DRAFT

FOR DISCUSSION ONLY

UNIFORM MEDIATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

November 2000

UNIFORM MEDIATION ACT

With Prefatory Note and Reporter's Notes

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

UNIFORM MEDIATION ACT

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

SECTION 2. APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration must be given to:

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

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

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

SECTION 3. DEFINITIONS. In this [Act]:

(1) "Court" means [a court of competent jurisdiction in this State].

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

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

(4) "Mediator" means an individual, of any profession or background, who is appointed by a court or government entity or engaged by parties under an agreement evidenced by a record to conduct a mediation.

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

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

(7) "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.

(8) "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.

SECTION 4. SCOPE.

(a) Except as otherwise provided in subsection (b), this [Act] applies to a mediation in which parties agree in a record to mediate or are directed or requested in a record by a court or governmental entity, to participate in a mediation.

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

(1) a dispute arising under or relating to a collective bargaining relationship; or

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

SECTION 5. PRIVILEGE AGAINST DISCLOSURE. In a civil proceeding before a court, an administrative agency, an arbitration panel, or any other tribunal, including juvenile court, or in a criminal misdemeanor proceeding, the following rules apply:

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

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

(3) A mediator may refuse to disclose evidence of a mediation communication.

SECTION 6. ADMISSIBILITY; DISCOVERY.

(a) A mediation communication is not subject to discovery or admissible in evidence in a civil proceeding before a court, an administrative agency, an arbitration panel, or any other tribunal, including juvenile court, or in a criminal misdemeanor proceeding, if:

(1) the communication is privileged under Section 5;

(2) the privilege is not waived or precluded under Section 7; and

(3) there is no exception that prevents disclosure of the communication under Section 8.

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

SECTION 7. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 5 may be waived either in a record or orally during a judicial, administrative, or arbitration proceeding, if it is expressly waived by all parties affected and, in the case of the privilege of a mediator, it is also expressly waived by the mediator.

(b) A party or mediator who makes a representation about or disclosure of a mediation communication that prejudices another person in a judicial, administrative, or arbitration proceeding may be precluded from asserting the privilege under Section 5, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

SECTION 8. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege against disclosure under Sections 5 or 6 for:

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

(2) a mediation communication made during a mediation that is required by law to be open to the public;

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

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

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

(b) There is no privilege under Section 5 or 6 if a court, administrative agency, or arbitration panel 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 policy favoring the protection of confidentiality under this [Act] and:

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

(2) the evidence is offered in a judicial, administrative, or arbitration 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 parties as the result of a mediation, but only if evidence is provided by a person other than the mediator of the dispute at issue; or

(3) the mediation communication evidences a significant threat to public health or safety.

(c) If a mediation communication is not privileged under an exception in subsection (a) or (b), only the portion of the communication necessary for the application of the exception for nondisclosure may 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.

SECTION 9. [DISCLOSURE BY MEDIATOR.]

(a) Before commencing a mediation, an individual who is requested to serve as a mediator shall make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable person would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and any existing or past relationship with a party or foreseeable participant in the mediation. The mediator shall disclose any such fact known or learned by the mediator to the parties as soon as is practical.

(b) If requested to do so by a party, a mediator shall disclose the mediator's qualifications to mediate a dispute.

(c) Except as permitted under Sections 7 and 8, a mediator may not provide a report, assessment, evaluation, recommendation, or finding regarding a mediation to a court, agency, or any other authority that may make a ruling on or an investigation into a dispute that is the subject of the mediation, other than whether the mediation occurred, has terminated, or a settlement was reached and a report of attendance at mediation sessions.

SECTION 10. PARTY'S RIGHT TO DESIGNATE MEDIATION PARTICIPANT. A party has a right to have an attorney or other individual designated by the party attend and participate in the mediation. Any waiver of this right may be rescinded.

[SECTION 11. OPTIONAL SUMMARY ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS.

(a) Parties entering into a mediated settlement agreement evidenced by a record executed by the parties, their attorneys, and the mediator may petition the court to enter a judgment in accordance with the settlement agreement, if:

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

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

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

(4) the agreement does not relate to a divorce or marriage dissolution; and

(5) no objection is filed by a party to the agreement with the court within [30] days of receipt of the notice.

(b) If the requirements of subsection (a) are satisfied, the court may enter judgment unless a party makes a showing that the settlement was obtained by corruption, fraud, or duress. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.]

[SECTION 12. EFFECT OF AGREEMENTS; NONWAIVABLE PROVISIONS.

(a) The parties may not agree to:

(1) expand the scope of the [Act] as defined in Section 4;

(2) waive an exception to the mediation privilege provided in Section 8; or

(3) vary the requirements of Sections 9(c) and 10.

(b) The parties and mediator may agree:

(1) pursuant to Section 7, to waive the mediation privilege protections of Sections 5 and 6;and

(2) except as disclosure is required by a court, administrative agency, or arbitration panel under Section 5, 6, 7, or 8 or is required under contract law, to expand the nondisclosure of mediation communications].

(c) The parties and mediator may not agree to expand the privileges in Sections 5 and 6.]

SECTION 13. 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 14. EFFECTIVE DATE. This [Act] takes effect ....

SECTION 15. REPEALS. The following acts and parts of acts are hereby repealed:

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

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Uniform Mediation Act

Prefatory Note

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

Public policy strongly supports this development. Mediation fosters the early resolution of

disputes. The mediator assists the parties in negotiating a settlement that is specifically tailored to their needs and interests. The parties' participation in the process and control over the result contributes to greater satisfaction on their part. See comments, Section 4. Increased use of mediation also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. For this reason, hundreds of state statutes establish mediation programs in a wide variety of contexts and encourage their use. Many states have also created state offices to encourage greater use of mediation. *See, e.g., See* ROGERS & MCEWEN, *supra*, at app. B; *see also* ARK. CODE ANN. § 16-7-101, *et seq.* (1995); HAW. REV. STAT. § 613-1, *et seq* .(1989); KAN. STAT. ANN. § 5-501, *et seq.* (1996); MASS. GEN. LAWS ch. 7, § 51 (1998); NEB. REV. STAT. § 25-2902, *et seq*. (1991); N.J. STAT. ANN. § 52:27E-73 (1994); OHIO REV. CODE ANN. § 179.01, *et seq*. (West 1995); OKLA. STAT. tit. 12, § 1801, *et seq.* (1983); OR. REV. STAT. § 36.105, *et seq. (1997)*; W. VA. CODE § 55-15-1, *et seq.* (1990).

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. The primary focus of this Act is confidentiality. Because the privilege makes it more difficult to offer evidence to challenge the agreement, the Drafters viewed the issue of confidentiality as tied to provisions that will help increase the likelihood that the mediation process will be conducted with integrity and that the process will be fundamentally fair on the ground that the parties' knowing consent will be preserved.

See Joseph B. Stulberg, *Fairness and Mediation,* 13 OHIO ST. J. ON DISP. RESOL. 909 (1998). In other words, without these assurances, they did not think it wise to expand confidentiality. In some limited ways, the law can also encourage the use of mediation as part of the policy to promote the private resolution of disputes through informed self-determination. *See* discussion in Section 2; *see also* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831 (1998); *Denburg v. Paker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1000 (N.Y. 1993).

The provisions in this Act reflect the intent of the Drafters to fulfill this fundamental obligation, and are generally consistent with policies of the states. Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications. *See* Sections 5-9. Self-determination is encouraged by provisions that limit the potential for coercion of the parties to accept settlements, *see* Section 9(c), and that allows parties to have counsel or other support persons present during the mediation session. *See* Section 10. The Act promotes the integrity of the mediation process by requiring the mediator to disclose conflicts of interest and be candid about qualifications. *See* Section 9(a), (b). Finally, the Act enhances the attractiveness of mediation by providing for the possibility of expediting enforcement of mediated agreements. *See* Section 11.

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. For this reason, the Act in many respects is a default act. For example, the parties may still set by the ground rules of their mediation,

including their agreement about what use will be made of mediation communications and agreements outside of legal proceedings. In addition, the provisions in the Act may be varied by party agreement in the ways set forth in Section 12.

This Act is designed to simplify rather than complicate the law. Currently, legal rules affecting mediation can be found in more than 2,500 statutes. On average, for example, each state has five mediation confidentiality statutes, each applying in a different context. Many of these statutes can be replaced by the Act, which applies a generic approach to topics covered in varying ways by a number of specific statutes currently scattered within substantive provisions.

2. Importance of uniformity.

Existing statutory provisions frequently vary not only within a state but also by 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. Common differences among these statutes include the definition of mediation, subject matter of the dispute, scope of protection, exceptions, and the context of the mediation that comes within the statute (such as whether the mediation takes place in a court or community program or a private setting).

Uniformity of the law encourages effective use of mediation in a number of ways. First, uniformity is a necessary predicate to predictability if there is any potential that a statement made in mediation in one state may be sought in litigation or administrative processes in another state. The law of conflict of law has failed to provide predictability. *See, e.g., U.S. v. Gullo*, 672 F.Supp. 99

(W.D.N.Y. 1987) (holding that New York mediation-arbitration privilege applies in federal court grand jury proceeding); *Royal Caribbean Corp. v. Modesto*, 614 So.2d 517 (Fla. App. 1992) (holding that federal Jones Act case applies in state court because Florida mediation privilege law is procedural). Parties to a mediation cannot always know where the later litigation or administrative process may occur. Without uniformity, there can be no firm assurance of confidentiality in any mediation.

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

Third, absent uniformity, a party trying to decide whether to sign an agreement to mediate may not know where the mediation will occur and therefore whether the law will ensure against conflict of interest or the right to bring counsel or support person. 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.

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

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 which types of legal standards are helpful, and which kinds are disruptive. The Drafters have studied this experimentation, enabling state legislators to enact the Act with the confidence that can only come from learned experience.

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. This modern trend is seen in about half of the states that have adopted statutes of general application. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (West 1993); ARK. CODE ANN. § 16-7-206 (1993); CAL. EVID. CODE § 1115, *et seq.* (West 1997); IOWA CODE § 679C.2 (1998); KAN. STAT. ANN. § 60-452 (1964); LA. REV. STAT. ANN. § 9:4112 (1997); ME. R. EVID. § 408 (1993); MASS. GEN. LAWS ch. 233, § 23C (1985); MINN. STAT. ANN. § 595.02 (1996); NEB. REV. STAT. § 25-2914 (1997); NEV. REV. STAT. § 48.109(3) (1993); N.J. REV. STAT. § 2A:23A-9 (1987); OHIO REV. CODE ANN. § 2317.023 (West 1996); OKLA. STAT. tit. 12, § 1805 (1983); OR. REV. STAT. ANN. § 36.220 (1997); 42 PA. CONS. STAT. ANN. § 5949 (1996); R.I. GEN. LAWS § 9-19-44 (1992); S.D. CODIFIED LAWS § 19-13-32 (1998); TEX. CIV. PRAC. & REM. CODE § 154.053 (c) (1999); UTAH CODE ANN. § 30-3-38(4) (2000); VA. CODE ANN. § 8.01-576.10 (1994); WASH. REV.

CODE § 5.60.070 (1993); WIS. STAT. § 904.085(4)(a) (1997); WYO. STAT. ANN. § 1-43-103 (1991).

At the same time, there are many statutes, particularly older ones that address 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.*, GA. CODE ANN. § 45-19-36(e) (1989) (fair employment); 775 ILL. COMP. STAT. § 5/7B-102(E)(3) (1989) (human rights); VT. R. CIV. P., RULE 16.3 (1998) (general civil); W. VA. CODE § 6B-2-4(r) (1990) (public employees). When a state has both generic and specific statutes, it becomes difficult to determine the confidentiality of a particular mediation session, and the expense of legal research can have a chilling effect of the use of mediation. *See, e.g.*, CAL. EVID. CODE § 1115 *et seq*. (West 1997), (noting exemption for domestic courts); CAL. GOV'T. CODE § 12980(i) (West 1998) (housing discrimination); COLO. REV. STAT. § 13-22-307 (1991); KAN. STAT. ANN. § 60-452 (1964) (general); KAN. STAT. ANN. § 75-4332 (d) (1996) (public employment); WASH. REV. CODE § 5.60.070 (West 1993); WIS. STAT. § 904.085(4)(a) (1997) (general); WIS. STAT. § 767.11(12) (1993) (family court).

The Act will accelerate the trend toward a generic, simpler statutory approach within each state and a more uniform approach among states. To avoid unnecessary disruption, on the critical issue of confidentiality the Act adopts the structure used by the overwhelming majority of these general application states: the evidentiary privilege.

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 Drafting Committee,

chaired by Judge Michael Getty, was joined in the drafting of this Act by a Drafting Committee sponsored by the American Bar Association, working through its Section of Dispute Resolution, which was co-chaired by former American Bar Association President Roberta Cooper Ramo (Modrall, Sperling, Roehl, Harris & Sisk, P.A.) and Chief Justice Thomas 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 for Community Mediation).

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 instance, 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); Chris Guthrie, John Lande, James Levin, Richard C. Reuben, Leonard L. Riskin, Jean R. Sternlight (University of Missouri-Columbia School of Law); James Brudney, Sarah R. Cole, L. Camille Hébert, Nancy H. Rogers, Joseph B. Stulberg, Laura Williams, and Charles Wilson (Ohio State University College of Law); Jeanne Clement (Ohio State University College of Nursing); and Craig A. McEwen (Bowdoin College). The Hewlett 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 Ellen Deason, Alan Kirtley, Kimberlee K. Kovach, 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 this work was published as a law review symposium issue. *See Symposium on Drafting a Uniform/Model Mediation Act,* 13 OHIO ST. J. DISP. RESOL.787 (1998).

Finally, observers from a vast array of mediation professional and provider organizations also

provided extensive suggestions to the Drafting Committees, including: the Society of Professionals in Dispute Resolution, National Council of Dispute Resolution Organizations, American Arbitration Association, Judicial Arbitration and Mediation Services, Inc. (JAMS), Center for Public Resources Institute for Dispute Resolution, Academy of Family Mediators, National Association for Community Mediations, 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, the Beverly Hills Bar Association, the State Bar of California, the Chicago Bar Association, the Louisiana State Bar Association, the Minnesota State Bar Association, and the Mississippi Bar. In addition, the Committees' work was supplemented by many other individual mediators and mediation professional organizations.

5. Drafting Philosophy.

Mediation often involves both parties and mediators from a variety of professions and backgrounds, many of who are not attorneys or represented by counsel. With this in mind, the Drafters sought to make the provisions accessible and understandable to readers from a variety of backgrounds, sometimes keeping the Act shorter by leaving some discretion in the courts to apply the

provisions in accordance with the general purposes of the Act. These policies include fostering prompt, economical, and amicable resolution, integrity in the process, self-determination by parties, candor in negotiations, societal needs for information, and uniformity of law. *See* Section 2.

The Act seeks to avoid inclusion of those provisions that can be more effectively drawn if they vary by type of program or legal context and that are more appropriately left to standards and court rules. For example, the Act does not provide for mediator qualifications.

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

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

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

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 parties' 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

continued litigation. *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 it feel satisfied with the resolution of their disputes because of their positive experience in a court-related mediation. Finally, mediation can also produce important ancillary effects by promoting an approach to the resolution of conflict that is direct and focused on the interests of those involved in the conflict, thereby fostering a more civil society and a richer discussion of issues basic to policy. *See* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831 (1998); *see also* Frances McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, 3 DISP. RESOL. MAG. 12-13 (1997); Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); ROBERT D. PUTNAM**,** BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (discussion the causes for the decline of civic engagement and ways of ameliorating the situation.

State courts and legislatures have perceived these benefits, 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 2500 state and federal statutes and court rules related to mediation. *See* ROGERS & MCEWEN, *supra*, apps. A and B.

The primary guarantees of fairness within mediation are integrity of the process and informed self-determination. Self-determination also contributes to party satisfaction. Consensual dispute resolution allows parties to tailor not only the result but also the process to their needs, with minimal intervention by the state. For example, parties can agree with the mediator on the general approach to mediation, including whether the mediator will be evaluative or facilitative. This party agreement is a flexible means to deal with expectations regarding the desired style of mediation, and so increases party empowerment. Indeed, some scholars have theorized that individual empowerment is a central benefit of mediation. *See, e.g,* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (1994). The Act should be construed in a manner consistent with the principles of integrity, individual self-determination and institutional encouragement of the use of mediation.

2. Importance of Candor.

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. *Id.*

The Drafters recognize that mediators typically promote a candid and informal exchange regarding events in the past, as well as the parties' perceptions of and attitudes toward these events, and encourage parties 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 party-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges. *See, e.g.*, UNIF. R. EVID. R. 501—509 (1986); *see generally* JACK B. WEINSTEIN, ET. AL, EVIDENCE: CASES AND MATERIALS 1314-1315 (9th ed.1997); *Developments in the Law – Privileged Communications,* 98 HARV. L. REV. 1450 (1985). This rationale has sometimes been extended to mediators to encourage mediators to be candid with the parties by allowing them to block evidence of their notes and other mediation communications. *See, e.g.*, OHIO REV. CODE ANN. § 2317.023 (West1996).

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 parties. *See, e.g., NLRB v. Macaluso*, 618 F.2d 51 (9th Cir. 1980) (public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator's testimony). To maintain public confidence in the fairness of mediation, a number of states prohibit a mediator from disclosing mediation communications to a judge or other officials in a position to affect the decision in a case. DEL. CODE ANN. TIT. 19, § 712(c) (1998) (employment discrimination); FLA. STAT. ANN. § 760.34(1) (1997) (housing discrimination); GA. CODE ANN. § 8-3-208(a) (1990) (housing discrimination); NEB. REV. STAT. § 20-140 (1973) (public accommodations); NEB. REV. STAT. § 48-1118 (1993) (employment discrimination); CAL. EVID.CODE § 703.5 (WEST 1994). This justification also is reflected in standards against the use of a threat of disclosure or recommendation to pressure the parties to accept a particular settlement. *See, e.g.*, CENTER FOR DISPUTE SETTLEMENT, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1994); SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1991); *see also* Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 831, 874 (1998).

3. Need to Promote Uniformity.

As discussed in the Preface, point 3, the constructive role of certain laws regarding mediation can be performed effectively only if the provisions are uniform across the states. *See generally* James

J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience,* 13 OHIO ST. J. ON DISP. RESOL. 795 (1998). In this regard, the law may serve to provide not only uniformity of treatment of mediation in certain legal contexts, but can serve to help define what reasonable expectations may be with regard to mediation. The certainty that flows from uniformity of interpretation can serve to promote local, state and national interests in the expansive use of mediation as an important means of dispute resolution.

SECTION 3. DEFINITIONS. In this [Act]:

(1) "Court" means [a court of competent jurisdiction in this State].

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

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

(4) "Mediator" means an individual, of any profession or background, who is appointed by a court or government entity or engaged by parties under an agreement evidenced by a record to conduct a mediation.

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

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government;

governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(7) "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.

(8) "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(2). "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 use of the word "facilitation" is not intended to express a preference with regard to approaches of mediation. The Drafters recognize approaches to mediation will vary widely.

PROPOSED NEW LANGUAGE: It has been recommended that the following provision be added to emphasize the voluntary nature of mediation:

"*Decision-making authority rests with the parties, and any decisions or settlement reached by the parties to the agreement must be mutually acceptable and voluntary.*"

2. Subsection 3(3). "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 party.

Critically, the provision makes clear that conversations to initiate mediation and other non-session communications that are related to a mediation are considered "mediation communications." This would include mediation "briefs" prepared by the parties for the mediator. Most statutes are silent on the question of whether they cover conversations to initiate mediation. However, the Drafters believe candor during these initial conversations is critical to insuring a thoughtful agreement to mediate, and have extended confidentiality to these conversations to encourage that candor.

The definition in subsection 3(3) is narrowly tailored to permit the application of the privilege to protect communications which a party would reasonably believe would be confidential, such as the explanation of the matter to an intake clerk for a community mediation program, and communications

between a mediator and a party that occur between formal mediation sessions. These would be communications "made for the purposes of considering, initiating, continuing, or reconvening a mediation or retaining a mediator." Protecting the confidentiality of such a communication advances the underlying policies of the privilege, while at the same time gives the courts the latitude to restrict the application of the privilege in situations where such an application of the privilege would constitute an abuse. For example, an individual trying to hide information from a court might later attempt to characterize a call to an acquaintance about a dispute as an inquiry to the acquaintance about the possibility of mediating the dispute. This definition would permit the court to disallow a communication privilege, and admit testimony from that acquaintance by finding that the communication was not "for the purposes of initiating considering, initiating, continuing, or reconvening a mediation or retaining a mediator."

Responding in part to public concerns about the complexity of earlier drafts, the Drafting Committees also elected to leave the questions of when a mediation 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 parties failed to reach an agreement, such as the 10-day period specified in CAL. EVID. CODE § 1125 (West 1997) (general). However, the Drafting Committees rejected that approach because it felt that such a requirement could be easily circumvented by a routine practice of extending mediation in a form mediation agreement. Indeed, such an extension in a form agreement could result in the coverage of communications unrelated to the dispute for years to come, without furthering the purposes of the privilege.

PROPOSED NEW LANGUAGE: Some questions have been raised regarding the clarity with which written documents prepared for the mediation are included within the definition of mediation communications. These concerns relate to whether, for example, documents prepared by experts at the request of mediation parties are afforded confidentiality in subsequent court proceedings. A task force has suggested adding following language to the current definition:

> **(4) "Mediation communication" means a statement made during a mediation or for purposes of considering, initiating, continuing, or reconvening a mediation or retaining a mediator;** *and a report [or record] prepared for mediation at the request of all mediation parties and considered during mediation*.

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

The triggering requirement of appointment or engagement is designed to provide clarity as to which mediations are covered by the privilege and obligations to disclose or forego disclosures. The engagement should be clear, evidenced in recorded form. Otherwise, even a casual discussion over a backyard fence might later be deemed to have been a mediation, unfairly surprising those involved.

PROPOSED NEW LANGUAGE: A task force appointed by the Chair recommends including the concept of mediator impartiality in the definitions section, both amending the definition of mediator to include the word "impartial" as follows, and in providing a separate new definition of impartial.

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

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

The Task Force 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 parties 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 a child 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 parties. Also, the Task Force 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.

Finally, 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.

The problem with the proposed language is that it may create meta-litigation over whether the mediator was in fact free from bias. The Task Force suggested amending Section 9 to provide

specifically that the confidentiality expectations would survive such a challenge against a party who reasonably believed that the mediator was impartial. Nonetheless, this creates a more complicated procedure. The Reporters recommend instead that the Drafting Committees connect the impartiality to the manner in which the mediation is conducted to avoid this issue. The recommended language would read:

> **(3) "Mediator" means an individual, of any professional background, who is appointed by a court or government entity or engaged by the parties through an agreement evidenced by a record to** *impartially* **conduct a mediation.**

The definition affects not only the breadth of the mediation privilege but also whether the mediator has the obligations regarding disclosure of conflict of interest, qualifications, and communications to courts, agencies and investigative authorities in Section 9 and requirements regarding accompanying individuals in Section 10. The Drafting Committees have discussed whether, therefore, the definition should be narrowed to protect application of the definition or Act to certain culturally specific assisted settlement processes. This should be discussed at the next meeting.

The Academic Advisory Committee and the Reporters note the specific problem of mental health mediation, in that often the mentally ill party has significant difficulties to overcome before feeling comfortable enough to sign a document. One method of accommodating this specific type of mediation may be to search for a way to put "mental health agencies" into the Act as referral agencies. Another may simply be to set aside the problem to be resolved in a uniform mental health mediation act.

4. Subsection 3 (5). "Party."

The Act defines "party" to be a person who participates in a mediation and has some stake in the resolution of the dispute, or whose agreement is necessary to resolve the dispute. These limitations are designed to prevent someone with only a passing interest in the mediation, such as a neighbor of a person embroiled in a dispute, from attending the mediation and then blocking the use of information or taking advantage of rights meant to be accorded to parties**.** Drafters had previously used the word "disputant" to emphasize that mediation often involves individuals and entities that are not in litigation, but comments to earlier drafts suggested the term was too unfamiliar to be incorporated into a uniform law.

Because of these structural limitations on the definition of parties, participants who do not meet the definition of "party" 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 parties. Parties seeking to apply restrictions on disclosures by such participants – including their attorneys and other representatives – should consider drafting such a confidentiality obligation into a valid and binding agreement that the participant signs as a condition of their participation in the mediation.

A party may participate in the mediation in person, by phone, or electronically. An entity may participate through a designated agent. If the party is an entity, it is the entity, rather than a particular agent, that holds the privilege afforded in Sections 5-8.

5. Subsections 3(6). "Person;" 3(7). "Record;" and 3(8). "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.

PROPOSED NEW LANGUAGE: The Reporters recommend two additional definitions:

(x)"Participant" means the parties, mediator, and anyone else who participates in a mediation.

(xx) "Record of an agreement" means a record which the parties have assented to as evidence of their agreement.

Both clarify references that have been confusing to some observers. Subsection (xx) broadens an executed written agreement to include other forms of recorded agreement.

SECTION 4. SCOPE.

(a) Except as otherwise provided in subsection (b), this [Act] applies to a mediation in which parties agree in a record to mediate or are directed or requested in a record by a court or governmental entity, to participate in a mediation.

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

(1) a dispute arising under or relating to a collective bargaining relationship; or

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

Reporter's Working Notes

1. Subsection 4 (a). Mediations covered by Act; triggering mechanisms.

The Act is broad in its coverage of mediation, a departure from the typical state statute that 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 (1993) (worker's compensation); IOWA CODE §216.15A (1999) (civil rights). Moreover, unlike many mediation privileges, it also applies in some contexts in which the Rules of Evidence are not consistently followed, such as administrative hearings and arbitration. Because of the breadth of coverage, it is important to delineate the limits of what is covered. But specifying limits is difficult in many mediation contexts. For this reason, the Drafting Committees included a triggering mechanism. Finally, 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.

2. Subsection 4(b). Exclusion of Labor Law.

Collective bargaining disputes are excluded because of the longstanding, solidified, and substantially uniform mediation systems that already are in place in the collective bargaining context. *See* Memorandum from ABA Section of Labor and Employment Law of the American Bar Association to Uniform Mediation Act Reporters 2 (Jan. 23, 2000) (on file with UMA Drafting Committees); Letter from New York State Bar Association Labor and Employment Law Section to Reporters, Uniform Mediation Act 2-4 (Jan. 21, 2000) (on file with UMA Drafting Committees). This includes the mediation of disputes arising under the terms of a collective bargaining agreement, as well as mediations relating to the formation of a collective bargaining agreement.

PROPOSED NEW LANGUAGE: Responding to concerns by Drafters that the UMA needs

to state expressly which types of collective bargaining mediations are specifically being exempted from the scope of the Act, the Reporters suggest the following revision of subsection 4(b)(1):

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

(1) disputes arising under, out of, or relating to a collective bargaining relationship, *authorized or governed by federal, state, or local law.*

3. Subsection 4(c). Exclusion of Peer Mediation.

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).

PROPOSED NEW LANGUAGE: The Drafting Committees have not yet given substantial consideration to the use of mediation in the context of judicial settlement conferences. The Reporters recommend the following italicized language as subsection 4(c), with the subsequent discussion incorporated into the Reporter's Working Notes.

(c) This [Act] does not apply to conferences or proceedings conducted by a judge or other judicial officer authorized to issue rulings.

Difficult issues arise in mediations that are conducted by judges during the course of settlement conferences attending to pending litigation. *See, e.g.*, James J. Alfini, *Risk of Coercion Too Great:*

Judges Should Not Mediate Cases Assigned to Them For Trial, 6 DISP. RESOL. MAG. 11 (Fall 1999), and Frank E.A. Sander, *A Friendly Amendment,* 6 DISP. RESOL. MAG. 11 (Fall 1999). 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 in which a part of the function of judicial conferencing 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 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. It is difficult to draw the line between judicial settlement conferences and judicial mediation. Therefore, the Drafting Committees opted to permit the courts to handle confidentiality of such sessions through local rule. The local rule may not provide assurance of confidentiality, however, if the mediation communications are sought in another jurisdiction.

SECTION 5. PRIVILEGE AGAINST DISCLOSURE. In a civil proceeding before a court, an administrative agency, an arbitration panel, or any other tribunal, including juvenile court, or in a criminal misdemeanor proceeding, the following rules apply:

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

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

(3) A mediator may refuse to disclose evidence of a mediation communication.

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. EVID. CODE § 703.5 (West 1994).

Reporter's Working Notes

1. In general.

Sections 5 through 8 set forth the Uniform Mediation Act's general structure for protecting the confidentiality of mediation communications against disclosure in later legal proceedings. Section 5 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 party or, for certain communications by a mediator as well, unless within an exception delineated in Section 8 or waived under the provisions of Section 7. It further delineates the fora in which the privilege may be asserted. Section 6 makes clear the basic effect of the 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 broad legal

protections for mediation confidentiality. Indeed, of the 25 states that have enacted confidentiality statutes of general application, 21 have plainly used the privilege structure. ARIZ. REV. STAT. ANN. § 12-2238 (West 1993); ARIZ. REV. STAT. ANN. § 16-7-206 (1997); IOWA CODE § 679C.2 (1998); KAN. STAT. ANN. § 60-452 (1964); LA. REV. ST. ANN. § 9:4112 (1997); ME. R. EVID. § 408 (1997); MASS. GEN. LAWS ch. 233, § 23C (1985); MONT. CODE ANN. § 26-1-813 (1999); NEV. REV. STAT. § 48.109(3) (1993); OHIO REV. CODE ANN. § 2317.023 (West1996); OKLA. STAT. tit. 12, § 1805 (1983); OR. REV. STAT. ANN. § 36.220 (1997); 42 PA. CONS. STAT. ANN. § 5949 (1996) (general); R.I. GEN. LAWS § 9-19-44 (1992); S.D. CODIFIED LAWS § 19-13-32 (1998); TEX. CIV. PRAC. & REM. CODE § 154.053 (c) (1999); UTAH CODE ANN. § 30-3-38(4) (2000); VA. CODE ANN. § 8.01-576.10 (1994); WASH. REV. CODE § 5.60.070 (1993); WIS. STAT. § 904.085(4)(a) (1997); WYO. STAT. § 1-43-103 (1991). At least one other has arguably used the privilege structure: *See Olam v. Congress Mortgage Co.*, 68 F.Supp. 2d 1110 (N.D. Cal. 1999) (treating CAL. EVID. CODE § 703.5 (West 1994) and CAL. EVID. CODE §§ 1119, 1122 (West 1997) as a privilege).

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 (West1996); FLA. STAT. ANN. § 44.102 (1999); WASH. REV. CODE ANN. § 5.60.072. (West 1993); *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 1977) (domestic court); ARK. CODE. ANN. § 11-2-204 (Arkansas Mediation and Conciliation Service) (1979); FLA. STAT. ANN. § 44.201 (publicly established dispute settlement centers) (West 1998); 710 ILL. COMP. STAT . § 20/6 (1987) (non-profit community mediation

programs); IND. CODE ANN. § 4-6-9-4 (West 1988) (Consumer Protection Division); IOWA CODE ANN. § 216.15B (West 1999) (civil rights commission); MINN. STAT. ANN. § 176.351 (1987) (workers' compensation bureau); CAL. EVID. CODE § 1119, *et seq*. (West 1997); MINN. STAT. ANN. § 595.02 (1996).

The privilege structure carefully balances the needs of the justice system against party and mediator needs for confidentiality. For this reason, legislatures and courts have used the privilege to provide the basis for confidentiality protection for other forms of professional privileges, including attorney-client, doctor-patient, and priest-penitent relationships. *See* UNIF. R. EVID. R. 510—510 (1986); STRONG, *supra,* at tit. 5. Congress recently used this structure to provide for confidentiality in the accountant-client context as well. 26 U.S.C. § 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).

2. Operation of the privilege.

As with other privileges, a mediation privilege operates to allow a person to refuse to disclose

and to prevent another from disclosing particular communications. *See generally* STRONG, *supra*, at § 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 parties from using that document in later litigation.

This blocking function is critical to the operation of the privilege. Parties may block provision of testimony about or other evidence of mediation communications made by anyone in the mediation, including persons other than the mediator and parties. Further, the evidence may be blocked whether the testimony is by another party, a mediator, or any other participant. However, a person who attends the mediation but is neither a mediator nor a party, as defined in Section 3, does not hold the privilege under the Act. In other words, if all parties (and if related to mediator communication or evidence, the mediator) agree, the non-party participants who attended the mediation cannot block the use of the evidence. 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.

Critically, the privilege is not self-executing, meaning a party 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 parties 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 party or mediator may wish to assert the privilege, but is unaware of the necessity.

To guard against this possibility, the parties and mediator may wish to contract for notification of the possible use of mediation information, as is a practice under the attorney-client privilege for joint defense consultation. *See* Reporter's Notes for Section 5; *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).

3. Holder of the privilege.

a. In general.

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. COMP. STAT. § 20/6 (1987) (community dispute resolution centers); IND. CODE § 20-7.5-1-13 (1987) (university employee unions); IOWA CODE § 679.12 (1985) (general); KY. REV. STAT. ANN. § 336.153 (1988)

(labor disputes); 26 ME. REV. STAT. ANN. § 1026 (1999) (university employee unions); MASS. GEN. LAWS ch. 150, § 10A (1985) (labor disputes).

Those statutes that designate a holder tend to be split between those that make the parties the only holders of the privilege, and those that also make the mediator a holder. *Compare* ARK. CODE ANN. § 11-2-204 (1979) (labor disputes); FLA. STAT. ANN. § 61.183 (1996) (divorce); KAN. STAT. ANN. § 23-605 (1999) (domestic disputes); N.C. GEN. STAT. § 41A-7(d) (1998) (fair housing); OR. REV. STAT. ANN. § 107.785 (1995) (divorce) (providing that the parties are the sole holders) *with* CAL. EVID. CODE § 1122 (West 1997) (general) OHIO REV. CODE ANN. § 2317.023 (West 1996) (general); WASH. REV. CODE ANN. § 7.75.050 (1984) (dispute resolution centers), all of which make the mediator an additional holder in some respects.

The Act adopts a bifurcated approach, providing that both the parties and the mediators may assert the privilege regarding certain matters, thus giving weight to the primary concern of each rationale. *See* OHIO REV. CODE ANN. § 2317.023 (West1996) (general); WASH. REV. CODE § 5.60.070 (1993) (general). Under Section 5, the parties jointly hold the privilege and any party can raise the privilege as to any mediation communication. At the same time, the mediator may both raise and prevent waiver regarding the mediator's own testimony, or the mediator's mediation communications.

b. Parties as holders.

The analysis for parties as holders is analogous to the attorney-client privilege in which the client holds the privilege. Because the interests of mediation parties are in conflict, 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 the joint defense doctrine to parties who were not directly adverse); *see generally* Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981). 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). In mediation, the parties' interests also conflict, so it is natural to require waiver by both in order for the waiver to be effective.

4. Proceedings at which the privilege applies.

The privilege under Section 5 applies in most legal proceedings - all civil, criminal misdemeanor and juvenile proceedings. It does not apply in criminal felony proceedings.

PROPOSED NEW SUBSECTIONS: The Drafting Committees have been considering bracketed language to extend the privilege to also include felonies under certain circumstances.

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

. . . .

(1) a criminal or juvenile delinquency proceeding related to the matter mediated by

[here each state inserts programs that should be covered by this provision] , unless a court determines, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is otherwise unavailable and that there is a need for the evidence that substantially outweighs the importance of the policy favoring the protection of confidentiality under this [Act].

In most situations, the parties 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 proceedings is not substantial. However, the prospect of an inaccurate decision because of unavailable evidence is of great importance in those proceedings that do include discussions of criminal acts. At the same time, public policy supports the mediation of gang disputes and mediation of some criminal acts in specified contexts, and these programs may be less successful if the parties cannot discuss the criminal acts underlying the disputes. CAL. PENAL CODE § 13826.6 (West 1996) (mediation of gang-related disputes); Colo. Rev. Stat. § 22-25-104.5 (1994) (mediation of gang-related disputes). The public's decision to use or support 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.

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, providing examples of the importance of both clarity about the limits of confidentiality in this setting and the fact that the courts will weigh heavily the need for the evidence in a particular case. *See Rinaker v. Superior Court,* 74 Cal. Rptr. 2d 464, 466 (Ct. App. 1998) (juvenile's

constitutional right to confrontation in civil juvenile delinquency trumps mediator's statutory right not to be called as a witness); *State v. Castellano,* 460 So.2d 480 (Fla. App. 1984) (statute excluding evidence of an offer of compromise presented to prove liability or absence of liability for a claim or its value does not preclude mediator from testifying in a criminal proceeding regarding alleged threat made by one party to another in mediation); *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)**.**

With these policy issues in mind, the proposed task force provision has two key limitations. First, this exception applies only if the parties assert the privilege. The mediator does not have a corresponding privilege. Thus, it promotes the primary rationale for a privilege – the reasonable expectation of a party is protected. Second, it includes a balancing provision. It is important to note that the courts will accord criminal defendants the rights to use evidence in certain egregious situations even without such a provision. *Davis v. Alaska*, 415 U.S. 308 (1974); *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 466 (Ct. App. 1998). This provision extends the same right to evidence introduced by the prosecution, thus evening the playing field. In addition, it puts the parties on notice of this limitation on confidentiality.

A task force also has suggested the addition of the following language in Section 5, but the Reporters recommend instead that the issues addressed in the language below be inserted in Section 8(a)(5), which deals with exceptions for abuse or neglect of certain dependent persons. The task force language provides:

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

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

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

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

5. Other structural approaches considered; rationales for rejection.

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

a. The settlement discussions approach: Too limited.

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. *Manko v. United States*, 87 F.3d 50, 54 (2d Cir. 1996) (Policy considerations that generally exclude settlement evidence in civil proceedings are not applicable in criminal context); *United States v. Gonzalez*, 748 F.2d 74, 78 (2d Cir. 1984) (defendant's admissions, made while negotiating a settlement to a potential civil claim, were admissible in criminal prosecution); *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). Some courts would not exclude settlement discussions regarding a criminal charge. *See State v. Burt*, 249 N.W.2d 651, 652 (Iowa 1977) (public policy of promoting compromise which lies behind the exclusionary rule in civil controversies has no application in the criminal law field where statutory safeguards against compounding felonies and offenses apply); *Commonwealth v. Melnyczenko*, 358 A.2d 98 (Pa. 1976) (admitting evidence of offer to make restitution). *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, 638 (E.D.N.Y. 1982) (alternative basis for ruling). Further, mediation over non-legal disputes, such as family tranquility, would not be excluded under a Rule 408 approach. *Crues v. KFC Corp.*, 768 F.2d 230, 233 (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, 1074 (2nd Cir. 1983), *cert denied* 464 U.S. 830 (1983); *Tindal v. Mills*, 144 S.E.2d 902, 903 (N.C. 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 parties 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) (1993); VT. R. EVID. 408 (1985).

b. The categorical exclusion approach: Too uncertain.

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. EVID. CODE § 1119 (West 1997); ARK. CODE ANN. § 16-7-206 (1993).

This categorical approach has the attractiveness of simplicity, but in practice some courts 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. EVID. CODE § 1119 (WEST 1997) (mediation communications inadmissible); CAL. EVID. CODE § 703.5 (West 1994) (mediator incompetent to testify). *See Rinaker v. Superior Court,* 74 Cal. Rptr.2d 464, 466 (Ct. App. 1998) (juvenile's constitutional right to confrontation in civil juvenile delinquency trumps mediator's statutory right not to be called as a witness); *Olam v. Congress Mortgage Co.*, 68 F.Supp. 2d 1110, 1131–33 (N.D. Cal. 1999) (construing California statutory scheme CAL. EVID. CODE § 703.5 (West 1994) as establishing a mediation privilege, and ruling that the mediator's right to testify gives way when both parties agree to waive mediation privilege, and the court determines evidence is material); *Foxgate Homeowners Ass'n v. Bramalea Cal., Inc*., 2000 WL 218353 (Cal. Ct. App. Feb. 25, 2000) (in ruling on sanctions motion, court may consider portions of a mediator's report about sanctionable conduct, along with mediation communications relating to that conduct).

The reasons for judicial reticence to construe a statute purporting to exclude an entire class of evidence is understandable. 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 evidence 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. In fact, the evidence often is admissible for some purposes, when it is especially pertinent. While public policy favors mediation confidentiality, it can hardly be said as a categorical matter that the admission of mediation communications 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. 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, in addition to its breadth, the evidentiary exclusion/discovery limitation has substantial weaknesses. For example, it does not permit the provision of relevant evidence in situations in which parties do not expect confidentiality and have in fact opened up the mediation to the public, as in public policy mediation. Similarly, if the jurisdiction follows a strictly categorical evidentiary exclusion, mediation parties who are not parties to the subsequent litigation could not prevent disclosure if the litigation parties stipulate to discoverability or admissibility. Finally, 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 testamentary incapacity approach: Too constrained.

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. ANN. § 595.02 (1996); NEV. REV. STAT. § 48.109(3) (1993); N.J. STAT. ANN. § 2A:23A-9 (1987). 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 parties. However, it is inadequate as a vehicle to provide comprehensive protection for the mediation process in legal proceedings, and thus meet the reasonable expectations of the participants because it does not affect the ability of the parties to make such disclosures, thus defeating the parties' reasonable expectations in the confidentiality of mediation communications.

Moreover, as noted above, courts are justifiably reluctant to create categorical exclusions of potentially relevant evidence and the exclusion of mediator testimony would be a form of categorical exclusion. *See e.g., In re Sealed Case,* 148 F.3d.1073, 1079 (D.C. Cir. 1998) (proposed protective function privilege does not clearly "promote sufficiently important interests to outweigh the need for probative evidence" in a criminal investigation) *cert. denied Rubin v. United States*, 525 U.S 990

(1998)); *In re Bruce Lindsey*, 158 F.3d 1263, 1266 (D.C. Cir. 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 more recently through the enaction of privilege statutes. *See id.*

SECTION 6. ADMISSIBILITY; DISCOVERY.

(a) A mediation communication is not subject to discovery or admissible in evidence in a civil proceeding before a court, an administrative agency, an arbitration panel, or any other tribunal, including juvenile court, or in a criminal misdemeanor proceeding, if:

(1) the communication is privileged under Section 5;

(2) the privilege is not waived or precluded under Section 7; and

(3) there is no exception that prevents disclosure of the communication under Section 8.

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

Reporter's Working Notes

1. Section 6(a). Exclusion of privileged mediation communications.

This Section makes explicit that a court or other tribunal must exclude privileged communications that are protected under these Sections, and may not compel discovery of them. Because the privilege is unfamiliar to many using mediation, this Section provides a description of the effect of the privilege provided in Sections 5, 7, and 8. It does not change the reach of these provisions.

The Committee on Style recommended that the types of proceedings be omitted, but the Reporters deemed that to be a substantive change that should be considered by the Drafting Committees before implementation.

2. Section 6(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, and is also found in Uniform Rule of Evidence 408. *See, e.g.*, FLA. STAT. ANN. §44.102 (1999) (general); MINN. STAT. ANN. § 595.02 (1996) (general); OHIO REV. CODE ANN. § 2317.023 (West 1996) (general); WASH. REV. CODE § 5.60.070 (1993) (general).

SECTION 7. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 5 may be waived either in a record or orally during a judicial, administrative, or arbitration proceeding, if it is expressly waived by all parties and, in the case of the privilege of a mediator, it is also expressly waived by the mediator.

(b) A party or mediator who makes a representation about or disclosure of a mediation communication that prejudices another person in a judicial, administrative, or arbitration proceeding may be precluded from asserting the privilege under Section 5, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

Reporter's Working Notes

Section 7 provides for waiver of privilege, and for a party or mediator to be precluded from asserting the privilege in situations in which mediation communications have been disclosed before the privilege has been asserted. Waiver must be express and recorded through a writing or electronic record or during the specified types of proceedings, or through estoppel, as described below. In this way, the provisions differ from the attorney-client privilege, which is waived by most disclosures. *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 parties discussing their dispute and mediation with friends and relatives. In addition, in all of the settings described there is a sense of formality and awareness of legal rights. Most of the covered proceedings are conducted on the record, easing the difficulties of establishing what was said. In arbitration, which is sometimes

conducted without an ongoing record, it will be important to ask the arbitrator to note the waiver.

Read together with Sections 5 and 6, the waiver operates as follows: For party mediation communications, a party or other participant may testify or provide evidence only if all parties waive the privilege, and a mediator may testify if all parties and the mediator waives the privilege. For mediation communications by the mediator, a party, mediator, or other participant may testify or provide evidence only if all parties and the mediator waive the privilege. Thus, a party may testify if all parties waive the privilege, but a mediator may testify or provide evidence only if all parties and the mediator waive the privilege.

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

To address this anomaly, the Drafters added to the Act an estoppel provision to cover situations in which the parties do not expressly waive the privilege but engage in conduct inconsistent with the assertions of the privilege and that causes prejudice. 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. R. 510 and 511 (1986). 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 that is not admitted in court, but would include disclosure that would, absent the exception,

allow one party to take unfair advantage of the privilege. For example, if one party's attorney states in court that the other party admitted destroying evidence during mediation, that party should not be able to block the use of testimony to refute that statement later in that proceeding. Such advantage taking or opportunism would be inconsistent with the continued recognition of the privilege, while the casual conversation would not. Thus, if A and B were the parties in a mediation, and A affirmatively stated in court that B admitted destroying evidence during the mediation, A would have effectively waived the protections of this statute regarding whether the statement was made during the mediation. In other words, A is estopped from asserting that A did not waive the privilege. If B decides to waive as well, evidence of A's and B's statements during mediation may be admitted. Analogous doctrines have developed regarding constitutional privileges, *Harris v. New York*, 401 U.S. 222, 224 (1971) (shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances), and the rule of completeness in Rule 106 of the Uniform Rules of Evidence, which states that if one party introduces part of a record, an adverse party may introduce other parts when to do otherwise would be unfair.

The Committee on Style recommended insertion of the italicized word in the following phrase: "**if it is expressly waived by all parties** *affected* . . . ." The Reporters considered this a substantive change that should not be made without approval of the Drafting Committees.

SECTION 8. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege against disclosure under Section 5 or 6 for:

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

(2) a mediation communication made during a mediation that is required by law to be open to the public;

(3) a threat made by a mediation participant to inflict bodily harm or property damage;

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

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

(b) There is no privilege under Section 5 or 6 if a judicial, administrative, or arbitration tribunal or court 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 policy favoring the protection of confidentiality under this [Act] and:

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

(2) the evidence is offered in a judicial, administrative, or arbitration 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 parties as the

result of a mediation, but only if evidence is provided by a person other than the mediator of the dispute at issue; or

(3) the mediation communication evidences a significant threat to public health or safety.

(c) If a mediation communication is not privileged under an exception in subsection (a) or (b), only the portion of the communication necessary for the application of the exception for nondisclosure may 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 Sections 5 and 6 and to the prohibition against disclosure Section 9(c). As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the Act contemplates that a court will hold an in camera proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended. *See, e.g.*, *Rinaker v. Superior Court*, 74 Cal. Rptr.2d 464, 466 (Ct. App. 1998); *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110, 1131–33 (N.D. Cal. 1999).

The exceptions in subsection 8(a) apply regardless of the need for the evidence. In contrast, the exceptions under subsection 8(b) would apply only in situations in which there was a hearing, and the proponent of the evidence meets a high standard of need that substantially outweighs other policies. The reason for the distinction is that the exceptions listed in (b) include situations that

should remain confidential but for overriding concerns for justice.

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

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

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. The Reporters have recommended a definition of this term in Section 3, to make clear that all parties must give actual assent to the record of the agreement. In other words, a participant's notes about an oral agreement would not be a record of agreement. On the other hand, the following situations would be a record of agreement: a handwritten transcription that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement. 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 (1993); CAL. EVID. CODE § 1120(1) (West 1997) (general); CAL. EVID. CODE § 1123 (West 1997) (general); CAL. GOV'T. CODE § 12980(i) (West 1998) (housing discrimination); COLO. REV. STAT. §24-34-506.5 (1993) (housing discrimination); GA. CODE ANN. § 45-19-36(e) (1989) (fair employment); 775 ILL. COMP. STAT. § 5/7B-102(E)(3) (1989) (human rights); IND. CODE § 679.2

(1998) (general); IOWA. CODE ANN. § 216.15(B) (1999) (civil rights); KY. REV. STAT. ANN. § 344.200(4) (1996) (civil rights); LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (1997) (general); LA. REV. STAT. ANN. § 51:2257(D) (1998) (human rights); 5 ME. REV. STAT. ANN. § 4612(1)(A) (1995) (human rights); MD. CODE 1957 ANN. Art. 49(B) § 28 (1991) (human rights); MASS. GEN. LAWS. ch. 151B, § 5 (1991) (job discrimination); MO. REV. STAT. § 213.077 (1992) (human rights); NEB. REV. STAT. § 43-2908 (1993) (parenting act); N.J. STAT. ANN. §10:5-14 (1992) (civil rights); OR. REV. STAT. ANN. § 36.220(2)(a) (1997) (general); OR. REV. STAT. ANN. 36.262 (1989) (agricultural foreclosure); 42 PA. CONSOL. STAT. § 5949(b)(1) (1996) (general); TENN. CODE ANN. § 4-21-303(d) (1996) (human rights); TEX. GOV'T. CODE ANN. § 2008.057 (1999) (Administrative Procedure Act); VT. R. CIV. P., RULE 16.3 (1998) (general civil); VA. CODE ANN. § 8.01-576.10 (1994) (general); VA. CODE ANN. § 8.01-581.22 (1988) (general); WASH. REV. CODE § 5.60.070 (1)(e) and (f) (1993) (1993) (general); WASH. REV. CODE § 26.09.015(3) (1991) (divorce); WASH. REV. CODE § 49.60.240 (1995) (human rights); W.VA. CODE § 5-11A-11(b)(4) (1992) (fair housing); W.VA. CODE § 6B-2-4(r) (1990) (public employees); WIS. STAT. § 767.11(12) (1993) (family court); WIS. STAT. § 904.085(4)(a) (1997) (general).

This exception is noteworthy only for what is not included: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a mediation session could bear on either whether the parties came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule. As a result, mediation participants might be less candid, not knowing whether a controversy later would erupt over an oral agreement. Unfortunately, excluding evidence of oral settlements reached during a mediation session would operate to the disadvantage of a less legally-sophisticated party who is

accustomed to the enforcement of oral settlements reached in negotiations. Such a person might also mistakenly assume the admissibility of evidence of oral settlements reached in mediation as well. However, because the majority of courts and statutes limit the confidentiality exception to signed written agreements, one would expect that mediators and others will soon incorporate knowledge of a writing requirement into their practices. *See Ryan v. Garcia*, 27 Cal. App.4th 1006, 1012 (1994) (privilege statute precluded evidence of oral agreement); *Hudson v. Hudson*, 600 So.2d 7,9 (Fla. App. 1992) (privilege statute precluded evidence of oral settlement); OHIO REV. CODE ANN. § 2317.023 (West 1996). For an example of a state statute permitting the enforcement of oral agreements under certain narrow circumstances, *see* CAL. EVID. CODE § 1118, 1124 (West 1997) (providing that oral agreement must be memorialized in writing within 72 hours).

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

The parties may still provide that particular settlements agreements are confidential with regard to disclosure to the general public, and provide for sanctions for the party who discloses voluntarily. However, confidentiality agreements reached in mediation, like those in other settlement situations, are subject to the need for evidence and public policy considerations. *See* ROGERS & MCEWEN, *supra*, §§ 9.23, 9.25.

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

Subsection 8(a)(2) makes clear that the privileges in Section 6 do not pre-empt open meetings

laws in various states, thus deferring to the policies of the individual states regarding the types of meetings that will be subject to open meetings laws.

PROPOSED NEW LANGUAGE: A task force appointed by the Chair has suggested that the Drafting Committees modify the current language to read as follows:

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

The Reporters suggest that the Drafting Committee consider whether to include the words "or open records" as the effect may be to open notes by public officials made during mediations that would otherwise be covered by privileged.

With these changes, this exception would reflect two major policy considerations. The first is that there is no after-the-fact confidentiality for communications that were made in a meeting that was either voluntarily open to the public – such as a workgroup meeting in a federal negotiated rule making that was made open to the general public, even though not required by Federal Advisory Committee Act (FACA) to be open – or if it was required to be open to the public pursuant to an open meeting law. For example, the Act would provide no confidentiality if an agency holds a closed meeting but FACA would require that it be open. The second major policy consideration is that even if a meeting was properly closed, an open record law may still require that meeting summaries or other documents – perhaps even a transcript – be made available under certain circumstances, e.g. the Federal Sunshine Act.

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

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

State mediation confidentiality statutes frequently recognize a similar exception. *See* ALASKASTAT. § 47.12.450(e) (1998) (community dispute resolution centers) (admissible to extent relevant to a criminal matter); COLO. REV. STAT. § 13-22-307 (1998) (general) (bodily injury); KAN. STAT. ANN. § 23-605(b)(5) (1999) (domestic relations) (mediator may report threats of violence to court); OR. REV. STAT. §36.220(6) (1997) (general) (substantial bodily injury to specific person); 42 PA. CONS. ST. ANN. § 5949(2)(I) (1996) (general) (threats of bodily injury); WASH. REV. CODE § 7.75.050 (1984) (community dispute resolution centers) (threats of bodily injury and property harm); WYO. STAT. § 1-43-103 (c)(ii) (1991) (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.

Almost a dozen states currently have mediation confidentiality protections that contain exceptions related to a commission of a crime. COLO. REV STAT. §13-22-307 (1991) (general) (future felony); FLA. STAT. ANN. § .723.038(8) (mobile home parks) (ongoing or future crime or fraud); IOWA CODE § 216.15B (1999) (civil rights) ; IOWA CODE § 654A.13 (1990) (farmer-lender); IOWA CODE § 679C.2 (1998) (general) (ongoing or future crimes); KAN. STAT. ANN. § 23-605(b)(3) (1989) (ongoing and future crime or fraud); KAN. STAT. ANN. § 44-817(c)(3) (1996) (labor) (ongoing and future crime or fraud); KAN. STAT. ANN. § 75-4332(d)(3) (1996) (public employment) (ongoing and future crime or fraud); 24 ME. REV. STAT. ANN. § 2857(2) (1999) (health care) (to prove fraud during mediation); MINN. STAT. § 595.02(1)(a) (1996) (general); NEB. REV. STAT. §25-2914 (1994) (general) (crime or fraud); N.H. REV. STAT. ANN. § 328-C:9(III) (1998) (domestic relations) (perjury in mediation); N.J. STAT ANN. § 34:13A-16(h) (1997) (workers' compensation) (any crime); N.Y. LAB. LAWS § 702-a(5) (McKinney 1991) (past crimes) (labor mediation); OR. REV. STAT. ANN. §36.220(6) (1997) (general) (future bodily harm to a specific person); S.D. CODIFIED LAWS § 19-13-32 (1998) (general) (crime or fraud); WYO. STAT. ANN. § 1-43-103(c)(ii) (1991) (future crime).

While ready to exempt attempts to commit or the commission of crimes from confidentiality protection, the Drafting Committees declined to cover "fraud" that would not also constitute a crime because civil cases frequently include allegations of fraud, with varying degrees of merit, and the mediation would appropriately focus on discussion of fraud claims. Some state statutes do exempt fraud, although less frequently than they do crime. *See, e.g.*, FLA. STAT. ANN. § 723.038(8) (1994) (mobile home parks) (communications made in furtherance of commission of crime or fraud); KAN. STAT. ANN. § 23-605(b)(3) (1999) (domestic relations)(ongoing crime or fraud); KAN. STAT. ANN. § 44-817(c)(3) (1996) (labor) (ongoing crime or fraud); KAN. STAT. ANN. § 60-452(b)(3) (1964)

(general) (ongoing or future crime or fraud); KAN. STAT. ANN. § 75-4332(d)(3) (1996) (public employment) (ongoing or future crime or fraud); NEB. REV. STAT. § 25-2914 (1994) (general) (crime or fraud); S.D. CODIFIED LAWS §19-13-32 (1998) (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 party makes an admission of past conduct that portends future bad conduct. However, they decided against such an expansion of this exception because such past conduct can already be disclosed in other important ways. Importantly, the other parties can warn others, because parties are not prohibited from disclosing by the Act. The Act permits the mediator to disclose if required by law to disclose felonies or if public policy requires. All persons can testify in a felony trial, since felony criminal proceedings are not covered by the privilege. 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.

It is important to note that this provision does not prohibit disclosures outside of proceedings, which could be governed by contract if the parties so agreed. Thus, it does not prevent a party from calling the police.

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

An exception for child abuse and neglect is common in domestic mediation confidentiality

statutes, and the Act reaffirms these important policy choices states have made to protect their citizens. *See e.g.*, IOWA. CODE ANN. § 679c.3(4) (1998) (general); KAN. STAT. ANN. § 23-605(b)(2) (1999) (domestic relations); KAN. STAT. ANN. § 38-1522(a) (1997) (general); KAN. STAT. ANN. § 44-817(c)(2) (1996) (labor); KAN. STAT. ANN. § 72-5427(e)(2) (1996) (teachers); KAN. STAT. ANN. § 75-4332(d)(1) (1996) (public employment); MINN. STAT. ANN. § 595.02(2)(a)(5) (1996) (general); MONT. CODE ANN. § 41-3-404 (1999) (child abuse investigations) (mediator may not be compelled to testify); NEB. REV. STAT. § 43-2908 (1993) (parenting act) (in camera); N.H. REV. STAT. ANN. § 328-C:9(III)(c) (1998) (marital); N.C. GEN. STAT. § 7A-38.1(L) (1999) (superior court); N.C. GEN. STAT. § 7A-38.4(K) (1999) (district courts); OHIO REV. CODE ANN. § 3109.052(c) (West 1990) (child custody); OHIO REV. CODE ANN. § 5123.601 (West 1988) (mental retardation); OHIO REV. CODE ANN. § 2317.02 (1998) (general); OR. REV. STAT. § 36.220(5) (1997) (general); TENN. CODE ANN. § 36-4-130(b)(5) (1993) (divorce); UTAH CODE ANN. § 30-3-38(4) (2000) (divorce) (mediator shall report); VA. CODE ANN. § 63.1-248.3(A)(10) (2000) (welfare); WIS. STAT. § 48.981(2) (1997) (social services): WIS. STAT. § 904.085(4)(d) (1997) (general); WYO. STAT. § 1-43-103(c)(iii) (1991) (general). *But see* ARIZ. REV. STAT. ANN. § 8-807(B) (West 1998) (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 public policy. It should be stressed that this exception applies only to permit disclosures in public agency proceedings in which the agency is the party. The exception does not apply to the general rule of privilege does not apply in private actions, such as divorce, because it is not needed as much there to not promote free interchange. Finally, stronger policies favor disclosure in proceedings brought to protect against abuse and neglect, so that the harm

can be stopped. For example, in a mediation between A and B who are seeking a divorce, B admits to sexually abusing a child. B's admission would not be privileged.

In some jurisdictions, the child protection agency seeks to hold mediation sessions over issues of abuse or neglect and seek a privilege to apply within their own proceedings. These programs represent public support for settlement over adjudication in these cases, and that object could not be achieved without the assurance of confidentiality. A task force recommended an amendment to Subsection 5, which, if adopted, would make 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. The Reporters recommend modifying Section 8(a)(5) instead, so that the provisions regarding abuse would be in one section of the Act.

PROPOSED NEW LANGUAGE: The exception for abuse and neglect in modified Section 8(a)(5) would state:

(5) a mediation communication offered to prove or disprove abuse, or neglect, abandonment, or exploitation in a judicial, administrative or arbitration proceeding in which a public agency is protecting the interests of a child, disabled adult, or elderly adult protected by law, other than a communication in a mediation that is convened with the participation of that public agency after such an allegation has already been made to a public agency designated to protect these interests and the communication relates to the previously disclosed allegation.

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 by mediators in Section 9. 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.

PROPOSED NEW LANGUAGE: The NCCUSL Committee on Style has recommended that the language in the final substantive clause of subsection 8(b) be changed from "substantially outweighs the importance of this [Act's] policy favoring the protection of confidentiality" to "... favoring the nondisclosure of mediation communications in certain situations." Subsection 8(b) would read as follows with this change:

> **(b) There is no privilege or prohibition under Section 5 or 6 if a judicial, administrative, or arbitration tribunal or court 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 this [Act's] policy** *favoring the nondisclosure of mediation communications in certain situations* **and:**

The Reporters view this as a substantive change that should be considered by the full Drafting Committees for implementation.

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. Therefore, mediators may make such disclosures without violating the statute's rule against disclosure. Further, 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 9(b).

This exception follows statutes in several states that permit the mediator to defend, and the parties to secure evidence in, the occasional claim against a mediator. *See, e.g.*, OHIO REV. CODE ANN. § 2317.023 (West 1996) (general); MINN. STAT. ANN. § 595.02 (1996) (general); FLA. STAT. ANN. § 44.102 (1999) (general); WASH. REV. CODE § 5.60.070 (1993) (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 exception also applies to permit the introduction of evidence in the situation of a participant who 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 specific 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 permit him to leave because of chest pains and a history of heart trouble, and that the mediator had refused to let him leave the mediation session. See *Randle v. Mid Gulf, Inc.*, No. 14-95-01292, 1996 WL 447954 (Tex App. 1996) (unpublished). Under this exception the evidence would not be privileged if the weighing requirements were met. This exception differs from the

exception for a record of an agreement in subsection 8(a)(1) 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. The Reporters recommend reconsideration of the last clause, limiting evidence to persons other than the mediator. In some situations, the mediator's testimony may be crucial to the determination and may be sought by all parties. *See Olam v. Congress Mortgage Co.*, 68 F.Supp. 2d 1110, 1131–33 (N.D. Cal. 1999).

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

This provision is to provide exceptions to Sections 5, 6, and 9(c) 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 parties would not be precluded from reporting the danger because there is no affirmative limitation in the Act 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, and 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. [DISCLOSURE BY MEDIATOR.]

(a) Before commencing a mediation, an individual who is requested to serve as a mediator shall make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable person would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and any existing or past relationship with a party or foreseeable participant in the mediation. The mediator shall disclose any such fact known or learned by the mediator to the parties as soon as is practical.

(b) If requested to do so by a party, a mediator shall disclose the mediator's qualifications to mediate a dispute.

(c) Except as permitted under Sections 7 and 8, a mediator may not provide a report, assessment, evaluation, recommendation, or finding regarding a mediation to a court, agency, or any other authority that may make a ruling on or an investigation into a dispute that is the subject of the mediation, other than whether the mediation occurred, has terminated, or a settlement was reached and a report of attendance at mediation sessions.

Reporter's Working Notes

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

While regulations for mediator disclosure are common in professional practice and ethics rules, 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 all mediators as defined in Section 3(4). Therefore, it applies to private mediators as well as those in publicly supported programs. It applies to volunteer as well as compensated mediators. The facts to be disclosed in any case will depend upon the circumstances. The goal of such a requirement is to protect the parties against a mediator who, unbeknownst to the parties, 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 party suffers damage as a result of the mediator's failure to disclose conflicts. The Drafting Committees may want to consider whether to provide sanctions in the Act.

?**PROPOSED NEW LANGUAGE.** The NCCUSL Committee on Style suggests that the final sentence of Section 9(a) be redrafted. It currently reads **"The mediator shall disclose any such fact known or learned to the disputants as soon as is practical."** The Style Committee proposes the following formulation:

The mediator shall disclose any such fact known by the mediator to the parties as soon as is practical before accepting appointment or engagement. The mediator shall disclose any such fact learned by the mediator after accepting appointment or engagement.

The Reporters view the suggestion as substantive and recommend it be discussed by the full Drafting Committees before implementation.

The Reporters suggest that the Drafting Committees consider changing the words "reasonable person" to "reasonable mediator" as a means of providing greater predictability over time through

mediator standards of disclosure.

3. Section 9(b). Qualifications.

The disclosure, upon request, of qualifications is a relatively novel requirement. In some situations, the parties 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 parties, and indeed this is one aspect of the mediator's background that has been shown to correlate with effectiveness in reaching settlement. *See, e.g.*, JESSICA PEARSON & NANCY THOENNES, *Divorce Mediation Research Results, in* DIVORCE MEDIATION: THEORY AND PRACTICE 429, 436 (Folberg & Milne, eds., 1988); Roselle L. Wissler, *A Closer Look at Settlement Week*, 4 DISP. RESOL. MAG. 28 (Summer 1998).

It must be stressed that the Act does not establish mediator qualifications. No consensus has emerged in the law, research, or commentary as to those mediator qualifications that will best produce effectiveness or fairness. 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* ROGERS & MCEWEN, *supra*, § 11.02 (discussing laws regarding mediator qualifications); CENTER FOR DISPUTE SETTLEMENT, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992); SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION COMMISSION ON QUALIFICATIONS, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES (1989); SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION COMMISSION ON QUALIFICATIONS, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE (1995); SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION, QUALIFYING DISPUTE RESOLUTION PRACTITIONERS: GUIDELINES FOR COURT-CONNECTED PROGRAMS (1997).

The decision of the Drafting Committees against prescribing qualifications should not be interpreted as a disregard for the importance of qualifications. Rather, respecting the unique characteristics that may qualify a particular mediator for a particular mediation, the silence of the Act reflects the difficulty of addressing the topic in a uniform statute that applies to mediation in a variety of contexts. Qualifications may be important, but they need not be uniform.

2. Section 9(c). Disclosures by a Mediator to Government Officials.

Subsection 9(c) 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 1997); FLA. STAT. ANN. § 373.71 (1999) (water resources); TEX. CIV. PRAC. & REM. CODE § 154.053 (c) (West 1999) (general). Disclosures of mediation communications to a 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). 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 and in the mediation process. *See* SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1991); CENTER FOR DISPUTE SETTLEMENT, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (D.C. 1992).

PROPOSED NEW LANGUAGE: A number of the comments to the last draft suggest that the language was broadened to prohibit reports of crime and other matters, even if those were not related to the court. The Reporters suggest narrowing the language regarding the authorities covered but also broadening the language to include all communications, not just reports, and other named documents. The new recommended language is as follows:

> *(c)* ***Except as permitted under Sections 7 and 8, a mediator may not communicate with a court or administrative agency that refers a case to mediation or before which the matter being mediated is pending, nor with the prosecutor or investigative agency referring the case that is the subject of the dispute to mediation, other than whether the mediation occurred, has terminated, or a settlement was reached and a report of attendance at mediation sessions.***

Under both the current and proposed language, the communications by the mediator to the court or other authority are circumscribed narrowly. They would not permit a mediator to communicate, for example, on whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement.

PROPOSED NEW LANGUAGE: A task force appointed by the Chair was asked to study the consequences of adding the concept of impartiality to the definition of mediator, and to make appropriate recommendations. The task force concluded that introducing the concept of impartiality required a policy determination on the effect of a finding that a mediator was not impartial. It was the task force's recommendation that such a mediation be deemed not a mediation for purposes of the act, but that parties not be adversely affected if they reasonably relied on the belief that a mediator was impartial. It recommended that a new subsection (d) be added to Section 9 as follows:

Section 9 (d). If a party reasonably believed the mediator to be impartial, then the party shall have the protections of the [Act] even if the mediator is later found to be partial.

An alternative to this language was to place the language about impartiality in the definition of "mediator" in Section 3 (4), providing that the individual who mediates is appointed "to impartially conduct a mediation." If the latter change is made, it would be clear that arguments about the actual impartiality of the mediator would not compromise the confidentiality under this Act, and the task force's proposed Section 9(d) would be unnecessary.

SECTION 10. PARTY'S RIGHT TO DESIGNATE MEDIATION PARTICIPANT. A party has a right to have an attorney or other individual designated by the party attend and participate in the mediation. Any waiver of this right may be rescinded.

Reporter's Working Notes

The fairness of mediation is premised upon the informed consent of the parties to any agreement reached. *See Wright v. Brockett*, 150 Misc.2d 1031 (1991) (setting aside mediation

agreement where conduct of landlord/tenant mediation made informed consent unlikely); *see generally,* Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 936-944 (1998)*;* Craig A. McEwen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995). Some statutes permit the mediator to exclude lawyers from mediation, resting fairness guarantees on the lawyer's later review of the draft settlement agreement. *See e.g.,* CAL. FAM. CODE § 3182 (West 1993); McEwen, et al., 79 MINN. L. REV., *supra*, at 1345–1346. At least one bar authority has expressed doubts about the ability of a lawyer to review an agreement effectively when that lawyer did not participate in the give and take of negotiation. BOSTON BAR ASS'N, OP. 78-1 (1979). Similarly, concern has been raised that the right to bring counsel might be a requirement of constitutional due process in mediation programs operated by courts or administrative agencies. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1095 (April 2000).

Most statutes are either silent on whether the parties' lawyers can be excluded or, alternatively, provide that the parties can bring lawyers to the sessions. *See, e.g.*, NEB. REV. STAT. § 42-810 (1997) (domestic relations) (counsel may attend mediation); N.D. CENT. CODE § 14-09.1-05 (1987) (domestic relations) (mediator may not exclude counsel); OKLA. STAT. tit. 12, § 1824(5) (1998) (representative authorized to attend); OR. REV. STAT. § 107.600(1) (1981) (marriage dissolution) (attorney may not be excluded); OR. REV. STAT. § 107.785 (1995) (marriage dissolution) (attorney may not be excluded); WIS. STAT. § 655.58(5) (1990) (health care) (authorizes counsel to attend mediation). Several states, in contrast, have enacted statutes permitting the exclusion of counsel from domestic mediation. *See* CAL. FAM. CODE § 3182 (West 1993); MONT. CODE ANN. §

40-4-302(3) (1997) (family); S.D. CODIFIED LAWS § 25-4-59 (1996) (family); WIS. STAT. § 767.11(10)(a) (1993) (family).

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

Finally, the Act also makes clear that parties may be accompanied by a designated person, and does not limit that person to lawyers. This provision is consistent with good practices that permit the *pro se* party to bring someone for support who is not a lawyer if the party cannot afford a lawyer.

In some instances, a party may seek to bring an individual whose presence will interfere with effective discussion. In divorce mediation, for example, a new friend of one of the parties may spark new arguments. In these instances, the mediator can make that observation to the parties and, if the mediation flounders because of the presence of the non-party, can terminate the mediation.

PROPOSED NEW LANGUAGE: The NCCUSL Committee on Style has recommended that the phrase ". . . has the right to . . ." be changed to ". . . may . . .," such that Section 10 would read:

A party *may* have an attorney or other individual designated by the party attend and participate in the mediation. A waiver of this right may be rescinded.

The Reporters view this as a substantive change that should be discussed by the Drafting Committees prior to implementation.

[SECTION 11. OPTIONAL SUMMARY ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS.

(a) Parties entering into a mediated settlement agreement evidenced by a record executed by the parties, their attorneys, and the mediator may petition the court to enter a judgment in accordance with the settlement agreement, if:

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

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

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

(4) the agreement does not relate to a divorce or marriage dissolution; and

(5) no objection is filed by a party to the agreement with the court within [30] days of receipt of the notice.

(b) If the requirements of subsection (a) are satisfied, the court may enter judgment unless a party makes a showing that the settlement was obtained by corruption, fraud, or duress. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.]

Reporter's Working Notes

Section 11 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 §14-09.1-07 (1987); IND. CODE § 22-9-1-6(p) (1987); *see also* FLA. STAT. § 73.015(3) (1999) (accords presuit mediation agreements enforcement after filing with administrative agency). 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 (1991); CAL. CIV. PRO. § 1297.401 (West 1988); FLA. STAT. ANN. § 684.10 (1986). This Section is designed to be similar to this new trend in international commercial conciliation agreements.

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 parties 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 C.F.R. § 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).

Although a mediated settlement may be satisfactory to the parties involved, the Drafters have recognized that attorney representation is a crucial prerequisite to any summary enforcement by the court. In addition, there may arise situations in which a party is unaware of a defense until they attempt to enforce a mediated settlement. Section 11(b) preserves these defenses, and precludes judicial enforcement of the agreement when there has been a showing of corruption, fraud, or duress. In addition, in Section 11(a), the Act requires that the parties agree to use the process, and that the agreement be expressed in writing. The mediator must sign the agreement, though only as a witness. Section 11(a)(3) 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. Section 11(a)(3) also requires that formal notice be provided to all party 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. PRO. § 1162 (1982). Section 11(a)(5) provides that the application may not be granted if any party objects for any reason. The objection would be filed as provided for filings under local court rules.

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.

The Reporters suggest that (a)(4) be bracketed, and the states requested to consider whether the exclusion for divorce or marital dissolution cases should apply.

[SECTION 12. NONWAIVABLE PROVISIONS; EFFECT OF AGREEMENTS.

(a) The parties may not agree to:

(1) expand the scope of the [Act] as defined in Section 4;

(2) waive an exception to the mediation privilege provided in Section 8; or

(3) vary the requirements of Sections 9(c) and 10.

(b) The parties and mediator may agree:

(1) pursuant to Section 7, to waive the mediation privilege protections of Sections 5 and 6;and

(2) except as disclosure is required by a court, administrative agency, or arbitration panel under Section 5, 6, 7, or 8 or is required under contract law, to expand the nondisclosure of mediation communications].

(c) The parties and mediator may not agree to expand the privileges in Sections 5 and 6.]

SECTION 13. 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 14. EFFECTIVE DATE. This [Act] takes effect ....

SECTION 15. REPEALS. The following acts and parts of acts are hereby repealed: