DRAFT

FOR DISCUSSION ONLY

UNIFORM MEDIATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

JANUARY 28, 2000

UNIFORM MEDIATION ACT

With Prefatory Note and Reporter's Notes

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

SECTION 1. DEFINITIONS. In this [Act:]

(1) "Disputant" means a person who 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, of any profession or background, who is appointed by a court or government entity or engaged by disputants through an agreement evidenced by a record.

(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.

SECTION 2. CONFIDENTIALITY: PRIVILEGE; WAIVER; EVIDENTIARY AND DISCOVERY EXCLUSION; NONDISCLOSURE; EXCEPTIONS.

(a) A disputant has a privilege to refuse to disclose, and to prevent any other person from disclosing, mediation communications in a civil judicial, administrative, or arbitration proceeding.

(1) This privilege may be waived, but only if expressly waived by all disputants either in a record or during a proceeding before a judicial, administrative, or arbitration tribunal. A disputant who makes a representation about or disclosure of a mediation communication that affects another person in a proceeding may be precluded from asserting the protections of the privilege, but only to the extent necessary to respond to the representation or disclosure.

(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 judicial, administrative, or arbitration proceeding.

(1) This privilege may be waived, but only if waived expressly by all disputants and the mediator**,** either in a record or during a proceeding before a judicial, administrative, or arbitration tribunal. A mediator who makes a representation about or disclosure of a mediation communication that affects another person in a proceeding may be precluded from asserting the protections of the privilege, but only to the extent necessary to respond to the representation or disclosure.

(2) A mediator may not disclose mediation communications unless all of the disputants agree, or the mediator reasonably believes that law, professional reporting requirements, or public policy requires the disclosure. A mediator also may not make a report, assessment, evaluation, recommendation, or finding regarding a mediation, to a judge, 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 of the mediation.

(c) Mediation communications are not subject to discovery or admissible in evidence in a civil, arbitration, or administrative tribunal if they are privileged and are not waived or subject to preclusion under subsection (a) or (b). [bracketed provision -- see Reporter's Working Notes].

[(d) Evidence of a disputant's mediation communications may not be admitted into evidence against that disputant in a criminal or juvenile delinquency proceeding related to a matter being mediated if:

1. A court or prosecutor refers a criminal or juvenile delinquency case to mediation,

2. A public agency refers a dispute involving allegations of juvenile criminal activity to mediation, or

3. An entity charged by law to mediate criminal or juvenile cases accepts a case involving allegations of crime.]

(e) There is no privilege or prohibition under subsections (a), (b), (c), or (d) of this section:

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

(2) for the sessions of a mediation that must be open to the public under the law.

(f) There is no privilege nor prohibition under subsections (a), (b), (c), or (d) of this section if a judicial, administrative, or arbitration tribunal finds, after an in camera hearing, that the disputant seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is an overwhelming need for the evidence that substantially outweighs the importance of the state's policy favoring the protection of confidentiality and the

subject matter of the disclosure is limited to:

(1) threats made by a participant to inflict violence or unlawful property damage;

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

(3) 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 or disprove abuse or neglect, unless that agency referred the case for mediation;

(4) establishing or disproving a claim or complaint of professional misconduct or malpractice filed against a mediator, a disputant or a representative of a disputant based on conduct occurring during a mediation;

(5) A proceeding in which fraud, duress, or incapacity are raised regarding the validity or enforceability of an agreement evidenced by a record and reached by the disputants as the result of a mediation, but only through evidence provided by persons other than the mediator of the dispute at issue.

[(6) An extraordinary situation not within these enumerated exceptions in which the general purposes of the state policy favoring mediation confidentiality is so outweighed by the need for disclosure that the interests of justice will be served only if disclosure is compelled.]

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

(h) Information otherwise admissible or subject to discovery does not become inadmissible

or protected from discovery solely by reason of its use in mediation.

Conceptual Additions to Reporter's Working Notes
(December 1999 Draft)

Subsections 2(a) and (b)

These sections do not preclude the use of mediation communications in criminal or juvenile proceedings. States that classify juvenile proceedings as civil in nature should add "non-juvenile" after "civil."

Subsection 2(c)

This provision would not preempt state laws that deem a mediator an incompetent witness and impose attorney's fees if a person causes a mediator to be subpoenaed to testify in violation of the statute. *See, e.g.*, Cal.Ev.Code § 703.5. The Drafting Committees may wish to make this intent more explicit that by including a bracketed provision that could be adopted by states that currently have mediator incompetency provisions. Such a provision could read: [This Act does not preempt the provisions of §_____] (*e.g.*, This Act does not preempt the provisions of Cal. Ev. Code §703.5.] Such an approach would advance the interests of permitting states to retain policy choices they already have made in this regard, while retaining general uniformity.

SECTION 3. 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.

SECTION 4. ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS.

Alternative 1

[(a) A disputant entering into a written mediation agreement may with the consent of all disputants to such agreement, either as part of the agreement or by a separate record, request that a court of general jurisdiction enter a judgment in accord with the agreement set forth in the settlement agreement, provided that:

(1) A petition requesting such judgement is filed within (30) days of such settlement agreement;

(2) Notice is given to or waived by all disputants to the agreement within (30) days of the filing of such petition;

(3) No disputant to the agreement files an objection within (30) days of notice or waiver of notice.

(b) If on motion of any of the disputants to the settlement agreement, the court finds that the provisions of subsection 4 (a) have been met, the court shall enter judgment in the terms set forth in the mediated settlement agreement.

(c) If the court finds that an objection has been filed as provided in subsection 4(a)(a)(3), or the interest of justice require, the court shall deny such petition, without prejudice to any contractual rights or remedies that may otherwise be available.]

Alternative 2

[(a) Disputants 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 disputants themselves, not solely their attorneys.

2. All disputants to the settlement agreement are represented by counsel and counsel for each disputant 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 Working Notes

Rationale for this provision

The Draft presents language representing alternative approaches to the enforcement of mediated settlement agreements that has not been considered by the Committee.

Statutory provisions for summary enforcement of mediated agreements are relatively rare. 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. § 45-19-39 (c) (1998)(conciliated agreement pending civil rights agency proceeding); Haw. Rev. Stat. § 515-18 (1998) (conciliated agreement pending civil rights agency proceeding); N.C. Gen. Stat. § 1-567.60 (1998) (international commercial arbitration/conciliation); Wash. Rev. Code § 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.

Alternative 1 presents an opt-in confirmation model that is similar to the enforcement mechanisms of the Revised Uniform Arbitration Act. It permits disputants to ask a court of

appropriate jurisdiction to enter the mediated settlement agreement as an enforceable court judgment. However, recognizing the disparities of power and information that can exist between mediation disputants, it places several conditions upon the ability of the court to act on such a request. First, it requires this decision to be made fairly soon after the settlement agreement, thus ensuring the disputants both time to reflect on their agreement, and to make the decision about whether they would want it to be summarily enforced while the issues are still fresh in their minds and their recollections. Critically, the provision also provides that the disputant seeking summary enforcement provide notice to the other disputant(s) of such an intent, thus prohibiting the possibility of ex parte requests for enforcement. Finally, Alternative 1 only permits the court to act on a summary enforcement request only if there is no disputant files an objection within 30 days. If such an objection is filed, the court may not grant the request for summary enforcement, regardless of the basis for or validity of the objection. This subsection also permits the court to deny enforcement if the interests of judgment require. The denial of a request for summary enforcement does not prejudice any rights or remedies that a disputant may have through the normal mechanisms of contract.

Alternative 2 presents a stipulated judgment model. That is, it permits the disputants to stipulate to the entry of the mediated settlement agreement as a court judgment. In this regard, Alternative 2 differs from Alternative 1 in that it requires affirmative participation by all disputants, while Alternative 1 permits a mediated settlement agreement to be entered upon a request by one disputant, if the other disputant does not respond within 30 days. Like Alternative 1, Alternative 2 places specific conditions upon the authority of the court to enter the stipulated agreement as an enforceable court order. It begins with a requirement of actual attestation by the disputants, not merely by their attorneys if they are represented. This provision is intended to ensure that it is the disputants who are making the decision about whether to waive future contractual defenses to the enforcement of the mediated settlement agreement. Critically, Alternative 2 also ensures that such a decision is an informed one by requiring the attestation of an attorney that he or she has reviewed the agreement and advised the disputant about his or her rights in connection with it, and about the consequences of signing or not signing the stipulation. This provision is intended to guard against the inadvertent waiver of contractual and trial rights by unknowing or unsophisticated disputants. This advantage-taking was a particular criticism of the cognovit notes in other contexts.

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 disputant seeking to enforce a mediation agreement would file a contract-based action. *See generally* Rogers & McEwen § 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 a provision. Disputants who seek this advantage can do so

currently by agreeing to arbitrate their dispute, and incorporating the mediated agreement into an 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 to enforce.