difficult clashes between the rights of litigants and the policy favoring confidentiality of mediation communications occur in the context of criminal and juvenile delinquency proceedings and in proceedings to determine whether a child or other individual needs to the protection of the law against abuse. *See Rinaker v. Superior Court*, 62 Cal.App.4th 155 (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*, 469 So.2d 480 (Fla. App. 1984) (criminal 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); *People v. Snyder*, 492 N.Y.S.2d 890 (1985) (defense counsel alluded in an 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)**.**

Under subsection 5(c)(3), the privilege is made applicable to publicly-supported mediations for cases involving abuses of children and other protected individuals; it, too, is bracketed to indicate that the Drafters have not adopted it. Like the mediation covered by subsection 5(c)(2), the public officials have determined that settlement is the best resolution in terms of the parties' and society's interests in a particular case. In such situations, evidence of abuse does not fall within the exception of subsection 8(a)(5).
This privilege is not held by the mediator, only the disputants.

7. Subsection 5(d). **Privilege of the Mediator.**

This provides for a privilege held by a mediator, and tracks the general discussion of privilege under subsection 5(c). In general, a mediator may block disclosure or evidence of the mediator's own mediation communications as well as the mediator's testimony or the mediator's provision of evidence of any other communications. As discussed above, this privilege is designed to promote mediator candor and to protect the mediation institution against the perception that mediators will testify about mediation communications. The privilege is subject to exceptions provided in Section 8 and the waiver and estoppel provisions of Section 6.

SECTION 6. WAIVER AND ESTOPPEL.

(a) The disputants' privilege in Sections 5 (c) may be waived, but only if expressly waived by all disputants, either in a record or during a civil proceeding before a judicial, administrative, or arbitration tribunal. A disputant who makes a representation about or disclosure of a mediation communication that prejudices another person in a proceeding may be precluded from asserting the privilege, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(b) The mediator's privilege in Section 5 (d) may be waived, but only if expressly waived by all disputants and the mediator, either in a record or during a civil proceeding before a judicial, administrative, or arbitration tribunal. A mediator who makes a representation about or disclosure of a mediation communication that prejudices another person in a proceeding may be precluded from asserting the privilege, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

Reporter's Working Notes

Section 6 provides for waiver of privilege, and for a disputant or mediator to be estopped from asserting the privilege in situations in which there have been pre-assertion disclosures. Waiver must be express and recorded through a writing or electronic record or on the record of a proceeding, or through estoppel, as described below. In this way, the provisions differ from the attorney-client privilege, which is waived by most disclosure. *See* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 511.1 (4th ed. 1996). The rationale for requiring explicit waiver is to protect the practice, often salutary, of disputants venting about their dispute and mediation with friends and relatives.

Read together with Section 5, the waiver operates as follows: For disputant mediation communications, a disputant or other participant may testify or provide evidence only if all disputants waive the privilege, and a mediator may testify if all disputants and the mediator waives the privilege. For mediator mediation communications, a disputant, mediator, or other participant may testify or provide evidence only if all disputants and the mediator waive the privilege. A mediator may testify or provide evidence only if all disputants and the mediator waive the privilege.

Because the Act does not allow waiver by conduct or disclosure, as do other privileges, it would open the undesirable opportunity for one disputant that would blurt out

potentially damaging information in the midst of a trial and then use the privilege to block the other disputant from contesting the truth. For this reason, the Drafters added to the Act an estoppel provision to cover situations in which the parties do not expressly waive the privilege.

The estoppel provision applies only if the disclosure prejudices another in a proceeding. It is not intended to encompass the casual recounting of the mediation session to a neighbor who was expected to keep the confidence, but would include disclosure that would, absent the exception, allow one disputant to take unfair advantage of the privilege. For example, if one disputant's attorney states in court that a client was threatened during mediation, that disputant should not be able to block the use of testimony to refute that statement. Such advantage-taking or opportunism would be inconsistent with the continued recognition of the privilege while the casual conversation would not. Thus, if A and B were the disputants in a mediation, and A affirmatively stated in court that B threatened A during the mediation, A would have effectively waived the protections of this statute regarding whether a threat occurred in mediation. If B decides to waive as well, evidence of A's and B's statements during mediation may be admitted. A is estopped from asserting that A did not waive the privilege. Analogous doctrines have developed regarding constitutional privileges, *Harris v. New York*, 401 U.S. 222 (1971), and the rule of completeness in Rule 106 of the Federal Rules of Evidence.

As under existing interpretations for other communications privileges, waiver through estoppel would not typically constitute a waiver of any mediation communication, only those related in subject matter. *See generally* UNIF. R. EVID. 510 and 511; STRONG, *supra*, at § 93. Also, the privilege is not waived by conduct if the disclosure is privileged, was compelled, or made without "opportunity to claim" the protections. *See* UNIF. R. EVID. 510 and 511.

SECTION 7. NONDISCLOSURE OUTSIDE OF DISCOVERY AND EVIDENTIARY PROCEEDINGS.

(a) In addition to the prohibitions regarding proceedings described in Section 5 and Section 6, a mediator may not disclose mediation communications unless all of the disputants agree, or the mediator reasonably believes that disclosure is required by law, a specific public policy established by statute or court decision, or professional reporting requirements.

(b) A mediator may not provide a report, assessment, evaluation, recommendation, or finding regarding a mediation to a court, agency, or authority that may make rulings on or investigations into a dispute that is the subject of the mediation, other than whether the

mediation occurred, a report of attendance at mediation sessions, whether the mediation has terminated, or whether settlement was reached, except as permitted under Sections 6 and 8.

[(c) This [Act] does not restrict the disclosure of mediation communications by disputants outside of discovery and evidentiary proceedings except as may be limited by the agreement of the disputants, or by court or administrative order.]

Reporter's Working Notes

1. In general.

This Section makes clear the statute's default principle that mediators *may not* disclose mediation communications outside of the context of court, administrative, and other proceedings covered by the evidentiary privilege, except under certain limited conditions specified in this Section. Subsection 7(a) speaks to general disclosures of mediation communications outside of the context of formal proceedings, such as disclosures to the general public. Subsection 7(b) addresses the specific context of the disclosure of mediation communications, and other information about a mediation, to courts, administrative agencies, and other government officials. The exceptions in Section 8 apply.

By contrast, the default position for disputants is that disputants *may* disclose mediation communications outside of the context of formal proceedings, including to the general public. Disputants may choose to limit this general right to disclose mediation communications outside of proceedings through a valid and binding non-disclosure agreement and thus would be enforceable. *See* Section 7; ROGERS & MCEWEN *supra*, at §§9:23-25 (agreements not to disclose); Stephen A. Hochman, *Confidentiality in Mediation: A Trap for the Unwary*, SB41 ALI-ABA 605 (1995).

2. Subsection 7(a). Disclosures by the Mediator to the General Public.

a. In General.

This subsection states the default rule of non-disclosure of mediation communications by mediators, and articulates certain narrow and specific exceptions.

The first exception is for situations in which the disputants expressly agree to permit the mediator to make such a disclosure. This furthers the Act's core value of self-determination by the disputants with regard to the mediation of their dispute. The rest of the exceptions are a cluster of situations in which the mediator reasonably believes he or she is under a duty to disclose information about a mediation. Critically, as a preliminary matter, the belief that a duty is owed must be reasonable. This reflect's the Drafting Committees' intent that the mediator's belief be objectively reasonable under the circumstances: that a reasonable mediator would have believed disclosure was required under the applicable duty.

The first of these situations is for disclosures reasonably believed to be required by law. This exception addresses the problem of statutory reporting requirements and makes

clear that mediators do not violate their obligations of confidentiality under this Act by complying with other statutory reporting obligations, such as those requiring the reporting of child or elder abuse.

The second of these situations is for disclosures relating to a reporting obligation that may arise under a specific public policy established by statute or court ruling. *See, e.g., Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 131 Cal. Rptr. 14 (1976) (regarding psychiatrist); *Division of Corrections Dept. of Health & Social Services v. Neakok*, 721 P.2d 1121 (Alaska 1986((parole officer); *but see Boyton v. Burglass*, 590 So.2d 446 (Fla. App. 1991)(rejecting *Tarasoff*); *see also* John R. Murphy III, *In the Wake of Tarasoff: Mediation and the Duty to Disclose*, 35 CATH. U.L. REV. 209 (1985).

The third of these situations is for disclosures relating to a reporting obligation that a mediator may have to report misconduct because he or she is a member of a profession. This provision addresses a problem, particularly for lawyer-mediators, by clarifying that a mediator may provide evidence of unprofessional conduct when they are required to do so under relevant professional standards. *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.

Significantly, in all three cases, this narrow exception would be limited to mediator reports to an agency charged by law to make investigations. Also, the use of these mediation communications as evidence would still be protected in proceedings under Section 5, subject to the exceptions provided in Section 8.

b. Variance by agreement of the disputants.

This subsection can be both expanded and contracted by agreement of the disputants. A privacy agreement by the parties would be enforced through damages or, in the case of irreparable harm, through specific performance. *See Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (journalist can be liable for breaking promise of confidentiality to source); *Doe v. Roe*, 400 N.Y.S.2d 688, 674-675 (1977) (physician libel for disclosing in violation of agreement). Thus, subsection 7(a) constitutes a default provision.

The default provision also results in mediation being closed to the press and others whose presence is not consented to by the disputants. However, Section 7(a) makes an exception for those sessions that must be open under the law. This avoids a situation in which a mediation confidentiality provision pre-empts open meetings law and frustrates policies encouraging openness in public decision-making. *See News-Press Pub. Co. v. Lee County*, 570 So.2d 1325 (Fla. App. 1990). *See generally Cincinnati Gas & Electric Co., v. General Electric Co.*, 854 F.2d 900 (6th Cir. 1988), *cert. den. sub. nom. Cincinnati Post v. General Electric Co.*, 489 U.S. 1033 (1989); Jane E. Kirtley, *No Place for Secrecy: Media Should be Permitted Access*, 5 DISP. RESOL. MAG 21 (Winter 1998). The related exception for public policy mediation for which the disputants have no reasonable expectation of confidentiality is in Section (8)(a)(2).

3. Subsection (b). Disclosures by a Mediator to Government Officials.

a. In general.

Subsection 7(b) prohibits reports by a mediator to a judge or other government official. Some states have already adopted similar prohibitions. *See, e.g.*, CAL. EVID. CODE § 1121 (West 1998); FLA. STAT. ch. 373.71 1998) (water resources); TEX. CIV. PRAC. & REM. CODE § 154.053 (c) (West 1998) (general). In addition, seminal reports in the field condemn the use of such reports as permitting coercion by the mediator and destroying confidence in the neutrality of the mediator. *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). Disclosures of mediation communications to the judge also would run afoul of prohibitions against ex parte communications with judges. *See* CODE OF CONDUCT FOR FEDERAL JUDGES, Canon 3(A)(3), 175 F.R.D. 364, 367 (1998).

b. Preemption and variance by agreement of the disputants.

The Act would preempt statutes and local rules that permit mediators to make such reports. The Act does not permit the disputants or mediator to waive this protection, as a way of protecting disputants and mediators against pressure by the court to waive.

4. Subsection 7(c). Non-disclosure by disputants.

The Act leaves the issue of whether there should be prohibitions to general disclosure by disputants to the agreement of the disputants, or by court or administrative order. In some settings, such as divorce mediation, it may be helpful to the purposes of the mediation for the disputants to discuss the session with family or close friends, whereas such disclosures may be both unhelpful and more harmful in commercial mediation. The different needs of these settings are best addressed through local or context-specific provisions. Leaving these matters to agreement also puts the signatories on notice of their duties, and furthers the Act's foundational notion of self-determination by the disputants. *See* Section 2. Moreover, if imposed by statute, such provisions might unfairly surprise those who did not know about the obligation. This is particularly important for mediation, because many parties are not represented by counsel. By agreement, for example, the disputants can provide that they will not disclose to others outside the mediation. They could enforce this agreement through damages or specific performance. *See* ROGERS & MCEWEN §§ 9:23-25 (nondisclosure agreements).

SECTION 8. EXCEPTIONS TO PRIVILEGE AND NONDISCLOSURE.

(a) There is no privilege or prohibition against disclosure under Sections 5, 6, or 7 of this [Act]:

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

(2) for the sessions of a mediation that must be open to the public under the law; or for sessions of a public policy mediation for which the disputants have no reasonable expectation of confidentiality;

(3) for threats made by a participant to inflict bodily harm or unlawful property damage;

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

(5) for mediation communications offered to prove or disprove abuse or neglect, except as provided in subsection 5 (c)(3), in a proceeding in which a public agency is protecting the interests of a child, disabled adult, or elderly adult protected by law, or

[(6) for mediation communications in a pretrial conferences conducted by a judge or other judicial officer who may make or inform rulings on the subject matter of the conference.]

(b) There is no privilege or prohibition under Sections (5), (6), or (7) of this [Act] if a judicial, administrative, or arbitration tribunal 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 importance of the state's policy favoring the protection of confidentiality and:

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

(2) the evidence is offered in a proceeding in which fraud, duress, or

incapacity is in issue regarding the validity or enforceability of an agreement evidenced by a record and reached by the disputants as the result of a mediation, but only if the evidence is provided by persons other than the mediator of the dispute at issue; or

(3) for mediation communications that evidence a significant threat to public health or safety.

(c) If mediation communications are admitted under subsection (a) or (b), only the portion of the communication necessary for the application of the excepted purpose shall be admitted. The admission of particular evidence for the limited purpose of an exception does not render that evidence, or any other mediation communication, admissible for any other purpose.

Reporter's Working Notes

1. In general.

This Section articulates exceptions to the broad grant of privilege provided to mediation communications in Section 5 and to nondisclosure under Section 7. 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 do so through 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*, 62 Cal. App.4th 155, 169-172 (1998); *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110 (1999).

Some exceptions apply regardless of the need for the evidence and without a hearing to determine the application of the exception. *See* subsections 8(a)(1) and 8(a)(2). This is because the exigency of the circumstances are such that persons may be harmed if disclosure is delayed until an evidentiary hearing is held. *See* subsections 8(a)(3)-(5). These are listed under subsection 8(a). In contrast, the exceptions under subsection 8(b) would apply in situations in which the application of the exception is not evident as a prima facie matter, or that the circumstances are not sufficiently exigent to override the more cautious process prescribed for assessing the application of an exception that would permit the admission or discovery of mediation communications.

2. Subsection 8(a)(1). Record of an agreement.

This exception would permit evidence of a recorded agreement. It would apply to agreements about how the mediation should be conducted as well as settlement agreements. The

words "record of agreement" refer to written and signed contracts, those recorded by tape recorder and ascribed to, as well as other means to establish a record. This is a common exception to mediation confidentiality protections, permitting the Act to embrace current practices in a majority of states. *See* ARIZ. REV. STAT. ANN. § 12-2238 (1997); CAL. EVID. CODE § 1120(1) (West 1998) (general); CAL. EVID. CODE § 1123 (West 1998) (general); CAL. GOV'T. CODE § 12980(I) (West 1998) (housing discrimination); COLO. REV. STAT. §24-34-506.53 (1998) (housing discrimination); GA. CODE ANN. § 45-19-36(e) (1998) (fair employment); ILL. REV. STAT. ch. 775, para. 5/7B-102(E)(3) (1998) (human rights); IND. CODE § 679.2(7) (1998) (civil rights); IND. CODE § 216.15(B) (1998) (civil rights); KY. REV. STAT. ANN. §344.200(4) (Baldwin 1998) (human rights); LA. REV. ST. ANN. § 9:4112(B)(1)(c) (West 1998) (human rights); LA. REV. ST. ANN. § 51:2257(D) (West. 1998) (human rights); ME. REV. STAT. ANN. tit. 5, § 4612(1)(A) (West 1998) (human rights); MD. SPEC. P. RULE § 73A (1998) (divorce); MD. CODE ANN. art. 49(B),§ 28 (1998) (human rights); MASS. GEN. L. ch. 151B, § 5 (1998) (job discrimination); MO. REV. STAT. § 213.077(8)(2) (1998) (human rights); NEB. REV. STAT. § 43-2908 (1998) (parenting act); N.J. REV. STAT. §10:5-14 (1998) (civil rights); OR. REV. STAT. § 36.220(2)(a) (1998) (general); OR. REV. STAT. tit. 3, ch. 36 (8)(1) (1998) (agricultural foreclosure); 42 PA. CONS. STAT. ANN. § 5949(b)(1) (1998) (general); TENN. CODE ANN. § 4-21-303(d) (1998) (human rights); TEX. GOV'T. CODE ANN. § 2008.054) (West 1998) (Administrative Procedure Act); VT. STAT. ANN. tit. 9, § 4555 (1998) (landlord/tenant); VA. CODE ANN. § 8.01-576.10 (Michie 1998) (general); VA. CODE ANN. § 8.01-581.22 (Michie 1998) (general); VA. CODE ANN. § 36-96.13© (Michie 1998) (fair housing); WASH. REV. CODE § 5.60.070 (1)(e) and (f) (1998) (West 1998) (general); WASH. REV. CODE § 26.09.015(5) (West 1998) (divorce); WASH. REV. CODE § 49.60.240 (1998) (human rights); W.VA. CODE §§ 6B-2-4(r) (1998) (public ethics), 5-11A-11 (1998) (fair housing); WIS. STAT. § 904.085(4)(a) (1998) (general); WIS. STAT. § 767.11(12) (1998) (family court).

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 disputants came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule. As a result, mediation participants might be less candid, not knowing whether a controversy later would erupt over an oral agreement. Unfortunately, excluding evidence of oral settlements reached during a mediation session would operate to the disadvantage of a less legally-sophisticated disputant 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 Ryan v. Garcia*, 27 Cal. App.4th 1006 (1994) (privilege statute precluded evidence of oral agreement); *Hudson v. Hudson*, 600 So.2d 7 (Fla. App. 1992) (privilege statute precluded evidence of oral settlement); *Cohen v. Cohen*, 609 So.2d 783 (Fla. App. 1992) (same); OHIO REV. CODE § 2317.02-03 (Baldwin 1998). For an example of a state statute permitting the enforcement of oral agreements under certain narrow circumstances, *see* CALIF. EVID. CODE § 1124 (West 1998) (providing, *inter alia*, that oral agreement must be memorialized in writing

within 72 hours).

Despite the limitation on oral agreements, the Act leaves disputants other means to preserve the agreement quickly. For example, disputants 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 (1996).

3. Subsection 8 (a)(2). Meetings open by law, and public policy mediations.

Subsection 8(a)(2) makes clear that the privilege in Section 5 and the prohibitions in Section 7 do not pre-empt open meetings laws in various states. Further, it applies to public policy mediation for those sessions that are typically held as open forums, so that issues of public policy, defined in Section 2 (e), are not hidden from those with an interest and so that the result will be credible to the affected constituencies. Because the exception for public policy is limited by the phrase "for which the disputants have no reasonable expectations of confidentiality," it permits confidentiality to be provided for separate sessions that are held privately. The limiting phrase also makes clear that, if the parties agree to confidentiality in a public policy mediation, the mediation communications will be privileged.

4. Subsection 8 (a)(3). Threats of bodily harm or unlawful property damage.

Mediation should be a civil process, and a privilege for mediation communications that threaten bodily injury and unlawful property damage would not serve the interests underlying the privilege. To the contrary, disclosure would serve public interests in protecting 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* ARK. CODE ANN. § 47.12.450(e) (Michie 1998) (community dispute resolution centers)(to extent relevant to a criminal matter); COLO. REV. STAT. § 13-22-307 (1998) (general) (bodily injury); KAN. STAT. ANN. § 23-605(b)(5) (1998) (domestic relations) (mediator may report threats of violence to court); KAN. STAT. ANN. § 23-606 (1998) (general) (information necessary to stop commission of crime); OR. REV. STAT. §36.220(6) (1998) (general) (substantial bodily injury to specific person); 42 PA. CONS. ST. ANN. § 5949(2)(I) (1998) (general) (threats of bodily injury); WASH. REV. CODE § 7.75.050 (1998) (community dispute resolution centers) (threats of bodily injury and property harm); WYO. STAT. § 1-43-103 (c)(ii) (1998) (general) (future crime or harmful act).

5. Subsection 8(a)(4). Use of the mediation to commit a crime.

This exception reflects a common practice in the states of exempting from confidentiality protection those mediation communications that relate to the future commission of a crime. However, it narrows the exception to remove the confidentiality protection only when an actor uses or attempts to use the mediation to further the commission of a crime, rather than lifting the confidentiality protection more broadly to any discussion of crimes.

More than a dozen states currently have mediation confidentiality protections that contain exceptions related to a commission of a crime. COLO. REV STAT. §13-22-307 (1998)

(general) (future felony); FLA. STAT. ch.723.038(8) (mobile home parks) (ongoing or future crime or fraud); IOWA CODE § 216.15B(3) (1998) (civil rights) (to prove perjury in mediation); IOWA CODE § 654A.13 (1998) (farmer-lender) (to prove perjury in mediation); IOWA CODE § 679.12 (1998) (general) (to prove perjury in mediation); IOWA CODE § 679C.2(4) (1998) (general) (ongoing or future crimes); KAN. STAT. ANN. § 23-605(b)(3) (1998) (ongoing and future crime or fraud); KAN. STAT. ANN. § 23-606(a)(2)&(3) (1998) (domestic relations) (ongoing and future crime or fraud); KAN. STAT. ANN. § 44-817(c)(3) (1998) (employment) (ongoing and future crime or fraud); KAN. STAT. ANN. § 75-4332(d)(3) (1998) (public employment) (ongoing and future crime or fraud); KAN. STAT. ANN. § 75-5427(e)(3) (1998) (teachers) (ongoing and future crime or fraud); ME. REV. STAT. ANN. tit.24, §2857(2) (1998) (health care) (to prove fraud during mediation); MINN. STAT § 595.02(1)(a) (1998) (general); NEB. REV. STAT. §25-2914 (1998) (general) (crime or fraud); N.H. REV. STAT. ANN. §328-C:9(III)(B) (1998) (domestic relations) (perjury in mediation); N.H. REV. STAT. ANN. § 328-C:9(III)(d) (1998) (domestic relations) (ongoing and future crime or fraud); N.J. REV. STAT. §34:13A-16(h) (1998) (workers' compensation) (any crime); N.Y. LAB. LAW §702-a(5) (McKinney 1998) (past crimes) (labor mediation); OR. REV. STAT. §36.220(6) (1998) (general) (future bodily harm to a specific person); S.D. CODIFIED LAWS ANN. §19-13-32 (1998) (general) (crime or fraud); WYO. STAT. 1-43-103(c)(ii) (1998) (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 states statutes do exempt fraud, although less frequently than they do crime. *See, e.g.*, FLA. STAT. ch. 723.038(8) (1998) (mobile home parks) (communications made in furtherance of commission of crime or fraud); KAN. STAT. ANN. § 60-452(b)(3) (1998) (general) (ongoing or future crime or fraud); KAN. STAT. ANN. § 75-4332(d)(3) (1998) (public employment) (ongoing or future crime or fraud); KAN. STAT. ANN. § 72-5427(e)(3) (1998) (teachers) (ongoing crime or fraud); KAN. STAT. ANN. § 44-817(c)(3) (1998) (employment) (ongoing crime or fraud); KAN. STAT. ANN. § 23-605(b)(3) (1998) (domestic relations)(ongoing crime or fraud); KAN. STAT. ANN. § 23-606(a)(2) and (3) (1998) (domestic relations) (ongoing crime or fraud); NEB. REV. STAT. § 25-2914 (general) (crime or fraud); S.D. CODIFIED LAWS ANN. §19-13-32 (general) (crime or fraud).

This exception does not cover mediation communications constituting admissions of past crimes, or past potential crimes, which remain privileged. Therefore, discussions of past aggressive positions with regard to taxation or other matters of regulatory compliance in commercial mediations remain privileged against possible use in subsequent or simultaneous civil proceedings. The Drafting Committees discussed the possibility of creating an exception for the related circumstance in which a disputant 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 disputants can warn others, because disputants are not prohibited from disclosing by subsection 7(a). Under subsection 7(a) the mediator can disclose if required by law to disclose felonies or if public policy requires. All persons can testify in a felony trial, since felony criminal proceedings are not

covered by the privilege, unless under the auspices of subsection 5(c)(2). Thus, the criminal use privilege exception would permit disclosure in only a few other settings – civil and misdemeanor proceedings and felony and juvenile misdemeanor proceedings covered by subsection 5(c)(2).

6. Subsection 8(a)(5). Evidence of abuse or neglect.

An exception for child abuse is especially common in domestic mediation confidentiality statutes, and the Act reaffirms these important policy choices states have made to protect their citizens. *See e.g.*, IND. CODE § 679C.2(5) (1998) (general); IND. CODE § 979.2(5) (1998) (general); KAN. STAT. ANN. § 23-605(b)(2) (1998) (domestic relations); KAN. STAT. ANN. § 23-606 (a)(1) (1998) (domestic relations); KAN. STAT. ANN. § 38-1522(a) (1998) (general); KAN. STAT. ANN. § 44-817(c)(2) (1998) (employment); KAN. STAT. ANN. § 72-5427(e)(2) (1998) (teachers); KAN. STAT. ANN. § 75-4332(d)(1) (1998) (public employment); MINN. STAT. § 595.02(2)(a)(5); MONT. CODE ANN. § 41-3-404 (1998) (child abuse investigations) (mediator may not be compelled to testify); NEB. REV. STAT. § 43-2908 (1998) (parenting act) (in camera); N.H. REV. STAT. ANN. § 328-C:9(III)(c) (1998) (marital); N.C. GEN. STAT. § 7A-38.1(L) (1998) (appellate); N.C. GEN. STAT. § 7A-38.4(K) (1998) (appellate); OHIO REV. CODE ANN. § 3109.05552(c)) (Baldwin 1998) (child custody); OHIO REV. CODE ANN. § 5123.601 (Baldwin 1998) (mental retardation), 2317.02 (general); OR. REV. STAT. § 36.220(5) (1998) (general); TENN. CODE ANN. § 36-4-130(b)(5) (1998) (divorce); UTAH CODE ANN. § 30-3-58(4) (1998) (divorce) (mediator shall report); VA. CODE ANN. § 63.1-248.3(A)(10) (1998) (welfare); WIS. STAT. § 48.981(2) (1998) (social services): WIS. STAT. § 904.085(4)(d) (1998) (general); WYO. STAT. § 1-43-105(c)(iii) (1998) (general); *but see* ARIZ. REV. STAT. ANN. § 8-807(B) (West 1997) (child abuse investigations) (rejecting rule of disclosure).

The Act broadens the coverage to include the elderly and disabled if the state has chosen to protect them by statute as a matter of policy. It should be stressed that this exception applies only to permit disclosures in public agency proceedings that such agencies initiate. It does not apply in private actions, such as divorce, in contrast, because such an approach would not promote free interchange in domestic mediation cases. Also, stronger policies favor disclosure in proceedings brought to protect against abuse and neglect, so that the harm can be stopped.

By reference to subsection 5(c)(3), the Act makes an exception to this exception if the mediation communications occur in a mediation that is publicly sanctioned for abuse or neglect cases such as these. These programs represent public support for settlement over adjudication in these cases, and that object could not be achieved without the assurance of confidentiality.

7. Subsection 8(a)(6). Pretrial conferences.

The Act makes an exception to the privilege and prohibition against disclosure for pre-trial conferences, where the parties may not anticipate confidentiality. Such conferences are typically conducted under court or procedural rules that are similar to Rule 16 of the Federal Rules of Civil Procedure, and have come to include a wide variety of functions, from simple case management to a venue for court-ordered mediations. In situations where a part of the function is case management, the parties hardly have an expectation of confidentiality in the proceedings, even though there may be settlement discussions initiated by the judge or judicial officer; in fact, such hearings frequently lead to court orders on discovery and issues limitations, for example,

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 also 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. For this reason, the Act applies to mediations conducted by a judge or judicial officer who may not make rulings on the subject matter of the dispute, as in the practice in some courts in which the case is mediated by a judge not assigned to the case for adjudicatory purposes. However, these policies are defeated in situations in which the judge or judicial officer may make rulings on the case, because of the inherent coerciveness of the environment and the possibility of confusion by the parties. *See* 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, Id.*

9. Subsection 8(b). Exceptions requiring demonstration of exceptional need.

a. In general.

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

b. Subsection 8(b)(1). Conduct during the mediation.

This exception addresses several specific issues that are joined because they relate to conduct occurring during the mediation.

The first is a problem, particularly for lawyer-mediators, of whether they may provide evidence of unprofessional conduct based on conduct 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 exception also is limited to proceedings at which the claim is made or defended. Significantly, the evidence would still be protected in other types of proceedings, such as those related to the dispute being mediated. Furthermore, this subsection does not apply to other statutory reporting obligations mediators may have because such reports to authorities would not involve the provision of evidence in a court or administrative hearing. Further, under subsection 7(a), mediators would not be precluded by the statute from complying with statutory reporting obligations that a state may seek to implement, unless that report would be to the court, agency or authority that may make rulings on or investigations into the dispute being mediated, as covered by subsection 7(b).

This exception follows statutes in several states that permit the mediator to defend, and the disputant to secure evidence in, the occasional claim against a mediator. *See, e.g.*, OHIO REV. CODE ANN. § 2317.023 (Baldwin 1998) (general); MINN. STAT. § 595.02 (1998) (general); FLA. STAT. ch. 44.102 (1998) (general); WASH. REV. CODE § 5.60.070 (1998) (general). The rationale

behind the exception is that such disclosures may be necessary to make procedures for grievances against mediators function effectively, and as a matter of fundamental fairness, to permit the mediator to defend against such a claim. Moreover, permitting complaints against the mediator furthers the central rationale that states have used to reject the traditional basis of licensure and credentialing for assuring quality in professional practice: that private actions will serve an adequate regulatory function and sift out incompetent or unethical providers through liability and the rejection of service. *See, e.g.,* W. Lee Dobbins, *The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?,* U. FLA. J. L. & PUB. POL'Y 95, 96-98 (1995).

The exceptional also applies to the situation of a participant is acting as a representative or fiduciary to persons not present and is sued for failing to fulfill duties through actions within a mediation session.

c. Subsection 8(b)(2). Validity and enforceability of settlement agreement.

This exception is designed to preserve specified contract defenses that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications. A recent Texas case provides an example. An action was brought to enforce a mediated settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to 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). This exception differs from the exception for a record of an agreement in subsection 8(a)(a) in that subsection 8(a)(1) only exempts the admissibility of the record of the agreement, while the exception in subsection 8(b)(2) is broader in that it would permit the admissibility of other mediation communications that are necessary to establish or refute a defense to the validity of a mediated settlement agreement.

d. Subsection 8(b)(3). Significant Threat to Public Health and Safety.

This provision is to provide exceptions to Section 5 and Section 7 if the mediation communications indicate that there is a significant threat to public health and safety. For example, if a mediation participant indicates that he regularly dumps radioactive wastes into a river, a court might, in a situation of extreme need, permit the participants to testify that this might occur. The mediator's ability to warn about this activity is allowed by the public policy exception in subsection 7(a). The disputants would not be precluded by Section 7 from reporting the danger because there is no affirmative limitation on their ability to disclose mediation communications absent a prior contractual agreement. This exception differs from subsection 8(a)(3), which covers threats of bodily harms and unlawful property damage, which are excepted from the privilege without the judicial weighing process required for exceptions in subsection 8(b).

10. Subsection 8(c). Limitations on exceptions.

This subsection makes clear the limited use that may be made of mediation communications that are admitted under the exceptions delineated in subsections 8 (a) and 8(b).

SECTION 9. MEDIATION PROCEDURES.

(a) Before accepting appointment or engagement a mediator shall make an inquiry that is reasonable under the circumstances to determine whether there are any facts 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 or existing or past relationships with a disputant or any known or foreseeable participant in the mediation. The mediator shall disclose such facts known or learned to the disputants as soon as is practical.

(b) If asked by a disputant, a mediator shall disclose the mediator's qualifications to mediate a dispute.

(c) A disputant has the right to have an attorney or other individual designated by the disputant attend and participate in the mediation. A waiver of this right may be revoked.

Reporter's Working Notes

1. Subsection 9(a). Disclosure of mediator's conflicts of interest.

This is a somewhat novel statutory provision that imposes on mediators the conflict of interest disclosure requirements that are more typically required of arbitrators. *See* Proposed Revisions of the Uniform Arbitration Act, October 1999, Section 9; Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, Section 2(B) (1985) (required disclosures).

The requirement extends to private mediators as well as those in publicly supported programs. The facts to be disclosed in any case will depend upon the circumstances. The goal of such a requirement is to protect the disputants against a mediator who, unbeknownst to the disputants, is not impartial. No sanctions are provided in the Act, but presumably the Act sets a standard that could be a basis of liability if a disputant suffers damage as a result of the mediator's failure to disclose conflicts.

2. Subsection 9(b). Disclosure of mediator's qualifications.

The disclosure, upon request, of qualifications is a more novel requirement. In some situations, the disputants may make clear that they care about the mediator's qualifications to conduct a particular approach to mediation and would want to know whether the mediator in the past has used a purely facilitative or instead an evaluative approach. *Compare* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the*

Perplexed, 1 HARV. NEGOTIATION L. REV. 7 (1996) with Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing The "Grid" Lock,* 24 FLA. STATE UNIV. L. REV. 985 (1997); *see generally Symposium*, FLA. STATE UNIV. L. REV. (1997). Experience mediating would seem important to some disputants, 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. 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* 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); 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.

3. Subsection 9(c). Right to attorney or other support person.

The fairness of mediation is premised upon the informed consent of the disputants to any agreement reached. *See Wright v. Brockett,* 150 Misc.2d 1031 (1991) (setting aside mediation agreement where conduct of landlord/tenant mediation made informed consent unlikely); *see generally,* Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 936-944 (1998)*;* Craig A. McEwen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995). Some statutes permit the mediator to exclude lawyers from mediation, resting fairness guarantees on the lawyer's later review of the draft settlement agreement. *See e.g.*, CAL. FAM. CODE § 3182 (West 1998); 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* GET PAGES (forthcoming, 47 UCLA L. REV. (April 2000)).

Most statutes are either silent on whether the disputants' lawyers can be excluded or, alternatively, provide that the disputants can bring lawyers to the sessions. *See, e.g.*, NEB. REV. STAT. § 42-810 (1998) (domestic relations) (counsel may attend mediation); N.D. CENT. CODE § 14-09.1-05 (1998) (domestic relations) (mediator may not exclude counsel); OKLA. STAT. tit. 12, § 1824(c)(5) (1998) (general conciliation court) (representative authorized to attend); OR. REV. STAT. § 107.600(1) (1998) (marriage dissolution) (attorney may not be excluded); OR. REV. STAT. § 107.785 (1998) (marriage dissolution) (attorney may not be excluded); WIS. STAT. § 655.58 (1998) (health care) (authorizes counsel to attend mediation). Several states, in contrast, have enacted statutes permitting the exclusion of counsel from domestic mediation. *See* CAL. FAM. CODE § 3182 (West 1998); MONT. CODE ANN. § 40-4-302(3) (1998); S.D. CODIFIED LAWS ANN. § 25-4-59 (1998) (family); WIS. STAT. § 767.11(10)(a) (1998) (family).

Some disputants may prefer not to bring counsel. However, because of capacity of attorneys to help mitigate power imbalances, and in the absence of other procedural protections for less powerful disputants, the Drafting Committees elected to let the disputants, 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.

Finally, the Act also makes clear that disputants may be accompanied by a designated person, and does not limit that to lawyers. This provision is consistent with good practices that permit the *pro se* disputant to bring someone to support who is not a lawyer if the disputant cannot afford a lawyer. Again, this seems especially important to help balance negotiating power if the other disputant is represented by legal counsel.

SECTION 10. SUMMARY ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS.

(a) A disputant entering into a settlement agreement evidenced by a record made during mediation, or as a result of mediation may, with the consent of all disputants to such agreement. petition a court of general jurisdiction to enter a judgment in accordance with the settlement agreement, provided that:

(1) A petition requesting such judgment is filed with the court within [30] days of the execution of such mediated settlement agreement;

(2) Written and legally sufficient notice is given to all disputant signatories to the agreement within [30] days of the filing of such petition; and

(3) No disputant to the agreement files an objection with the court within [30] days of receipt of such notice or execution of waiver of notice.

(b) If the court finds that an objection has been filed as provided in subsection 10 (a)(3), that a disputant failed to understand the rights being waived and that the settlement agreement was not signed by the disputant and the disputant's attorney, or that the interests of justice require, the court shall deny such petition, without prejudice to any contractual rights or remedies that may otherwise be available.

(c) If on motion of any of the disputant signatories to the settlement agreement, the court finds that the provisions of subsection 10 (a) have been met, and the provisions of subsection 10 (c) do not preclude entry, the court shall enter judgment in the terms set forth in the mediated settlement agreement.

Reporter's Working Notes

Section 10 expands the situations in which a settlement agreement may be given expedited enforcement. Currently, the courts will accord expedited enforcement to settlement agreements in the two situations. In the first such situation, agreements reached pending court or administrative proceedings that are incorporated into an order or judgment of that tribunal may be enforced through a variety of expedited processes, such as liens, attachment, and contempt. *See, e.g.*, Uniform Marriage and Divorce Act §305; N.D. CENT. CODE §14-9.1-07; IND. CODE § 22-9-1-6(p) . Agreements reached pending arbitration proceedings that become a part of the arbitral award represent a second category. Some international commercial arbitration statutes specifically authorize conciliation agreements to be enforced as arbitration awards. *See, e.g.*, N.C. GEN. STAT. § 1-567.60; CAL. CIV. PRO. § 1297.401; FLA. STAT. § 684.10.

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

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

More particularly, confessions of judgment are a mechanism by which lenders recover sums due when borrowers default. Typically, when securing a loan using a *cognovit note*, the borrower signs an agreement which states that the lender can obtain a court judgment against the buyer in case of default, without further notification or consent by the borrower. The United States Supreme Court has held that confessions of judgment do not necessarily violate constitutional due process. *See Swarb v. Lennox*, 405 U.S. 191 (1972). However, the practice is disfavored by many courts, and there are both state and federal statutes which outlaw its use in particular contexts. The federal government has restricted the use of *cognovit notes* via the Federal Trade Commission's Credit Practices Rule as well as the Consumer Credit Protection Act of 1968. *See* 16 CFR § 444.2 (West 2000) ("In connection with the extension of credit to consumers in or affecting commerce,..it is an unfair act or practice...for a lender or retail investment seller . . . to take or receive from a consumer an obligation that . . . [c]onstitutes or contains a *cognovit* or confession of judgment; "12 CFR § 535.2 (West 2000) ("In connection with the extension of credit to consumers after January 1, 1986, it is an unfair act or practice...for a savings association...to enter into a consumer credit obligation that constitutes or contains . . . .[a] *cognovit* or confession of judgment.") In addition, several states have restricted the practice. One scholar has determined that "seventeen states have abolished confession of judgment upon warrant of attorney before the commencement of action," and that many other states prohibit or limit its use by small loan companies. *See* Peter V. Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 606 (1995).

The Act protects against the possibility of such abuses in subsection 10(a) by establishing certain conditions for the filing of the request for expedited enforcement that seek to assure minimal notions of due process. First, in subsection 10(a), the Act requires

that the disputants agree to use the process, and that the agreement be expressed in writing. Second, subsection 10(a)(1) sets a specific and short period of time in which to exercise this option by filing an appropriate application with a court of general jurisdiction, 30 days, to guard against the possibility of its surprising use after significant period of time has elapsed. Third, subsection 10(a)2) requires that formal notice be provided to all disputant signatories – that is, notice that would comply with relevant local or state court rules for the provision of legal notice of other motions or applications. *See, e.g.,* Fed. R. Civ. Proc. 5; CAL.CIV.PROC. §1162 (1998). Significantly, the Act does not permit waiver of notice.

The Act also protects against the possibility of abuse in subsection 10(b) by placing certain restrictions on the ability of court to grant an application for expedited enforcement. First, it provides that the application may not be granted if any disputant objects for any reason. Second, the Act provides protection for those who might not understand that such a process would result in their foregoing certain contract defenses as well as their right to a jury trial by permitting a defense of unknowing waiver by persons not represented by counsel at the time they agreed to the expedited process. Finally, the subsection 10(b) also gives courts the discretion to refuse to grant the application if the interests of justice compel against it.

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

SECTION 11. 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 12. EFFECTIVE DATE.

This [Act] takes effect .....

SECTION 13. REPEALS.

The following acts and parts of acts are hereby repealed: