DRAFT

FOR DISCUSSION ONLY

UNIFORM MEDIATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

DECEMBER 1999

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 even tentatively approved by either Drafting Committee.

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PREFACE

The Drafting Committee s work has benefitted from the research and comments by an Academic Advisory Faculty drawn from four universities that has donated its time to assist this project. Richard C. Reuben, of the Harvard Negotiation Research Project at Harvard Law School, also assisted enormously in this effort. The project faculty include:

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A number of others in the dispute resolution field have shared their expertise with this group, including Christine Carlson, Kimberlee K. Kovach, Peter Adler, Eileen Pruett, Alan Kirtley, Ellen Deason, Tom Stipanowich, and Jack Hanna.

UNIFORM MEDIATION ACT (1999)

SECTION 1. DEFINITIONS. In this [Act:]

(1) Disputant means a person that participates in mediation and:

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

(B) is asked by a court, governmental entity, or mediator to appear for mediation or entered an agreement to mediate that is evidenced by a record.

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

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

(4) Mediator means an impartial individual appointed by a court or government entity or engaged by disputants through an agreement evidenced by a record.

(5) 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.

(6) 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.

(7) 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

The need for uniformity

Mediation is a consensual dispute resolution process that helps disputants overcome barriers to negotiated settlement and, in so doing, can make important contributions to society by promoting the earlier and less contentious resolution of disputes. Disputant participation in the mediation process, often with counsel, allows for results that are tailored to the disputants' needs, and leads the disputants to be more satisfied with the resolution of their disputes. In addition to promoting earlier resolution and satisfaction, mediation serves an educational function, promoting an approach to negotiation that is direct and focused on understanding the interests of others, thereby fostering a more civil society.

State 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 20 years. *See*, NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION LAW, POLICY, PRACTICE 5:1-5:19 (2nd ed. 1994 & **Cole et al.,** supp. **1999**) [hereinafter ROGERS & MCEWEN]; Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54 (Aug. 1996).

The legislative embodiment of this public support is more than 2000 state and federal statutes related to mediation. *See* ROGERS & MCEWEN, apps. A and B. Many of these statutes simply authorize the use of mediation in a particular context. Hundreds of the statutes, in contrast, construct a complex patchwork of law regulating mediation or providing for confidentiality. These statutes seek variously**:** to promote greater use and more effective resolution through mediation, to protect against unfairness, to encourage high quality in mediation, to make the programs cost-effective for the parties and the public, and to maintain or increase public respect for the justice system. The foci of these statutes include: confidentiality; education of participants; legal representation within mediation; case selection and referral; judicial review of mediated agreements; mediator qualifications; mediator standards of conduct; liability, discipline, or immunity for mediators; and program-monitoring requirements.

The statutes constitute a tangle of legal requirements regarding mediation that vary not only by state but also by type of program and subject matter of the dispute. For example, confidentiality provisions for domestic mediation are different from one state to the next. **In addition, they** often differ between types of mediation within a given state, such domestic and environmental mediation. Further, because only about half the states have enacted mediation provisions of general application, most mediation sessions are conducted without any type of protection regarding confidentiality; in other words, the patchwork of statutes is

hit and miss in terms of its coverage. *Compare* NEB. REV. STAT. 25-2902 -25-2921(1998) (dealing with most, but not all publicly-approved mediation programs, though not completely of general application) and TEX. CIV. PRAC. & REM. CODE 152.001-152.004 (generally covering dispute resolution programs) with statutes included within specific substantive laws and applying to them, such as COLO. REV. STAT. 14-12-105 (1998)(domestic relations); FLA. STAT. ch. 681.1097 (1998) (motor vehicle sales warranties); Iowa Code 13.4 (1998) (farm assistance program); and with states that have both comprehensive and subject-specific mediation provisions such as CAL. EVID. CODE 1119 (West 1998) (mediation confidentiality generally); CAL. GOV T CODE 12984 (West 1998) (housing discrimination mediation).

The diversity of statutory approaches presents both problems and opportunities. The most serious problems stem from an inability of mediation participants to predict which law will apply to their mediation. At the time of the mediation, the participants often do not know whether information from the mediation will be sought in another jurisdiction s courts or administrative agencies and whether the law of the forum state or the mediation state will be applied. *See* Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws,* 10 OHIO ST. J. ON DISP. RESOL. 157 (1994). Mediation often is conducted by telephone and, increasingly, electronically, also complicating the ability of participants to know what state law governs the standards for the mediation or confidentiality. The safest course for a participant would be to take no risks in other words, to avoid the frank conversations and informal atmosphere that the statutes are designed to encourage.

Another problem of the differing laws is that they introduce such complexity that it constitutes a drain on a process that is effective primarily because of its flexibility and simplicity. Mediators and participants must do legal research on mediation laws as they move from state to state and from subject matter to subject matter. This is particularly challenging for lay disputants and mediators who often cannot develop an intuitive sense of the law; nor can they readily find or read it.

This situation argues compellingly in favor of a uniform approach on certain fundamental issues that are common to all mediation. The mix of statutory approaches, while no longer productive on balance, has served a valuable purpose. The Drafting Committee heard from those urging a variety of approaches and studied reports on the effectiveness of these statutes, permitting the development of a more sound approach to a uniform law through an understanding and appreciation of the diversity that marks the field. In fact, the early review of the literature and cases developed for the Drafting Committee has been published in a law review, and a dispute resolution professional magazine dedicated most of an issue to the exploration of various aspects of confidentiality in mediation. *See Symposium on Drafting a Uniform/Model Mediation Act,* 13 OHIO ST. J. DISP. RESOL.787 (1998); *see also* Richard C. Reuben and Nancy H. Rogers, *Choppy Waters for a Movement Toward a Uniform Confidentiality Privilege,* 5 DISP. RESOL. MAG 4 (Winter 1998); Alan Kirtley A *Mediation Privilege Should Be Both Absolute and Qualified,* 5 DISP. RESOL. MAG 5 (Winter 1998); Charles Pou Jr., *Confidentiality in Federal Agency ADR: A Troubling*

Decision, 5 DISP. RESOL. MAG 9 (Winter 1998); Christopher Honeyman, *Confidential, More or Less*, 5 DISP. RESOL. MAG 12 (Winter 1998); Scott H. Hughes, *A Closer Look Shows No Case for Privilege*, 5 DISP. RESOL. MAG 14 (Winter 1998); Charles W. Ehrhardt, *Confidentiality Protection: An Open Question in Federal Courts*, 5 DISP. RESOL. MAG 17 (Winter 1998); Lawrence W. Hoover Jr., *A Place for Privacy: Media Creates Special Problems for Mediation*, 5 DISP. RESOL. MAG 20 (Winter 1998); Jane E. Kirtley, *No Place for Secrecy: Media Should be Permitted Access*, 5 DISP. RESOL. MAG 21 (Winter 1998); Lemoine D. Pierce, *Media Access Needs to be Well Managed*, 5 DISP. RESOL. MAG 23 (Winter 1998).

Reach of the Act

The guiding purpose of the drafting effort was to provide a simple and clear statute that would serve the interests of promoting the use, effectiveness, fairness and integrity of mediation, while not interfering with the ability of the broader justice system in achieving the goals set by the public for the resolution of disputes. The Drafting Committee sought to avoid creating legislation on matters that are better handled through local rules, **standing court orders, contract among the disputants,** mediator ethics provisions, or ethics provisions for particular mediation professionals.

Understanding the superiority of dealing with some matters through ethics provisions and local rules, the Draft does not set standards of conduct for mediators except **in Section 4** with respect to disclosures to judges and investigators, integrity with respect to statements about qualifications and conflicts of interest, interference with disputants desires for representation, and **lack of accountability through immunity.** Others in the mediation field have been moving toward self-regulation through the development of professional practice standards such as those that might be a basis for certification or de-certification of mediators or the regulation of legal practice related to mediation. *See e.g.*, CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS IN ADR, PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT FOR THE LAWYER AS THIRD PARTY NEUTRAL (April 1999); ABA SECTION OF DISPUTE RESOLUTION/AAA/SPIDR, ETHICAL GUIDELINES FOR MEDIATORS (1996); *Prototype Agreement on Job Bias Dispute Resolution: A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 1995 DAILY LAB. REP. 91 d34; SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION COMMISSION ON QUALIFICATIONS, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE (1995).

There are many different forms of mediation, along with a wide variety of styles and backgrounds of mediators, and an equally broad universe of participant needs for mediation and mediators. This diversity is a strength of mediation as an alternative method of dispute resolution that counsels against unnecessary regulation. **The need for variance by locale and type of practice is significant and the need for uniformity is slight.** The Committee therefore tried to avoid entering matters of practice preference, where these differences did not affect significantly the fairness of the process or respect for the administration of justice. **Also**, **the Committee did not set mediator qualifications, as discussed in the commentary**

to Section 4.

For similar reasons, the Drafting Committees avoided drafting statutory language for matters that could easily, or sometimes better, accomplished by agreement of the disputants. As discussed in the commentary to Section 3, disputants agreements that they will not disclose outside the mediation session are enforceable through damages if they voluntarily tell another person about what was said. The agreement warns those who sign of these possible sanctions, whereas the statute may be a trap for the unwary. At the same time, the disputants cannot by contract increase the inadmissibility of evidence from the mediation; this must be accomplished by statute. For these reasons, the Drafting Committees provide greater protection in Section 2 for disclosures within legal proceedings but in Section 3 leave protection outside these settings to the disputants through contract.

After weighing what could better be accomplished through other means, the drafters included provisions that deal with two fundamental areas confidentiality and **mediation procedures affecting the** fairness of mediation. The Draft also presents a tentative idea, for reactions, of including novel approaches regarding enforcement of agreements to mediate and the enforcement of settlement agreements reached as a result of mediation.

Section 1 (1). Disputant.

The Draft defines "disputant" to be a person who participates in a mediation and has some stake in the resolution of the dispute, as delineated in (A), and who either has been asked to attend or has entered an agreement, in writing or electronically, to mediate. These limitations are designed to prevent someone with only a passing interest in the mediation, such as a neighbor of a person embroiled in a dispute, from attending the mediation and then blocking the use of information or taking advantage of rights meant to be accorded to disputants. Attorneys or other representatives of the parties are not disputants, even though they may be participants in a mediation for purposes of the Act. A disputant may participate in the mediation in person, by phone, or electronically. An entity may attend through a designated agent.

Section 1(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 Committee preferred the word assistance to emphasize that, in contrast to an arbitration, a mediator has no authority to issue a decision.

Problems emerge in defining mediator and mediation so that the definition does not also encompass other processes, such as early neutral evaluation, fact-finding, facilitation, and family counseling. The Draft moderates between competing tensions. The Drafting Committee considered a definition of mediation that would exclude related processes that are not the type of mediation contemplated by the Act. However, it rejected this approach because narrowing the definition, for example, to exclude neutral evaluation could lead to attempts to thwart the privilege if the mediator gave an opinion concerning the likely

outcome of the dispute when the disputants did not settle, and carries potential for abuse. Instead, the Draft definitions in 1(2) and 1(4) provide three characteristics to distinguish mediation from other dispute resolution processes: (1) that a mediator is not aligned with a disputant, (2) that the mediator assists the disputants with their own negotiated resolution of the dispute, without the authority to issue a binding decision, and (3) the mediator is appointed by an appropriate authority or engaged by the disputants.

Section 1(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 2 and 3. It tracks the general rule, as reflected in Uniform Rule of Evidence 801, which defines a statement as an oral or written assertion or nonverbal conduct of an individual who intends it as an assertion. The mere fact that a person attended the mediation in other words, the physical presence of a person is not a communication. By contrast, nonverbal conduct such as nodding in response to a question would be a communication because it is meant as an assertion. Nonverbal conduct such as smoking a cigarette during the mediation session typically would not be a communication because it was not meant by the actor as an assertion. Similarly, a tax return brought to a divorce mediation would not be a mediation communication because it was not a statement made as part of the mediation, even though it may have been used extensively in the mediation. However, a note written on the tax return during the mediation to clarify a point for other participants would be a mediation communication, as would a memorandum prepared for the mediator by an attorney for a disputant.

The Drafting Committee **previously included** language regarding the disputants expectation of confidentiality to assure openness in public policy mediation and other mediations conducted without such expectations. **The Drafting Committees have asked that this draft include, instead, an exception for public policy mediation.**

The second sentence in 1(3) makes clear that early conversations and other non-session communications that are related to a mediation typically should be considered mediation communications. However, it uses conditional language to reflect the potential ambiguity of the disputants or participants reasonable expectations of those communications and to leave courts with the discretion to limit application of the privilege if the communication did not relate to the mediation. This is a familiar construct in statutory drafting, intended to signal to courts general drafting intent while at the same time providing for the discretion necessary when considering a variety of factors to ensure that the application of the statute is consistent with its purposes.

The Drafting Committee devoted considerable discussion to the issue of when the mediation begins and ends for purposes of the application of the privilege. The questions are complex and present drafting difficulties if more specificity is sought. On the one hand, disputants might be more likely to use a mediator if they are assured of confidentiality for the initial contact or communication, thus promoting one of the important purposes expressly contemplated for the privilege. On the other hand, permitting a disputant to protect from

disclosure any contact or communication that could be remotely argued as one to a mediator would frustrate the historic public policy favoring the availability of every person s evidence, without furthering the goals underlying the privilege. This must be seen as a particular concern because as noted above, it sometimes can be difficult to discern if one is in a mediation because mediators do not have to be licensed or associated with a public entity or an entity organized to provide mediation services.

The Draft resolves this tension by specifying the availability of the privilege at these gray stages of a mediation, while also giving the courts the sound discretion to lift the cloak of privilege when it has been abused. In reaching this decision, it is worth noting that the Drafting Committee considered but rejected two other approaches taken by the state statutes that offered greater specificity. One approach, found in a relatively new California statute, was to create a new term and make privileged a "mediation consultation," defined as "a communication between a person and a mediator for the purposes of initiating, considering, or reconvening a mediation or retaining the mediator." CAL. EVID. CODE 1115 (West 1998) (general); CAL. EVID. CODE 1119 (West 1998) (general). The other approach was to cover broadly communications between a disputant and a mediator "relating to the subject matter of a mediation agreement." *See, e.g.*, IOWA CODE 216.15B (1998) (civil rights). In both cases, the legislation properly sought to preclude the abuse of the privilege by a person who later claims a conversation with another person to be a mediation an abuse that seems even greater when the privilege could be interpreted to extend to conversations that do not even include the other disputant.

The Drafting Committee decided against adopting the California approach, determining it would make the Act more complex by unnecessarily introducing a term and concept that would be new to most state courts, mediation practitioners, and lawyers. Similarly, it rejected the Iowa approach as too narrow to encourage the disputants frank discussion of a variety of differences. For example, a dispute over the quality of a washing machine may not be settled unless the company apologizes for an unrelated matter, the insult made by the company receptionist when the disputant first called to register a complaint.

Instead, the Drafting Committee chose to include within the definition of mediation communication those communications that are made for the purposes of considering, initialing, continuing, or reconvening a mediation. Such a definition is narrowly tailored to specify only those ambiguous situations in which the disputants may have a reasonable expectation of confidentiality, and which advance the underlying policies of the privilege while at the same time giving the courts the latitude to restrict the application of the privilege in situations of abuse.

Responding in part to public concerns about the complexity of earlier drafts, the Drafting Committee also elected to leave the questions of when a mediation begins and ends to the sound judgment of the courts to determine according to the facts and circumstances presented by individual cases. In weighing language about when a mediation ends, the Drafting Committee considered other more specific approaches for answering these questions. One approach in particular would have terminated the mediation after a specified period of time if the disputants failed to reach an agreement, such as the 10-day period

specified in CAL. EVID. CODE 1125 (West 1998) (general). However, the Drafting Committee 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.

Section 1 (4). Mediator.

The Drafting Committee selected the term impartial instead of neutral or not involved in the dispute. The term impartial reflects a mediator who has no reason to favor one of the disputants over the other. In contrast, the term neutral might be construed to exclude a mediator in a court program, for example, who is charged by statute to look out for the best interests of the children because this mediator is not neutral as to the result. At the same time, this type of mediation should be encouraged by providing confidentiality as long as the mediator is impartial as between the particular disputants. Also, the Drafting Committee 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.

Section 1(5). Person.

The Draft 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. One additional comment is appropriate: The definition of person includes governmental entities, as well as mediation entities when appointed or engaged to mediate a dispute. For example, if two disputants agree to engage the ABC Mediation Center, the center as an entity would fall within the protections and obligations of the Act for purposes of that mediation.

Section 1(6). Record.

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

Section 1(7). State.

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

SECTION 2. CONFIDENTIALITY: PRIVILEGE; WAIVER; EXCEPTIONS**.**

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

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

(**c**) There is **no privilege** under subsections (a) and (b) of this section n**or prohibition against disclosure** under Section 3:

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

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

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

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

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

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

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

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

[(9) to the extent found necessary by a court or administrative

agency hearing officer if a person who is not a disputant and to whom a disputant owes a duty files a claim or complaint against the disputant related to the disputants conduct in the mediation.]

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

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

Reporter s Working Notes

Section 2. In general.

When the disputants agreement expands and contracts the law

The law of privilege is not simply a default rule for disputants who fail to deal with the matter by contract. By contract, the disputants can waive the protections of the privilege, but they cannot expand it. Agreements to keep evidence from a public tribunal are void as against public policy. 14 WILLISTON ON CONTRACTS 881, 885 (3rd ed. 1972); Equal Employment Opportunity Commission v. Astra USA, 94 F.3d 738 (1st Cir. 1996). The situation for privilege stands in contrast with the effects of contract on disclosure to the public more generally, discussed in Section 3

Rationales for a privilege covering mediation communications

Mediators typically promote a candid and informal exchange regarding events in the past, as well as the disputants' perceptions of and attitudes toward these events, and encourage disputants to think constructively and creatively about ways in which their differences might be resolved. Many contend that this frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. *See, e.g.*, Lawrence R. Freedman and Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection,* 2 OHIO ST. J. DISP. RESOL. 37, 43-44 (1986); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 323-324 (1989); Alan Kirtley, *The Mediation Privilege s*

Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, 1995 J. DISP. RESOL. 1, 17. Such disputant-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges. *See, e.g.*, UNIF. R. EV. 501-509. *See generally* JACK B. WEINSTEIN, ET. AL, EVIDENCE: CASES AND MATERIALS 1314-1315 (9th ed.1997); *Developments in the Law Privileged Communications*, 98 HARV. L. REV. 1450 (1985). This rationale has sometimes been extended to mediators to encourage mediators to be candid with the disputants by allowing them to block evidence of their notes and other mediation communications. *See, e.g.*, OHIO REV. CODE ANN. 2317.023 (Baldwin 1998). **The Draft embodies the communications privilege rationale for disputants but the Committee split, and therefore brackets set off, provisions that would extend the rationale to protect the interest of encouraging the mediator to be candid.**

A second justification for **protecting mediation communications** is that public confidence in and the voluntary use of mediation will 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. For this reason, a number of states prohibit a mediator from disclosing mediation communications, including to a judge or other officials in a position to affect the decision in a case. DEL. CODE ANN. TIT. 19, 712(c) (1998) (employment discrimination); FLA. STAT. ANN. 760.34(1) (West 1998) (housing discrimination); GA. CODE ANN. 8-3-208(a) (1998) (housing discrimination); NEB. REV. STAT. 20-140 (1998) (public accommodations); NEB. REV. STAT. 48-1118(a) (1998) (employment discrimination). This prohibition also reduces the potential for a mediator to use the threat of disclosure or recommendation to pressure the disputants to accept a particular settlement. Such a statutory prohibition is supported by professional practice standards. *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). The public confidence rationale also has been extended to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable disputants. *See, e.g.*, *NLRB v. Macaluso*, 618 F.2d 51 (9th Cir. 1980) (public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator s testimony). **The Draft embodies the public confidence rationale in Section 2(b), which protects the mediator from providing evidence, and Section 3, which prohibits the mediator from disclosing.**

The policy of the states may be seen as strongly favoring **an evidentiary privilege for mediation commications that extends** mediation confidentiality **beyond that provided by Uniform Rule of Evidence 408.** Most states have enacted mediation privilege statutes for at least some kinds of disputes. Indeed, state legislatures have enacted more than 250 mediation confidentiality statutes. *See* Appendix; *see also* ROGERS & MCEWEN, *supra*, at apps. A and B. Scholars and practitioners alike generally show strong support for a

mediation 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). However, because only about half of the states have enacted mediation **privileges that** are of general application which even then often have substantial limitations (excluding, for example, application of the protection in the criminal context) and because the legislation in the remaining states is subject-specific (for example, applying only in domestic relations or farmer-lender cases), it is likely that the majority of mediation sessions conducted in this country are not covered by legal protections for **their use in evidence**. *See* ROGERS & MCEWEN, supra, apps. A and B; *see also* 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 app.

Nearly all of these states also provide an evidentiary exclusion for compromise discussions. See, e.g., Uniform Rule of Evidence 408. The privileges extend the protection of the compromise discussions for mediation communications in a number of ways. These privilege statutes extend the protections to discovery, administration and arbitration proceedings, some criminal proceedings, and other proceedings not governed by the rules of evidence. Also, the privilege statutes typically exclude use for a variety of reasons, whereas compromise discussions may be introduced into evidence to prove matters other than liability and amount for the claim under discussion, such as bias and other impeachment. The protection of the compromise discussion may be raised and waived only by the parties to the pertinent litigation, whereas the privilege allows the mediation disputants to raise and waive the protections. The exclusion for compromise discussions applies only to legal claims that are disputed as to validity or amount, whereas the mediation privilege applies to disputes, such as those within a family, that are not legally cognizable and also applies to mediations involving schedules for paying an admittedly due amount. See also discussion of evidentiary exclusions in the appendix.

At the same time, as with all privileges, any statutory protection of confidentiality in mediation is in derogation of necessary and historical policies favoring the admissibility of relevant evidence. *See, e.g.*, WEINSTEIN, *supra*, at 1-6; FED. R. EVID. 402 (relevancy). *Compare Folb v. Motion Picture Industry Pension & Health Plans*, 16 F.Supp.2d 1164, 1174 (C.D.C.A. 1998) (balancing needs of confidentiality in mediation against common law presumption of availability of evidence in and recognizing a mediation privilege under Federal Rule of Evidence 501) and *Rinaker v. Superior Court*, 62 Cal.App.4th 155 (1998) (rejecting mediator s privilege claim as against a minor s constitutional right of impeachment in delinquency proceeding). *See generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 30 (1986); James J. Restivo, Jr. and Debra A. Mangus, *Special Supplement Confidentiality in Alternative Dispute Resolution*, 2 ALTERNATIVES TO THE HIGH COST OF LITIG. 5 (May 1984). Confidentiality

provisions also have the potential to frustrate policies encouraging openness in public decision-making. *See News-Press Pub. Co. v. Lee County*, 570 So.2d 1325 (Fla. App. 1990); *Cincinnati Gas & Electric Co., v. General Electric Co.*, 854 F.2d 900 (6th Cir. 1988), *cert. den. sub. nom. Cincinnati Post v. General Electric Co.*, 489 U.S. 1033 (1989) For thoughtful arguments against a mediation privilege, *see* 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). *See also,* Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N.D. L. REV. 45 (1998). *See generally,* ROGERS & MCEWEN, *supra at* 8:1-8:19. These competing tensions were among the important principles that guided the Drafting Committee in the formulation of the confidentiality provisions of this Uniform Mediation Act.

Section 2(a) and (b). Privilege; Waiver.

These sections set forth the evidentiary privilege for mediation communications, as well as the conditions for waiving such privilege.

A critical component of this general rule is its designation of the holder i.e., the person who can raise and waive the privilege. If all disputants agree, any disputant, representative of a disputant, or mediation participant can be required to disclose what these persons said; the mediator cannot block them from doing so. At the same time, even if the disputants, representatives of a disputant, or mediation participants agree to disclosure, the mediator can decline to testify **and protect evidence** of the mediator's notes. **The Committee split as to whether the mediator should be able to block the disputants testimony about the mediator s mediation communications.**

Statutory mediation privileges are somewhat unusual among evidentiary privileges in that they often do not specify who may hold and/or waive the privilege, leaving that to judicial interpretation. *See, e.g.*, 710 ILL. REV. STAT. ch. 20, para. 6 (1998) (community dispute resolution centers); IND. CODE 20-7.51-13 (1998) (university employee unions); IOWA CODE 679.12 (1998) (general); KY. REV. STAT. ANN. 336.153 (Baldwin 1998) (labor disputes); ME. REV. STAT. ANN. tit. 26 1026 (West 1998) (university employee unions); MASS. GEN. LAWS ch. 150, 10A (West 1998) (labor disputes). Those statutes that designate a holder seem to be split between those that make the disputants the joint and sole holder of the privilege and those that make the mediator an additional holder. *Compare* ARK. CODE ANN. 11-2-204 (Michie 1998) (labor disputes); FLA. STAT. ANN. 61.183 (West 1998) (divorce); KAN. STAT. ANN. 23-606 (1998) (domestic disputes); N.C. GEN. STAT. 41A-7 (1998) (fair housing); OR. REV. STAT. 107.785 (1998) (divorce) (providing that the disputants are the sole holders) with CAL. EVID. CODE 1122 (West 1998) (general) (which make the mediator an additional holder in some respects); OHIO REV. CODE ANN. 2317.023 (Baldwin 1998) (general); WASH. REV. CODE ANN. 7.75.050 (West 1998) (dispute resolution centers). The disputant-holder approach is analogous to the attorney-client privilege in which the client holds the privilege. The mediator-holder approach tracks those

privileges, such as the executive privilege, which are designed to protect the institution rather than the client s expectations.

The differences among statutes reflect varying rationales for the mediation privilege. For some, the perceived neutrality of the mediator is a key justification for the privilege, which leads to the conclusion that the mediator should be a holder of the privilege. For others, the primary justification is to protect the disputants' reasonable expectations of confidentiality. Under this rationale, the disputants would be **joint holders** of the privilege.

The Draft **adopts a bifurcated approach. See** OHIO REV. CODE ANN. 2317.023 (Baldwin 1998) (general); WASH. REV. CODE 5.60.070 (1998) (general). The disputants **jointly** hold the privilege and **any disputant** 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. This approach gives weight to the primary concern of each rationale. The disputants can restrict confidentiality by agreeing to waive the privilege as it relates to any evidence but the mediator s of mediation communications by anyone but the mediator. The disputants cannot, in contrast, by agreement expand the privilege, because agreements to keep evidence from a judicial tribunal are void as against public policy. ROGERS & MCEWEN, *supra*, at sec. 9:24. The disputants can agree to privacy outside the context of the tribunal and expect court enforcement as it relates to this voluntary disclosure. *Id.* at sec. 9:25.

The Drafting Committee **used an estoppel approach when the parties do not expressly waive the privilege. This is not intended to** encompass the casual recounting of the mediation session to a neighbor who was expected to keep the confidence, but would include disclosure that would, **absent the exception, allow one disputant to take unfair** advantage of the privilege. For example, if one disputant s attorney states **in court** that a client was threatened during mediation, that disputant should not be able to block the use of testimony to refute that statement. Such advantage-taking or opportunism would be inconsistent with the continued recognition of the privilege while the casual conversation would not. Thus, if A and B were the disputants in a mediation, and A affirmatively stated in court that B threatened A during the mediation, A would have effectively waived the protections of this statute regarding whether a threat occurred in mediation. If B decides to waive as well, evidence of A s and B s statements during mediation may be admitted. In this way, the **provisions differ** from the attorney-client privilege, which is waived by most disclosure. *See* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 511.1 (4th ed. 1996). Analogous doctrines have developed regarding constitutional privileges, *Harris v. New York*, 401 U.S. 222 (1971), and the rule of completeness in Rule 106 of the Federal Rules of Evidence. As under existing interpretations for other communications privileges, waiver through conduct would not typically constitute a waiver of any mediation communication, only those related in subject matter. *See generally* UNIF. R. EVID. 510 and 511; JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE 93 (4th ed. 1992). Also, the privilege is not waived by conduct if the disclosure is privileged, was compelled, or made without opportunity to claim the protections. *See* UNIF. R. EVID. 510 and 511.

i. Approaches to mediation confidentiality; choice of the privilege structure

The Drafting Committee s choice of a privilege structure for the protection of confidentiality in mediation should be understood in the context of the current fabric of statutory protection for confidentiality in mediation in the states. Existing mediation confidentiality statutes **and rules** reflect **four** primary approaches to addressing the various and often competing policy various considerations and dilemmas: privilege, mediator testamentary incapacity, **evidentiary privilege for compromise discussions, and** a **broad** evidentiary **and discovery** exclusion. **In addition, these primary approaches are sometimes combined. Each is examined below, and examples are included in the appendix.**

1. Privilege

The most common approach has been to extend the laws of privilege to certain types of mediation. 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* WEINSTEIN, *supra,* at 1314-1315; *Developments in the Law Privileged Communications,* 98 HARV. L. REV. 1450 (1985). By narrowing the protection to such communications, these provisions allow for the enforcement of agreements to mediate, for example, by permitting evidence as to whether a mediation occurred, and who attended. Communications privileges also allow the use of other important evidence of actions taken, such as money received, during a mediation. The privilege structure safeguards against abuse by preventing those not involved in the mediation from taking advantage of the confidentiality, thereby foreclosing the availability of evidence without serving the purposes underlying the confidentiality. For example, if those involved in a divorce mediation draft a schedule of the couple s assets and their values, a stranger to the mediation cannot keep one of the mediation disputants from using that document in later litigation.

Because the privilege structure carefully balances the needs of the justice system against participant needs for confidentiality, it has been used to provide the basis for confidentiality protection for other forms of professional privileges, including attorney-client, doctor-patient, and priest-penitent relationships. *See* UNIF. R. EVID. 510-510*;* WEINSTEIN, *supra.* 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).

So, too, in mediation, the privilege structure may be seen as the general rule, as it has been used by the overwhelming majority of states that have enacted comprehensive mediation confidentiality statutes. That these statutes also are the more recent of mediation confidentiality statutory provisions, suggests privilege may also be seen as the more modern approach taken by state legislatures. *See e.g.,* OHIO REV. CODE. ANN. 2317.023 (Baldwin 1998); FLA. STAT. ch. 44.102 (1998); WASH. REV. CODE ANN. 5.60.072. (West 1998). *See generally,* ROGERS & MCEWEN, *supra,* at 9:10-9:17. Moreover, states have been even more consistent in using the privilege structure for mediation offered by publicly funded entities. See, e.g., ARIZ. REV. STAT. ANN. 25-381.16 (West 1997) (domestic court); ARK. CODE.

ANN. 11-2-204 (Arkansas Mediation and Conciliation Service) (Michie 1998); FLA. STAT. ANN. 44.201 (publicly established dispute settlement centers) (West 1998); 710 ILL. REV. STAT ANN. 20/6 (non-profit community mediation programs); IND. CODE ANN. 4-6-9-4 (Burns 1998) (Consumer Protection Division); IOWA CODE ANN. 216.B(West 1998) (civil rights commission); MINN. STAT. ANN. 176.351 (West 1998) (workers' compensation bureau).

There are two important subsets of the majority privilege approach. One has been to define mediation broadly but make the privilege qualified that is, permitting a court to lift the privilege when necessary to prevent manifest injustice. This is the approach taken by the federal Administrative Dispute Resolution Act of 1996, and some states. *See* 5 U.S.C. 574 (1998); *see also, e.g.,* LA. REV. STAT. ANN. 9:4112(B(1)(c) (1998) (general); OHIO REV. CODE ANN. 2317.023(c)(4) (Baldwin 1998) (general). A second subset defines mediation broadly, but makes the privilege inapplicable when the loss of evidence would most damage the interests of justice, such as in criminal proceedings, and by providing exceptions for child abuse and other defined circumstances. *See, e.g.,* CAL. EVID. CODE 1119 (West 1998) (general) (general rule of evidentiary exclusion not applicable to criminal proceedings; exceptions); MONT. CODE ANN. 26-1-811 (1998) (family law) (privilege only applies in civil action; exceptions).

The mediation privilege involves various combinations of joint holders. In this way, it resembles the attorney-client privilege with multiple clients, all of whom must waive. For example, in a situation in which defendants form a common defense, a single defendant can keep others from using privileged information, and all defendants must waive before the information can be disclosed.

2. The testimonial incapacity approach

An alternative to privilege as an approach for the protection of mediation confidentiality is to render the mediator incompetent to testify about the mediation. *See, e.g.,* MINN. STAT. 595.02 (1998); NEV. REV. STAT. 48.109(3) (1997); N.J. REV. STAT. 23A:23A-9 (1998

While this testimonial incapacity approach addresses a primary concern with regard to confidentiality the potential for the mediator to disclose mediation communications against the will of the disputants it is more limited in that it does not affect the ability of the disputants to make such disclosures. This 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 generally been served by enacting privilege statutes instead. *See generally* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 92-93 (3d ed. 1996).

3. The compromise discussions evidentiary exclusion (Evidence Rule 408) approach

This is the default approach when mediation is not covered by a specific statute. Compromise discussions evidentiary provisions apply whether the conversations occur

inside or outside of mediation. In all states, this doctrine applies to offers and counter-offers, and factual statements that are intertwined with them, and in most states this doctrine also covers evidence of conduct or statements made in compromise negotiations. Uniform Rule of Evidence 408. See generally ROGERS & MCEWEN, secs. 9:03-9-08. The evidentiary exclusion for compromise discussions still permits the introduction of evidence from the discussions in many situations and therefore less evidence is lost to the judicial and other processes. Another primary advantage of the compromise discussions exclusion approach is its limited scope and therefore its simplicity. There is no need to define mediation, as the presence of a third party does not affect the law. There is no need to list where the exclusion applies, because it clearly applies only where the proceedings are governed by the rules of evidence, and not during some court processes, such as discovery and pre-trial hearings, or non-judicial hearings of various types. There is no need for exceptions related to criminal proceedings because the exclusion generally is not applied in criminal settings. There is no need to define the holder, because only those who are the parties to the litigation where the evidence is presented can object or acquiesce in the use of the information.

Conversely, the disadvantages, in terms of the goals discussed above, are also its limited scope. Disputants in mediation must be at least as guarded in their discussions as adverse parties in settlement discussions conducted without mediator assistance, and probably more guarded, because the mediator represents a particularly credible witness to the discussions.

4. General evidentiary exclusion and discovery limitation approach

A third alternative for the protection of mediation confidentiality has been the use of a general evidentiary exclusion and discovery limitation on mediation communications an approach adopted by a small handful of states. *See e.g.,* ARIZ. REV. CODE ANN. 16-7-206 (1997); MO. REV. STAT. 435.014 (1998). This approach is similar to Rule 408 provisions regarding compromise discussions that are found in both the Federal Rules of Evidence and the Uniform Rules of Evidence, and, in fact, some states have expressly incorporated mediation into their Rule 408 provisions. *See, e.g.,* ME. R. EVID. 408 (b) (1998); VT. EVID. R. 408 (1998).

The use of a broad evidentiary exclusion as a vehicle for protecting **communications** confidentiality is uncommon for professional relationships. Traditionally, the exclusion of relevant evidence on policy grounds has been limited to situations involving exclusion of certain facts demonstrating interests that the law has a strong policy in encouraging such as the fact of subsequent remedial repairs, liability insurance, **compromise discussions, juvenile delinquency records,** and the payment 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. It is in these situations that the law excludes certain specific classes of evidence.

While the exclusion of the class of evidence of mediation communications has the attractiveness of simplicity, its breadth also **seems inappropriately broad in some respects**

and narrow in others. The evidentiary exclusion/discovery limitation a potentially powerful weapon of abuse, **because** it can be employed by any party to future litigation, even strangers to the mediation, such that the evidence is lost without regard to the policies that justify the exclusion of evidence that the law would otherwise make as available and admissible. Moreover, despite its breadth, the evidentiary exclusion/discovery limitation still has substantial weaknesses. For example, it does not permit the provision of relevant evidence in situations in which disputants do not expect confidentiality and in fact have opened up the mediation to the public, as in public policy mediation. Similarly, mediation disputants who are not parties to the litigation could not prevent disclosure if the litigation parties stipulate to discoverability or admissibility. The evidentiary exclusion/discovery limitation approach also has the detriment of being limited to **proceedings governed by the rules of evidence,** permitting broad disclosure in other types of contexts. **In addition, the approach is a minority one both for other protected professional communications and for mediation, perhaps affecting the enactability of the Act and the predictability of its interpretations in the courts.**

For these reasons, the Drafting Committee rejected the evidentiary exclusion/discovery limitation approach in favor of the more traditional privilege structure.

5. Combined approaches

Another approach is to cumulate approaches. For example, the statute could provide for incompetency and evidentiary exclusion but allow the parties to waive the applicability of both. What is lost here is simplicity and predictability. For example, one such combined statute was recently deemed a privilege. Olam v. Congress Mortgage Co., No. C95-2806 WDB, 1999 WL 909731 (N.D. Calif., October 15, 1999).

The Approach of the Draft

The Draft s privilege approach balances the tensions between broad application and danger of abuse or injustice in three principal ways. First, it narrows the definition of mediation by requiring a triggering event: the appointment or engagement of a mediator (*see* Section 1(4)). This triggering event requirement makes it more difficult later to label a discussion a "mediation" when the persons involved neither intended to be in a mediation process nor believed that they were speaking under the cloak of privilege. *See `Jersey Boys Mediate a Dixie Mob Dispute*, NEWARK STAR LEDGER, July 22, 1987, discussed in ROGERS & MCEWEN, *supra* 9:24. In addition, Sections 2(a) and (b) the Draft makes the privilege inapplicable in adult felony proceedings, a controversial provision that is discussed below. Finally, Section 2(c)(5) of the Draft gives courts the discretion to make an exception to the privilege when its application would result in a situation of manifest injustice, which is discussed later in the comments.

Section 2(c). Generally.

This subsection articulates exceptions to the broad grant of privilege provided to mediation communications in Section 2**(a) and (c) and to the prohibitions against disclosure**

by the mediation in Section 2(d). As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the Drafting Committee expects that a court will do so through an *in camera* proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended. *See, e.g., Rinaker v. Superior Court*, 62 Cal.App.4th 155, 169-172 (1998).

Section 2(c)(1). Record of an agreement.

This exception would permit evidence of a recorded agreement. It would apply to agreements about how the mediation should be conducted as well as settlement agreements. The words "record of **agreement**" refer to written and signed contracts, those recorded by tape recorder and ascribed to, as well as other means to establish a record. This is a common exception to mediation confidentiality protections, permitting the Act to embrace current practices in a majority of states. *See* ARIZ. REV. STAT. ANN. 12-2238 (1997); CAL. EVID. CODE 1120(1) (West 1998) (general); CAL. EVID. CODE 1123 (West 1998) (general); CAL. GOV T. CODE 12980(I) (West 1998) (housing discrimination); COLO. REV. STAT. 24-34-506.53 (1998) (housing discrimination); GA. CODE ANN. 45-19-36(e) (1998) (fair employment); ILL. REV. STAT. ch. 775, para. 5/7B-102(E)(3) (1998) (human rights); IND. CODE 679.2(7) (1998) (civil rights); IND. CODE 216.15(B) (1998) (civil rights); KY. REV. STAT. ANN. 344.200(4) (Baldwin 1998) (human rights); LA. REV. ST. ANN. 9:4112(B)(1)(c) (West 1998) (human rights); LA. REV. ST. ANN. 51:2257(D) (West. 1998) (human rights); ME. REV. STAT. ANN. tit. 5, 4612(1)(A) (West 1998) (human rights); MD. SPEC. P. RULE 73A (1998) (divorce); MD. CODE ANN. art. 49(B), 28 (1998) (human rights); MASS. GEN. L. ch. 151B, 5 (1998) (job discrimination); MO. REV. STAT. 213.077(8)(2) (1998) (human rights); NEB. REV. STAT. 43-2908 (1998) (parenting act); N.J. REV. STAT. 10:5-14 (1998) (civil rights); OR. REV. STAT. 36.220(2)(a) (1998) (general); OR. REV. STAT. tit. 3, ch. 36 (8)(1) (1998) (agricultural foreclosure); 42 PA. CONS. STAT. ANN. 5949(b)(1) (1998) (general); TENN. CODE ANN. 4-21-303(d) (1998) (human rights); TEX. GOV T. CODE ANN. 2008.054) (West 1998) (Administrative Procedure Act); VT. STAT. ANN. tit. 9, 4555 (1998) (landlord/tenant); VA. CODE ANN. 8.01-576.10 (Michie 1998) (general); VA. CODE ANN. 8.01-581.22 (Michie 1998) (general); VA. CODE ANN. 36-96.13(c) (Michie 1998) (fair housing); WASH. REV. CODE 5.60.070 (1)(e) and (f) (1998) (West 1998) (general); WASH. REV. CODE 26.09.015(5) (West 1998) (divorce); WASH. REV. CODE 49.60.240 (1998) (human rights); W.VA. CODE 6B-2-4(r) (1998) (public ethics), 5-11A-11 (1998) (fair housing); WIS. STAT. 904.085(4)(a) (1998) (general); WIS. STAT. 767.11(12) (1998) (family court).

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

negotiations. Such a person might also mistakenly assume the admissibility of evidence of oral settlements reached in mediation as well. However, because the majority of courts and statutes limit the confidentiality exception to signed written agreements, one would expect that mediators and others will soon incorporate knowledge of a writing requirement into their practices. *See Ryan v. Garcia*, 27 Cal. App.4th 1006 (1994) (privilege statute precluded evidence of oral agreement); *Hudson v. Hudson*, 600 So.2d 7 (Fla. App. 1992) (privilege statute precluded evidence of oral settlement); *Cohen v. Cohen*, 609 So.2d 783 (Fla. App. 1992) (same); OHIO REV. CODE 2317.02-03 (Baldwin 1998). For an example of a state statute permitting the enforcement of oral agreements under certain narrow circumstances, *see* CALIF. EVID. CODE 1124 (West 1998) (providing, *inter alia*, that oral agreement must be memorialized in writing within 72 hours).

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

Section. 2(c)(2). Threats of bodily injury or unlawful property damage.

Mediation should be a civil process, and a privilege for mediation communications that threaten bodily injury and unlawful property damage would not serve the interests underlying the privilege. To the contrary, disclosure would serve public interests in protecting others. Because such statements are sometimes made in anger with no intention to commit the act, the exception is a narrow one that applies only to the threatening statements; the remainder of the mediation communication remains protected against disclosure. State mediation confidentiality statutes frequently recognize a similar exception. *See* ARK. CODE ANN. 47.12.450(e) (Michie 1998) (community dispute resolution centers)(to extent relevant to a criminal matter); COLO. REV. STAT. 13-22-307 (1998) (general) (bodily injury); KAN. STAT. ANN. 23-605(b)(5) (1998) (domestic relations) (mediator may report threats of violence to court); KAN. STAT. ANN. 23-606 (1998) (general) (information necessary to stop commission of crime); OR. REV. STAT. 36.220(6) (1998) (general) (substantial bodily injury to specific person); 42 PA. CONS. ST. ANN. 5949(2)(I) (1998) (general) (threats of bodily injury); WASH. REV. CODE 7.75.050 (1998) (community dispute resolution centers) (threats of bodily injury and property harm); WYO. STAT. 1-43-103 (c)(ii) (1998) (general) (future crime or harmful act).

The Committee discussed the possibility of creating an exception for the related circumstance in which a disputant makes an admission of past conduct that portends future bad conduct. For example, a disputant admitting to arson in five schools might burn other schools. The argument against this expansion of the exception is that such past conduct can already be disclosed in other important ways: The other disputants can warn others, under Section 3(b). Under Section 3(a) the mediator can disclose, if required by law to disclose felonies or if public policy requires. All persons can testify in a felony trial, since felony criminal proceedings are not covered by the privilege. Thus, the privilege exception would permit disclosure in only a few other settings civil and misdemeanor proceedings.

Section. 2(c)(3). Commission of 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 to an actor who uses or attempts to use the mediation to further the commission of a crime, rather than lifting the confidentiality protection more broadly. More than a dozen states currently have mediation confidentiality protections that contain such broader exceptions. COLO. REV STAT. 13-22-307 (1998) (general) (future felony); FLA. STAT. ch.723.038(8) (mobile home parks) (ongoing or future crime or fraud); IOWA CODE 216.15B(3) (1998) (civil rights) (to prove perjury in mediation); IOWA CODE 654A.13 (1998) (farmer-lender) (to prove perjury in mediation); IOWA CODE 679.12 (1998) (general) (to prove perjury in mediation); IOWA CODE 679C.2(4) (1998) (general) (ongoing or future crimes); KAN. STAT. ANN. 23-605(b)(3) (1998) (ongoing and future crime or fraud); KAN. STAT. ANN. 23-606(a)(2)&(3) (1998) (domestic relations) (ongoing and future crime or fraud); KAN. STAT. ANN. 44-817(c)(3) (1998) (employment) (ongoing and future crime or fraud); KAN. STAT. ANN. 75-4332(d)(3) (1998) (public employment) (ongoing and future crime or fraud); KAN. STAT. ANN. 75-5427(e)(3) (1998) (teachers) (ongoing and future crime or fraud); ME. REV. STAT. ANN. tit.24, 2857(2) (1998) (health care) (to prove fraud during mediation); MINN. STAT 595.02(1)(a) (1998) (general); NEB. REV. STAT. 25-2914 (1998) (general) (crime or fraud); N.H. REV. STAT. ANN. 328-C:9(III)(B) (1998) (domestic relations) (perjury in mediation); N.H. REV. STAT. ANN. 328-C:9(III)(d) (1998) (domestic relations) (ongoing and future crime or fraud); N.J. REV. STAT. 34:13A-16(h) (1998) (workers compensation) (any crime); N.Y. LAB. LAW 702-a(5) (McKinney 1998) (past crimes) (labor mediation); OR. REV. STAT. 36.220(6) (1998) (general) (future bodily harm to a specific person); S.D. CODIFIED LAWS ANN. 19-13-32 (1998) (general) (crime or fraud); WYO. STAT. 1-43-103(c)(ii) (1998) (future crime).

While ready to exempt attempts to commit or the commission of crimes from confidentiality protection, the Drafting Committee was hesitant to cover "fraud" that would not also constitute a crime because civil cases frequently include allegations of fraud, with varying degrees of merit, and the mediation would appropriately focus on discussion of fraud claims. Some states statutes do cover fraud, although there is less agreement than on the exemption of crime. *See, e.g.*, FLA. STAT. ch. 723.038(8) (1998) (mobile home parks) (communications made in furtherance of commission of crime or fraud); KAN. STAT. ANN. 60-452(b)(3) (1998) (general) (ongoing or future crime or fraud); KAN. STAT. ANN. 75-4332(d)(3) (1998) (public employment) (ongoing or future crime or fraud); KAN. STAT. ANN. 72-5427(e)(3) (1998) (teachers) (ongoing crime or fraud); KAN. STAT. ANN. 44-817(c)(3) (1998) (employment) (ongoing crime or fraud); KAN. STAT. ANN. 23-605(b)(3) (1998) (domestic relations)(ongoing crime or fraud); KAN. STAT. ANN. 23-606(a)(2) and (3) (1998) (domestic relations) (ongoing crime or fraud); NEB. REV. STAT. 25-2914 (general) (crime or fraud); S.D. CODIFIED LAWS ANN. 19-13-32 (general) (crime or fraud).

Section. 2(c)(4). Evidence of abuse or neglect.

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

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

Section 2(c)(5). **Manifest injustice.**

The exception for "manifest injustice" permits a court to rule that the privilege should yield in unusual and exceptional circumstances. The recent federal Administrative Dispute Resolution Act of 1996 has such an exception for mediation. 5 U.S.C. 574 (1998). In recent years, some states have also begun adopting such a provision. *See, e.g.*, LA. REV. STAT. ANN. 9:4112(B(1)(c) (1998) (general); OHIO REV. CODE ANN. 2317.023(c)(4) (Baldwin 1998) (general); UTAH CODE ANN. 78-31(b)(8)(2)(a) (1998) (general) (if court finds strong countervailing interest); WIS. STAT. 904.085(4)(e) (1998) (general). **The draft provision is narrower than these existing statutes.**

The Supreme Court of Ohio recently became the first state supreme court to construe such a provision, giving it a narrow construction in describing the meaning of manifest injustice as a clear or openly unjust act. *Schneider v. Kreiner*, 83 Ohio St.3d 203, 208 (1998). The court did not find manifest injustice in the need to avoid possible future litigation, stating, [T]he General Assembly has determined that confidentiality is a means to encourage the use of mediation and frankness within mediation sessions. Were we to agree with the relator s argument, we would severely undermine that determination. . . *Id.*

The Drafting Committee decided to continue this modern trend, to give courts the sound discretion to meet exigent, unforeseen, or exceptional situations requiring individualized consideration, and to keep the Act simple and accessible by eliminating the need for an extensive list of highly detailed exceptions. However, it adopts a high standard to reflect the Drafting Committee s intent that the confidentiality protections the Act provides only be lifted by post hoc judicial determination in narrow and exceptional circumstances, thus preserving the disputants *reasonable* expectations of confidentiality. As with other exceptions, in situations in which a court needs to hear evidence to determine whether the exception applies, the Drafting Committee expects that the court would typically hold an *in camera* hearing at which the need for the evidence in a case would be weighed against the interests served by the privilege. Given the fundamental nature of advocacy, the Drafting Committee anticipates that many if not most such claims of manifest injustice will fail.

This exception is particularly important because the Act adopts a very broad definition of mediation that could by mistake or overbreadth include discussions that the public would not have contemplated to be worthy of protecting. It is also important because the Draft, unlike some other confidentiality statutes, extends to some kinds of criminal proceedings misdemeanors. Some of the most difficult issues have arisen in the context of criminal proceedings. In one case, a defendant would have been precluded from presenting evidence that would bear on self-defense if the court would have recognized a mediation privilege as applying in the criminal context. *State v. Castellano,* 469 So.2d 480 (Fla. App. 1984). In another case, 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. *People v. Snyder*, 129 Misc.2d 137, 492 N.Y.S.2d 890 (1985). The exception is also important because mediation privileges are relatively new. This exception permits the courts to recognize exceptional situations that have not been fully anticipated by the Drafting Committee but which would involve such serious injustice that the need for the evidence outweighs the purposes served by the privilege. An earlier Draft was criticized for the failure to include such a provision. *See* Alan Kirtley, *A Mediation Privilege Should Be Both Absolute and Qualified,* 5 DISP. RESOL. MAG. 5 (Winter 1998).

2(c)(6). Reports of Professional Misconduct.

The Drafting Committee seeks comment on whether this issue is sufficiently covered by the manifest injustice exception, subsection 2 (c)(5), and is therefore unnecessary.

This exception addresses a problem, particularly for lawyer-mediators, by clarifying that any participant to a mediation may provide evidence of unprofessional conduct. *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.

This narrow exception would be limited to participant testimony to an investigation of professional misconduct that is conducted by an agency charged by law to make such investigations. Significantly, the evidence would still be protected in other types of proceedings,

including malpractice or related claims against professionals involved the mediation, other than the mediator. (A separate bracketed exception has been included within the Draft for exemption from the confidentiality protection for claims against the mediator, subsection 2(c)(7).) 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 would not be precluded by the statute from complying with statutory reporting obligations a state may seek to implement, unless such report would be to the agency conducting the mediation.

Several state statutes have adopted a similar position. *See, e.g.,* HAW. REV. STAT. 672.8 (1998) (professional design); HAW. REV. STAT. 671.16 (1998) (medical care); ME. REV. STAT. ANN. tit. 24, 2857(E) (1998) (medical care); MINN. STAT. 595.02(1)(A)(3) (1998) (general); N.C. GEN. STAT. 7A-38.1(L) (1998) (appellate); N.C. GEN. STAT. 7A-38.4(k) (1998) (appellate); OHIO REV. CODE ANN. 5123.601(E) (Baldwin 1998) (mental retardation and developmental disability investigation mediation); OKLA. STAT. tit. 59, 328.64(B) and (C) (1998) (dentistry); UTAH CODE ANN. 78-31(b)-(8)(2)(c)(I) (1998) (claim of legal malpractice).

Section 2(c)(7). Complaints against the mediator.

The Drafting Committee seeks comment on whether this issue is sufficiently covered by the exception for manifest injustice, subsection 2 (c)(5), and therefore is unnecessary.

This exception follows statutes in several states that permit the mediator to defend, and the disputant to secure evidence, in the occasional claim against a mediator. *See, e.g.,* OHIO REV. CODE ANN. 2317.023 (Baldwin 1998) (general); MINN. STAT. 595.02 (1998) (general); FLA. STAT. ch. 44.102 (1998) (general); WASH. REV. CODE 5.60.070 (1998) (general). The rationale behind the exception is that such disclosures may be necessary to make procedures for grievances against mediators function effectively, and as a matter of fundamental fairness, to permit the mediator to defend against such a claim. Moreover, permitting complaints against the mediator furthers the central rationale that states have used to reject the traditional basis of licensure and credentialing for assuring quality in professional practice: that private actions will serve an adequate regulatory function and sift out incompetent or unethical providers through liability and the rejection of service. *See, e.g.,* W. Lee Dobbins, *The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?,* U. FLA. J. L. & PUB. POL Y 95, 96-98 (1995). *See also* Reporter s Working Notes to subsection 4(a) (disclosure of qualifications).

2(c)(8). Validity and enforceability of agreement.

The Drafting Committee seeks comment on whether this is sufficiently covered by the manifest injustice exception, subsection 2(c)(5), and is therefore unnecessary.

This provision is designed to preserve **specified** contract defenses **that relate to the integrity of the mediation process**, which otherwise would be unavailable if based on mediation communications. A recent Texas case provides an example. An action was brought to enforce a mediated settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to leave because of chest pains and a history

of heart trouble, and that the mediator had refused to let him leave the mediation session. See *Randle v. Mid Gulf, Inc.*, No. 14-95-01292, 1996 WL 447954 (Tex App. 1996) (unpublished). This exception differs from the exception for a record of an agreement in subsection 2(c)(1) in that subsection 2(c)(1) only exempts the admissibility of the record of the agreement, while the exception in subsection 2(c)(8) 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.

2(c)(9). Claims against a disputant.

The Drafting Committee seeks comment on whether this is sufficiently covered by the manifest injustice exception, subsection 2(c)(5), and is therefore unnecessary.

This exception seeks to provide for a situation in which a representative or fiduciary is sued for failing to fulfill duties to represent certain persons by actions within a mediation session. The exemption from confidentiality protections would permit such claims against a disputant to be established.

2 (d). Otherwise discoverable.

This is a common exemption in mediation privilege statutes, as well as Uniform Rule of Evidence 408, to make clear that information does not necessarily become privileged simply because it is communicated in a mediation, although the communication itself is privileged. *See, e.g.*, FLA. STAT. ch. 44.102 (1998) (general); MINN. STAT. 595.02 (1998) (general); OHIO REV. CODE ANN. 2317.023 (Baldwin 1998) (general); WASH. REV. CODE 5.60.070 (1998) (general). It also clarifies that the statutory evidentiary privilege does not operate to preclude the use of evidence derived as the result of communications made during the mediation session, as is the case with a constitutional exclusionary rule under the so-called fruit of the poisonous tree doctrine. *See, e.g., Wong Sun v. United States*, 371 U.S. 471 (1963); *see generally*, CHARLES WHITEBREAD AND CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 34-37 (2d ed. 1986).

SECTION 3. CONFIDENTIALITY: PROHIBITION AGAINST DISCLOSURE BY A MEDIATOR.

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

(b) There is an exception to the prohibition in subsection (a) if:

1. The parties agree to the disclosure,

2. For public policy reasons,

3. A mediator [reasonably] believes that disclosure is required by law or professional reporting requirements, or

4. An exception is provided in section 2(c).

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

Reporter s Working Notes

(a) and (b) Prohibitions against disclosure by mediator; exceptions

Where Section 2 of the Act applies to decisions about disclosure and admissibility within the formal proceedings of courts and public agencies, Section 3 limits the disclosure by the mediator in other settings, such as reports to judges or enforcement personnel associated with administrative agencies that may make rulings on or investigations into the dispute and to members of the general public. **This states the default rule, if the parties have not agreed to disclosure. It has been suggested that the Drafters consider limiting the situations in which the parties may consent to disclosure to the judge to those initiated in writing by the**

disputants for purposes of advancing a settlement, so that judges will not pressures disputants or mediators to give these waivers.

The previous draft provision was as follows:

Unless disclosure is permitted under Section 2, a mediator may not:

(1) disclose mediation communications to a judge or agency, or authority *that refers the matter to mediation or employs the mediator, and* that may make rulings on or investigations into the dispute that is the subject of the mediation.

(2) make any report, assessment, evaluation, recommendation, or finding representing the opinions of the mediator to those persons described in paragraph (1); or

(3) disclose mediation communications to the general public.

This provision was replaced to provide more clarity about general disclosures.

Disclosure of mediation communications by the mediator **in generally prohibited but special emphasis is placed on prohibitions against disclosure** to a judge or investigative agency **because such disclosures** would undermine the disputants' candor, create undesirable pressures to settle, and introduce *ex parte* hearsay into the judicial process. Such disclosures have been condemned by the Society for Professionals in Dispute Resolution and the recommendations of a blue ribbon advisory group in its National Standards for Court-Connected Mediation Programs. *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). A statutory prohibition seems warranted, and a few statutes now include such a provision. *See, e.g.*, CAL. EVID. CODE 1121 (West 1998); FLA. STAT. ch. 373.71 1998) (water resources); TEX. CIV. PRAC. & REM. CODE 154.053 (c) (West 1998) (general). **Disclosures of mediation communications to the judge also would run afoul of prohibitions against ex parte communications w28th judges. See Code of Conduct for Federal Judges, Canon 3(A)(3), 175 F.R.D. 364, 367 (1998).**

The section also prohibits disclosure to other persons. The reason for doing so is to promote candor without concern of disputants that their statements will be disclosed in such a way that could lead to personal or business damage. The **public policy exception to the** limitation on mediator disclosure leaves open the possibility that the mediator could comply with other laws requiring certain reporting to police or other public officials and could warn possible victims of threatened harm. The disputants and mediator could expand the protection by contract **but the courts are unlikely to enforce secrecy contracts when the enforcement would violate public policy [insert cites]**. The Drafters considered it important to include a prohibition against mediator disclosure to the general public in the statute because mediators are not licensed and therefore are not generally subject to discipline, as lawyers are, for voluntary disclosure of mediation communications, although they may be decertified for certain rosters. *See* Charles Pou Jr., *`Wheel of Fortune or `Singled Out? : How Rosters `Matchmake Mediators*, 3 DISP. RESOL. MAG. 10 (Spring 1997).

The Drafters were aware of the argument that concerns about nondisclosure could best be handled by contract among the mediator and disputants. Such a contract would lead to civil damages for any damages caused by a breach, as it has for other professionals. *See,*

e.g. Horne v. Patton, 291 Ala. 701, 287 So.2d 824 (1973) (physician); *Humphers v. First Interstate Bank*, 298 Or. 706, 696 P.2d 527 (1985) (physician). Also, even without a contract, cases regarding other professionals indicate that a mediator who violates the disputants reasonable expectations regarding confidentiality might be liable for invasion of privacy. *See, e.g. Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (N.D. Ohio 1965) (physician); *Horne v. Patton*, 291 Ala. 701, 287 So.2d 824 (1973)(physician); *Doe v. Roe*, 93 Misc.2d 201, 400 N.Y.S.2d 668 (1977)(psychiatrist); Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982). Because disclosure to the general public would typically involve an intentional act, mediators would be liable despite immunity provisions except where these immunity provisions apply to intentional acts. **On balance, the Drafters decided to include the statutory language to protect parties who might not know to seek such an agreement.**

The provision does not include a sanction for a mediator s violation of this statutory obligation. The Drafting Committee discussed this issue, and concluded, as discussed above, that it was reasonable to expect that courts would award damages to a disputant hurt by a disclosure in violation of the statute in a separate claim against the mediator. Moreover, mediators employed or appointed by courts who may be immune from civil liability may still be subject to discipline by the court. **For this reason, Section 4 limits mediator immunity to that provided under judicial immunity.** Some statutes provide for criminal sanctions for unlawful disclosures by mediators, but the Drafting Committee decided this **sanction** was more serious than warranted. *See, e.g.*, 42 U.S.C. 2000g-2(b) (1998) (disclosure by Community Relations Service mediators); DEL. CODE ANN. tit. 19, 712 (c) (1998) (employment discrimination); FLA. STAT. ch. 760.32(1) (1998) (general); GA. CODE ANN. 8-3-208(a) (1998) (general).

(c) Disputants disclosures

The Draft does not prohibit disclosure by the disputants. Rather, the Act leaves the disputants to decide themselves whether to broaden the scope of the mediation s confidentiality by entering into a confidentiality agreement, the breach of which would presumably lead a court to award contract damages. The rationale for not prohibiting disclosures by disputants and participants is based on the reasonable expectations of the disputants and other mediation participants. Because the disputants are often one-time participants in mediation, they might be unfairly surprised if the provision prohibited disclosure by them as it does for mediators and they were held liable for speaking about mediation with others, including a casual conversation with a friend or neighbor. The statutory silence leaves the disputants free to agree to additional confidentiality protections, and through that agreement they would be on notice of the duty to maintain confidentiality. *[For redrafted language alternatives, see Alternative Drafting Proposals, Sections A and B]*

Moreover, although the statute is silent on this point, a court could by rule or order prohibit disclosure of mediation communications by parties in litigation. Violation of this type of order could lead to a finding of contempt or imposition of sanctions. *See, e.g., Paranzino v. Barnett Bank of South Florida*, 690 So.2d 725 (Fla. Dist. Ct. App. 1997) (striking pleadings for disclosure of mediation communications despite prohibition); *Bernard v. Galen Group, Inc.*, 901

F.Supp. 778 (S.D.N.Y. 1995) (fining lawyer for disclosure of mediation communications despite prohibition).

The Draft is further silent at this time on the effects of public record and meeting laws, which vary significantly by state. *See generally* Lawrence H. Hoover Jr., *A Place for Privacy: Media Creates Special Problems for Mediation*, 5 DISP. RESOL. MAG. 20 (Winter 1998); Jane E. Kirtley, *supra;* Lemoine D. Pierce, *Media Access Needs To Be Well Managed*, 5 DISP. RESOL. MAG. 23 (Winter 1998). The competing policies may have greater strength in different states. The overwhelming majority of states that have considered this tension have sided in favor of confidentiality protections for mediation, often expressly exempting them from state open meetings and related laws, or providing that mediation documents are not public records. *See e.g.,* ARIZ. REV. STAT. ANN. 2-7-202 (West 1997) (farm mediation); CAL. GOV T. CODE 1145.20 (1998) (administrative adjudications); DEL. CODE. ANN. tit.19 1613 (b) (1998) (labor mediations); ILL. REV. CODE ch. 120, para. 2(c)(13) (1998) (housing discrimination); IND. CODE 13.14(1)(farming); MD. CODE ANN. OF 1957, art. 49(B), 48 (1998) (human relations); MINN. STAT. 13.99 (1998) (child custody); NEV. REV. STAT. 288.220 (1997) (public employment); OR. REV. STAT. 192.690(1) (1998) (agricultural foreclosure); OR. REV. STAT. 192.501(16) (1998) (agricultural foreclosure); S.D. CODIFIED LAWS ANN. 38-6-12 (1998) (agricultural assistance), 54-13-18 (1998) (agricultural debtor); TENN. CODE ANN. 63-4-115(g) (1998) (chiropractor discipline); TENN. CODE ANN. 63-6-214(i)(3) (1998) (medical and surgical discipline); TENN. CODE ANN. 63-7-115(3) (1998) (nursing discipline); TEX. GOV T. CODE ANN. 441.031(5) (West 1998) (definition of public records); VT. STAT. ANN. tit. 9, 4555(b) (1998) (human rights); VA. CODE ANN. 15.2-2907(d) (Michie 1998) (local government annexation); WIS. STAT. 93.50.2 (1998) (farm mediation); WYO. STAT. 11-41-106(b) (1998) (agricultural mediation). Some states have taken something of a middle ground, providing some but less than full preemption. For example, a new series of Oregon statutes may provide an interesting model. The statutes allow state agencies to exempt mediation regarding personnel matters from public records and meeting laws. *See* OR. REV. STAT. 36.224 (1998) (general); OR. REV. STAT. 36.226 (1998) (general); OR. REV. STAT. 36.228 (1998) (general); OR. REV. STAT. 36.230 (1998) (general).

SECTION 4. MEDIATION PROCEDURES

(a) A mediator shall disclose any information related to a conflict of interest the mediator may have with regard to a particular dispute, and, if asked by a disputant or a disputant's representative, a mediator shall disclose the mediator's qualifications to mediate a dispute.

(b) Unless **mediators fall within common law protections extending judicial immunity**, **no immunity may be extended to mediators specifically for their conduct related to mediation. In an action against a mediator arising out of conduct of the mediation session, reasonable attorney s fees and other expenses of litigation may be awarded to a prevailing defendant**

(c) A disputant has the right to **bring a designated representative to** any mediation session. A waiver of **this right** before mediation is ineffective.

REPORTER S WORKING NOTES

Section 4(a) and (b). Disclosure of Qualifications and Conflicts.

Consistent with traditional notions of informed consent, the Draft sets a minimal standard with respect to qualifications and disclosure of conflicts. The requirement of disclosure extends to private mediators with no connection to courts or administrative agencies, thus promoting the marketplace as a check on quality among prospective mediation clients.

This approach of requiring disclosure permits the context to determine what a person in a particular setting could reasonably expect to qualify or disqualify a mediator in a given case. Conflicts of interest **must** be a part of that disclosure, although the facts to be disclosed in any particular case will depend upon the circumstances. In this regard, this provision is similar to the requirements of lawyers and arbitrators. *See, e.g.*, ABA Model Rules of Professional Responsibility 1.6; National Academy of Arbitrators, *Code of Ethics and Procedural Standards for Arbitrators of Labor-Management Disputes.*, Canon II (1985). **In fact, if the provisions mirror the arbitration provisions more closely, they might provide:**

(a) Before accepting appointment, or as soon as practical, a person who is requested to serve as a mediator shall make an inquiry that is reasonable

under the circumstances of the mediation, and disclose any facts learned that a reasonable person would consider likely to affect the impartiality of the mediator, including any

1. financial or personal interest in the outcome of the mediation, and existing or past relationships with the disputants, their counsel or designated representatives.

The disclosure, upon request, of qualifications is a more novel requirement.

In some situations the disputants may make clear that they care about the format of the mediation and would want to know whether the mediator used a purely facilitative or instead an evaluative approach. Experience mediating would seem important, because 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 Draft does not establish or call for 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. Adopted by the ABA Section of Dispute Resolution Council, April 28, 1999. In fact, an alternative version of this provision might be:**

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

At the same time, the law and commentary do recognize that the quality of the mediator is important and that the courts and public agencies referring cases to mediation have a heightened responsibility to assure it. *See generally* CENTER FOR DISPUTE SETTLEMENT, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992); SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION COMMISSION ON QUALIFICATIONS, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES (1989); SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION COMMISSION ON QUALIFICATIONS, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE (1995); QUALIFYING DISPUTE RESOLUTION PRACTITIONERS: GUIDELINES FOR COURT-CONNECTED PROGRAMS (1997). A legal treatise synthesizes the situation as follows:

> In addition to qualifications set by local rule or agency regulation, there are over a hundred mediator qualifications statutes. The qualifications are based variously on educational degrees, training in mediation skills, and experience. Some experimental efforts

> have focused on qualifying mediators through skills testing. . . . In other words, there is little similarity among approaches to qualifications, even for mediation in similar contexts. . . . For example, domestic relations mediators must have masters degrees in mental health in some jurisdictions, law degrees in other states, and no educational degrees in still others. Training requirements range from 0 to 60 hours. . . . The common view seems to be only that something is required. Empirical research provides little help. Only experience mediating has emerged as a qualification that leads to different results for the sessions. ROGERS & MCEWEN, *supra*, at 11:04.

The decision of the Drafting Committee 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 Drafting Committee 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.

Mediators sometimes are appointed as special masters. See, e.g. Federal Rule of Civil Procedure 53. If so, the disclosures regarding conflicts should be made to the court as well as the parties.

Section 4(c). Immunity.

The Drafting Committee seeks guidance regarding this subsection. Some Drafting Committee viewed disclaimers of liability as a decision of the disputants, at least as to non-intentional conduct by the mediator; others thought that it was inappropriate to expand limitations on civil mediator liability beyond that conferred through court decisions **for judicial immunity.**

As drafted, the Draft takes the second approach. It **thereby diminishes any non-judicial** immunity that a mediator may enjoy under current state law. **Presumably, it also puts** mediators on the same footing as lawyers who are prohibited by professional ethics from disclaiming liability. *See* ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY 1.8(h). Disclaimers of liability are generally disfavored by the courts, especially in situations in which the disputants might not be alert that they forego substantial claims. Such strong public policy considerations that flow from the elimination of substantive rights has led the courts to strictly scrutinize such agreements, construing them against the party invoking them, and to require as a condition to validity that the `intention of the disputants [be] expressed in clear and unambiguous language. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. 9 (T.D. NO. 2, 1995). *See* discussion in Alexander T. Pendleton, *Enforcing Exculpatory Agreements,* 70 WIS LAW. 10 (Nov. 1997). Mediators are not licensed, so such a statutory bar on exculpatory agreements provides a minimal means to hold them accountable outside the programs supervised by courts or public agencies.

The argument made in favor of a broad grant of immunity regarding mediators has been that immunity would encourage persons to become mediators. However, some task forces that have considered this argument and have weighed it against the need for accountability have come down in favor of leaving the mediators accountable. *See* CENTER FOR DISPUTE SETTLEMENT, NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION PROGRAMS (1992); NEW JERSEY SUPREME COURT, TASK FORCE REPORT ON COMPLEMENTARY DISPUTE RESOLUTION,124 N.J. L. J. 90, 96 (1989); NEW JERSEY SUPREME COURT, FINAL REPORT ON COMPLEMENTARY DISPUTE RESOLUTION 23-24 (1990). These groups note that insurance for mediators is typically not expensive and that there are no reported cases in which a mediator has been held liable. S*ee generally* ROGERS & MCEWEN, *supra*, at 11:06-11:21. Therefore, it seems unlikely that there will be a shortage of mediators because of liability concerns.

At the same time, mediators who disclose in violation of statutory provisions, who hide conflicts of interest, or who exclude legal counsel from the sessions over the objection of disputants should be accountable to disputants who are hurt. The court rulings and statutes conferring immunity most often relate to mediators who are supervised by a court or public agency, posing less threat of lack of accountability. *See generally* ROGERS & MCEWEN, *supra*, at 11:06-11:21. The potential of civil liability if a state elects to make that choice seems to provide a minimal but meaningful vehicle for providing mediator accountability.

Section 4(c). Right to Representation.

The fairness of mediation is premised upon the informed consent of the disputants to any agreement reached. *See Wright v. Brockett*, 150 Misc.2d 1031 (1991) (setting aside mediation agreement where conduct of landlord/tenant mediation made informed consent unlikely); *see generally,* Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 936-944 (1998)*;* Craig A. McEwen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995). Some statutes permit the mediator to exclude lawyers from mediation, resting fairness guarantees on the lawyer's later review of the draft settlement agreement. *See e.g.*, CAL. FAM. CODE 3182 (West 1998); McEwen, et. al., 79 MINN. L. REV., *supra*, at 1345-1346. At least one bar authority has expressed doubts about the ability of a lawyer to review an agreement effectively when that lawyer did not participate in the give and take of negotiation. Boston Bar Ass n, Op. 78-1 (1979). Similarly, concern has been raised that the right to **bring** counsel might be a requirement of constitutional due process in mediation programs operated by courts or administrative agencies. RICHARD C. REUBEN, CONSTITUTIONAL GRAVITY: A UNITARY THEORY OF ALTERNATIVE DISPUTE RESOLUTION AND PUBLIC CIVIL JUSTICE 172-174 (forthcoming, 47 UCLA L.REV. _____ (April 2000)).

Most statutes are either silent on whether the disputants' lawyers can be excluded or, alternatively, provide that the disputants can bring lawyers to the sessions. *See, e.g.*, NEB. REV. STAT. 42-810 (1998) (domestic relations) (counsel may attend mediation); N.D. CENT. CODE 14-09.1-05 (1998) (domestic relations) (mediator may not exclude counsel); OKLA. STAT. tit. 12, 1824(c)(5) (1998) (general conciliation court) (representative authorized to attend); OR. REV. STAT. 107.600(1) (1998) (marriage dissolution) (attorney may not be

excluded); OR. REV. STAT. 107.785 (1998) (marriage dissolution) (attorney may not be excluded); WIS. STAT. 655.58 (1998) (health care) (authorizes counsel to attend mediation). Several states, in contrast, have enacted statutes permitting the exclusion of counsel from domestic mediation. *See* CAL. FAM. CODE 3182 (West 1998); MONT. CODE ANN. 40-4-302(3) (1998); S.D. CODIFIED LAWS ANN. 25-4-59 (1998) (family); WIS. STAT. 767.11(10)(a) (1998) (family).

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

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

The remaining sections are presented for preliminary discussion only; the Drafting Committee has not acted on it:

[SECTION 5. ENFORCEMENT OF AGREEMENTS TO MEDIATE, MEDIATED AGREEMENTS.

(a) Parties who have entered into a written settlement agreement following mediation may stipulate in writing for the entry of a judgment without action pursuant to the terms of that settlement agreement.

(b) A judgment based on a settlement agreement following mediation may be entered only if the following requirements are satisfied:

1. The settlement agreement is signed by the parties themselves, not solely their attorneys.

2. All parties to the settlement agreement are represented by counsel and counsel for each party signs a certificate stating, I have examined the proposed judgment and have advised my client concerning his or her rights in connection with this matter and the consequences of signing or not signing the agreement of the entry of the judgment. My client, after being so advised, has agreed to the entry of the judgment.

3. The settlement agreement and all the attorneys certificates are filed with the court.

(c) If the requirements of this section are satisfied, the court may enter judgment pursuant to the terms of the settlement agreement without action. A judgment so entered may be enforced by any means by which other civil judgment may be enforced.

Reporter s Note: This draft statute was prepared by the staff of the California Supreme Court s George Commission on ADR and the Courts for purposes of stimulating discussion within the Commission about the propriety of a summary enforcement procedure, and some sense as to what one might look like. The Commission ultimately decided against making a recommendation on this question, generally concluding the matter was too complex to be considered under the timetable set forth for the Commission, and instead recommended further study. It is offered to the Drafting Committees and Academic Advisory Faculty of the ABA/UMA Mediation Law Project as a confidential courtesy only, and is not to be otherwise distributed.

Rationale for this provision

This draft has not been considered by the Committee. Statutory provisions for summary enforcement of mediated agreements are novel in approach. Those statutes that provide for special enforcement of mediated agreements are limited to contexts in which the agreement is reached in a court-annexed, agency-annexed, or arbitration-annexed mediation program. See, e.g., Cal. Civil Pro. Code sec. 1297.401 (West 1998)(international commercial arbitration/conciliation); Ga. Code Ann. Sec. 45-19-39 (c) (1998)(conciliated agreement pending civil rights agency proceeding); Haw. Rev. Stat. Sec. 515-18 (1998) (conciliated agreement pending civil rights agency proceeding); N.C. Gen. Stat. Sec. 1-567.60 (1998) (international commercial arbitration/conciliation); Wash. Rev. Code sec. 26.09.184 (1998)(domestic court settlement). The Draft provisions, in contrast, also apply to mediation in a private setting, without the possible review or oversight of the tribunal.

Absent such a provision, mediated agreements are usually on the same footing in terms of enforcement as other settlement agreements. If the settlement is reached pending litigation, the courts may provide summary enforcement, particularly if the agreement is incorporated in a consent judgment. If not, a party seeking to enforce a mediation agreement would file a contract-based action. See generally Rogers & McEwen sec. 4:14.

A key justification for this provision is that it would encourage greater use of mediation and, presumably, more settlement. At the same time, an argument might be that disputants would be fearful of using this process because they would forego contract defenses, such as fraud and duress. The provision might encourage those who could settle without a mediator to use one, thereby increasing the expense of settlement.

Another advantage would be that the procedure would impinge less on the confidentiality of the mediation process.

A key issue is the need for such provisions. Parties who seek this advantage can do so currently by agreeing the arbitration, and incorporating the mediated agreement into the arbitration award, thereby securing expedited and summary enforcement.

This draft attempts to reduce some possible disadvantages. The process is limited to situations in which the disputants are advised by counsel that they are giving up trial rights. In

addition, by using may, the draft invites the courts to examine extreme situations of injustice prior to entering judgment. Indeed, such a provision may be necessary to protect the courts from placing their enforcement powers behind something that may not be appropriate for a court.

APPENDIX OF STATE CONFIDENTIALITY STATUTES CONSULTED

Alabama Code (1998)
24-8-12 (fair housing); 33-18-1, Article XIII (river basin compact) (aka Act 97-66); 33-19-1, Article XIII (river basin compact) (aka Act 97-67)

Alaska Statutes (1998)
18.80.115 (human rights); 23.40.120 (public employment); 42.40.770 (railroads); 47.12.450 (community dispute resolution centers for minors)

Arizona Revised Statutes Annotated (West 1998)
12-2238 (general); 8-809 (child welfare); 25-381.16 (dissolution of marriage); 41-148 1 (B) (discrimination in employment); 41-1491.26 (fair housing conciliation)

Arkansas Code Annotated (Michie 1998)
16-7-206 (general); 11-2-201 thru 206 (labor); *16-7-101 to 107* (Arkansas ADR commission); 2-7-202 (farm mediation office)

California Codes (West 1998)
Business and Professional Code 467.4, 467.6, 471.5 (dept. of consumer affairs); Code of Civil Procedure 1297.371 (conciliation), 1775, 1775.10 and .11 (LA County courts); Evidence Code 703.5 (mediator testimony), 1115-1128 (specifically 1119) (general); Family Code 6303(c) (domestic violence prevention); Gov't Code 3597(c) (higher education employees), 11420.30 (administrative adjudication ADR), 11425.20 (administrative adjudication), 12932(b) (fair employment and housing), 12963.7 (fair employment and housing), 12969 (fair employment and housing), 12984 (housing discrimination), 12985 (housing discrimination); Insurance Code 1858.02(b) (insurance rates), 10089.80 (earthquake insurance); Labor Code 65 (industrial relations); Welfare and Institutions Code 601.3(d) (truancy)

Colorado Revised Statutes (1998)
13-22-302 and 307 (dispute resolution act); 8-1-115 (industrial claims appeals office) (exception to confidentiality); 8-43-205 (workers' comp); 14-12-105 (marriage counseling); 24-34-306(3) (civil rights division); 24-34-506.5 (housing practices); 19-3-310.5 (child abuse or neglect mediation pilot program

Connecticut General Statutes (1998)
31-96 and 31-100 (labor board of mediation and arbitration); 10-153d and 153f (teaching); 46a-83and 84 (human rights); 46b-53 and 53a (dissolution of marriage); 52-195b (motor vehicle ADR)

Delaware Code Annotated (1998)

Title 6 7716 (voluntary ADR confidentiality); Title 11 9503 (victim-offender); Title 14 4002(l) (definition of mediation), 4013(b) (public school employment relations); Title 18 2304(22)(d) (unfair practices in insurance); Title 19 712(c), (e) (discrimination in employment), 16020(j) (definition of mediation), 1613(b) (police and firefighters employment relations)

Florida Statutes (1998) and Florida Statutes Annotated (West 1998)

44.102, .1011, .106, and .107 (general); 44.201 (citizen dispute settlement centers); 61.183 (dissolution of marriage); 337.271 (public transportation); 440.25 (workers' compensation); 455.2235 (business and professional regulation); 497.131 (funeral and cemetery services); 627.745(5) (motor vehicle and casualty insurance); 723.038(8) (mobile home parks); 760.10 and .11 (civil rights act); 760.34 and .36 (fair housing); 373.71 (river basin compact); 455.614 (dept. of health); 681.1097 (motor vehicle sales warranties); 718.1255 (condominiums)

Georgia Code Annotated (1998)

8-3-208 and 209 (fair housing); 45-19-36 and 37 (fair employment); 12-10-100 and 110 (river basin compact)

Hawaii Revised Statutes (1998)

671-16 (medical claim conciliation); 672-8 (design professional conciliation)

Idaho Code (1998)

22-510 (potato seed arbitration); 22-4110 (agriculture labor law); 67-5907 (human rights)

Illinois Revised Statutes (1998)

5 ILCS 120/2 (open meetings); 710 ILCS 20/6 (not-for-profit dispute resolution center); 750 ILCS 5/404 (dissolution and separation); 775 ILCS 5/7A-102 (human rights); 775 ILCS 5/7B-102 (human rights); 705 ILCS 405/5-310 (delinquent minors)

Indiana Code (1998) and Indiana Code Annotated (Burns 1998)

20-7.5-1-13 (educational employee bargaining); 4-21.5-3.5-17, -18, -26, -27 (administrative orders and procedures); 4-6-9-4 (consumer protection); 31-12-1-14 (domestic relations); 31-12-2-8 (domestic relations)

Iowa Code (West 1998)

679C (general); 13.14 (farm mediation); 20.17 (public employment -collective bargaining); 22.7 (open records); 86.44 (employment services); 216.15 (civil rights); 216.15B (civil rights); 654A.13 (farmer -creditor mediation); 679.12 (informal dispute resolution); 679B.

Kansas Statutes Annotated (1998)

60-452a (general)(rules of evidence); 23-605 and -606 (domestic disputes); 38-1522 (child abuse); 44-817 (employment relations); 44-1005(e)and (h) (acts against discrimination); 44-1019 and -1021 (acts against discrimination); 72-5427 (teachers' contracts); 75-4332 (public employee relations)

Kentucky Revised Statutes Annotated (Baldwin 1998)

336.153 (labor cabinet); 344.200 (civil rights); 344.605 and .615 (discrimination in housing)

Louisiana Revised Statutes Annotated (West 1998)

9:41112 (general); 9:332 and 334 (child custody mediation); 30:2480 (oil spills); 51:2257 (human rights)

Maine Revised Statutes Annotated (West 1998)

Evidence Rule 408 (general); 5 3341 (land use), 5 4612 (human rights); 24 2857 (health security); 26 965 (municipal public employees), 26 979D (state employees), 26 1026 (University of Maine labor relations), 26 1285 (judicial employees), 26 1325 (agriculture employees), 26 939 (labor and industry)

Maryland Code Annotated (1998)

20 4-107 (consumer affairs); 49B 28 (discrimination in housing); Rule 73A (divorce); 49B 48 (human relations)

Massachusetts General Laws (West 1998)

233 23C (general); 39 23B (open meetings); 150 10A (conciliation of industrial disputes); 150E 9 (public employees); 151B 5 (discrimination); 151C 3 (fair educational practices); 152 10-B (workmen's compensation)

Michigan Compiled Laws (1998)

423.25 (labor disputes) (no confidentiality); 552.513 (domestic relations); 600.4913 (medical malpractice); 600.4961 (tort mediation); 691.1557 (community dispute resolution centers); 330.1772 (mental health code) (defines mediation as "in a confidential setting")

Minnesota Statutes (West 1998)

595.02 (general); 13.02 (definitions); 13.75 (data maintained by state); 13.88 (criminal justice agencies); 17.697 (agriculture marketing); 325F.665 (consumer protection); 363.04 and .05 (human rights); 494.02 (community dispute resolution program); 518.167 (marriage dissolution); 518.619 (child custody); 115B.443 (landfill cleanup); 176.351 (workers' compensation); 583.26 and .29 (farmer-lender mediation).

Missouri Revised Statutes (1998)

435.014 (general); 162.959(3) (special education); 213.075 and .077 (human rights)

Montana Code Annotated (1998)
26-1-811 (family law); 39-71-2410 (workers' compensation); 40-3-116 (family law) (conciliation court); 40-4-301 to 308 (family law); 41-3-404 (child abuse)

Nebraska Revised Statutes (1998)
25-2914 (general); 2-4812 and 4804 (farmer mediation); 20-140 and 141 (public accommodations); 20-327 and 330 (civil rights); 42-810 (husband and wife) (conciliation court); 43-2908 (parenting); 48-168 (workers' compensation); 48-1118 (employment)

Nevada Revised Statutes (1998)
48.109 (general); 3.475 (child custody); 40.680(6) (property actions); 233.190 (equal rights); 288.220 (public employees)

New Hampshire Revised Statutes Annotated (1998)
126-A:4 (health department); 186-C:23 and 24 (special education); 328-C:9 (marital mediators); 354-A:21 (human rights); 458:15-a (annulment, divorce and separation)

New Jersey Revised Statutes (1998)
2A:23A-9(c) (general); 4:1C-26 (agriculture development); 10:5-14 and 16 (discrimination); 34:13A-16 (employer/employee relations); 52:9DD-9 and 10 (commission on racism)

New Mexico Statutes Annotated (1998)
13-4C-9 (public works); 28-1-10 and 11 (human rights)

New York Statutes (McKinney 1998)
Civil Service 205(4)(b) (public employees); Education 313(5)(c) (commissioner of education executive law); 297(3)(a) (human rights); Family Court 915 (conciliation); Judiciary Law 849-b (community dispute resolution centers labor law); 702-a (labor relations)

North Carolina General Statutes (1998)
1-567.81 (international commercial conciliation); 7A-38.1(1) (superior court mediation); 7A-38.4 (district court settlement); 41A-7(a), (d), (g) (fair housing); 50-13.1(e), (f) (divorce); 95-36 (department of labor); 115C-431 (school budgets); 7A-38.2 (mediator regulation) (not confidentiality)

North Dakota Century Code (1998)
6-09.10-04.1 (liability of banks); 14-02.4-21 (human rights); 14-09.1-05 and 06 (child custody); 40-47-01.1 (city zoning) (no confidentiality); 40-51.2-12 (annexation) (no confidentiality)

Ohio Revised Code Annotated (Baldwin 1998)
2317.02 (general); 2317.023 (mediation communications privileged - exceptions); 2712.80 (international commercial arbitration); 3109.052(B), (C) (parental rights and responsibilities); 3117.05(F) (marital controversies); 3332.091 (proprietary schools certification); 4112.05(B) (civil rights); 5123.601(C) to (E) (mental retardation); 5123.603(B) (mental retardation)

Oklahoma Statutes (1998)
Tit. 12 1805(A) (general), 1824 (district court mediation); Tit. 25 1505(a) (discrimination); Tit. 27A 2-3-104 (environment); Tit. 51 307 (political ethics); Tit. 59 328.64 and .71 (dentistry); Tit. 85 3.10 (workers' compensation)

Oregon Revised Statutes (1998)
36.220 to .238 (general); 36.210 (mediator liability); 107.600 and .785 (domestic relations) (court conciliation); 135.951 and .957 (criminal offenses); 192.501 and .690 (public meetings); Title 3, Ch. 36 2-10 (agriculture property); 107.179(4) (domestic relations)

Pennsylvania Consolidated Statutes Annotated (1998)
42/ 5949 (general); 35/ 6020.708 (hazardous sites cleanup); 40/ 1301.702 (health care malpractice); 43/ 211.34 (labor disputes)

Rhode Island General Laws (1998)
9-19-44 (general); 15-5-29 (divorce); 34-37-5(b) (fair housing)

South Carolina Code Annotated (1998)
1-13-90(c) and (d)(3) (human affairs); 8-17-345 and 360 (state employees)

South Dakota Codified Laws Annotated (1998)
19-13-32 (general); 25-4-58.2, 59, and 60 (divorce); 38-6-12 (agriculture); 54-13-18 (farm mediation)

Tennessee Code Annotated (1998)
4-21-303(d) and 304(g) (human rights); 16-20-102 and 103 (victim-offender mediation); 36-4-130 (divorce); 63-6-214(i)(3) (medical misconduct); 63-4-115 (chiropractors); 63-7-115 (nursing)

Texas Codes Annotated (West 1998)
Civil Practice and Remedies 154.053(b), (c) (general), 154.073 (general); Civil Statutes 4413(36) 3.07A (motor vehicle commission); Gov't Code 441.031(state records), 441.091 (county records), 2008.054 (administrative procedure), 2008.055 (interagency sharing); Labor Code 21.207 and .305 (employment discrimination); Natural Resources Code

40.107(c)(7)(F) (oil spill response); Property Code 301.085 (fair housing); Civil Practice and Remedies 172.206 (conciliation)

Utah Code Annotated (1998)

78-31b-7 and 8 (general); 30-3-16.6 and 17.1 (divorce) (conciliation); 30-3-38 (duty to report child abuse); 35A-5-107 (anti-discrimination); 57-21-9(8) (fair housing)

Vermont Statutes Annotated (1998)

Tit. 9 4555 (human rights)

Virginia Code Annotated (Michie 1998)

8.01-576.9, .10, and .22 (general); 2.1-342-(B)(30) (open records); 2.1-723 (human rights); 10.1-1186.3 (environmental quality); 15.2-2907 (city boundary adjustments); 20-124.4 (child custody); 36-96.13 (fair housing); 63.1-248.3 (child abuse)

Washington Revised Code (West 1998)

5.60.070 and .072 (general); 7.75.050 and .090 (dispute resolution centers); 26.09.015 (domestic relations); 42.30.140 (open meetings) (no mediation exception); 47.64.170(3) (marine employees); 49.60.240 and 250(2) (human rights); 76.09.230 (forest practices)

West Virginia Code (1998)

5-11A-11 (fair housing); 6B-2-4(r) (ethics; public officers); 18-29-10 (education); 29-6A-12 (state employees)

Wisconsin Statutes (1998)

904.085 and 905.11 (general); 48.981 (children's code - duty to report); 93.50 (farm mediation); 655.42 and .58 (health care liability); 767.11(14)(c) (family law); 802.12 (ADR); 115.797 (children with disabilities)

Wyoming Statutes (1998)

1-43-102 and 103 (general); 11-41-106 (agriculture)