DRAFT

FOR DISCUSSION ONLY

UNIFORM MEDIATION ACT

NATIONAL CONFERENCE OF COMMISIONERS

ON UNIFORM STATE LAWS

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UNIFORM MEDIATION ACT

With Prefatory Note and Reporter's Notes

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Preface

The draft reflects the reporter's suggested language on confidentiality in response to suggestions made by the Drafting Committee at its last meeting and new language on issues of quality. 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 Harvard Program on Negotiation Research Project assisted enormously in this effort. The project faculty include:

Professor Frank A. E. Sander, Harvard Law School

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

Professors Sarah Cole, Camille Hébert, 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, Scott Hughes, Kim Kovach, Peter Adler, Jose Feliciano, Eileen Pruett, and Jack Hanna.

UNIFORM MEDIATION ACT (1999)

SECTION 1. DEFINITIONS. In this Act:

(1) "Mediator" means an impartial individual or entity who assists the disputants' efforts to negotiate the resolution of their dispute.

(2) "Mediation" means a negotiation facilitated 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 or governmental entity appoints a mediator, or two or more non-aligned disputants select a mediator;

(B) by (i)a [mediation participant] in the presence of the mediator;(ii) the mediator; or (iii) the [disputants or their representatives] when asked to communicate by the mediator, if their communications relate to the subject of the mediation; and

(C) before the disputants make a record of their agreement, the mediator announces that the mediation has been concluded, only non-aligned disputants remain as participants, or there is no communication between the mediator and any of the parties relating to the dispute within [number] days. The mediator and the parties may shorten or extend this time by

agreement.

(4) "Mediation consultation" means a communication for purposes of initiating, considering, or reconvening a mediation or retaining the mediator between an individual and

(A) a mediator who is appointed by a court or government entity,

(B) a neutral association, agency, board, or commission that administers mediation or is involved in the appointment of mediators, or

(C) an individual regularly practicing mediation.

(5) "disputant" means an individual or entity who attends a mediation and who:

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

(B) was asked by a court, governmental entity or mediator to appear for mediation, or makes a record of that individual's agreement to mediate.

(6) "Representative of a disputant" means that person's attorney or other individual asked to assist that person in expressing views.

(7) "Mediation participant" means an individual who attends the mediation at the behest of the mediator or a disputant.

Reporter's Working Notes

In general

Mediation serves to overcome barriers to negotiated settlement and can make important contributions to society by promoting the earlier and better resolution of disputes, as well as a more civil society. Disputant participation in the mediation process, often with counsel, allows for results that are tailored to the parties' needs, and leads the parties to be more satisfied with the resolution of their disputes.

Mediators typically promote a candid and informal exchange regarding events in the past, as well as the parties' perceptions of and attitudes toward these events, and encourage parties to think constructively and creatively about ways in which their differences might be resolved. Many contend that 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. *See, e.g.,* Lawrence R. Friedman and Michael L. Prighoff, *Confidentiality in Mediation: The Need for Protection,* 2 Ohio St. J. on 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. These justifications for mediation confidentiality resemble those underlying other communications privileges, such as the attorney-client privilege and various other counseling privileges. *See generally* Developments in the Law-Privileged Communications, 98 Harv. L. Rev. 1450 (1985).

Some authorities contend 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 in the context of other investigations, judicial processes, or the media. For this reason, a number of states have chosen **to** prohibit a mediator's disclosure of mediation conversations to a judge or other officials in a position to affect the decision in a case. Del. Code Ann. 19, § 712(c); Fla. Stat. § 760.34(1); Ga. Code Ann. § 8-3-208(a); Neb. Rev. Stat. §§ 10-140, 48-1118(a). This prohibition also reduces the likelihood that a mediator will use the threat of disclosure or recommendation to pressure the parties to accept a particular settlement. National Standards for Court-Connected Mediation

Programs (Center for Dispute Settlement 1994); Society for Professionals in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts (1991). The public confidence rational also has been extended to rationalize the need to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable parties. See 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).

State policy seems to favor mediation confidentiality. More than three quarters of the states have enacted mediation privilege statutes for some kinds of disputes. Indeed, state legislatures have enacted more than 200 mediation confidentiality statutes. *See* ROGERS & MCEWEN, MEDIATION LAW, POLICY, PRACTICE, Appendices A and B. (2nd ed. 1994 & supp. 1998). Scholars and practitioners alike generally support a mediation privilege. For commentary favorable to a privilege, *see* Kirtley, *supra;* Freedman and Prighoff, *supra;* Jonathan M. Hyman, *The Model Mediation Confidentiality Rule,* 12 Seton Hall Legis. J. 17 (1988). 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, MEDIATION LAW, POLICY, PRACTICE Ch. 8(2nd ed. 1994 & supp. 1998).

At the same time, provisions expanding confidentiality are in derogation of policies making "every person's evidence" available, 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 LITIGATION 5 (May, 1984) and 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 Company, 854 F.2d 900 (6th Cir. 1988), cert. den. sub. nom. Cincinnati Post v. General Electric

Co., 489 U.S. 1033 (1989)

To be effective in promoting candid communications, the contours of the confidentiality should be clear to the parties before they speak candidly about sensitive information in a mediation. The need for clarity weighs heavily in favor of structuring and wording the statute so that its provision will be easily understood, especially because mediators often are not lawyers and mediation parties are not always represented by counsel.

The need to make the contours of confidentiality clear at the beginning makes it important that the states take a uniform approach to mediation. When the mediation begins, the participants cannot be certain whether litigation concerning this matter will arise in the court of another state. Also, with telephone mediation, and other mediations conducted in whole or in part through an electronic medium, the participants may not be able to predict a future ruling that specifies the state where the mediation occurred.

1(A)(1). "Mediation"

The Draft definitions reflect balancing among competing considerations. One goal is to promote mediation in many contexts, including community and private mediation as well as mediation programs connected to courts and public agencies. At the same time, another goal is to avoid misuse of the privilege that might result in the loss of relevant evidence while not promoting the purposes underlying the privilege. For example, under a privilege that defines mediation broadly, parties could strategically claim to have been involved in a mediation by virtue of their mere participation in a group discussing areas of disagreement. Moreover, mediators are not licensed like other professionals who are protected by privilege, a fact that could make it difficult to prove 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 likelihood of abuse.

Existing mediation confidentiality statutes reflect three primary approaches to addressing such competing considerations and dilemmas. The most common approach has been to extend the evidentiary laws of privilege only to a specified type of mediation, particularly for mediation offered by a particular

institution, such as a publicly funded entity. *See, e.g.,* Iowa Code § 216.B (civil rights commission); Ark. Stat. Ann. § 11-2-204 (Arkansas Mediation and Conciliation Service); Ariz. Rev. Stat. Ann. § 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. § 4-6-9-4 (Consumer Protection Division); Minn. Stat. Ann. § 176.351 (workers' compensation bureau). A second approach 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. *See, e.g.,* Ohio Rev. Code § 2317.023. Like the second approach, a third approach defines mediation broadly. These statutes vary from the second approach by making the privilege 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. Evid. Code § 1119, 1120; Mont. Code Ann. § 26-1-811.

The Draft combines some of each approach in balancing the tensions between broad application and danger of abuse or injustice. It narrows the definition of mediation by requiring a triggering event: the appointment or engagement of a mediator. 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* §9:10. In addition, Section (d)(3) of the Draft makes the privilege inapplicable in certain adult criminal proceedings, a controversial provision that is discussed below. Finally, the Draft does include an exception in a situation of manifest injustice, as discussed later in the comments.

1(a)(2) "Mediator"

Definitional problems also emerge in determining whether to define 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 again moderates between competing tensions. A definition of

mediation could be drafted to exclude related processes that are not the type of mediation contemplated by the Drafters. However, to narrow the definition to purely facilitative mediation could lead to attempts to thwart the privilege if the mediator gave an opinion concerning the likely outcome if the parties did not settle, and carries potential for abuse. The Draft definitions provide only two distinguishing factors (1) a mediator not aligned with a disputant and (2) assistance is through negotiation.

[The Academic Advisory Faculty recommended the term "impartial individual or entity" over other alternatives considered by the Drafting Committee, including "neutral individual or entity" and "an individual or entity not involved in the dispute." The term "impartial" encompasses 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 term "impartial" would be better than "not involved in the dispute" because the former appropriately includes, for example, the university mediation program for student disputes that, if not resolved, might be a basis for university disciplinary action.]

The emphasis on negotiation is designed to exclude adjudicative processes, not to distinguish among styles or approaches to mediation. An earlier draft used the word "conducted," but "facilitated" was substituted to emphasize that, in contrast to an arbitration, the mediator has no authority to decide the dispute.

1(A)(3). "Mediation Communications"

The privilege is designed to encourage candor and therefore is meant to cover only what is said orally, through conduct, or in writing or other recorded activity. In Uniform Rule of

Evidence 801, a "statement" is defined 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 location 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 striking another person during the mediation session would not be a "communication" because it was not meant by the actor as an assertion.

An issue related to the definitional issues is at what point during the conversations related to mediation the discussions should be covered by the privilege – that is, when the mediation begins and ends for purposes of the application of the privilege. On the one hand, parties might be more likely to use a mediator if 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 remotely be deemed one to a mediator would frustrate 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 mediators do not have to be licensed or associated with 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 disputant. 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 §§ 1115, 1119. An Iowa statute covers communications between a disputant and the mediator "relating to the subject matter of a mediation agreement." Iowa Code § 216.B.

The specificity results from a need to preclude the abuse of the privilege by a person who later claims a conversation with one other person to be a mediation. This potential abuse seems even greater when the privilege will extend to conversations that do not even include the other disputant. At the same time, the

provision would add to the length of the Act, as well as introduce a concept of a mediation consultation that will be new to most mediation practitioners, lawyers, and courts.

The problem with the "relating to the subject matter of a mediation agreement" language used in the Iowa statute is that it is too narrow to encourage the disputants' frank discussion of a variety of differences. For example, a dispute over the quality of the washing machine may not be settled unless the company apologizes for an unrelated matter, the insult made by the delivery worker to the buyer's child.

This Draft adopts the California approach, which creates complexity and still does not cover all pre-mediation conversations. The Draft omits from coverage conversations with a private mediator not regularly in the business of mediation and not appointed by a court or agency.

[The Academic Advisory Faculty recommends a return to the more common approach of leaving the interpretation to the courts. Unlike those statutes that are silent, the Academic Advisory Faculty would make clear that the early conversations about the mediation should typically be covered. At the same time, the courts would have the discretion to make the privilege inapplicable if they doubt the connection between the conversation and mediation. They would substitute the following language:

> *"Mediation communication" may also encompass a communication for purposes of initiating, considering, or reconvening a mediation or retaining the mediator.]*

The Draft's 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 of the confidentiality privilege. The notice of mediation in court-related and administrative programs provides one initiating event. The private selection of a mediator provides the other initiating event. When the mediator is not present, the communications are covered only if the mediator asks them to converse. This limitation protects against covering a separate conversation in which the parties may not expect confidentiality.

The Draft deems the mediation concluded by settlement, settlement by all but one side, or the elapse of unspecified time, except as extended by agreement. The problem with this approach, which is patterned after the California statute, [Cal. Ev. § 1125], is that it encourages a routine practice of extending mediation in the form mediation agreement. It could result in covering communications unrelated to the dispute for years to come.

[The Reporter suggests replacing the last phrase time period and waiver by agreement with the following:

. . . or the mediation session is concluded without plans for a future session.]

1(A)(5). "Representative of a Disputant"

The Draft's definition of "representative of a disputant" 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 disputant or the mediator. *See, e.g.,* Kan. Stat. Ann. § 60-452a. Others more broadly refer to any information received in the course of a mediation, including pre-mediation documents. *See, e.g.,* Ky. Rev. Stat. Ann. § 336.153. The new California statute applies to all participants. Cal. Evid. Code § 1119. The Draft's middle ground would cover only those persons who were present and acting under the authority of the disputant.

1(a)(5) "Disputant", 1(a)(6) "Representative of a disputant", and 1(a)(7) "Mediation participant"

These definitions permit the statute to make distinctions about the degree of protection given to different persons involved in the mediation process for whom there are different public policy justifications for confidentiality protections. The Draft's definition of "representative of a disputant" broadens the language in Uniform Rule of Evidence 502(a) regarding the lawyer-client privilege to include non-lawyer advocates or support persons.

SECTION 2. Confidentiality: Protection Against Compelled Disclosure; Admissibility

(a) A disputant may refuse to disclose, and prevent any other individual from disclosing, mediation communications in a civil, juvenile, criminal misdemeanor, or administrative proceeding.

(b) A mediator may refuse to disclose, and prevent any other individual from disclosing, that mediator's communications during mediation and may refuse to provide evidence of mediation communications in a civil, juvenile, criminal misdemeanor or administrative proceeding.

(c) An individual waives the rights conferred in (a) and (b)if the individual either

(1) acknowledges that the individual does not seek the protection, or

(2) voluntarily discloses a significant part of a mediation communication or mediation consultation in a manner that is inconsistent with maintaining the confidentiality. Such waiver by disclosure shall be limited to the extent of the disclosure. This rule does not apply if the disclosure itself is privileged.

The protection is not waived unless all persons who are entitled to the protection waive it.

Reporter's Working Notes

2(a) and (b). Compelled Disclosure; Admissibility

These sections set forth the fundamental evidentiary privilege for mediation communications.

A critical component of this general rule is its designation of the holder – i.e., the person who can raise the privilege and waive the privilege. Statutory mediation privileges are somewhat unique 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 I.L.C.S. 20/6; Ind. Code Ann. § 20-7.51-13; Iowa Code § 679.12; Ky. Rev. Stat. Ann. § 336.153; Me. Rev. Stat. Ann. tit. 26 § 1026; Mass. Ann. Laws ch. 150, § 10A. Those statutes that designate a holder seem to be split between those that make the parties the joint and sole holder of the privilege and those that make the mediator an additional holder. *Compare* Kan. Stat. Ann. § 23-606; Fla. Stat. Ann. § 61.183; Ark. Stat. Ann. § 11-2-204, N.C. Gen. Stat. § 411-7; Or. Rev. Stat. § 107.785 with Wash. Rev. Code Ann. § 7.75.050; Ohio Rev. Code § 2317.023; Cal. Evid. Code § 1122. 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 communicator.

The differences reflect varying rationales for the mediation privilege. For some, the perceived neutrality and privacy of the mediation process 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 parties' reasonable expectations of confidentiality. Under this rationale, the parties would be a holder of the privilege.

The Draft adopts the bifurcated approach taken by several statutes, such as the Ohio statute. Ohio Rev. Code § 2317.023. The disputants hold the privilege and 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 communications and testimony.

This approach gives weight to the primary concern of each rationale. If all parties agree, any disputant, representative

of a disputant, or mediation participant can be required to disclose what they 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 even can block any testimony about what the mediator said, as well as evidence of the mediator's notes.

2(c). Waiver

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

[Because waiver is an evidence concept that is similar across jurisdictions, the Academic Advisory Faculty recommends omitting the definition of waiver as a means to simplify the statute. It suggests instead the following version of (c):

(c) The protections in (a) and (b) may be waived, but only if all persons who hold the protection waive it.]

Reporter's Note on Alternative Structures For Protecting Confidentiality in Mediation

The protection of confidentiality in mediation may be structured according to three basic paradigms: an evidentiary privilege to compelled disclosure; a provision making witnesses incompetent to testify about mediation communications; and a provision for an evidentiary exclusion and discovery limitation. Each will be discussed in turn.

1. The Evidentiary Privilege Approach

Most mediation confidentiality provisions are structured as privileges for communications in mediations, in the manner currently taken by the Draft. That is, the statute operates to allow a person to refuse to disclose and to prevent another from

disclosing particular communications. *See, e.g.,* Ohio Rev. Code §2317.023; Fla. St. Ann. §44.102; Wash. Rev. Code § 5.60.072. *See generally,* Nancy Rogers and Craig McEwen, Mediation: Law, Policy, Practice §§ 9:10-9:17 (1994 and Supp. 1998). By narrowing the protection to such communications these provisions allow for enforcement of mediation clauses, for example, by permitting evidence as to whether a mediation occurred, and who attended,as well as evidence of actions taken, such as money received, during a mediation. *See generally Developments in the Law-Privileged Communications,* 98 Harv. L. Rev. 1450 (1985). Also, 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 the evidence without serving either of the purposes underlying the confidentiality. For example, if those involved in a divorce mediation draft a schedule of the couple's assets and their values, a stranger to the mediation cannot keep one of the mediation parties from using that document in later litigation.

2. The Witness Incompetency Approach

An alternative structure for the protection of confidentiality in mediation is to use a witness incompetency model. Such a model has been used in one state, *see, e.g.,* Cal. Ev. Code sec. 703.5, and is under discussion by the Revised Uniform Arbitration Act Drafting Committee to prevent arbitrators from being examined about the basis for their awards. Such a provision might state:

> (b) Mediators shall not be competent to testify or provide evidence in any civil, juvenile, criminal misdemeanor, or administrative proceeding regarding mediation communications occurring in a mediation that they conducted. Mediation disputants, [representatives and participants] shall not be competent to testify in any civil, juvenile, criminal misdemeanor, or administrative proceeding regarding mediation communications.

The witness incompetency model has not been used in most mediation confidentiality statutes, and therefore the adoption of this approach would constitute a drastic change for most states.

One argument in favor of adopting this approach is to

facilitate greater consistency between arbitration and mediation on the issue of confidentiality. However, the fundamental differences between these two processes counsels in favor of a more nuanced approach. In particular, arbitration is an adjudicatory process in which the arbitrator renders a final and binding decision in the case. Compelling an arbitrator to testify about his or her decisional process would heighten the potential for judicial review of the arbitration award, thereby defeating the arbitration process' central goals of decisional discretion and finality.

Mediation, on the other hand, is a consensual process in which the parties decide the dispute themselves, with the assistance of the mediator. While mediation agreements may be enforced like any other contract (see related provision in Section 4: Quality), it is the parties' participation in the development of the resolution of to the dispute, and their ultimate and uncoerced approval of it, that gives the mediation agreement its greatest authority. It is this frank and uninhibited communication that serves as a primary justification for protecting of the confidentiality of the process.
Finally, the application of a witness incompetency approach to mediation would produce substantial anomalies. Strangers to the mediation would be able to prevent the use of evidence about it, a result unnecessary to preserve the disputants' expectations of confidentiality or the mediator's desire to be able to block admission of their own mediation communications. The witness incompetency approach also is too narrow to accomplish the goals listed above, thereby failing to protect the parties' expectations regarding the confidentiality of the mediation communications. For example, under a witness incompetency model, a mediation disputant would not be able to prevent the use of documentary evidence from the mediation session. Moreover, unless the statute also makes mediation participants and representatives incompetent as witnesses, these persons would be able to testify about mediation communications despite any objections by the disputants or the mediator.

These 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. Evidentiary Exclusion and Discovery Limitation

Beyond privilege and witness incompetency, a third possible structure is an evidentiary exclusion and discovery limitation for communications during the mediation process. This would broaden existing protections in Uniform Rule of Evidence 408 and Federal Rules of Civil Procedure 26. Such a provision might state:

> (b) Except as otherwise provided in this Section, no evidence of a mediation communication or mediation consultation is admissible or subject to discovery in any civil or non-felony criminal proceeding in which evidence can be compelled.
>
> (c) A mediation communication or mediation consultation is not made inadmissible by this Section if the mediator and all participants make a record of their agreement to disclose the mediation communication or mediation consultation.

Like the witness incompetency structure, the exclusion/discovery limitation can be taken advantage of by any party to future litigation, even by strangers to the mediation. Conversely, mediation disputants who are not parties to the litigation could not prevent disclosure if the litigation parties stipulate to discoverability or admissibility. Uniform Rule of Evidence 103; Federal Rule of Civil Procedure 29.

(d) There is no protection under (c):

(1) For a record of an agreement by two or more parties.

(2) For communications evidencing abuse or neglect when offered in proceedings initiated by a public agency for the protection of a child or others protected by the law.

(3) For reports of professional misconduct when made to the agency charged by law to oversee professional

conduct.

(4) To the degree ruled necessary by a court or agency if a party files a claim or complaint against the mediator.

(5) For mediation communications that threaten to cause another bodily injury or unlawful property damage.

(6) If any party or the mediator uses or attempts to use the mediation to commit or plan to commit a crime.

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.

Reporter's Working Notes

2(d)(1). Record of an agreement.

This is a common exception that would permit evidence of a recorded agreement that would apply to agreements about how the mediation will be conducted as well as settlement agreements to be enforced. The words "record of" refer to written and signed contracts, those recorded by tape recorder and ascribed to, as well as other means to establish a record.

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 parties came to an agreement 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 not permitting evidence of oral settlements reached during mediation is that a less legally

sophisticated party who is accustomed to the enforcement of oral settlements reached in negotiations might assume the admissibility of evidence of oral settlements reached in mediation. However, a number of courts or statutes limit the confidentiality exception to signed written agreements and one would expect that mediators and others will soon incorporate knowledge of this into their practices. *See* Ryan v. Garcia, 27 Cal. App.4th 1006, 33 Cal. Rptr.2d 158 (1994)(privilege statute precluded evidence of oral agreement); Ohio Revised Code § 2317.02-03; 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). There are means to preserve the agreement quickly. For example, parties can agree that the mediation has ended and 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 (1st Dist. 1996).

2(d)(2). Evidence of abuse or neglect.

An exception for child abuse is common in domestic mediation confidentiality statutes. *See e.g.*, Ohio Rev. Code § 2317.02. This Draft version broadens the coverage to include other classes of persons that the state may have chosen to protect by statute as a matter of policy, such as the elderly or those with diminished mental capacity. As with other statutes, the exception does not apply in private actions, such as divorce, because such an approach would not permit free interchange in domestic mediation programs. *Id.*

2(d)(3). Reports of Professional Misconduct.

This exception permits any participant to report unprofessional conduct. In re Waller, 573 A.2d 780 (D.C. App. 1990). The evidence would still be protected in other types of proceedings. This Section of the Draft does not speak to the issue of 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. Rather, such disclosures are treated in Section 3 regarding a mediator's specific obligations regarding disclosure.

2(d)(4). Complaints against the mediator.

This exception follows statutes in several states that permit the mediator to defend, and the party to secure evidence, in the occasional claim against a mediator. *See, e.g.,* Ohio Rev. Code sec. 2317.023; Minn. Stat. sec. 595.02; Fla. Stat. sec. 44.102; Wash. Rev. Code sec. 5.60.070. 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 himself or herself against such a claim.

2(d)(5). Threats of bodily injury or property damage.

The disputants do not need to be encouraged to threaten one another during mediation. Disclosure would serve public interests in protecting others. *See, e.g.,* Wyo. Stat. sec. 1-43-103; Kan. Stat. Ann. sec. 23-606 (information necessary to stop commission of crime).

2(d)(6). Commission of a crime.

Most mediation privilege statutes do not contain this exception. As the mediation privilege applies in broader contexts, however, such an exception seems more important to prevent abuse. A few of the Florida mediation confidentiality statutes contain an exception covering both fraud and crime. *See, e.g.,* Fla. Stat Ann. sec. 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 civil cases frequently include allegations of fraud, with varying degrees of merit.

Last sentence

This is a common statement in mediation privilege statutes as well as Uniform Rule of Evidence 408, simply to clarify that this is a privilege, not an exclusionary rule. *See* Minn. Stat. § 595.02; Fla. Stat. § 44.102; Ohio Rev. Code § 2317.023; Wash. Rev. Code § 5.60.070.

[The Faculty Advisory Committee urges the Drafting Committee to adopt two additional exceptions:

(d)(7) To establish the validity or invalidity of a

recorded agreement.

(d)(8) When the court determines, after a hearing, that disclosure is necessary to prevent a manifest injustice of such magnitude as to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

The reason for the first is to preserve contract defenses, 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).

The exception for "manifest injustice" seems necessary to take care of unforeseen problems. This is particularly important because the confidentiality has been extended to mediators who are neither connected to any public agency nor have been certified or licensed by any governmental body. It is also more important now that the Draft extends to some kinds of criminal proceedings. 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. Appl. 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 new federal Administrative Procedure Act amendment for mediation has such an

exception. 5 U.S.C. § 574. Ohio has a "manifest injustice" provision and the Supreme Court of Ohio has given it a narrow construction. See Ohio Rev. Code § 2317.023. The last Draft has been criticized for the failure to include such a provision. Alan Kirtley, *A Mediation Privilege Should Be Both Absolute and Qualified*, 5 Disp. Resol. Mag. 5 (Winter, 1998).

This provision adds an element of qualification to an otherwise absolute evidentiary privilege by permitting some measure of judicial balancing, and therefore some uncertainty in the application of the privilege. Even then, however, the Draft strikes a balance between competing policies by requiring the proponent of the exception to meet the higher "manifest injustice" standard of proof.

SECTION 3. CONFIDENTIALITY: NON-DISCLOSURE BY THE MEDIATOR.

(a) Unless all of the parties agree or the mediator is compelled to testify pursuant to an exception in 2(d) of the statute, a mediator shall not disclose mediation communications or mediation consultations outside the mediation including a report, assessment, evaluation, recommendation, or finding of any kind by the mediator to others outside the mediation, including to the judge, or other appointing authority, who may make rulings on or persons who might investigate the matters in dispute.

(b) A mediator does not violate the general rule of non-disclosure:

(1) if the mediator testifies or provides evidence because the matter is not privileged under (d).

(2) for a report to appropriate authorities if federal or state law that the mediator in good faith believes to be

applicable requires the mediator to report crime or neglect or abuse of a protected population to appropriate authorities.

(3) For a record of an agreement by two or more parties.

(4) For reports of professional misconduct when made to the agency charged by law to oversee professional conduct.

(5) To file a claim or complaint with the appropriate authority or court against the mediator.

(6) For mediation communications that threaten to cause another bodily injury or unlawful property damage.

(7) If any party or the mediator uses or attempts to use the mediation to commit or plan to commit a crime.

Reporter's Working Notes

3(a). Nondisclosure by mediator.

Mediators are not licensed and therefore are not general subject to discipline, as lawyers are, for voluntary disclosure of mediation communications. 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 a 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 recommendations of a blue ribbon group that issued national Standards for Court-Connected Mediation Programs. *See* QUALIFYING DISPUTE RESOLUTION PRACTITIONERS: GUIDELINES FOR COURT-CONNECTED PROGRAMS (1998). A statutory prohibition seems warranted, and a few statutes now do so. *See, e.g.*, Fla. Stat. Ann. § 373.71, Article XIII(8); Cal. Evid. Code § 1121; Tex. Civil Practice and Remedies Code § 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. 2000g-2(b)(disclosure by Community Relations Service mediators); Del. Code Ann. 19, § 712(c); Fla. Stat. § 760.32(1); Ga. Code Ann. § 8-3-208(a).

The Draft does not prohibit disclosure by the parties. Rather, the parties are free to enter a secrecy agreement, 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 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).

3(b). Exceptions to rule of mediator non-disclosure.

These situations involve instances in which there is a strong public interest in disclosure. The exception for duties to report crimes does not make evidence of crimes admissible. The question of admissibility is covered under the testimonial privilege.

The Faculty Advisory Committee recommends inclusion of an exception for monitoring the quality of the program. This is an important component of maintaining program quality and agencies should be encouraged to do this without fear that they are violating a statute. A number of statutes and rules contain this exclusion. Fla. Stat. sec. 44.102(5); Wisc. Stat. sec. 904.085; N.C. Rules of Court, Rules of

the North Carolina Supreme Court for the Dispute Resolution Commission, Standards of Professional Conduct, D;

SECTION 4. QUALITY OF MEDIATION.

(a) Qualifications. Courts and administrative agencies that refer parties to a mediator or pool of mediators may establish qualifications for these mediators. A mediator shall disclose his or her qualifications if requested by a mediation disputant or representative of a disputant.

(b) Immunity. Except as provided by [section or common law judicial immunity doctrines], a mediator shall not be immune from civil liability for matters arising out of the mediation. Any contractual provision purporting to disclaim such liability shall be void as a matter of public policy.

(c) Right to counsel. A disputant should not be prevented from bringing legal counsel to mediation sessions.

REPORTER'S WORKING NOTES

4(a). Qualifications

No consensus has emerged in the law, research, and commentary as to those mediator qualifications that will best produce effectiveness or fairness. At the same time, the law and commentary recognize that the quality of the mediator is important and that the courts and public agencies referring cases to mediation have a heightened responsibility to assure it. 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. Nancy H. Rogers and Craig A. McEwen, Mediation: Law, Policy, Practice sec. 11:02 (2d ed. 1994).

By authorizing the establishment of qualifications, this statute recognizes the heightened importance of qualifications when a court of administrative agency has referred the parties and brings this to the attention of these authorities. Regarding recognition of the importance of qualifications for courts and administrative agencies, see National Standards for Court Connected mediation Programs (Center for Dispute Settlement, D.C. 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).

Consistent with traditional notions of informed consent, the Draft also establishes integrity with respect to qualifications as a mediator duty. The requirement of disclosure extends to private mediators with no connection to courts or administrative agency, thus promoting the marketplace as a check on quality among prospective mediation clients.

This approach of authorizing qualifications and 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. Experience mediating would seem important, because this is the one aspect of the

mediator's background that has been shown to correlate with effectiveness in reaching settlement. See, e.g., Pearson & 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). Conflicts of interest would typically be a part of that disclosure, though the facts to be disclosed in any particular case will depend upon the circumstances. In some situations the parties 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.

4(b). Immunity

Mediators are not licensed, so the only means to hold them accountable outside the programs supervised by courts or public agencies is to preserve the possibility of civil liability. The argument made in favor of a broad grant of immunity regarding mediators has been to encourage persons to become mediators. However, the professional organizations that have considered this argument and have weighed it again the need for accountability have come down in favor of leaving the mediators accountable. See National Standards for Court Connected Mediation Programs (Center for Dispute Settlement, D.C. 1992); Task Force Report, New Jersey Supreme Court Task Force on Complementary Dispute Resolution, 124 N.J. L. J. 90, 96 (1989), Final Report 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 despite tacit and sometimes explicit authority for such legal claims. See e.g., Cal. Food & Agric. § 54458; see generally Rogers & McEwen, Mediation: Law, Policy, and Practice, supra, at §11:03. Therefore, it seems unlikely that persons will hesitate to mediate 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 reason for leaving existing immunities intact is that most such statutes or common law doctrines protect mediators who are supervised by a court of public agency, posing less threat of

lack of accountability. See generally Nancy H. Rogers and Craig A. McEwen, Mediation: Law, Policy, Practice sec. 11:03 (2d ed. 1984). It is the intent of the Draft to permit the state legislatures to designate whether any new immunities will supersede the provisions of the Act.

> Some state statutes set detailed standards for mediator conduct, and provide structures for the filing of complaints against mediators. See, e.g., West's F.S.A. § 44.106, West's F.S.A. Mediator Rule 10.010. The Faculty Advisory Committee suggests that most of these standards may be left to private or local enforcement. Only those provisions that are universally important – prohibition against mediator reports to judges and investigators, assurance of the right to bring legal counsel, and disclosure of qualifications – should be imposed by statute.

4(c) Right to counsel.

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 review of the draft settlement agreement. See e.g., Cal. Fam. Code § 3182; McEwen, et. al., supra 79 Minn. L. Rev. 1317, 1345-1346 (1995). A number of commentators, however, have 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. Similarly, concern has been raised the right to 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 Public Civil Justice _____, manuscript on file. Most statutes are either silent on whether the disputants' lawyers can be excluded

or provide that the disputants can bring lawyers to the sessions. This Draft takes the approach of letting the disputants decide whether to bring legal counsel to mediation sessions.

Although the Draft does not speak to advocates who are not licensed lawyers, it is good practice to permit the pro se disputant to bring an advocate or assistant who is not a lawyer if the disputant cannot afford a lawyer. This seems especially important to help balance negotiating power if the other disputant is represented by legal counsel. The difficulty in distinguishing by law between helpful lay advocates and persons who would interfere with the process without assisting the disputants led the Faculty Advisory Committee to suggest that only legal counsel be mentioned in the statute.

The remaining sections have not been reviewed by the Faculty Advisory Committee and are presented for preliminary discussion only:

SECTION 5. ENFORCEMENT OF AGREEMENTS TO MEDIATE, MEDIATED AGREEMENTS

(a) A written agreement to submit any existing controversy to mediation, or a provision in a written contract to submit to mediation any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(b) On application of a party showing an agreement described in (a), and the opposing party's refusal to mediate, the Court shall order the parties to proceed with mediation. However, if the opposing party denies the existence of the agreement to mediate, the Court shall proceed summarily to the determination of the issue so raised and shall order mediation if found for the moving party; otherwise the application shall be denied.

(c) If an issue referable to mediation under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under (b), the application shall be made therein. Otherwise, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to mediation shall be stayed if an order for mediation or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for mediation shall include such stay.

(e) An order for mediation shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or ground for the claim sought to be mediated have not been shown.

(f) Upon application of a party to a mediated settlement agreement who was represented by legal counsel in the review and acceptance of the agreement, the Court shall confirm the agreement, unless within the time limits hereinafter imposed grounds are urged for failing to enforce the agreement.

(g) Upon application of a party to a mediated settlement agreement, the Court shall decline to confirm the agreement if any defense recognized by law to the enforcement of a contract is established.

(h) Upon the granting of an order confirming a mediated

settlement agreement, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

(i) Except as otherwise provided, an application to the court under this Act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the services of a summons in an action.

(j) The term "court" means any court of competent jurisdiction of this State. The making of an agreement to mediate in this State confers jurisdiction on the court to enforce the agreement under this Act and to enter judgment on a mediated agreement reached with assistance of legal counsel thereunder.

(k) An initial application shall be made to the court of the [county] in which the agreement provides the mediation shall be held or, if the mediation has been held, in the county in which it was held. Otherwise the application shall be made in the [county[where the other party resides or has a place of business or, if the other party has no residence or place of business in this Sate, to the court of any [county]. All subsequent

applications shall be made to the court hearing the initial application unless the court otherwise directs.

Reporter's Working Notes

When persons agree to mediate their dispute, the courts have been willing to enforce that agreement by dismissing any litigation filed prior to mediating. [See, e.g. Annapolis Professional Firefighters Local 1926, IAFF, AFL-CIO v. City of Annapolis, 100 Md. App. 714, 642 A.2d 889 (1993); Design Benefit Plans, Inc., 940 F.Supp. 200 (N.D. Ill. 1996); De Valk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 335-337 (7th Cir. 1987).] However, it is not clear that the courts will order specific performance of an agreement to mediate or will provide summary enforcement. See generally, Rogers & McEwen, Mediation: Law, Policy, Practice §§ 8:01-8:02 (2d ed. 1994 & 1998 Supp. This Draft tracks pertinent portions of the Revised Uniform Arbitration Act, and provides for similar enforcement of mediation agreements or clauses in contracts.

In an effort to make use of mediation more attractive, and thereby the more effective resolution of disputes, the Act also provides for summary enforcement, again drawing on pertinent provisions of the Revised Uniform Arbitration Act as a model. This portion of the Draft applies only to those parties represented by legal counsel in the formation of the settlement agreement; otherwise this might be subject to abuse against the unwary in the same manner as cognovit notes in the past. The pro se party could still apply to the court for summary enforcement against a represented party.

SECTION 6. PUBLIC RECORDS AND PUBLIC MEETINGS LAWS.

[Each state should indicate whether the statute supersedes public records and public meetings laws.]

REPORTER'S WORKING NOTES

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, and 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. In this regard, 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. Or. Rev. Stat. §§ 6.224, 6.226, 6.228, 6.230.

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to the subject matter among States that enact it.