DRAFT

FOR DISCUSSION ONLY

UNIFORM MEDIATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

APRIL, 1999

UNIFORM MEDIATION ACT

With Prefatory Note and Reporter's Notes

DRAFTING COMMITTEE ON UNIFORM MEDIATION ACT

MICHAEL B. GETTY, Room 2510, Richard J. Daley Center, 50 W. Washington Street, Chicago, IL 60602, Chair
PHILLIP CARROLL, 120 E. Fourth Street, Little Rock, AR 72201
DAVID CALVERT DUNBAR, P.O. Box 2990, Jackson, MS 39207
JOSE FELICIANO, 3200 National City Center, 1900 E. 9th Street, Cleveland, OH 44114-3485, American Bar Association Member
RICHARD O. GREGERSON, 300 S. Phillips Avenue, Suite 300, Sioux Falls, SD 57104-6322
NANCY ROGERS, Ohio State University, College of Law, 55 W. 12th Avenue, Columbus, OH 43210, National Conference Reporter
FRANK A. E. SANDER, Harvard University Law School, Cambridge, MA 02138, American Bar Association Member
BYRON D. SHER, State Capitol, Suite 2054, Sacramento, CA 95814
MARTHA LEE WALTERS, Suite 220, 975 Oak Street, Eugene, OR 97401

EX OFFICIO

GENE N. LEBRUN, P.O. Box 8250, 9th Floor, 909 St. Joseph Street, Rapid City, SD 57709, President
STANLEY M. FISHER, 1100 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115-1475, Division Chair

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, Executive Director
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, Executive Director Emeritus

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195

ABA SECTION OF DISPUTE RESOLUTION
DRAFTING COMMITTEE ON MEDIATION ACT

THE HON. CHIEF JUSTICE THOMAS J. MOYER, Co-Chair, Ohio Supreme Court, 30 E. Broad Street, Columbus, OH 43215

MS. ROBERTA COOPER RAMO, Co-Chair, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Sunwest Bldg., Ste. 1000, Albuquerque, NM 87102

THE HON. MICHAEL B. GETTY, NCCUSL Representative, Room 2510, Richard J. Daley Center, 50 W. Washington Street, Chicago, IL 60602

THE HON. CHIEF JUDGE ANNICE M. WAGNER, Court of Appeals of the District of Columbia, 500 Indiana Ave., NW, Washington, DC 20001

JAMES DIGGS, PPG Industries, 1 PPG Place, Pittsburgh, PA 15272

JOSE FELICIANO, Baker & Hostetler, 3200 National City Center, 1900 East 9th St., Cleveland, OH 44114

JUDITH SAUL, Community Dispute Resolution, 120 W. State Street, Ithaca, NY 14850

FRANK A.E. SANDER, Harvard Law School, Cambridge, MA 02138

NANCY ROGERS, Ohio State University, College of Law, 55 W. 12th Avenue, Columbus, OH 43210, Coordinator

RICHARD C. REUBEN, Reporter, Harvard Law School, 506 Pound Hall, Cambridge, MA 02138

Preface

The Draft reflects the Reporter's suggested language on confidentiality and quality in mediation, in response to suggestions made by the ABA and NCCUSL Drafting Committees at their last meeting. The research and comments benefitted from the work of an Academic Advisory Faculty drawn from four universities who donated their time to assist this project. Richard C. Reuben from the Harvard Negotiation Research Project at Harvard Law School also assisted enormously in this effort. The project faculty include:

Professor Frank E.A. Sander, Harvard Law School;
Professors Leonard L. Riskin, James Levin, Barbara J. MacAdoo, and Chris Guthrie, University of Missouri-Columbia School of Law;
Professors James Brudney, Sarah R. Cole, Camille Hébert, Nancy H. Rogers, Joseph B. Stulberg, Laura Williams, and Charles Wilson, Ohio State University College of Law;
Professor Craig McEwen, Bowdoin College;
Professor Jean R. Sternlight, Florida State University College of Law.

A number of others in the dispute resolution field have shared their expertise with this group, including Christine Carlson, Scott Hughes, Kimberlee K. Kovach, Peter Adler, Jose Feliciano, Eileen Pruett, and Jack Hanna.

UNIFORM MEDIATION ACT (1999)

SECTION 1. DEFINITIONS. In this Act:

(a) "Mediation" means a process in which disputants negotiate a dispute with the assistance of a mediator toward a resolution that is to be the disputants' decision.

(b) "Mediator" means an impartial person or persons appointed by a court or government entity, or engaged by disputants through an agreement evidenced by a record.

(c) "Disputant" means a person who attends a mediation and:

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

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

(d) "Mediation communication" means a statement made as part of a mediation unless the disputant would not be reasonable in expecting that the mediation is confidential. It may also encompass a communication for purposes of considering, initiating, continuing, or reconvening a mediation or retaining the mediator.

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 participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. See, e.g., Lawrence R.

Friedman and Michael L. Prigoff, 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. Such disputant-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges. See, e.g., Uniform Rule of Evidence 501 et. seq. See generally Developments in the Law – Privileged Communications, 98 Harv. L. Rev. 1450 (1985). This rationale has sometimes been extended to mediators to encourage them to be candid with the disputants by allowing them to block evidence of their notes and other mediation communications. See Ohio Rev. Code § 2317.023.

A second justification for a confidentiality privilege in mediation is that public confidence in and the voluntary use of mediation will expand if people have confidence that the mediator will not take sides or disclose their statements in the context of other investigations, judicial processes, or the media. For this reason, a number of states prohibit a mediator from disclosing mediation communications, including to a judge or other officials in a position to affect the decision in a case. Del. Code Ann. tit. 19, § 712(c); 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 potential for a mediator to use the threat of disclosure or recommendation to pressure the parties to accept a particular settlement. Such a statutory prohibition is supported by professional practice standards. See, e.g., 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 rationale also has been extended to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable parties. See, e.g., NLRB v. Macaluso, 618 F.2d 51 (9th Cir. 1980) (public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator's testimony).

The policy of the states may be seen as strongly favoring mediation confidentiality. Most states have enacted mediation privilege statutes for at least some kinds of disputes. Indeed, state legislatures have enacted more than 200 mediation confidentiality statutes. See Appendix for a list of these statutes. See ROGERS & MCEWEN, MEDIATION LAW, POLICY, PRACTICE, Appendices A and B. (2nd ed. 1994 & supp. 1998). Scholars and practitioners alike generally show strong support for a mediation privilege. See, e.g., Kirtley, supra; Freedman and Prigoff, supra; Jonathan M. Hyman, The Model Mediation Confidentiality Rule, 12 Seton Hall Legis. J. 17 (1988); Eileen Friedman, Protection of Confidentiality in the Mediation of Minor Disputes, 11 Cap. U.L. Rev. 305 (1971); Michael Prigoff, Toward Candor or Chaos: The Case of Confidentiality in Mediation, 12 Seton Hall Legis. J. 1(1988).

At the same time, it must be recognized that provisions expanding confidentiality are in derogation of policies making "every person's evidence" available. See 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). Confidentiality provisions also have the potential to frustrate policies encouraging openness in public decision-making. See News-Press Pub. Co. v. Lee County, 570 So.2d 1325 (Fla. App. 1990); Cincinnati Gas & Electric Co., v. General Electric Co., 854 F.2d 900 (6th Cir. 1988), cert. den. sub. nom. Cincinnati Post v. General Electric Co., 489 U.S. 1033 (1989) For thoughtful arguments against a mediation privilege, see Eric D. Green, A Heretical View of the Mediation Privilege, 2 Ohio St. J. on Disp. Resol. 1 (1986); Scott H. Hughes, A Closer Look: The Case for a Mediation Privilege Has Not Been Made, 5 Disp. Resol. Mag. 14 (Winter 1998). See also, Daniel R. Conrad, Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota, 74 N.D. L. Rev. 45 (1998). See generally, ROGERS & MCEWEN, MEDIATION LAW, POLICY, PRACTICE Ch. 8(2nd ed. 1994 & supp. 1998).

These competing tensions were among the important principles that guided the Drafting Committee in the formulation of the confidentiality provisions of this Draft Uniform Mediation Act. In particular, respect for the interests that compel a mediation privilege, and the concerns that warn against it, counseled a cautious and constrained approach to the drafting of a uniform mediation privilege. At the same time, the diverse character of the mediation community instructed the Drafting Committee to favor plain language that can be easily understood by the many non-lawyers who may refer to the Act, either as mediators or disputants who may not be represented by counsel in a mediation. For similar reasons, the Drafting Committee also chose to structure a less complicated, but less detailed statute rather than one that was more detailed but which could also be more difficult to understand and apply.

These drafting considerations further reflect and advance the fundamental goals of a uniform mediation statute. That is, to be effective in promoting candid communications, the contours of 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 a uniform approach to mediation among the states. Even if their state protects mediation communications, mediation participants cannot be certain when a mediation begins that third-party interest in information about the mediation may not come from another jurisdiction that does not have a mediation privilege, or has one of limited or inapplicable scope. See Joshua P. Rosenberg, Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws, 10 Ohio St. J. on Disp. Resol. 157 (1994). Also, with telephone mediation, and other mediation 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.

Section. 1. Definitions.

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, persons could strategically claim to have been involved in a mediation by virtue of their mere participation in a group discussing areas of disagreement – a problem

compounded by the fact that mediators are not licensed, which distinguishes them from all other professionals whose communications are protected by a privilege, and which could 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 it permits in the development of mediation, but the greater the potential for 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 to 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., 5 U.S.C. § 574; 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, by 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 in three principle ways. First, it narrows the definition of mediation by requiring a triggering event: the appointment or engagement of a mediator (see Section 1(b) and 1(c)). 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 2(a) and (b) the Draft makes the privilege inapplicable in adult felony proceedings, a controversial provision that is discussed below. Finally, Section 2(c)(5) of the Draft includes an exception giving courts the discretion to make an exception to the privilege when its application would result in a situation of manifest injustice, which is discussed later in the comments.

Section 1(a). "Mediation."

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

Definitional problems 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. The Drafting Committee considered drafting a definition of mediation that would exclude related processes that are not the type of mediation contemplated by the Act. However, it

rejected this approach because narrowing the definition, for example, to exclude neutral evaluation could lead to attempts to thwart the privilege if the mediator gave an opinion concerning the likely outcome if the parties did not settle, and carries potential for abuse. Instead the Draft definitions in 1(a) and 1(b) provide only three distinguishing characteristics: (1) that a mediator not aligned with a disputant, (2) that the mediator assists the parties with their own negotiation and that the mediator has no authority to issue a binding decision, and (3) the mediator is appointed by an appropriate authority or engaged by the disputants.

Section 1 (b). "Mediator."

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

The term "person or persons" includes mediation entities when these are appointed or engaged to mediate a dispute.

Section 1 (c). "Disputant."

The Draft takes a narrow view of the parties to a mediation, defining them as "disputants" to reflect that they have some stake, as defined in (1) and must have either been asked to attend or entered an agreement, either in writing or electronically. These restrictions are designed to prevent abuse in which someone with only a passing interest in the mediation, such as a neighbor of a person embroiled in a dispute, from preventing the use of information or taking advantage o rights accorded to disputants. Attorneys or other representatives of the parties are not disputants.

A disputant may "attend" the mediation in person, by phone, or electronically.

Section 1(d). "Mediation Communication."

The privilege is designed to encourage candor and therefore is meant to cover only statements made 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 typically would not be a communication" because it was not meant by the actor as an assertion. A tax return brought to a divorce mediation would not be a "mediation communication" because it was not a "statement made as part of the mediation," even though it may have been used extensively in the mediation. However, a note written on the

tax return during the mediation would be a "mediation communication," as would a memorandum prepared for the mediator by an attorney for a disputant.

The Drafting Committee added the language regarding the disputants' expectation to assure openness in public policy mediations and other mediations conducted without reasonable expectations of confidentiality. For example, a public policy mediation regarding airport noise that is open to the press would not be protected under the Draft Act. On the other hand, if the disputants agree to confidentiality or are assured of confidentiality, the statements made within the session are "mediation communications."

The second sentence in 1(d) makes clear that early conversations about a mediation typically should be "mediation communications." A court could, however, make the provisions inapplicable if there is little connection between the conversation and mediation or if the disputant would not be reasonable in expecting that the conversation is confidential.

The Drafting Committee devoted considerable discussion to the issue of when the mediation begins and ends for purposes of the application of the privilege. The questions are complex and present drafting difficulties if more specificity is sought. On the one hand, disputants might be more likely to use a mediator if they are assured of confidentiality for the initial contact or communication, thus promoting one of the important purposes expressly contemplated for the privilege. On the other hand, permitting a disputant to protect from disclosure any contact or communication that could remotely be argued as 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 as noted above, it sometimes can be difficult to discern if one is in a mediation because mediators do not have to be licensed or associated with a public entity or an entity organized to provide mediation services.

The Draft resolves this tension by specifying the availability of the privilege at these "gray" stages of a mediation, while also giving the courts the sound discretion to lift the cloak of privilege when it has been abused.

In reaching this decision, it is worth noting that the Drafting Committee considered but rejected two other approaches seen in the state statutes that offered greater specificity. In one approach, a relatively new California statute creates a new term and 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. The other approach covers communications between a disputant and the mediator "relating to the subject matter of a mediation agreement." See, e.g., Iowa Code § 216.B.

In both cases, 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 could be interpreted to extend to conversations that do not even include the other disputant. Further, following the California approach would make the Act more complex, while at the same time introducing a concept of a mediation consultation that would be new to most state courts, mediation practitioners, and lawyers.

Similarly, another problem with the Iowa approach 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 company receptionist when the disputant first called to register a complaint.

The Draft also avoids specific language about when mediation ends. In weighing this question, the Drafting Committee considered more specific approaches that would terminate the mediation after a specified period of time if the disputants failed to reach an agreement, such as the 10-day period specified in no Cal. Evid. Code § 1125. However, it rejected that approach because it felt that such a requirement could be easily circumvented by a routine practice of extending mediation in a form mediation agreement. Indeed, such an extension in a form agreement could result in the coverage of communications unrelated to the dispute for years to come, without furthering the purposes of the privilege.

SECTION 2. CONFIDENTIALITY: PROTECTION AGAINST COMPELLED DISCLOSURE; WAIVER.

(a) A disputant may refuse to disclose, and prevent any other persons from disclosing, mediation communications in a civil, juvenile, criminal misdemeanor, arbitration, or administrative proceeding. These protections may be waived, but only if waived by all disputants explicitly or through conduct inconsistent with the continued recognition of the protection.

(b) A mediator may refuse to disclose, and prevent any other person from disclosing, that mediator's mediation communications and may refuse to provide evidence of mediation communications in a civil, juvenile, criminal misdemeanor, arbitration, or administrative proceeding. These protections may be waived, but only if waived by all disputants and the mediator explicitly or through conduct inconsistent with continued recognition of the protection.

(c) There is no protection under (a) and (b):

(1) For a record of an agreement by two or more disputants;

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

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

(4) In proceedings initiated by a public agency for the protection of a child or other populations protected by the law, for communications offered to evidence abuse or neglect;

(5) When the court determines, after a hearing, that disclosure is necessary to prevent a manifest injustice of such a magnitude as to outweigh the importance of protecting the confidentiality of mediation communications.

[(6) For communications evidencing professional misconduct when a report is required by law to be made to an entity charged by law to oversee professional misconduct.]

[(7)To the degree ruled necessary by a court, arbitrator, or agency if the disputant files a claim or complaint against a mediator or mediation program.]

[(8)To establish the validity or invalidity, or the enforceability or nonenforceability of an agreement reached by the disputants as the result of the mediation session if the agreement is evidenced by a record.]

[(9) To the degree ruled necessary by a court or administrative agency hearing officer if a person who is not a disputant and to whom a disputant owes a legal duty files a claim or complaint against the disputant related to that disputants' actions or inactions in the mediation.]

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

Section 2(a) and (b). Compelled Disclosure; Waiver.

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

The Drafters chose to use "protection" instead of "privilege," but the effect is the same. The privilege structure, although not always using the word, is by far the most common approach taken in existing statutes regarding mediation confidentiality.

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. 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.

Statutory mediation privileges are somewhat unusual among evidentiary privileges in that they often do not specify who may hold and/or waive the privilege, leaving that to judicial interpretation. See, e.g., 710 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 (providing that the disputants are the sole holders) with Wash. Rev. Code Ann. § 7.75.050; Ohio Rev. Code § 2317.023; Cal. Evid. Code § 1122 (which make the mediator an additional holder in some respects). 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 of the mediator is a key justification for the privilege, which leads to the conclusion that the mediator should be a holder of the privilege. For others, the primary justification is to protect the 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 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.

The disputants can restrict confidentiality by agreeing to waive the privilege as it relates

to any evidence but the mediator's of mediation communications by anyone but the mediator. The disputants cannot, in contrast, by agreement expand the privilege, because agreements to keep evidence from a judicial tribunal are void as against public policy. Rogers & McEwen, MEDIATION: LAW, POLICY, PRACTICE § 9:24 (2d ed. 1994). The disputants can agree to privacy outside the context of the tribunal and expect court enforcement as it relates to this voluntary disclosure. Rogers & McEwen, supra, § 9:25.

The Drafting Committee intended that waiver through conduct should not encompass the casual recounting of the mediation session to a neighbor who was expected to keep the confidence, but would include disclosure that would take advantage of the privilege. For example, if one disputant's attorney states that a client was threatened during mediation, that disputant should not be able to block the use of testimony to refute that statement. Such advantage-taking or opportunism would be inconsistent with the continued recognition of the privilege while the casual conversation would not. In this way the doctrine would differ from the attorney-client privilege, which is waived by most disclosure. See Michael H. Graham, Handbook of Federal Evidence § 511.1 (4th ed. 1996). Analogous doctrines have developed regarding constitutional privileges, Harris v. New York, 401 U.S. 222 (1971), and the rule of completeness in Rule 106 of the Federal Rules of Evidence. Thus, if A and B were the disputants in a mediation, and A affirmatively stated in court that B threatened A during the mediation, A effectively waived the protections of this statute regarding whether a threat occurred in mediation. If B decides to waive as well, evidence of A's and B's statements during mediation may be admitted.

As under existing interpretations for other communications privileges, waiver through conduct would not typically constitute a waiver of any mediation communication, only those related in subject matter. See generally Uniform Rules of Evidence 510 and 511; John W. Strong et al., McCormick on Evidence § 93 (4th ed. 1992). Also, the privilege is not waived by conduct if the disclosure is privileged, was compelled, or made without "opportunity to claim" the protections. See generally Uniform Rules of Evidence 510 and 511.

Section 2(c)(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. See Ariz. Rev. Stat. Ann. § 12-2238; Cal. Evid. Code §§ 1120(1), 1123; Cal. Gov't. Code § 12980(I) (housing discrimination); Colo. Rev. Stat. §24-34-506.53 (housing discrimination); Ga. Code Ann. § 45-19-36(e) (fair employment); Ill. Rev. Stat. ch. 775, § 5/7B-102(E)(3)(human rights); Ind. Code Ann. §§ 679.2(7), 216.15(B)(civil rights); Ky. Rev. Stat. Ann. §344.200(4) (human rights); La. Rev. St. Ann. §§ 9:4112(B)(1)(c), 51:2257(D)(human rights); 1997 Me. Rev. Stat. Ann. tit. 5, § 4612(1)(A)(human rights); Md. Spec. P. Rule § 73A (divorce); Md. Code Ann. of 1957 art. 49(B),§ 28 (human rights); Mass. Gen. L. ch. 151B, § 5 (job discrimination); Mo. Rev. Stat. Ann. § 213.077(8)(2)(human rights); Neb. Rev. Stat. § 43-2908 (parenting act); N.J. Rev. Stat. 10:5-14 (civil rights); Or. Rev. Stat. §§ 36.220(2)(a), tit. 3, ch. 36 (8)(1) (agricultural foreclosure); 42 Pa. Cons. Stat. Ann. § 5949(b)(1); Tenn. Code Ann. § 4-21-303(d) (human rights); Tex. Gov't. 2008.054)(Administrative Procedure Act); Vt. Stat. Ann. tit. 9, § 4555; Va. Code Ann. §§ 8.01-576.10; 8.01-581.22, 36-96.13(c)(fair housing); Wash. Rev. Code §§ 5.60.070 (1)(e) and (f), 26.09.015(5)(divorce), 49.60.240 (human rights);

Vt. Stat. Ann. tit. 9, § 4555; W.Va. Code §§ 6B-2-4(r)(public ethics), 5-11A-11 (fair housing); Wis. Stat. §§ 904.085(4)(a), 767.11(12)(family court). 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 disputant 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 and 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); Hudson v. Hudson, 600 So.2d 7 (Fla. App. 1992)(privilege statute precluded evidence of oral settlement); Cohen v. Cohen, 609 So.2d 783 (Fla. App. 1992)(same; Ohio Revised Code § 2317.02-03. 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).

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

Mediation seeks to be a civil process, and a privilege for mediation communications that threaten bodily injury and unlawful property damage would not serve the interests underlying the privilege. To the contrary, disclosure would serve public interests in protecting others. Some mediation confidentiality statutes recognize this exception. See Ark. Code Ann. § 47.12.450(e)(community dispute resolution centers)(to extent relevant to a criminal matter); Colo. Rev. Stat. § 13-22-307 (bodily injury); Kan. Stat. Ann. § 23-605(b)(5)(domestic relations)(mediator may report threats of violence to court); Or. Rev. Stat. §36.220(6) (substantial bodily injury to specific person); 42 Pa. Cons. St. Ann. § 5949(2)(I)(threats of bodily injury); Wash. Rev. Code § 7.75.050 (community dispute resolution centers) (threats of bodily injury and property harm); Wyo. Stat. § 1-43-103 (c)(ii); Kan. Stat. Ann. § 23-606 (information necessary to stop commission of crime). Sometimes such statements are made in anger with no intention to commit the act. For this reason, the exception is a narrow one that applies only to the threatening statements; the remainder of the mediation communication remains protected against disclosure.

Section. 2(c)(3). Use of mediation to commit a crime.

More than a dozen states currently have mediation confidentiality protections that contain this exception. Colo. Rev Stat. §13-22-307 (future felony); Fla. Stat. §723.038(8) (ongoing or future crime or fraud)(mobile home parks); Iowa Code §§ 216.15B(3)(to prove perjury in mediation)(civil rights),654A.13 (to prove perjury in mediation)(farmer-lender),679.12 (to prove

perjury in mediation)(general),679C.2(4)(ongoing or future crimes); Kan. Stat. Ann. §§ 23-605(b)(3)(ongoing and future crime or fraud)(domestic relations), 23-606(a)(2)&(3)(ongoing and future crime or fraud)(domestic relations), 44-817(c)(3) (ongoing and future crime or fraud) (employment),75-4332(d)(3) (ongoing and future crime or fraud)(public employment),75-5427(e)(3)(ongoing and future crime or fraud) (teachers); Me. Rev. Stat. Ann. tit.24, §2857(2) (prove fraud in health care mediation); Minn. Stat § 595.02(1)(a) (general); Neb. Rev. Stat. §25-2914 (crime or fraud)(general); NH ST §§328-C:9(III)(B) (perjury in mediation) (marital), 328-C:9(III)(d) (ongoing and future crime or fraud) (marital); N.J. Rev. Stat. §34:13A-16(h)(workers' compensation); N.Y. Labor Law §702-a(5) (past crimes) (labor mediation); Or. Rev. Stat. §36.220(6) (future bodily harm to a specific person) (general); S.D. Codified Laws Ann. §19-13-32 (crime or fraud)(general); Wyo Stat. 1-43-103(c)(ii) (future crime)(general).

As the mediation privilege applies in broader contexts, not just in court or community programs, an exception for crime seems increasingly important to prevent abuse. The Drafting Committee, however, was hesitant to cover "fraud" that would not also constitute a crime because civil cases frequently include allegations of fraud, with varying degrees of merit, and the mediation would appropriately focus on discussion of fraud claims. Some states statutes do cover fraud, however. See, e.g., Fla. Stat. §§ 44.1011, 44.162, 44.201 (court-related), 723.038(8)(mobile home parks); Kan. Stat. Ann. §§ 60-452(b)(3)(ongoing or future crime or fraud), 75-4332(d)(3) (public employment)(ongoing or future crime or fraud), 72-5427(e)(3)(teachers)(ongoing crime or fraud), 44-817(c)(3)(employment)(ongoing crime or fraud), 23-605(b)(3)(domestic relations)(ongoing crime or fraud), 23-606(a)(2) and (3)(domestic relations) ongoing crime or fraud); Neb. Rev. Stat. § 25-2914 (crime or fraud); S.D. Codified Laws Ann. §19-13-32 (crime or fraud).

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

An exception for child abuse is common in domestic mediation confidentiality statutes. See e.g., Ariz. Rev. Stat. Ann. § 8-807(B) (rejecting rule of disclosure); Ind. Code §§ 679C.2(5), 979.2(5); Kan. Stat. Ann. §§ 23-605(b)(2) (domestic relations), 23-606 (a)(1) (domestic relations), 38-1522(a), 44-817(c)(2) (employment), 72-5427(e)(2) (teachers), 75-4332(d)(1) (public employment); Minn. Stat. 595.02(2)(a)(5); Mont. Code Ann. §4 1-3-404 (mediator may not be compelled to testify); Neb. Rev. Stat. § 43-2908 (in camera); N.H. Rev. Stat. Ann. § 328-C:9(III)(c) (marital); N.C. Gen. Stat. §§ 7A-38.1(L)(appellate), 7A-38.4(K) (appellate); Ohio Rev. Code Ann. §§ 3109.05552(c)(child custody), 5123.601 (mental retardation), 2317.02; Or. Rev. Stat. § 36.220(5); Tenn. Code Ann. § 36-4-130(b)(5)(divorce); Utah Code Ann. § 30-3-58(4) (divorce)(shall report); Va. Code Ann. § 63.1-248.3(A)(10)(welfare); Wis. Stat. §§ 48.981(2), 904.085(4)(d); Wyo. Stat. § 1-43-105(c)(iii).

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. It should be stressed that this exception applies only to permit disclosures to public agencies in proceedings that such agencies initiate. It does not apply in private actions, such as divorce, however, because such an approach would not promote free interchange in domestic mediation cases. Id. Also, stronger policies favor disclosure in proceedings brought to protect against abuse and neglect, so that the harm can be stopped.

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

The exception for "manifest injustice" permits the court to rule that the privilege should yield in unusual circumstances. The new federal Administrative Procedure Act amendment for mediation has such an exception. 5 U.S.C. § 574. In recent years, some states have also begun adopting such a provision. See, e.g., La. Rev. Stat. Ann.§ 9:4112(B(1)(c); Ohio Rev. Code § 2317.023(c)(4); Utah Code Ann. § 78-31(b)(8)(2)(a) (if court finds "strong countervailing interest"); Wis. Stat. § 904.095(4)(e). The Supreme Court of Ohio recently became the first state supreme court to construe such a provision, giving it a narrow construction. The Supreme Court of Ohio described the meaning of "manifest injustice" as a "clear or openly unjust act."Schneider v. Kreiner, 83 Ohio St.3d 203, 208, 699 N.E.2d 83, 85 (1998). The court did not find "manifest injustice" in the need to avoid possible future litigation, stating, "[T]he General Assembly has determined that confidentiality is a means to encourage the use of mediation and frankness within mediation sessions. Were we to agree with the relator's argument, we would severely undermine that determination. . ." Id.

The Drafting Committee decided to continue this modern trend, to give courts the sound discretion to meet exigent and unforeseen situations requiring individualized consideration, and to keep the Act simple and accessible. As with other exceptions, a court would typically hold an in camera hearing at which the need for the evidence in a particular case would be weighed against the interests served by the privilege.

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 important because the Draft, unlike some other confidentiality statutes, extends to some kinds of criminal proceedings -- misdemeanors. Some of the most difficult issues have arisen in the context of criminal proceedings. In one case, a defendant would have been precluded from presenting evidence that would bear on self-defense if the court would have recognized a mediation privilege as applying in the criminal context. State v. Castellano, 469 So.2d 480 (Fla. 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). An earlier Draft has been criticized for the failure to include such a provision. See Alan Kirtley, A Mediation Privilege Should Be Both Absolute and Qualified, 5 Disp. Resol. Mag. 5 (Winter, 1998).

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

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

This exception addresses a common problem, particularly for lawyer mediators, by permitting any participant to provide evidence of unprofessional conduct. See In re Waller, 573 A.2d 780 (D.C. App. 1990); see generally Pamela Kentra, Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct, 1997 B.Y.U.L. Rev. 715. 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. Therefore, mediators would not be precluded by the statute from complying with statutory reporting obligations a state may seek to implement. Several state statutes have also adopted this position. See, e.g., Minn. Stat.§ 595.02(1)(A)(3); Utah Code Ann. § 78-31(b)-(8)(2)(c)(I) (claim of legal malpractice); Haw. Rev. Stat. §§ 672.8 (professional design), 671.16 (medical); Me. Rev. Stat. Ann. tit. 24, § 2857(E)(medical care); N.C.Gen. Stat. §§ 7A-38.1(L)(appellate), 7A-38.4(k)(appellate); Ohio Rev. Code § 5123.601(E)(mental retardation mediations); Okla. Stat. tit. 59, § 328.64(B) and (C) (dentistry).

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

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

This exception follows statutes in several states that permit the mediator to defend, and the disputant to secure evidence, in the occasional claim against a mediator. See, e.g., Ohio Rev. Code § 2317.023; Minn. Stat. § 595.02; Fla. Stat. § 44.102; Wash. Rev. Code § 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.

Section (c)(7) Validity of agreement.

The drafters seek comment on whether this is sufficiently covered by the manifest injustice exception, 2(c)(5), and is therefore unnecessary.

This provision is designed 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) (unpublished).

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, e.g., Minn. Stat. § 595.02; Fla. Stat. § 44.102; Ohio Rev. Code § 2317.023; Wash. Rev. Code § 5.60.070.

SECTION 3. CONFIDENTIALITY: PROHIBITION AGAINST VOLUNTARY DISCLOSURES BY A ~~THE~~ MEDIATOR. Except where disclosure is permitted under Section 2, a mediator shall not:

(a) Disclose mediation communication to:

(1) a judge; or

(2) an agency or authority that may make rulings on or investigations into a dispute.

(b) Make any report, assessment, evaluation, recommendation, or finding representing the opinions of the mediator to those persons described in (a).

Reporter's Working Notes

Section 3. Prohibitions against voluntary disclosure by mediator.

Where Section 2 of the Act applies to decisions about disclosure and admissibility within the formal proceedings of courts and public agencies, Section 3 limits the voluntary disclosure by the mediator in more informal settings, such as reports to judges or enforcement personnel.

Mediators are not licensed and therefore are not generally 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 Society for Professionals in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991); National Standards for Court-Connected Mediation Programs (Center for Dispute Settlement, D.C. 1992). A statutory prohibition seems warranted, and a few statutes now do so. See, e.g., Fla. Stat. Ann. art. XIII(8) § 373.71,; Cal. Evid. Code § 1121; Tex. Civ. Prac. & Rem. Code § 154.053(c).

The provision does not include a sanction. The Drafting Committee discussed this issue, and concluded that it was reasonable to expect that courts would award damages to a disputant 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. tit. 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).

The Draft is silent on the effects of public record and meeting laws, which 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. See generally Lawrence H. Hoover Jr., A Place for Privacy: Media Creates Special Problems for Mediation, 5 Dispute Resolution Mag., Winter 1998, at 21; Jane E. Kirtley, No Place for Secrecy: Media Should Be Permitted Access, 5 Dispute Resolution Mag., Winter 1998, at 21; Lemoine D. Pierce, Media Access Needs To Be Well Managed,5 Dispute Resolution Mag., Winter 1998, at 23. The competing policies may have greater strength in different states. The overwhelming majority of states that have considered this tension have sided in favor of confidentiality protections for mediation, often expressly exempting them from state open meetings and related laws, or stating statutorily that mediation documents are not "public records." See e.g., Ariz. Rev. Stat. Ann. § 2-7-202 (farm mediation); Cal. Gov't. Code **§** 1145.20 (administrative adjudications act); Del. Code. Ann. tit.19 § 1613 (b) (labor mediations); Ill. Rev. Code ch. 120 § 2(c)(13) (housing discrimination); Ind. Code § 13.14(1)(farming); Md. Code Ann. of 1957, art. 49(B), § 48 (human relations); Minn. Stat. § 13.99 (child custody); Nev. Rev. Stat. § 288.220 (public employment); Or. Rev. Stat. §§ 192.690(1)(agricultural foreclosure), 192.501(16)(agricultural foreclosure); S.D. Codified Laws Ann. §§ 38-6-12 (agricultural assistance), 54-13-18 (agricultural debtor); Tenn. Code Ann. §§ 63-4-115(g) (chiropractor discipline), 63-6-214(i)(3) (medical and surgical discipline), 63-7-115(3)(nursing discipline); Tex. Gov't. Code Ann. § 441.031(5) (definition of public records); Vt. Stat. Ann. tit. 9, § 4555(b)(human rights); Va. Code Ann. § 15.2-2907(d) (local government annexation); Wis. Stat. § 93.50.2 (farm mediation); Wyo. Stat. § 11-41-106(b) (agricultural mediation).

Some states may seek something of a middle ground, providing some but less than full preemption. For example, a new series of Oregon statutes may provide an interesting model. The statutes allow state agencies to exempt mediation regarding personnel matters from public records and meeting laws. Or. Rev. Stat. §§ 6.224, 6.226, 6.228, 6.230.

SECTION 4. QUALITY OF MEDIATION.

(a) A mediator shall disclose information related to his or her qualifications or possible conflicts of interest if requested by a mediation disputant or representative of a disputant.

[(b) If immunity from liability is not extended to mediators by common law judicial immunity doctrine, rules of court or other law of this state, any contractual provision purporting to disclaim the mediator's liability shall be void as a matter of public policy.]

(c) A disputant has the right to be represented at any mediation session. A pre-dispute waiver of representation prior to mediation is ineffective.

REPORTER'S WORKING NOTES

Section 4(a). Qualifications.

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

This approach of requiring disclosure permits the context to determine what a person in a particular setting could reasonably expect to qualify or disqualify a mediator in a given case. 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 be a part of that disclosure, although 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.

It must be stressed that the Draft does not establish mediator qualifications. No consensus has emerged in the law, research, or commentary as to those mediator qualifications that will best produce effectiveness or fairness. At the same time, the law and commentary do recognize that the quality of the mediator is important and that the courts and public agencies referring cases to mediation have a heightened responsibility to assure it. See 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). 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 § 11:02 (2d ed. 1994).

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

Section 4(b). Disclaimers of Immunity.

The Drafting Committee seeks guidance regarding this subsection. Some Drafting Committee reviewed disclaimers of liability as a decision of the parties, at least as to non-intentional conduct by the mediator; others thought that it was inappropriate to expand non-liability beyond that conferred through court decisions and statutes.

The Draft extends to mediators what is prohibited for lawyers by ethics provisions -- disclaiming liability. ABA Model Rule 1.8(h). Disclaimers of liability are generally disfavored by the courts, especially in situations in which the parties might not be alert that they forego substantial claims. Such strong public policy considerations that flow from the elimination of substantive rights "has led the courts to strictly scrutinize such agreements, construing them against the party invoking them, and to require as a condition to validity that the `intention of the parties [be] expressed in clear and unambiguous language." See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 9 (T.D. NO. 2, 1995). See discussion in Alexander T. Pendleton, Enforcing Exculpatory Agreements, 70 Wis Law. 10 (Nov. 1997). Mediators are not licensed, so such a statutory provision provides a means to hold them accountable outside the programs supervised by courts or public agencies.

This Draft takes no position on the general issue of immunity for mediators. The argument made in favor of a broad grant of immunity regarding mediators has been to encourage persons to become mediators. However, some task forces that have considered this argument and have weighed it against the need for accountability have come down in favor of leaving the mediators accountable. See 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. 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 court rulings and statutes conferring immunity most often relate to mediators who are supervised by a court or public agency, posing less threat of lack of accountability. See generally Nancy H. Rogers and Craig A. McEwen, MEDIATION: LAW, POLICY, PRACTICE § 11:03 (2d ed. 1984).

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 Draft leaves these standards 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.

Section 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). At least one bar authority has expressed doubts about the ability of a lawyer to review an agreement effectively when that lawyer did not participate in the give and take of negotiation. Boston Bar Ass'n, Op. 78-1 (1979). Similarly, concern has been raised that the right to 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. See also Goldberg v. Kelly, 397 U.S. 254, 270-271 (1970).

Most statutes are either silent on whether the disputants' lawyers can be excluded or provide that the disputants can bring lawyers to the sessions. See, e.g., Neb. Rev. Stat. § 42-810 (counsel may attend mediation); N.D. Cent. Code § 14-09.1-05 (mediator may not exclude counsel); Okla. Stat. tit. 12, § 1824(c)(5) (conciliation court); Or, Rev. Stat. §§ 107.600(1)(marriage dissolution)(attorney may not be excluded); 107.785 (marriage dissolution)(attorney may not be excluded); Wis. Stat. § 655.58 (authorizes counsel to attend mediation). Several states have enacted statutes permitting the exclusion of counsel from domestic mediation. See Mont. Code Ann. § 40-4-302(3); Kan. Stat. Ann. sec. 23-603(a)(6); Wis. Stat. Ann. sec. 767.11(10)(a); Cal. Fam. Code sec. 3182; S.D. Codified Laws § 25-4-59.

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

Although the Draft does not speak to advocates who are not licensed lawyers, the Drafting Committee also recognized that 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. Again, 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 are presented for preliminary discussion only:

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

[Reporter's Note: This Section calls for the incorporation of mediation into the Revised Uniform Arbitration Act enforcement provisions. For ease of reading, please see Reporter's Working Notes for a full-text version of how that addition would appear in the RUAA.]

[The words "or mediate" shall be inserted after the word "arbitrate" in the following provisions of the Uniform Arbitration Act [as drafted in April 1999 for submission to the National Conference of Commissioners on Uniform State Laws]: Sections 3(a); 4(a); 4(b)(3); and 4(e).

[The words "or mediation" shall be inserted after the word "arbitration in the following provisions of the Uniform Arbitration Act [as drafted in April 1999 for submission to the National Conference of Commissioners on Uniform State Laws]: Sections 4(b); 4(d); 4(e); 4(f); and 19.

[The words "or mediator" shall be inserted after the word "arbitrator" in the following provisions of the Uniform Arbitration Act [as drafted in April 1999 for submission to the National Conference of Commissioners on Uniform State Laws]: Section 8.

[The words "or assent to a mediated settlement agreement evidenced by a record" shall be inserted after the first use of the word "award" in the following provisions of the Uniform Arbitration Act [as drafted in April 1999 for submission to the National Conference of Commissioners on Uniform State Laws] in Section 19 and the words "or mediated settlement agreement" shall be inserted after the second use of the word "award" in Section 19.

[The following provision should be added to Section 20: (d) [existing (d) becomes (e)] "Upon

motion of a party, the court shall not enforce the mediated settlement agreement if there are defenses recognized in law to the validity or enforcement of contracts in general or if a party was not represented by legal counsel at the time that the mediated settlement agreement was entered."]

Reporter's Working Notes

This Draft provides for expedited enforcement of mediation agreements, pre-dispute mediation clauses in contracts, and the mediated settlement agreements reached through mediation. The purpose of the provisions is to encourage greater use of mediation clauses and mediation in general by expediting enforcement of the parties' agreement. Provisions for enforcement of pre-dispute conciliation clauses have been placed in statutes governing conciliation in international commercial disputes but are novel for domestic cases. For international commercial, see Cal. Civ. Pro. Code § 1297.381; Fla. Stat. Ann. §§ 684.03, 684.10; Tex. Code Ann. art. 249-38. Provisions for expedited enforcement of conciliated or mediated settlement agreements are included in some statutes regarding international commercial disputes, public agencies or courts but are unusual for settlement agreements reached in private, domestic mediation. See, e.g., N.C. Gen. Stat. § 1-567.60 (international commercial); Cal. Civil Pro. Code § 1297.401 (international commercial); Tex. Code Ann. art. 249-40 (international commercial); Wash. Rev. Code § 26.09.184 (family); Ind. Code § 22-901-6(p)(conciliated civil rights agreement); Haw. Rev. Stat. § 515-18 (conciliated civil rights agreement); Ga. Code Ann. § 45-19-39(c)(conciliated civil rights agreement); Ky. Rev. Stat. Ann. § 344.610 (conciliated civil rights agreement).

The Draft allows the parties to assert contract defenses by motion. Parties not represented by legal counsel in the formation of the settlement agreement may raise the lack of representation as a defense; otherwise this provision might be subject to abuse against the unwary in the same manner as cognovit notes in the past. The pro se disputant could still apply to the court for summary enforcement against a represented party.

The mediation clause enforcement provisions codify a result reached by some courts regarding summary enforcement. Absent such a statute, 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.); CB Richard Ellis, Inc. v. American Environmental Waste Management, 1998 WL 903495 (E.D.N.Y. 1998)(applying Federal Arbitration Act to mediation clause).

The mediation enforcement provisions would appear in the RUAA as follows:

SECTION 3. VALIDITY OF ARBITRATION [OR MEDIATION] AGREEMENT.

(a) An agreement or a contractual term contained in a record to submit to arbitration [or mediation] any existing or subsequent controversy arising between the parties is valid, enforceable, and irrevocable except upon grounds that exist at law or in equity for the revocation of any contract.

(b) Unless the parties otherwise agree:

(1) A court shall decide whether an agreement to arbitrate exists or the dispute is subject to the agreement.

(2) Arbitrator, chosen in accordance with Section 8, shall decide whether the conditions precedent to arbitrability have been met and whether the contract of which the arbitration agreement is a part is enforceable.

(3) If a party challenges in court the existence of an agreement to arbitrate [or mediate] or whether a dispute is subject to an agreement to arbitrate [or mediate], the arbitration [or mediation] may proceed pending final resolution of the issue by the court, unless the court otherwise orders.

SECTION 4. MOTIONS TO COMPEL OR STAY ARBITRATION [OR MEDIATION].

(a) A court shall order the parties to arbitrate [or mediate] on motion of a party showing:

(1) an agreement to arbitrate [or mediate]; and

(2) the opposing party's refusal to arbitrate [or mediate].

(b) If a party opposes a motion made under subsection (a), the court shall proceed immediately and summarily to determine the issue. Unless the court finds there is no arbitration [or mediation] agreement, it shall order the parties to arbitrate [or mediate.]

(c) A court may stay an arbitration commenced or threatened, after trying the issue immediately and summarily, on a motion of a party showing that there is no agreement to arbitrate [or mediate]. If the court finds for the moving party that there is no agreement to arbitrate [or mediate], it shall stay the arbitration. If the court finds for the opposing party, it shall order the parties to arbitrate [or mediate].

(d) A court may not refuse to order arbitration [or mediation] because:

(1) the claim lacks merit; or

(2) a party has failed to prove the grounds for the claim.

(e) If there is a proceeding pending in a court involving an issue referable to arbitration [or mediation] under an alleged agreement to arbitrate [or mediate,] a motion under this Section shall be filed in that court. Otherwise and subject to Section 25, a motion under this Section may be made in any other court of competent jurisdiction.

(f) The court shall stay a proceeding that involves an issue subject to arbitration [or mediation] if an order for arbitration [or mediation] or a motion for that order is made under this Section. The stay of proceedings may only apply to the issue subject to arbitration [or mediation,] if that issue is severable. The order compelling arbitration [or mediation] must include a stay of court proceedings.

SECTION 8. APPOINTMENT OF ARBITRATOR [OR MEDIATOR].

If the parties have agreed on a method for appointing an arbitrator [or mediator,] the method must be followed. If there is no agreed method or the agreed method fails or cannot be

followed, or if an arbitrator [or mediator] appointed fails or is unable to act and a successor has not been duly appointed, the court on motion of a party shall appoint one or more arbitrators [or mediators]. An arbitrator [or mediator] so appointed has all the powers of an arbitrator [or mediator] specifically named in the agreement or appointed by the agreed method.

SECTION 19. CONFIRMATION OF AWARD [OR MEDIATED SETTLEMENT AGREEMENT].

After receipt of notice of an award [or an assent to a mediated settlement agreement evidenced by a record], a party to an arbitration [or mediation] may apply to a court for an order confirming the award [or mediated settlement agreement], and thereupon a court shall issue such an order unless the award is modified or corrected pursuant to Section 17 or the award is vacated, modified, or corrected pursuant to Sections 20 and 21[, or unless the mediated settlement agreement is unenforceable pursuant to Section 20].

SECTION 20. VACATING AN AWARD.

(a) Upon motion of a party, the court shall vacate an award if:

(1) the award was procured by corruption, fraud, or other undue means;

(2) there was evident partiality by an arbitrator appointed as a neutral or corruption or misconduct by any of the arbitrators prejudicing the rights of any party;

(3) the arbitrator refused to postpone the hearing upon sufficient cause being shown therefor, refused to consider evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of Section 12, as to prejudice substantially the rights of a party;

(4) the arbitrator exceeded the arbitrator's powers; or

(5) there was no arbitration agreement, unless the party participated in the arbitration proceeding without having raised the objection not later than the commencement of the arbitration hearing on the merits.

(b) In addition to the grounds to vacate an award set forth in subsection (a), the parties may contract in the arbitration agreement for judicial review of errors of law in the arbitration award. If they have so contracted, the court shall vacate the award if the arbitrator has committed an error of law substantially prejudicing the rights of a party.

(c) A motion under this Section must be made within 90 days after delivery of a copy of the award to the movant unless the motion is predicated upon corruption, fraud, or other undue means, in which case it must be made within 90 days after those grounds are known or should have been known to the moving party.

[(d) Upon motion of a party, the court shall not enforce the mediated settlement agreement if there are defenses recognized in law to the validity or enforcement of contracts in general or if a party was not represented by legal counsel at the time that the mediated settlement agreement was entered.]

(e) In vacating the award on grounds other than that stated in subsection (a)(5), a court may order a rehearing before new arbitrators chosen in accordance with Section 8. If the award is vacated on grounds stated in (a)(3) or (4), the court may order a rehearing before the arbitrator who made the award or the arbitrator's successor appointed in accordance with Section 8. The time within which the agreement requires the award to be made is applicable to the

rehearing and commences from the date of the order.

(f) If the motion to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

SECTION 6. 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.

APPENDIX OF STATE CONFIDENTIALITY STATUTES CONSULTED

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

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

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

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

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

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

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

Delaware Code Annotated
Title 6 §7716 (voluntary ADR confidentiality); Title 11 §9503 (victim-offender); Title 14

§4002(l) (definition of mediation), §4013(b) (public school employment relations); Title 18 §2304(22)(d) (unfair practices in insurance); Title 19 §§712(c), (e) (discrimination in employment), §16020(j) (definition of mediation), § 1613(b) (police and firefighters employment relations)

Florida Statutes

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

Georgia Code Annotated

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

Hawaii Revised Statutes

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

Idaho Code

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

Illinois Revised Code

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

Indiana Code

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

Iowa Code

§679C (general); §13.14 (farm mediation); §20.17 (public employment -collective bargaining); §22.7 (open records); §86.44 (employment services); §216.15 (civil rights); §216.15B (civil rights); §654A.13 (farmer -creditor mediation); §679.12 (informal dispute resolution); §679B. 14 (decision published)

Kansas Statutes Annotated

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

employee relations)

Kentucky Revised Statutes Annotated
§336.153 (labor cabinet); §344.200 (civil rights); §§344.605 and .615 (discrimination in housing)

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

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

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

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

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

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

Missouri Revised Statutes
§435.014 (general); §162.959(3) (special education); §§213.075 and .077 (human rights)

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

Nebraska Revised Statutes

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

Nevada Revised Statutes

§48.109 (general); §3.475 (child custody); §40.680(6) (property actions); §233.190 (equal rights); §288.220 (public employees)

New Hampshire Revised Statutes Annotated

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

New Jersey Revised Statutes

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

New Mexico Statutes Annotated

§13-4C-9 (public works); §§28-1-10 and 11 (human rights)

New York Statutes

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

North Carolina General Statutes

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

North Dakota Century Code

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

Ohio Revised Code Annotated

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

Oklahoma Statutes

Tit. 12 §1805(A) (general), §1824 (district court mediation); Tit. 25 §1505(a) (discrimination); Tit. 27A §2-3-104 (environment); Tit. 51 §307 (political ethics); Tit. 59 §§328.64 and .71

(dentistry); Tit. 85 §3.10 (workers' compensation)

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

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

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

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

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

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

Texas Code Annotated
Civil Practice and Remedies §§154.053(b), (c) (general), §154.073 (general); Civil Statutes 4413(36) §3.07A (motor vehicle commission); Gov't Code §441.031(state records), §441.091 (county records), §2008.054 (administrative procedure), §2008.055 (interagency sharing); Labor Code §§21.207 and .305 (employment discrimination); Natural Resources Code §40.107(c)(7)(F) (oil spill response); Property Code §301.085 (fair housing); Civil Practice and Remedies §172.206 (conciliation)

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

Vermont Statutes Annotated
Tit. 9 §4555 (human rights)

Virginia Code Annotated
§§8.01-576.9, .10, and .22 (general); §2.1-342-(B)(30) (open records); §2.1-723 (human rights); 10.1-1186.3 (environmental quality); §15.2-2907 (city boundary adjustments); §20-124.4 (child

custody); §36-96.13 (fair housing); §63.1-248.3 (child abuse)

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

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

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

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