DRAFT

FOR DISCUSSION ONLY

MEDIATION ACT

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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 on by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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Preface

The draft reflects the reporter's suggested language in response to suggestions made by the Drafting Committee at its initial meeting. The research and comments benefitted from the work of a faculty from four universities who have donated their time to assist this project. Richard Reuben from the Stanford Law School Center on Conflict and Negotiation assisted enormously in this effort. The project faculty include:

Professor Frank E.A. Sander, Harvard Law School

Professors Leonard Riskin, Jim Levin, and Chris Guthrie, University of Missouri-Columbia School of Law

Professors Sarah Cole, Camille Hebert, Nancy Rogers, Joseph Stulberg, Laura Williams, and Charlie Wilson, Ohio State University College of Law

Professor Craig McEwen, Bowdoin College

A number of others in the field met with this group, including Christine Carlson, Kim Kovach, Peter Adler, Jose Feliciano, and Jack Hanna.

(a) Definitions. As used in this statute:

(1) "Mediator" means an impartial person, including an entity, who assists the parties to negotiate an agreed resolution of a dispute after being:

(A) appointed by a court or public agency or

(B) engaged by two or more adverse parties.

(2) "Mediation" means a negotiation process presided over by a mediator.

(3) "Mediation communication" means an oral or written assertion or nonverbal conduct of an individual who intends it as an assertion and that is made:

(A) after a court, public agency, or mediator notifies the parties to appear for the mediation or two or more adverse parties engage the mediator;

(B) by a party or a representative of a party to or in the presence of the mediator; by the mediator; or by the parties or their representatives when asked to communicate by the mediator;

(C) related to the subject matter of the mediation; and

(D) before the parties execute a settlement agreement, the mediator announces that the mediation has been concluded, or all but one of the parties withdraws from the mediation.

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

(A) is involved in the dispute or whose agreement is necessary to resolve the dispute and

(B) signs an agreement to mediate or was notified by a court, public

agency or mediator to appear for mediation.

(5) "Representative of a party" means that person's attorney or other representative acting within the scope of employment for the party.

(b) **General rule of privilege.** A party to a dispute has a privilege to refuse to disclose and to prevent any other person from disclosing mediation communications. A mediator has a privilege to refuse to disclose and to prevent any other person from disclosing that mediator's communications during the mediation and to refuse to provide evidence of mediation communications.

(c) **Waiver.** The privilege is waived if the persons on whom this statute confers this privilege acknowledge that they do not seek the protection of the privilege or voluntarily disclose a significant part of a mediation communication in a manner that is inconsistent with maintaining the confidentiality of the privilege. This rule does not apply if the disclosure itself is privileged.

(d) **Exceptions to rule of privilege.** There is no privilege under this statute:

(1) **Furtherance of crime [or fraud].** If any party or the mediator uses or attempts to use the mediation to commit or plan to commit a crime [or fraud].

(2) **Agreement.** For a record evidencing an executed agreement by two or more parties.

(3) **Criminal proceedings.** In criminal proceedings other than juvenile proceedings.

(4) **Child abuse or neglect.** For communications evidencing child abuse or neglect when offered in proceedings initiated by a public agency for the protection of a child.

(5) **Threats of harm.** For mediation communications that explicitly or implicitly

threaten to cause another to suffer unlawful bodily or pecuniary harm.

(6) **Claims against the mediator.** To the degree ruled necessary by a court, if a party files a claim against the mediator.

(7) **Otherwise discoverable.** If information would otherwise be admissible or subject to discovery outside its use in a mediation, it does not become inadmissible or protected from disclosure solely by reason of its use in mediation.

(e) **General rule of non-disclosure.** A mediator shall not disclose mediation communications to others outside the mediation, including the judge or other appointing authority who may make rulings on or persons who might investigate the matters in dispute unless all of the parties agree or the mediator is compelled to testify pursuant to an exception in (d) of the statute.

(f) **Exceptions to rule of non-disclosure.** A mediator may disclose mediation communications in the following circumstances, but only as the mediator reasonably believes is needed to achieve the purposes of the exception:

(1) **Furtherance of crime [or fraud].** If any party or the mediator uses or attempts to use the mediation to commit or plan to commit a crime [or fraud].

(2) **Threats of harm.** For mediation communications that explicitly or implicitly threaten to cause another to suffer unlawful bodily or pecuniary harm.

(3) **Reports of crime.** If federal or state law that a mediator reasonably believes to be applicable requires the mediator to report crimes to appropriate authorities.

(4) **Evidence of neglect or abuse.** For mediation communications evidencing neglect or abuse of children or others protected by state neglect and abuse reporting

requirements.

Reporter's Notes

Introduction

Mediation serves to overcome barriers to negotiated settlement and therefore can contribute to the earlier resolution of disputes. The parties usually participate, often with their lawyers, in the mediation process, and therefore the process tends to increase their satisfaction and lead to a result tailored to their needs.

Mediators typically promote a candid and informal exchange regarding events in the past and encourage people to suggest ways in which differences might be resolved. Mediators and commentators believe that candor and unguarded discussions help the parties reach earlier settlement and more satisfying results. According to this view, this frank exchange is achieved only if the mediator and participants know that what is said in the mediation will not be used to their detriment through court proceedings and other adjudicatory processes. Lawrence R. Friedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection,* 2 Ohio St. J. on Disp. Resol. 37, 43-44 (1986); Philip 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 Standard to Protect mediation Participants, The Process and the Public Interest,* 1995 J. Disp. Resol. 1, 17. According to some authorities, public confidence in and voluntary use of mediation will expand if people believe that the mediators are impartial, and public acceptance will be eroded when people hear that mediators testify about exchanges in mediation. *See, e.g., NLRB v. Joseph Macaluso, Inc.,* 618 F.2d 51, 54 (9th Cir. 1980) ("We conclude that the public interest in maintaining the perceived and actual impartiality of federal mediators does outweigh the benefits derivable from the goals discussed above."). Because privileges result in the loss of evidence, some justifications based on professional convenience or desires for privacy (outside the family context) put forward for privilege are generally rejected.

Mediation confidentiality provisions often include

(1) evidentiary privileges and

(2) prohibitions against disclosures by privileges.

Evidentiary privileges, sometimes called testimonial privileges, usually operate to allow a person to refuse to disclose and to prevent another from disclosing particular communications. *See* Uniform Rule of Evidence 502(b) (regarding lawyer-client privilege). Prohibitions against disclosure, in contrast, prescribe and sanction voluntary disclosure.

To be effective in promoting effective communications, the contours of the privilege should be clear to the parties at the time that they decide whether to be candid. This need for clarity at the beginning of the mediation should be weighed as drafters determine exceptions to the privilege based on later behavior, such as whether one party claims that the other failed to negotiate in good faith. Also, this fact underscores the need for uniformity across jurisdictions

because parties entering a mediation often cannot anticipate what court or administrative agency will later be asked to receive evidence about the dispute being mediated. In addition, the need for clarity weighs heavily in favor of wording the statute so that people will easily understand its provisions, especially because mediators often are not lawyers and mediation parties are not always represented by counsel.

(a) Definitions

The draft reflects balancing among competing considerations. One goal is to promote mediation in many contexts, including in community and private mediation as well as in mediation programs connected to courts and public agencies. At the same time, another goal is to avoid misuse of the privilege which might result in the loss of significant evidence while not promoting the purposes underlying the privilege. For example, under a privilege covering mediation broadly defined, persons could strategically claim to have been involved in a mediation if they were part of a group discussing areas of disagreement. Mediators are not licensed as are other professionals protected by a privilege, a fact that might make it difficult to prove that the discussion leader was not a mediator. The resulting dilemma is that the broader the definition, the greater the flexibility in the development of mediation but also the greater the likelihood of abuse.

Existing mediation confidentiality statutes reflect three primary approaches to the competing considerations. The most common approach as been to limit applicability to mediation offered by a particular institution, such as mediation by a particular publicly funded entity. *See, e.g.*, Iowa Code sec. 216.B (civil rights commission); Ark. Stat. Ann. sec. 11-2-204 (Arkansas Mediation and Conciliation Service); Ariz. Rev. Stat. Ann. sec. 25-381.16 (domestic court); Fla. Stat. Ann. 44.201 (publicly established dispute settlement centers); 710 I.L.C.S. 20/6 (non-profit community mediation programs); Ind. Code Ann. sec. 4-6-9-4 (Consumer Protection Division); Minn. Stat. Ann. sec. 176.351 (workers' compensation bureau). A second approach has been to define mediation broadly but make the privilege qualified, that is a privilege that yields when the court decides that the interests of justice outweigh the purposes served by maintaining confidentiality. *See, e.g.,* Ohio Rev. Code sec. 2317.023. Like the second approach, a third approach defines mediation broadly. Statutes in this third category vary from the second approach by deeming the privilege to be absolute but making the privilege inapplicable when the loss of evidence would most damage the interests of justice, such as in criminal proceedings, and providing exceptions for child abuse and other defined circumstances. *See, e.g.,* Cal. Evidence Code secs. 1119, 1120; Mont. Code An. sec. 26-1-811.

The draft combines some of each approach. It narrows the definition of mediation by requiring a triggering event -- the appointment or engagement of the mediator. This triggering event requirement makes it more difficult later to label a discussion "mediation" when the persons involved never intended to be in a mediation process or believed that they were speaking under the cloak of privilege. In addition, the draft makes the privilege inapplicable in adult criminal proceedings in (d)(3), a controversial provision which is discussed below. The draft does not make the privilege qualified, as discussed later in the comments.

Just as the draft covers mediation in a variety of contests, it also covers mediation as defined in a variety of ways. The definition of mediation could apply to processes sometimes given other names, such as neutral evaluation or facilitation. To narrow the definition to purely facilitative mediation would lead to attempts to thwart the privilege if the mediator gave an opinion concerning the likely outcome if the parties did not settle.

A related definitional issue is when the confidentiality should attach. On the one hand, persons might be more likely to call a mediator if assured of confidentiality for the initial call. On the other hand, it would be undesirable if unscrupulous persons could claim that any call they wished to protect from disclosure could later be deemed a call to a mediator. The latter possibility is not an unlikely one because mediators do not have to be licensed or attached to a public entity or an entity organized to provide mediation services.

The common approach among statutes has been to state generally that mediation communications are confidential, leaving to the courts the question of initial contacts by one party. Taking a different approach, a new California statute makes privileged a "mediation consultation," which is "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 secs. 1115, 1119. An Iowa statute covers communications between a party and the mediator "relating the the subject matter of a mediation agreement." Iowa Code sec. 216.B.

The draft approach covers a wide variety of communications, even if not in the presence of the mediator, but only after an initiating event designed to protect against abuse. The notice of mediation provides one initiating event. The engagement of the mediator provides an alternative initiating event, providing that at least two adverse parties engage the mediator. The draft approach, therefore, would not cover the initial call by a prospective mediation party to the mediator.

The draft's definition of "representative of a party" tracks language in Uniform Rule of Evidence 502(a) regarding the lawyer-client privilege. Some statutes take a narrower view, making the privilege applicable only to communications by a party or the mediator. *See, e.g.,* Kan. Stat. Ann. sec. 60-452a. Others more broadly refer to any information received in the course of mediation. *See, e.g.,* Ky. Rev. Stat. Ann. sec. 336.153. The new California statute applies to all participants. Cal. Evid. Code sec. 1119. The draft's middle ground would cover only those persons who were present and acting under the direction of the party.

(b) General rule of privilege

This sections sets forth the evidentiary privilege; part (e) relates to prohibitions against disclosure.

This section also designates the holder of the privilege, the person who can raise the privilege and is a position to waive the privilege. Most statutes do not designate who holds the privilege, leaving that as a matter of judicial interpretation. *See, e.g.,* 710 I.L.C.S. 20/6; I'd. Code

Ann. sec. 20-7.51-13; Iowa Code sec. 679.12; Ky. Rev. Stat. Ann. sec. 336.153; Me. Rev. Stat. Ann. tit. 26 sec. 1026; Mass. An. Laws ch. 150, sec. 10A. Those that designate a holder seem to be split from those making the parties the joint and sole holder of the privilege, *see, e.g.,* Kan. Stat. Ann. sec. 23-606; Fla. Stat. Ann. sec. 61.183; Ark. Stat. Ann. sec. 11-2-204, N.C. Gen. Stat. sec. 411-7; Or. Rev. Stat. sec. 107.785; and those making the mediator an additional holder, *see, e.g.,* Wash. Rev. Code Ann. sec 7.75.050; Ohio Rev. Code sec. 2317.023; Cal. Evid. Code sec. 1122. The party-holder approach is analogous to the attorney-client privilege in which the client holds the privilege. The mediator-holder approach tracks privileges such as the executive privilege designed to protect the institution rather than the communicator.
The differences reflect varying privacy rationales for the mediation privilege. For some, the perceived neutrality and privacy of the mediation process is the key rationale, which leads to the conclusion that the mediator should hold the privilege. For others, the primary rationale is to protect the parties' reasonable expectations of confidentiality. Under this rationale, the parties would be the holder.

The draft statute takes a bifurcated approach that tracks an Ohio statute. Ohio Rev. Code sec. 2317.023. The parties hold the privilege and can raise the privilege as to any mediation communication. At the same time, the mediator may raise and can prevent waiver regarding the mediator's own communications and testimony.

This approach gives weight to the primary concern of each rationale. If all parties agree, any party can be required to testify about what the parties said; the mediator cannot block them from doing so. At the same time, even if the parties agree to disclosure, the mediator can decline to testify and even can block the parties' testimony about what the mediator said as well as evidence of the mediator's notes.

(c) Waiver

The language of this section tracks the language of Uniform Rule of Evidence 510 regarding the privileges covered by the Uniform Rule of Evidence, including lawyer-client, physician and psychotherapist-patient, husband-wife, religious, political vote, trade secrets, government secrets, and informer identity.

(d) Exceptions to rule of privilege

(1) Furtherance of crime [or fraud]

Most mediation privilege statutes do not contain this exception. As the mediation privilege applies in broader contexts, however, such an exception seems more important. A few Florida statutes contain an exception covering both crime and fraud. *See, e.g.,* Fla. Stat. Ann. secs. 44.1011, 44.162, 44.201. The Wyoming statute excepts those in "contemplation of a future crime or harmful act." Wyo. Stat. sec. 1-43-103.

The Drafting Committee has been hesitant to cover "fraud" because many civil cases

involve allegations of fraud. Another approach to this problem might be to adopt the language in the exception to the lawyer-client privilege in Uniform Rule of Evidence 502, which provides an exception to the privilege if services were "sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." This language reduces the likelihood that later strategic claims of civil fraud will be raised.

(2) Agreement

This is a common exception which would cover both agreements to mediated and settlement agreements. The parties may provide for nondisclosure as part of their agreement but this agreement would prevent use only by the signatories.

This exception is controversial only in what is not included -- oral settlements. The disadvantage of exempting oral settlements is that nearly everything said during mediation could bear on either whether the parties agreed or the content of the agreement. In other words, an exception for oral agreements might swallow the rule. As a result, mediation participants might be less candid, not knowing whether a controversy later would erupt over an oral agreement. The primary disadvantage of creating no exception for oral settlements is that the naive party who is accustomed to the enforcement of oral settlements reach in negotiations might assume the admissibility of evidence of oral settlements reached in mediation. However, a number of statutes limit the confidentiality exception to executed agreements (not excepting oral agreements from the privilege) and one would expect that mediators and others will soon incorporate knowledge of this into their practices. *See Hudson v. Hudson,* 600 So.2d 7 (Fla. App. 1992)(privilege precluded evidence of oral settlement); *Cohen v. Cohen*, 609 So.2d 783 (Fla. App. 1992) (same); *Ryan v. Garcia*, 27 Cal. App.4th 1006, 33 Cal. Rptr.2d 158 (1994). For example, parties can agree that the mediation has ended and state their oral agreement into the tape recorder. *See Regents of the University of California v. Sumner*, 42 Cal. App. 4th 1209 (1st Dist. 1996).

(3) Criminal proceedings

Some of the most difficult mediation privilege 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 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). There also is concern that, because of the broad statutory definition of mediation, criminal defendants will seek to preclude use of wiretaps, for example, on the grounds that one of the group was engaged as a mediator for their discussions and the discussions were not in furtherance of a crime (perhaps only discussing a past crime). The loss of evidence resulting from the privilege seems to exact the highest cost in terms of the administration of justice in criminal proceedings. Several statutes exempt criminal proceedings from their

provisions. Cal. Evidence Code secs. 1119, 1120; Mont. Code An. sec. 26-1-811; Ohio Rev. Code sec. 2317.023. The more common approach, however, is to make the privilege applicable to all proceedings.

The rationale for excepting adult criminal proceedings does not apply with the same force in juvenile mediation contexts. The juveniles would be less likely to appreciate the consequences of making delinquency admissions and less astute at avoiding admissions. Also, there is a stronger public policy support for settling gang, truancy, and other juvenile delinquency disputes through mediation than for settling adult criminal disputes other than through plea bargaining. Therefore, the draft statute does apply to preclude use of mediation communications in juvenile proceedings.

The exception does not permit use of mediation communications regarding past crimes to be admitted in civil proceedings.

An alternative approach would be to replace this exception with a qualified privilege. An example of an exception that creates a qualified privilege is Ohio Rev. Code sec. 2317.023, which authorizes a court to order disclosure to prevent manifest injustice in the particular case, of such a magnitude as to "outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings." Examples of qualified privileges include the reporter-source privilege and the executive privilege.

(4) Child abuse or neglect

This is a sensible and common exception for divorce mediation statutes because of the greater public policy desire to secure accurate determinations on proceedings regarding issues that may present continuing harm to children. There is no reason to limit the exception to divorce mediation because the same public policy concerns weighing favor of admissibility if evidence of child abuse or neglect is revealed in the mediation of another kind of dispute. A similar analysis applies to elderly abuse.

(5) Threats of harm

Parties do not need to be encouraged to threaten one another during mediation, so disclosure of such threats does little harm to the policies served by the privilege. Disclosure would serve public interests in terms of protecting others. A couple of statutes provide this exception. *See, e.g.,* Wyo. Stat. sec. 1-43-103; Kan. Stat. Ann. sec. 23-606 (information necessary to stop commission of crime).

(6) Claims against the mediator

This exception permits the mediator to defend, and the party to secure evidence, in the occasional claim against a mediator. A similar exception is recognized in a few statutes. *See, e.g,* Ohio Rev. Code s 2317.023; Minn. Stat. sec. 595.02; Fla. Stat. sec. 44.102; Wash. Rev. Code

sec. 5.60.070. As the states increasing provide procedures for grievances against mediators, the need for this exception becomes greater in order to make grievances processes function effectively.

(7) Otherwise discoverable

This is a common exception to mediation privilege as well as to Federal Rule of Evidence 408 regarding compromise discussions. See, e.g., Cal. Evidence Code 1120; Wyo. Stats. sec. 1-43-103(c)(iv); Ohio Rev. Code sec. 2317.023(D). At the same time, the language is unnecessary. It was omitted from Uniform Rule of Evidence 408.

(e) General rule of non-disclosure

Mediators are not licensed and therefore are not generally subject to discipline, as lawyers are, for voluntary disclosure. The limits of the sanctions through similar oversight appears to be through de-certification by courts or similar referral entities.

At the same time, disclosure of mediation communications by the mediator, especially to the judge or investigative agency, would undermine the parties' candor, create undesirable pressures to settle, and invade the judicial process. Such disclosures have been condemned by the Society for Professionals in Dispute Resolution and the blue ribbon group that issued Standards for Court-Connected Mediation Programs. A statutory prohibition seems warranted, and a few statutes now do so. *See, e.g.,* Fla. Stat. Ann. sec. 373.71, Article XIII(8); Cal. Evid. Code sec. 1121; Tex. Civil Practice and Remedies Code sec. 154.053(c).

The provision does not include a sanction. One would expect that courts would award damages to a party hurt by a disclosure in violation of the statute. Some statutes provide for criminal sanctions for unlawful disclosures by mediators, but this remedy seems more serious than warranted. *See, e.g.,* 42 U.S.C. sec. 2000g-2(b)(disclosure by Community Relations Service mediators); Del. Code Ann. 19, sec 712(c); Fla. Stat. sec. 760.32(1); Ga. Code Ann. sec. 8-3-208(a).

The draft statute does not prohibit disclosure by the parties. The parties are free to enter a secrecy agreement, howeveer, and presumably courts would award contract damages for breach of the secrecy agreement. Because the parties 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 parties free to agree to secrecy; through the agreement they would be on notice of the duty to maintain secrecy.

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 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).

(f) Exceptions to non-disclosure

These are instances of either strong public interest in disclosure or, in the case of monitoring, of little intrusion into confidentiality. The exception for duties to report crimes does not make evidence of crimes admissible. The question of admissibility is covered under the testimonial privilege, parts (b) - (d).

The exception to disclosure for child and elderly abuse is broader than that provided in the few statutes that prohibit disclosure. The new Oregon statute, for example, permits disclosure only if the mediator is a person who has a statutory duty to report child abuse or elderly abuse. *See, e.g.,* OR. Rev. Stat. sec. 36.222(6).

Public record and meeting laws vary significantly by state. It is important for each state to determine whether this statute preempts the public record and meeting laws or vice versa. The competing policies may have greater strength in different states. Unlike the other provisions in this draft statute, the need for uniformity is not as great for public records and meetings laws. The state whose law is pertinent should be clear in the case of public officials.

A new series of Oregon statutes may provide an interesting model for dealing with public records and meeting laws. The statutes allow state agencies to exempt mediation regarding personnel matters from public records and meeting laws. Or. Rev. Stat. secs. 6.224, 6.226, 6.228, 6.230.