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An Act To Enact the Uniform Mediation Act

Reference to the Committee on Judiciary suggested and ordered printed.

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator MARTIN of Aroostook.
Cosponsored by Senators: DOUGLASS of Androscoggin, GAGNON of Kennebec,
Representatives: FAIRCLOTH of Bangor, NORBERT of Portland.

Be it enacted by the People of the State of Maine as follows:

PREFATORY NOTE

During the last thirty years the use of mediation has expanded beyond its century-long home in collective bargaining to become an integral and growing part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.

Public policy strongly supports this development. Mediation fosters the early resolution of disputes. The mediator assists the parties in negotiating a settlement that is specifically tailored to their needs and interests. The parties' participation in the process and control over the result contributes to greater satisfaction on their part. See Chris Guthrie & James Levin, A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute, 13 Ohio St. J. on Disp. Resol. 885 (1998). Increased use of mediation also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. For this reason, hundreds of state statutes establish mediation programs in a wide variety of contexts and encourage their use. See Sarah R. Cole, Craig A. McEwen & Nancy H. Rogers, Mediation: Law, Policy, Practice App. B (2001 2d ed. and 2001 Supp.)(hereinafter, Cole et al.). Many States have also created state offices to encourage greater use of mediation. See, e.g., Ark. Code Ann. Section 16-7-101, et seq. (1995); Haw. Rev. Stat. Section 613-1, et seq. (1989); Kan. Stat. Ann. Section 5-501, et seq. (1996); Mass. Gen. Laws ch. 7, Section 51 (1998); Neb. Rev. Stat. Section 25-2902, et seq. (1991); N.J. Stat. Ann. Section 52:27E-73 (1994); Ohio Rev. Code Ann. Section 179.01, et seq. (West 1995); Okla. Stat. tit. 12, Section 1801, et seq. (1983); Or. Rev. Stat. Section 36.105, et seq. (1997); W. Va. Code Section 55-15-1, et seq. (1990).

These laws play a limited but important role in encouraging the effective use of mediation and maintaining its integrity, as well as the appropriate relationship of mediation with the justice system. In particular, the law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated. For this reason, a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings (see Sections 4-6). Because the privilege makes it more difficult to offer evidence to challenge the settlement agreement, the Drafters viewed the issue of confidentiality as tied to provisions that will help increase the likelihood that

the mediation process will be fair. Fairness is enhanced if it will be conducted with integrity and the parties' knowing consent will be preserved. See Joseph B. Stulberg, Fairness and Mediation, 13 Ohio St. J. on Disp. Resol. 909 (1998); Nancy A. Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, 6 Harv. Neg. L. Rev. 1 (2001). The Act protects integrity and knowing consent through provisions that provide exceptions to the privilege (Section 6), limit disclosures by the mediator to judges and others who may rule on the case (Section 7), require mediators to disclose conflicts of interest (Section 9), and assure that parties may bring a lawyer or other support person to the mediation session (Section 10). In some limited ways, the law can also encourage the use of mediation as part of the policy to promote the private resolution of disputes through informed self-determination. See discussion in Section 2; see also Nancy H. Rogers & Craig A. McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13 Ohio St. J. on Disp. Resol. 831 (1998); Denburg v. Paker Chapin Flattau & Klimpl, 624 N.E.2d 995, 1000 (N.Y. 1993) (societal benefit in recognizing the autonomy of parties to shape their own solution rather than having one judicially imposed). A uniform act that promotes predictability and simplicity may encourage greater use of mediation, as discussed in part 3, below.

At the same time, it is important to avoid laws that diminish the creative and diverse use of mediation. The Act promotes the autonomy of the parties by leaving to them those matters that can be set by agreement and need not be set inflexibly by statute. In addition, some provisions in the Act may be varied by party agreement, as specified in the comments to the sections. This may be viewed as a core Act which can be amended with type specific provisions not in conflict with the Uniform Mediation Act.

The provisions in this Act reflect the intent of the Drafters to further these public policies. The Drafters intend for the Act to be applied and construed in a way to promote uniformity, as stated in Section, and also in such manner as to:

promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests (see part 1, below);

encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active

party involvement, and informed self-determination by the parties (see part 2, below); and

advance the policy that the decision-making authority in the mediation process rests with the parties (see part 2, below).

Although the Conference does not recommend "purpose" clauses, States that permit these clauses may consider adapting these principles to serve that function. Each is discussed in turn.

1. Promoting candor

Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications. See Sections 4-6. Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality to encourage the effective use of mediation to resolve disputes. Indeed, state legislatures have enacted more than 250 mediation privilege statutes. See Cole et al., supra, at apps. A and B. Approximately half of the States have enacted privilege statutes that apply generally to mediations in the State, while the other half include privileges within the provisions of statutes establishing mediation programs for specific substantive legal issues, such as employment or human rights. Id.

The Drafters recognize that 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 that mediators encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. See, e.g., Lawrence R. Freedman and Michael L. Prigoff, Confidentiality in Mediation: The Need for Protection, 2 Ohio St. J. Disp. Resol. 37, 43-44 (1986); Philip J. Harter, Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality, 41 Admin. L. Rev. 315, 323-324 (1989); Alan Kirtley, The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, 1995 J. Disp. Resol. 1, 17; Ellen E. Deason, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?, 85 Marquette L. Rev. 79 (2001). For a critical perspective, see generally Eric D. Green, A Heretical View of the Mediation Privilege, 2 Ohio St. J. on Disp. Resol. 1

(1986); Scott H. Hughes, The Uniform Mediation Act: To the Spoiled Go the Privileges, 85 Marquette L. Rev. 9 (2001). Such party-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges. See, e.g., Unif. R. Evid. R. 501-509 (1986); see generally Jack B. Weinstein, et. al, Evidence: Cases and Materials 1314-1315 (9th ed.1997); Developments in the Law - Privileged Communications, 98 Harv. L. Rev. 1450 (1985); Paul R. Rice, Attorney-Client Privilege in the United States, Section 2/1-2.3 (2d ed. 1999). This rationale has sometimes been extended to mediators to encourage mediators to be candid with the parties by allowing them to block evidence of their notes and other statements by mediators. See, e.g., Ohio Rev. Code Ann. Section 2317.023 (West 1996).

Similarly, public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes. The public confidence rationale 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). To maintain public confidence in the fairness of mediation, a number of States prohibit a mediator from disclosing mediation communications to a judge or other officials in a position to affect the decision in a case. Del. Code Ann. tit. 19, Section 712(c) (1998) (employment discrimination); Fla. Stat. Ann. Section 760.34(1) (1997) (housing discrimination); Ga. Code Ann. Section 8-3-208(a) (1990) (housing discrimination); Neb. Rev. Stat. Section 20-140 (1973) (public accommodations); Neb. Rev. Stat. Section 48-1118 (1993) (employment discrimination); Cal. Evid. Code Section 703.5 (West 1994). This justification also is reflected in standards against the use of a threat of disclosure or recommendation to pressure the parties to accept a particular settlement. See, e.g., Center for Dispute Settlement, National Standards for Court-Connected Mediation Programs (1994); Society for Professionals in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991); see also Craig A. McEwen & Laura Williams, Legal Policy and Access to Justice Through Courts and Mediation, 13 Ohio St. J. on Disp. Resol. 831, 874 (1998).

A statute is required only to assure that aspect of confidentiality that relates to evidence compelled in a judicial and other legal proceeding. The parties can rely on the

mediator's assurance of confidentiality in terms of mediator disclosures outside the proceedings, as the mediator would be liable for a breach of such an assurance. See, e.g., Cohen v. Cowles Media Co, 501 U.S. 663 (1991) (First Amendment does not bar recovery against a newspaper's breach of promise of confidentiality); Horne v. Patton, 291 Ala. 701, 287 So.2d 824 (1973) (physician disclosure may be invasion of privacy, breach of fiduciary duty, breach of contract). Also, the parties can expect enforcement of their agreement to keep things confidential through contract damages and sometimes specific enforcement. The courts have also enforced court orders or rules regarding nondisclosure through orders striking pleadings and fining lawyers. See Section 8; see also Parazino v. Barnett Bank of South Florida, 690 So.2d 725 (Fla. Dist. Ct. App. 1997); Bernard v. Galen Group, Inc., 901 F. Supp. 778 (S.D.N.Y. 1995). Promises, contracts, and court rules or orders are unavailing, however, with respect to discovery, trial, and otherwise compelled or subpoenaed evidence. Assurance with respect to this aspect of confidentiality has rarely been accorded by common law. Thus, the major contribution of the Act is to provide a privilege in legal proceedings, where it would otherwise either not be available or would not be available in a uniform way across the States.

As with other privileges, the mediation privilege must have limits, and nearly all existing state mediation statutes provide them. Definitions and exceptions primarily are necessary to give appropriate weight to other valid justice system values, in addition to those already discussed in this Section. They often apply to situations that arise only rarely, but might produce grave injustice in that unusual case if not excepted from the privilege.

In this regard, the Drafters recognize that the credibility and integrity of the mediation process is almost always dependent upon the neutrality and the impartiality of the mediator. The provisions of this Act are not intended to provide the parties with an unwarranted means to bring mediators into the discovery or trial process to testify about matters that occurred during a court ordered or agreed mediation. There are of course exceptions and they are specifically provided for in Section 5(a)(1), (express waiver by the mediator) or pursuant to Section 6's narrow exceptions such as 6(b)(1), (felony). Contrary use of the provisions of this Act to involve mediators in the discovery or trial process would have a destructive effect on the mediation process and would not be in keeping with the intent and purpose of the Act.

Finally, these exceptions need not significantly hamper candor. Once the parties and mediators know the protections and limits, they can adjust their conduct accordingly. For example,

if the parties understand that they will not be able to establish in court an oral agreement reached in mediation, they can reduce the agreement to a record or writing before relying on it. Although it is important to note that mediation is not essentially a truth-seeking process in our justice system such as discovery, if the parties realize that they will be unable to show that another party lied during mediation, they can ask for corroboration of the statement made in mediation prior to relying on the accuracy of it. A uniform and generic privilege makes it easier for the parties and mediators to understand what law will apply and therefore to understand the coverage and limits of the Act, so that they can conduct themselves in a mediation accordingly.

2. Encouraging resolution in accordance with other principles

Mediation is a consensual process in which the disputing parties decide the resolution of their dispute themselves with the help of a mediator, rather than having a ruling imposed upon them. The parties' participation in mediation, often accompanied by counsel, allows them to reach results that are tailored to their interests and needs, and leads to their greater satisfaction in the process and results. Moreover, disputing parties often reach settlement earlier through mediation, because of the expression of emotions and exchanges of information that occur as part of the mediation process.

Society at large benefits as well when conflicts are resolved earlier and with greater participant satisfaction. Earlier settlements can reduce the disruption that a dispute can cause in the lives of others affected by the dispute, such as the children of a divorcing couple or the customers, clients and employees of businesses engaged in conflict. See generally, Jeffrey Rubin, Dean Pruitt and Sung Hee Kim, Social Conflict: Escalation, Stalemate and Settlement 68-116 (2d ed. 1994) (discussing reasons for, and manner and consequences of conflict escalation). When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. The public justice system gains when those using it feel satisfied with the resolution of their disputes because of their positive experience in a court-related mediation. Finally, mediation can also produce important ancillary effects by promoting an approach to the resolution of conflict that is direct and focused on the interests of those involved in the conflict, thereby fostering a more civil society and a richer discussion of issues basic to policy. See Nancy H. Rogers & Craig A. McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13 Ohio St. J. on Disp. Resol. 831 (1998); see also Frances McGovern, Beyond Efficiency: A Bevy of ADR Justifications (An

Unfootnoted Summary), 3 Disp. Resol. Mag. 12-13 (1997); Wayne D. Brazil, Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns, 14 Ohio St. J. on Disp. Resol. 715 (1999); Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community (2000) (discussion the causes for the decline of civic engagement and ways of ameliorating the situation).

State courts and legislatures have perceived these benefits, as well as the popularity of mediation, and have publicly supported mediation through funding and statutory provisions that have expanded dramatically over the last twenty years. See, Cole et al., supra 5:1-5:19; Richard C. Reuben, The Lawyer Turns Peacemaker, 82 A.B.A. J. 54 (Aug. 1996). The legislative embodiment of this public support is more than 2500 state and federal statutes and many more administrative and court rules related to mediation. See Cole et al, supra apps. A and B.

The primary guarantees of fairness within mediation are the integrity of the process and informed self-determination. Self-determination also contributes to party satisfaction. Consensual dispute resolution allows parties to tailor not only the result but also the process to their needs, with minimal intervention by the State. For example, parties can agree with the mediator on the general approach to mediation, including whether the mediator will be evaluative or facilitative. This party agreement is a flexible means to deal with expectations regarding the desired style of mediation, and so increases party empowerment. Indeed, some scholars have theorized that individual empowerment is a central benefit of mediation. See, e.g., Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation (1994).

Self-determination is encouraged by provisions that limit the potential for coercion of the parties to accept settlements, see Section 9(a), and that allow parties to have counsel or other support persons present during the mediation session. See Section 10. The Act promotes the integrity of the mediation process by requiring the mediator to disclose conflicts of interest, and to be candid about qualifications. See Section 9.

3. Importance of uniformity.

This Act is designed to simplify a complex area of the law. Currently, legal rules affecting mediation can be found in more than 2500 statutes. Many of these statutes can be replaced by the Act, which applies a generic approach to topics that are covered in varying ways by a number of specific statutes currently scattered within substantive provisions.

Existing statutory provisions frequently vary not only within a State but also by State in several different and meaningful respects. The privilege provides an important example. Virtually all States have adopted some form of privilege, reflecting a strong public policy favoring confidentiality in mediation. However, this policy is effected through more than 250 different state statutes. Common differences among these statutes include the definition of mediation, subject matter of the dispute, scope of protection, exceptions, and the context of the mediation that comes within the statute (such as whether the mediation takes place in a court or community program or a private setting).

Uniformity of the law helps bring order and understanding across state lines, and encourages effective use of mediation in a number of ways. First, uniformity is a necessary predicate to predictability if there is any potential that a statement made in mediation in one State may be sought in litigation or other legal processes in another State. For this reason, the UMA will benefit those States with clearly established law or traditions, such as Texas, California, and Florida, ensuring that the privilege for mediation communications made within those States is respected in other States in which those mediation communications may be sought. The law of privilege does not fit neatly into a category of either substance or procedure, making it difficult to predict what law will apply. See, e.g., U.S. v. Gullo, 672 F.Supp. 99 (W.D.N.Y. 1987) (holding that New York mediation-arbitration privilege applies in federal court grand jury proceeding); Royal Caribbean Corp. v. Modesto, 614 So.2d 517 (Fla. App. 1992) (holding that Florida mediation privilege law applies in federal Jones Act claim brought in Florida court). Moreover, parties to a mediation cannot always know where the later litigation or administrative process may occur. Without uniformity, there can be no firm assurance in any State that a mediation is privileged. Ellen E. Deason, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?, 85 Marquette L.Rev.79 (2001).

A second benefit of uniformity relates to cross-jurisdictional mediation. Mediation sessions are increasingly conducted by conference calls between mediators and parties in different States and even over the Internet. Because it is unclear which State's laws apply, the parties cannot be assured of the reach of their home state's confidentiality protections.

A third benefit of uniformity is that a party trying to decide whether to sign an agreement to mediate may not know where the mediation will occur and therefore whether the law will provide a privilege or the right to bring counsel or support

person. Uniformity will add certainty on these issues, and thus allows for more informed party self-determination.

Finally, uniformity contributes to simplicity. Mediators and parties who do not have meaningful familiarity with the law or legal research currently face a more formidable task in understanding multiple confidentiality statutes that vary by and within relevant States than they would in understanding a Uniform Act. Mediators and parties often travel to different States for the mediation sessions. If they do not understand these legal protections, participants may react in a guarded way, thus reducing the candor that these provisions are designed to promote, or they may unnecessarily expend resources to have the legal research conducted.

4. Ripeness of a uniform law.

The drafting of the Uniform Mediation Act comes at an opportune moment in the development of the law and the mediation field.

First, States in the past thirty years have been able to engage in considerable experimentation in terms of statutory approaches to mediation, just as the mediation field itself has experimented with different approaches and styles of mediation. Over time clear trends have emerged, and scholars and practitioners have a reasonable sense as to which types of legal standards are helpful, and which kinds are disruptive. The Drafters have studied this experimentation, enabling state legislators to enact the Act with the confidence that can only come from learned experience. See Symposium on Drafting a Uniform/Model Mediation Act, 13 Ohio St. J. on Disp. Resol. 787, 788 (1998).

Second, as the use of mediation becomes more common and better understood by policymakers, States are increasingly recognizing the benefits of a unified statutory environment for privilege that cuts across all applications. This modern trend is seen in about half of the States that have adopted statutes of general application, and these broad statutes provide guidance on effective approaches to a more general privilege. See, e.g., Ariz. Rev. Stat. Ann. Section 12-2238 (West 1993); Ark. Code Ann. Section 16-7-206 (1993); Cal. Evid. Code Section 1115, et seq. (West 1997); Iowa Code Section 679C.2 (1998); Kan. Stat. Ann. Section 60-452 (1964); La. Rev. Stat. Ann. Section 9:4112 (1997); Me. R. Evid. Section 408 (1993); Mass. Gen. Laws ch. 233, Section 23C (1985); Minn. Stat. Ann. Section 595.02 (1996); Neb. Rev. Stat. Section 25-2914 (1997); Nev. Rev. Stat. Section 48.109(3) (1993); N.J. Rev. Stat. Section 2A:23A-9 (1987); Ohio Rev. Code Ann. Section 2317.023 (West 1996); Okla. stat. tit. 12, Section

1805 (1983); Or. Rev. Stat. Ann. Section 36.220 (1997); 42 Pa. Cons. Stat. Ann. Section 5949 (1996); R.I. Gen. Laws Section 9-19-44 (1992); S.D. Codified Laws Section 19-13-32 (1998); Tex. Civ. Prac. & Rem. Code Section 154.053 (c) (1999); Utah Code Ann. Section 30-3-38(4) (2000); Va. Code Ann. Section 8.01-576.10 (1994); Wash. Rev. Code Section 5.60.070 (1993); Wis. Stat. Section 904.085(4)(a) (1997); Wyo. Stat. Ann. Section 1-43-103 (1991).

5. A product of a consensual process.

The Mediation Act results from an historic collaboration. The Uniform Law Commission Drafting Committee, chaired by Judge Michael B. Getty, was joined in the drafting of this Act by a Drafting Committee sponsored by the American Bar Association, working through its Section of Dispute Resolution, which was co-chaired by former American Bar Association President Roberta Cooper Ramo (Modrall, Sperling, Roehl, Harris & Sisk, P.A.) and Chief Justice Thomas J. Moyer of the Supreme Court of Ohio. The leadership of both organizations had recognized that the time was ripe for a uniform law on mediation. While both Drafting Committees were independent, they worked side by side, sharing resources and expertise in a collaboration that augmented the work of both Drafting Committees by broadening the diversity of their perspectives. See Michael B. Getty, Thomas J. Moyer & Roberta Cooper Ramo, Preface to Symposium on Drafting a Uniform/Model Mediation Act, 13 Ohio St. J. on Disp. Resol. 787 (1998). For instance, the Drafting Committees represented various contexts in which mediation is used: private mediation, court-related mediation, community mediation, and corporate mediation. Similarly, they also embraced a spectrum of viewpoints about the goals of mediation - efficiency for the parties and the courts, the enhancement of the possibility of fundamental reconciliation of the parties, and the enrichment of society through the use of less adversarial means of resolving disputes. They also included a range of viewpoints about how mediation is to be conducted, including, for example, strong proponents of both the evaluative and facilitative models of mediation, as well as supporters and opponents of mandatory mediation.

Finally, with the assistance of a grant from the William and Flora Hewlett Foundation, both Drafting Committees had substantial academic support for their work by many of mediation's most distinguished scholars, who volunteered their time and energies out of their belief in the utility and timeliness of a uniform mediation law. These included members of the faculties of Harvard Law School, the University of Missouri-Columbia School of Law, the Ohio State University College of Law, and Bowdoin College, including Professors Frank E.A. Sander (Harvard Law School); Chris Guthrie, John Lande,

James Levin, Richard C. Reuben, Leonard L. Riskin, Jean R. Sternlight (University of Missouri-Columbia School of Law); James Brudney, Sarah R. Cole, L. Camille Hébert, Nancy H. Rogers, Joseph B. Stulberg, Laura Williams, and Charles Wilson (Ohio State University College of Law); Jeanne Clement (Ohio State University College of Nursing); and Craig A. McEwen (Bowdoin College). The Hewlett support also made it possible for the Drafting Committees to bring noted scholars and practitioners from throughout the nation to advise the Committees on particular issues. These are too numerous to mention but the Committees especially thank those who came to meetings at the advisory group's request, including Peter Adler, Christine Carlson, Jack Hanna, Eileen Pruett, and Professors Ellen Deason, Alan Kirtley, Kimberlee K. Kovach, Thomas J. Stipanowich, and Nancy Welsh.

Their scholarly work for the project examined the current legal structure and effectiveness of existing mediation legislation, questions of quality and fairness in mediation, as well as the political environment in which uniform or model legislation operates. See Frank E.A. Sander, Introduction to Symposium on Drafting a Uniform/Model Mediation Act, 13 Ohio St. J. on Disp. Resol. 791 (1998). Much of this work was published as a law review symposium issue. See Symposium on Drafting a Uniform/Model Mediation Act, 13 Ohio St. J. Disp. Resol. 787 (1998).

Finally, observers from a vast array of mediation professional and provider organizations also provided extensive suggestions to the Drafting Committees, including: the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution, Academy of Family Mediators and CRE/Net), National Council of Dispute Resolution Organizations, American Arbitration Association, Federal Mediation and Conciliation Service, Judicial Arbitration and Mediation Services, Inc. (JAMS), CPR Institute for Dispute Resolution, International Academy of Mediators, National Association for Community Mediation, and the California Dispute Resolution Council. Other official observers to the Drafting Committees included: the American Bar Association Section of Administrative Law and Regulatory Practice, American Bar Association Section of Litigation, American Bar Association Senior Lawyers Division, American Bar Association Section of Torts and Insurance Practice, American Trial Lawyers Association, Equal Employment Advisory Council, National Association of District Attorneys, and the Society of Professional Journalists.

Similarly, the Act also received substantive comments from several state and local Bar Associations, generally working through their ADR committees, including: the Alameda County Bar Association, the Beverly Hills Bar Association, the State Bar of

California, the Chicago Bar Association, the Louisiana State Bar Association, the Minnesota State Bar Association, and the Mississippi Bar. In addition, the Committees' work was supplemented by other individual mediators and mediation professional organizations too numerous to mention.

6. Drafting philosophy.

Mediation often involves both parties and mediators from a variety of professions and backgrounds, many of who are not attorneys or represented by counsel. With this in mind, the Drafters sought to make the provisions accessible and understandable to readers from a variety of backgrounds, sometimes keeping the Act shorter by leaving some discretion in the courts to apply the provisions in accordance with the general purposes of the Act, delineated and expanded upon in Section 1 of this Prefatory Note. These policies include fostering prompt, economical, and amicable resolution, integrity in the process, self-determination by parties, candor in negotiations, societal needs for information, and uniformity of law.

The Drafters sought to avoid including in the Act those types of provisions that should vary by type of program or legal context and that were therefore more appropriately left to program-specific statutes or rules. Mediator qualifications, for example, are not prescribed by this Act. The Drafters also recognized that some general standards are often better applied through those who administer ethical standards or local rules, where an advisory opinion might be sought to guide persons faced with immediate uncertainty. Where individual choice or notice was important to allow for self-determination or avoid a trap for the unwary, such as for nondisclosure by the parties outside the context of proceedings, the Drafters left the matter largely to local rule or contract among the participants. As the result, the Act largely governs those narrow circumstances in which the mediation process comes into contact with formal legal processes.

Finally, the Drafters operated with respect for local customs and practices by using the Act to establish a floor rather than a ceiling for some protections. It is not the intent of the Act to preempt state and local court rules that are consistent with the Act, such as those well-established rules in Florida. See, for example, Fla.R.Civ.P. Rule 1.720; see also Sections 12 and 15.

Consistent with existing approaches in law, and to avoid unnecessary disruption, the Act adopts the structure used by the overwhelming majority of these general application States: the evidentiary privilege. However, many state and local laws do not conflict with the Act and would not be preempted by it. For

example, statutes and court rules providing standards for mediators, setting limits of compulsory participation in mediation, and providing mediator qualifications would remain in force.

The matter may be less clear if the existing provisions relate to the mediation privilege. Legislative notes provide guidance on some key issues. Nevertheless, in order to achieve the simplicity and clarity sought by the Act, it will be important in each State to review existing privilege statutes and specify in Section 15 which will be repealed and which will remain in force.

Sec. 1. 14 MRSA Pt. 8 is enacted to read:

PART 8

MEDIATION

CHAPTER 801

UNIFORM MEDIATION ACT

§10001. Title

This chapter may be cited as "the Uniform Mediation Act."

§10002. Definitions

In this chapter, the following terms have the following meanings.

1. Mediation. "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

2. Mediation communication. "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator.

3. Mediation party. "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

4. Mediator. "Mediator" means an individual who conducts a mediation.

5. Nonparty participant. "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

6. Person. "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency or instrumentality; public corporation; or any other legal or commercial entity.

7. Proceeding. "Proceeding" means:

A. A judicial, administrative, arbitral or other adjudicative process, including related prehearing and posthearing motions, conferences and discovery; or

B. A legislative hearing or similar process.

8. Record. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

9. Sign. "Sign" means:

A. To execute or adopt a tangible symbol with the present intent to authenticate a record; or

B. To attach or logically associate an electronic symbol, sound or process to or with a record with the present intent to authenticate a record.

REPORTER'S NOTES

1. Section 2(1). "Mediation."

The emphasis on negotiation in this definition is intended to exclude adjudicative processes, such as arbitration and fact-finding, as well as counseling. It was not intended to distinguish among styles or approaches to mediation. An earlier draft used the word "conducted," but the Drafting Committees preferred the word "assistance" to emphasize that, in contrast to an arbitration, a mediator has no authority to issue a decision. The use of the word "facilitation" is not intended to express a preference with regard to approaches of mediation. The Drafters recognize approaches to mediation will vary widely.

2. Section 2(2). "Mediation Communication."

Mediation communications are statements that are made orally, through conduct, or in writing or other recorded activity. This definition is aimed primarily at the privilege provisions of

Sections 4-6. It is similar to the general rule, as reflected in Uniform Rule of Evidence 801, which defines a "statement" as "an oral or written assertion or nonverbal conduct of an individual who intends it as an assertion." Most generic mediation privileges cover communications but do not cover conduct that is not intended as an assertion. Ark. Code Ann. Section 16-7-206 (1993); Cal. Evid. Code Section 1119 (West 1997); Fla. Stat. Ann. Section 44.102 (1999); Iowa Code Ann. Section 679C.3 (1998); Kan. Stat. Ann. Section 60-452a (1964) (assertive representations); Mass. Gen. Laws ch. 233, Section 23C (1985); Mont. Code Ann. Section 26-1-813 (1999); Neb. Rev. Stat. Section 25-2914 (1997); Nev. Rev. Stat. Section 25-2914 (1997) (assertive representations); N.C. Gen. Stat. 7A-38.1(1) (1995); N.J. Rev. Stat. Section 2A:23A-9 (1987); Ohio Rev. Code Ann. Section 2317.023 (West 1996); Okla. Stat. tit. 12, Section 1805 (1983); Or. Rev. Stat. Ann. Section 36.220 (1997); 42 Pa. Cons. Stat. Ann. Section 5949 (1996); R.I. Gen. Laws Section 9-19-44 (1992); S.D. Codified Laws Section 19-13-32 (1998); Va. Code Ann. Section 8.01-576.10 (1994); Wash. Rev. Code Section 5.60.070 (1993); Wis. Stat. Section 904.085(4)(a) (1997); Wyo. Stat. Ann. Section 1-43-103 (1991). The mere fact that a person attended the mediation - in other words, the physical presence of a person - is not a communication. By contrast, nonverbal conduct such as nodding in response to a question would be a "communication" because it is meant as an assertion, however nonverbal conduct such as smoking a cigarette during the mediation session typically would not be a "communication" because it was not meant by the actor as an assertion.

A mediator's mental impressions and observations about the mediation present a more complicated question, with important practical implications. See Olam v. Congress Mortgage Co., 68 F.Supp. 2d 1110 (N.D. Cal. 1999). As discussed below, the mediation privilege is modeled after, and draws heavily upon, the attorney-client privilege, a strong privilege that is supported by well-developed case law. Courts are to be expected to look to that well developed body of law in construing this Act. In this regard, mental impressions that are based even in part on mediation communications would generally be protected by privilege.

More specifically, communications include both statements and conduct meant to inform, because the purpose of the privilege is to promote candid mediation communications. U.S. v. Robinson, 121 F.3d 911, 975 (5th Cir., 1997). By analogy to the attorney-client privilege, silence in response to a question may be a communication, if it is meant to inform. U.S. v. White, 950 F.2d 426, 430 n.2 (7th Cir., 1991). Further, conduct meant to explain or communicate a fact, such as the re-enactment of an accident, is a communication. See Weinstein's Federal Evidence 503.14 (2000). Similarly, a client's revelation of a hidden scar to an

attorney in response to a question is a communication if meant to inform. In contrast, a purely physical phenomenon, such as a tattoo or the color of a suit of clothes, observable by all, is not a communication.

If evidence of mental impressions would reveal, even indirectly, mediation communications, then that evidence would be blocked by the privilege. Gunther v. U.S., 230 F.2d 222, 223-224 (D.C. Cir. 1956). For example, a mediator's mental impressions of the capacity of a mediation participant to enter into binding mediated settlement agreement would be privileged if that impression was in part based on the statements that the party made during the mediation, because the testimony might reveal the content or character of the mediation communications upon which the impression is based. In contrast, the mental impression would not be privileged if it was based exclusively on the mediator's observation of that party wearing heavy clothes and an overcoat on a hot summer day because the choice of clothing was not meant to inform. Darrow v. Gunn, 594 F.2d 767, 774 (9th Cir. 1979).

There is no justification for making readily observable conduct privileged, certainly not more privileged than it is under the attorney-client privilege. If the conduct is seen in the mediation room, it can also be observed, even photographed, outside of the mediation room, as well as in other contexts. One of the primary reasons for making mediation communications privileged is to promote candor, and excluding evidence of a readily observable characteristic is not necessary to promote candor. In re Walsh, 623 F.2d 489, 494 (7th Cir., 1980).

The provision makes clear that conversations to initiate mediation and other non-session communications that are related to a mediation are considered "mediation communications." Most statutes are silent on the question of whether they cover conversations to initiate mediation. However, candor during these initial conversations is critical to insuring a thoughtful agreement to mediate, and the Act therefore extends confidentiality to these conversations to encourage that candor.

The definition in Section 2(2) is narrowly tailored to permit the application of the privilege to protect communications that a party would reasonably believe would be confidential, such as the explanation of the matter to an intake clerk for a community mediation program, and communications between a mediator and a party that occur between formal mediation sessions. These would be communications "made for the purposes of considering, initiating, continuing, or reconvening a mediation or retaining a mediator." This language protects the confidentiality of such a communication when doing so advances the underlying policies of the privilege, while at the same time gives the courts the

latitude to restrict the application of the privilege in situations where such an application of the privilege would constitute an abuse. For example, an individual trying to hide information from a court might later attempt to characterize a call to an acquaintance about a dispute as an inquiry to the acquaintance about the possibility of mediating the dispute. This definition would permit the court to disallow a communication privilege, and admit testimony from that acquaintance by finding that the communication was not "made for the purposes of initiating considering, initiating, continuing, or reconvening a mediation or retaining a mediator."

Responding in part to public concerns about the complexity of earlier drafts, the Drafting Committees also elected to leave the question of when a mediation ends to the sound judgment of the courts to determine according to the facts and circumstances presented by individual cases. See Bidwell v. Bidwell, 173 Or. App. 288 (2001) (ruling that letters between attorneys for the parties that were sent after referral to mediation and related to settlement were mediation communications and therefore privileged under the Oregon statute). In weighing language about when a mediation ends, the Drafting Committees considered other more specific approaches for answering these questions. One approach in particular would have terminated the mediation after a specified period of time if the parties failed to reach an agreement, such as the 10-day period specified in Cal. Evid. Code Section 1125 (West 1997) (general). However, the Drafting Committees 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.

Finally, this definition would also include mediation "briefs" and other reports that are prepared by the parties for the mediator. Whether the document is prepared for the mediation is a crucial issue. For example, 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 to clarify a point for other participants would be a mediation communication. Similarly, a memorandum specifically prepared for the mediation by the party or the party's representative explaining the rationale behind certain positions taken on the tax return would be a "mediation communication." Documents prepared for the mediation by expert witnesses attending the mediation would also be covered by this definition. See Section 4(b)(3).

3. Section 2(3). "Mediator."

Several points are worth stressing with regard to the definition of mediator. First, this definition should be read in conjunction with Section 9(c), which makes clear that the Act does not require that a mediator have a special qualification by background or profession. Second, this definition should be read in conjunction with the model language in Section 9(a) through (e) on disclosures of conflicts of interest. Finally, the use of the word "conducts" is intended to be value neutral, and should not be read to express a preference for the manner by which mediations are conducted. Compare Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Tactics: A Grid for the Perplexed, 1 Harv. Neg. L. Rev. 7 (1996) with Joseph B. Stulberg, Facilitative vs. Evaluative Mediator Orientations: Piercing the "Grid" Lock, 24 Fla. St. U. L. Rev. 985 (1997)

4. Section 2(4). "Nonparty Participant."

This definition would cover experts, friends, support persons, potential parties, and others who participate in the mediation. The definition is pertinent to the privilege accorded nonparty participants in Section 4(b)(3), and to the ability of parties to bring attorneys or support persons in Section 10. In the event that an attorney is deemed to be a nonparty participant, that attorney would be constricted in exercising that right by ethical provisions requiring the attorney to act in ways that are consistent with the interests of the client. See Model Rule of Professional Conduct 1.3 (Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.); and Rule 1.6(a) (Confidentiality of Information. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).).

5. Section 2(5). "Mediation Party."

The Act defines "mediation party" to be a person who participates in a mediation and whose agreement is necessary to resolve the dispute. These limitations are designed to prevent someone with only a passing interest in the mediation, such as a neighbor of a person embroiled in a dispute, from attending the mediation and then blocking the use of information or taking advantage of rights meant to be accorded to parties. Such a person would be a non-party participant and would have only a limited privilege. See Section 4(b)(3). Similarly, counsel for a mediation party would not be a mediation party, because their agreement is not necessary to the resolution of the dispute.

Because of these structural limitations on the definition of parties, participants who do not meet the definition of "mediation party," such as a witness or expert on a given issue,

do not have the substantial rights under additional sections that are provided to parties. Rather, these non-party participants are granted a more limited privilege under Section 4(b)(3). Parties seeking to apply restrictions on disclosures by such participants - including their attorneys and other representatives - should consider drafting such a confidentiality obligation into a valid and binding agreement that the participant signs as a condition of participation in the mediation.

A mediation party may participate in the mediation in person, by phone, or electronically. A person, as defined in Section 2(6), may participate through a designated agent. If the party is an entity, it is the entity, rather than a particular agent, that holds the privilege afforded in Sections 4-6.

6. Section 2(6). "Person."

Sections 2(6) adopts the standard language recommended by the National Conference of Commissioners of Uniform State Laws for the drafting of statutory language, and the term should be interpreted in a manner consistent with that usage.

7. Section 2(7). "Proceeding."

Section 2(7) defines the proceedings to which the Act applies, and should be read broadly to effectuate the intent of the Act. It was added to allow the Drafters to delete repetitive language throughout the Act, such as judicial, administrative, arbitral, or other adjudicative processes, including related pre-hearing and post-hearing motions, conferences, and discovery, or legislative hearings or similar processes.

8. Section 2(8). "Record" and Section 2(9). "Sign."

These Sections adopt standard language approved by the Uniform Law Conference that is intended to conform Uniform Acts with the Uniform Electronic Transactions Act (UETA) and its federal counterpart, Electronic Signatures in Global and National Commerce Act (E-Sign) (15 U.S.C 7001, etc seq. (2000).

Both UETA and E-Sign were written in response to broad recognition of the commercial and other use of electronic technologies for communications and contracting, and the consensus that the choice of medium should not control the enforceability of transactions. These Sections are consistent with both UETA and E-Sign. UETA has been adopted by the Conference and received the approval of the American Bar Association House of Delegates. As of December 2001, it had been enacted in more than 35 states. See also Section 11, Relation to Electronic Signatures in Global and National Commerce Act.

The practical effect of these provisions is to make clear that electronic signatures and documents have the same authority as

written ones for purposes of establishing an agreement to mediate under Section 3(a), party opt-out of the mediation privilege under Section 3(c), and participant waiver of the mediation privilege under Section 5(a).

§10003. Scope

1. Application. Except as otherwise provided in subsection 2 or 3, this chapter applies to a mediation in which:

A. The mediation parties are required to mediate by statute or court or administrative agency rule or to be referred to mediation by a court, administrative agency or arbitrator;

B. The mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

C. The mediation parties use as a mediator an individual who is held out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

2. Exemptions. The chapter does not apply to a mediation:

A. Relating to the establishment, negotiation, administration or termination of a collective bargaining relationship;

B. Relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the chapter applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

C. Conducted by a judge who might make a ruling on the case; or

D. Conducted under the auspices of:

(1) A primary or secondary school if all the parties are students; or

(2) A correctional institution for youths if all the parties are residents of that institution.

3. By agreement. If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged,

the privileges under sections 10004 to 10006 do not apply to the mediation or part agreed upon. However, sections 10004 to 10006 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

REPORTER'S NOTES

1. In general.

The Act is broad in its coverage of mediation, a departure from the common state statutes that apply to mediation in particular contexts, such as court-connected mediation or community mediation, or to the mediation of particular types of disputes, such as worker's compensation or civil rights. See, e.g., Neb. Rev. Stat. Section 48-168 (1993) (worker's compensation); Iowa Code Section 216.15A (1999) (civil rights). Moreover, unlike many mediation privileges, it also applies in some contexts in which the Rules of Evidence are not consistently followed, such as administrative hearings and arbitration.

Whether the Act in fact applies is a crucial issue because it determines not only the application of the mediation privilege but also whether the mediator has the obligations regarding the disclosure of conflicts of interest and, if asked, qualifications in Section 9; is prohibited from making disclosures about the mediation to courts, agencies and investigative authorities in Section 7; and must accommodate requirements regarding accompanying individuals in Section 10.

Because of the breadth of the Act's coverage, it is important to delineate its scope with precision. Section 3(a) sets forth three different mechanisms that trigger the Act's coverage, and will likely cover most mediation situations that commonly arise. Section 3(b) on the other hand, carves out a series of narrow and specific exemptions from the Act's coverage. Finally, Section 3(c) provides a vehicle through which parties who would be mediating in a context covered by Section 3(a) may "opt out" of the Act's protections and responsibilities. The central operating principle throughout this Section is that the Act should support, and guide, the parties' reasonable expectations about whether the mediations in which they are participating are included within the scope of the Act.

2. Section 3(a). Mediations covered by Act; triggering mechanisms.

Section 3(a) sets forth three conditions, the satisfaction of any one of which will trigger the application of the Act. This triggering requirement is necessary because the many different forms, contexts, and practices of mediation and other methods of dispute resolution make it sometimes difficult to know with

certainty whether one is engaged in a mediation or some other dispute resolution or prevention process that employs mediation and related principles. See, e.g., Ellen J. Waxman & Howard Gadlin, Ombudsmen: A Buffer Between Institutions, Individuals, 4 Disp. Resol. Mag. 21 (Summer 1998) (describing functions of ombuds, which can at times include mediation concepts and skills); Janice Fleischer & Zena Zumeta, Group Facilitation: A Way to Address Problems Collaboratively, 4 Disp. Resol. Mag.. 4 (Summer 1998) (comparing post-dispute mediation with pre-dispute facilitation); Lindsay "Peter" White, Partnering: Agreeing to Work Together on Problems, 4 Disp. Resol. Mag. 18 (Summer 1998) (describing a common collaborative problem solving technique used in the construction industry). This problem is exacerbated by the fact that unlike other professionals - such as doctors, lawyers, and social workers - mediators are not licensed and the process they conduct is informal. If the intent to mediate is not clear, even a casual discussion over a backyard fence might later be deemed to have been a mediation, unfairly surprising those involved and frustrating the reasonable expectations of the parties. The first triggering mechanism, Section 3(a)(1), subject to exceptions provided in 3(b), covers those situations in which mediation parties are either required to mediate or referred to mediation by governmental institutions or by an arbitrator. Administrative agencies include those public agencies with the authority to prescribe rules and regulations to administer a statute, as well as the authority to adjudicate matters arising under such a statute. They include agricultural departments, child protective services, civil rights commissions and worker's compensation boards, to name only a few. Through this triggering mechanism, the formal court-referred mediation that many people associate with mediation is clearly covered by the Act.

Where Section 3(a)(1) focuses on publicly referred mediations, the second triggering mechanism, Section 3(a)(2), furthers party autonomy by allowing mediation parties and the mediator to trigger the Act by agreeing to mediate in a record that is signed by the parties and by the mediator. A later note by one party that they agreed to mediate would not constitute a record of an agreement to mediate. In addition, the record must demonstrate the expectation of the mediation parties and the mediator that the mediation communications will have a privilege against disclosure.

Yet significantly, these individuals are not required to use any magic words to obtain the protection of the Act. See Haghighi v. Russian-American Broadcasting Co., 577 N.W.2d 927 (Minn.1998). The lack of a requirement for magic words tracks the intent to be inclusive and to embrace the many different approaches to mediation. Moreover, were magic words required, party and mediator expectations of confidentiality under the Act might be

frustrated, since a mediation would only be covered by the Act if the institution remembered to include them in any agreement.

The phrase "privileged against disclosure" clarifies the type of expectations that the record must demonstrate tin order to show an expectation of confidentiality in a subsequent legal setting. Mere generalized expectations of confidentiality in a non-legal setting are not enough to trigger the Act if the case does not fit under Sections 3(a)(1) or 3(a)(3). Take for example a dispute in a university between the heads of the Spanish and Latin departments that is mediated or "worked out informally" with the assistance of the head of the French department, at the suggestion of the university provost. Such a mediation would not reasonably carry with it party or mediator expectations that the mediation would be conducted pursuant to an evidentiary privilege, rights of disclosure and accompaniment and the other protections and obligations of the Act. Indeed, some of the parties and the mediator may more reasonably expect that the mediation results, and even the underlying discussions, would be disclosed to the university provost, and perhaps communicated throughout the parties' respective departments and elsewhere on campus. By contrast, however, if the university has a written policy regarding the mediation of disputes that embraces the Act, and the mediation is specifically conducted pursuant to that policy, and the parties agree to participate in mediation in a record signed by the parties, then the parties would reasonably expect that the Act would apply and conduct themselves accordingly, both in the mediation and beyond.

The third triggering mechanism, Section 3(a)(3), focuses on individuals and organizations that provide mediation services and provides that the Act applies when the mediation is conducted by one who is held out as a mediator. For example, disputing neighbors who mediate with a volunteer at a community mediation center would be covered by the Act, since the center holds itself out as providing mediation services. Similarly, mediations conducted by a private mediator who advertises his or her services as a mediator would also be covered, since the private mediator holds himself or herself out to the public as a mediator. Because the mediator is publicly held out as a mediator, the parties may reasonably expect mediations they conduct to be conducted pursuant to relevant law, specifically the Act. By including those mediations conducted by private mediators who hold themselves out as mediators, the Act tracks similar doctrines regarding other professions. In other contexts, "holding out" has included making a representation in a public manner of being in the business or having another person make that representation. See 18A Am. Jur.2d Corporations Section 271 (1985).

Mediations can be conducted by ombuds practitioners. See Standards for the Establishment and Operation of Ombuds Offices (August 2001). If such a mediation is conducted pursuant to one of these triggering mechanisms, such as a written agreement under Section 3(a)(2), it will be protected under the terms of the Act. There is no intent by the Drafters to exclude or include mediations conducted by an ombuds a priori. The terms of the Act determine applicability, not a mediator's formal title.

Finally, on the issue of Section 3(a) inclusions into the Act, the Drafting Committees discussed whether it should cover the many cultural and religious practices that are similar to mediation and that use a person similar to the mediator, as defined in this Act. On the one hand, many of these cultural and religious practices, like more traditional mediation, streamline and resolve conflicts, while solving problems and restoring relationships. Some examples of these practices are Ho'oponopono, circle ceremonies, family conferencing, and pastoral or marital counseling. These cultural and religious practices bring richness to the quality of life and contribute to traditional mediation. On the other hand, there are instances in which the application of the Act to these practices would be disruptive of the practices and therefore undesirable. On balance, furthering the principle of self-determination, the Drafting Committees decided that those involved should make the choice to be covered by the Act in those instances in which other definitional requirements of Section 2 are met by entering into an agreement to mediate reflected by a record or securing a court or agency referral pursuant to Section 3(a)(1). At the same time, these persons could opt out the Act's coverage by not using this triggering mechanism. This leaves a great deal of leeway, appropriately, with those involved in the practices.

3. Section 3(b)(1) and (2). Exclusion of collective bargaining disputes.

Collective bargaining disputes are excluded because of the longstanding, solidified, and substantially uniform mediation systems that already are in place in the collective bargaining context. See Memorandum from ABA Section of Labor and Employment Law of the American Bar Association to Uniform Mediation Act Reporters 2 (Jan. 23, 2000) (on file with UMA Drafting Committees); Letter from New York State Bar Association Labor and Employment Law Section to Reporters, Uniform Mediation Act 2-4 (Jan. 21, 2000) (on file with UMA Drafting Committees). This exclusion includes the mediation of disputes arising under the terms of a collective bargaining agreement, as well as mediations relating to the formation of a collective bargaining agreement. By contrast, the exclusion does not include employment discrimination disputes not arising under the collective bargaining agreement as well as employment disputes arising after

the expiration of the collective bargaining agreement. Mediations of disputes in these contexts remain within the protections and responsibilities of the Act.

4. Section 3(b)(3). Exclusion of certain judicial conferences. Difficult issues arise in mediations that are conducted by judges during the course of settlement conferences related to pending litigation, and this Section excludes certain judicially conducted mediations from the Act. Some have the concern that party autonomy in mediation may be constrained either by the direct coercion of a judicial officer who may make a subsequent ruling on the matter, or by the indirect coercive effect that inherently inures from the parties' knowledge of the ultimate presence of that judge. See, e.g., James J. Alfini, Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them For Trial, 6 Disp. Resol. Mag. 11 (Fall 1999), and Frank E.A. Sander, A Friendly Amendment, 6 Disp. Resol. Mag. 11 (Fall 1999).

This concern is further complicated by the variegated nature of judicial settlement conferences. As a general matter, judicial settlement conferences are typically conducted under court or procedural rules that are similar to Rule 16 of the Federal Rules of Civil Procedure, and have come to include a wide variety of functions, from simple case management to a venue for court-ordered mediations. See Mont. R. Civ. P., Rule 16(a). In situations in which a part of the function of judicial conferences is case management, the parties hardly have an expectation of confidentiality in the proceedings, even though there may be settlement discussions initiated or facilitated by the judge or judicial officer. In fact, such hearings frequently lead to court orders on discovery and issues limitations that are entered into the public record. In such circumstances, the policy rationales supporting the confidentiality privilege and other provisions of the Act are not furthered.

On the other hand, there are judicially-hosted settlement conferences that for all practical purposes are mediation sessions for which the Act's policies of promoting full and frank discussions between the parties would be furthered. See generally Wayne D. Brazil, Hosting Settlement Conferences: Effectiveness in the Judicial Role, 3 Ohio St. J. on Disp. Resol. 1 (1987); Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485 (1985).

The Act recognizes the tension created by this wide variety of settlement functions by drawing a line with regard to those conferences that are covered by the Act and those that are not covered by the Act. The Act excludes those settlement conferences in which information from the mediation is communicated to a

judge with responsibility for the case. This is consistent with the prohibition on mediator reports to courts in Section 7. The term "judge" in Section 3(b)(3) includes magistrates, special masters, referees, and any other persons responsible for making rulings or recommendations on the case. However, the Act does not apply to a court mediator, or a mediator who contracts or volunteers to mediate cases for a court because they may not make later rulings on the case. Similarly mediations conducted by judges specifically and exclusively are assigned to mediate cases, so-called "buddy judges," and retired judges who return to mediate cases do not fall within the Section 3(b)(3) exemption because such mediators do not make later rulings on the case.

Local rules are usually not recognized beyond the court's jurisdiction, and may not provide assurance of confidentiality if the mediation communications are sought in another jurisdiction, and if the jurisdiction does not permit recognize privilege by local rule.

5. Section 3(b)(4)(A). Exclusion of peer mediation.

The Act also exempts mediations between students conducted under the auspices of school programs because the supervisory needs of schools toward students, particularly in peer mediation, may not be consistent with the confidentiality provisions of the Act. For example, school administrators need to be able to respond to, and in a proceeding verify, legitimate threats to student safety or domestic violence that may surface during a mediation between students. See Memorandum from ABA Section of Dispute Resolution to Uniform Mediation Act Reporters (Nov. 15, 1999) (on file with UMA Drafting Committees). The law has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969), citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968) and Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

This exemption does not include mediations involving a teacher, parent, or other non-student as such an exemption might preclude coverage of truancy mediation and other mediation sessions for which the privilege is pertinent

6. Section 3(b)(4)(B). Exclusion of correctional institutions for youth.

The Act also exempts programs involving youths at correctional institutions if the mediation parties are all residents of the institution. This is to facilitate and encourage mediation and conflict prevention and resolution techniques among those juveniles who have well-documented and profound needs in those areas. Kristina H. Chung, Kids Behind Bars: The Legality of

Incarcerating Juveniles in Adult Jails, 66 Ind. L.J. 999, 1021 (1991). Exempting these programs serves the same policies as are served by the peer mediation exclusion for non-incarcerated youths. The Drafters do not intend to exclude cases where at least one party is not a resident, such as a class action suit against a non-resident in which the parties mediate or attempt to mediate the case.

7. Section 3(c). Alternative of non-privileged mediation.

This Section allows the parties to opt for a non-privileged mediation or mediation session by mutual agreement, and furthers the Act's policy of party self-determination. If the parties so agree, the privilege sections of the Act do not apply, thus fulfilling the parties reasonable expectations regarding the confidentiality of that mediation or session. For example, parties in a sophisticated commercial mediation, who are represented by counsel, may see no need for a privilege to attach to a mediation or session, and may by express written agreement "opt out" of the Act's privilege provisions. Similarly, parties may also use this option if they wish to rely on, and therefore use in evidence, statements made during the mediation. It is the parties rather than the mediator who make this choice, although a mediator could presumably refuse to mediate a mediation or session that is not covered by this Act. Even if the parties do not agree in advance, the parties, mediator, and all nonparty participants can waive the privilege pursuant to Section 5. In this instance, however, the mediator and other participants can block the waiver in some respects.

If the parties want to opt out, they should inform the mediators or nonparty participants of this agreement, because without actual notice, the privileges of the Act still apply to the mediation communications of the persons who have not been so informed until such notice is actually received. Thus, for example, if a nonparty participant has not received notice that the opt-out has been invoked, and speaks during a mediation, that mediation communication is privileged under the Act. If, however, one of the parties or the mediator tells the nonparty participant that the opt-out has been invoked, the privilege no longer attaches to statements made after the actual notice has been provided, even though the earlier statements remain privileged because of the lack of notice.

8. Other scope issues.

The Act would apply to all mediations that fit the definitions of mediation by a mediator unless specifically excluded by the State adopting the Act. For example, a State may want to exclude international commercial conciliation, which is covered by specific statute in some States. See, e.g., N.C. Gen. Stat.

Section 1-567.60 (1991); Cal. Civ. Pro. Section 1297.401 (West 1988); Fla. Stat. Ann. Section 684.10 (1986).

§10004. Privilege against disclosure; admissibility; discovery

1. Privileged unless waived or precluded. Except as otherwise provided in section 10006, a mediation communication is privileged as provided in subsection 2 and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 10005.

2. Privileges. In a proceeding, the following privileges apply.

A. A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

B. A mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator.

C. A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

3. Admissibility; discovery. Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

REPORTER'S NOTES

1. In general.

Sections 4 through 6 set forth the Uniform Mediation Act's general structure for protecting the confidentiality of mediation communications against disclosure in later legal proceedings. Section 4 sets forth the evidentiary privilege, which provides that disclosure of mediation communications generally cannot be compelled in designated proceedings or discovery and results in the exclusion of these communications from evidence and from discovery if requested by any party or, for certain communications, by a mediator or nonparty participant as well, unless within an exception delineated in Section 6 applies or the privilege is waived under the provisions of Section 5. It further delineates the fora in which the privilege may be asserted. The term "proceeding" is defined in Section 2(7). The provisions of Sections 4-6 may not be expanded by the agreement of the parties,

but the protections may be waived under Section 5 or under Section 3(c).

2. The mediation privilege structure.

a. Rationale for privilege.

Section 4(b) grants a privilege for mediation communications that, like other communications privileges, allows a person to refuse to disclose and to prevent other people from disclosing particular communications. See generally Strong, supra, at Section 72; Developments in the Law - Privileged Communications, 98 Harv. L. Rev. 1450 (1985). The Drafters considered several other approaches to mediation confidentiality - including a categorical exclusion for mediation communications, the extension of evidentiary settlement discussion rules to mediation, and mediator incompetency. Upon exhaustive study and consideration, however, each of these mechanisms proved either overbroad in that they failed to fairly account for interests of justice that might occasionally outweigh the importance of mediation confidentiality (categorical exclusion and mediator incompetency), underbroad in that they failed to meet the reasonable needs of the mediation process or the reasonable expectations of the parties in the mediation process (settlement discussions), or under-inclusive in that they failed to provide protection for all of those involved in the mediation process (mediator incompetency).

The Drafters ultimately settled on the use of the privilege structure, the primary means by which communications are protected at law, an approach that is narrowly tailored to satisfy the legitimate interests and expectations of participants in mediation, the mediation process, and the larger system of justice in which it operates. The privilege structure also provides greater certainty in judicial interpretation because of the courts' familiarity with other privileges, and is consistent with the approach taken by the overwhelming majority of legislatures that have acted to provide broad legal protections for mediation confidentiality. Indeed, of the 25 States that have enacted confidentiality statutes of general application, 21 have plainly used the privilege structure. Ariz. Rev. Stat. Ann. Section 12-2238 (West 1993); Ariz. Rev. Stat. Ann. Section 16-7-206 (1997); Iowa Code Section 679C.2 (1998); Kan. Stat. Ann. Section 60-452 (1964); La. Rev. St. Ann. Section 9:4112 (1997); Me. R. Evid. Section 408 (1997); Mass. Gen. Laws ch. 233, Section 23C (1985); Mont. Code Ann. Section 26-1-813 (1999); Nev. Rev. Stat. Section 48.109(3) (1993); Ohio Rev. Code Ann. Section 2317.023 (West 1996); Okla. stat. tit. 12, Section 1805 (1983); Or. Rev. Stat. Ann. Section 36.220 (1997); 42 Pa. Cons. Stat. Ann. Section 5949 (1996) (general); R.I. Gen. Laws Section 9-19-44 (1992); S.D. Codified Laws Section 19-13-32 (1998); Tex. Civ. Prac. & Rem. Code Section 154.053 (c) (1999); Utah Code Ann. Section 30-3-38(4) (2000); Va. Code Ann. Section 8.01-576.10

(1994); Wash. Rev. Code Section 5.60.070 (1993); Wis. Stat. Section 904.085(4)(a) (1997); Wyo. Stat. Section 1-43-103 (1991). At least one other has arguably used the privilege structure: See Olam v. Congress Mortgage Co., 68 F.Supp. 2d 1110 (N.D. Cal. 1999) (treating Cal. Evid. Code Section 703.5 (West 1994) and Cal. Evid. Code Section 1119, 1122 (West 1997) as a privilege).

That these privilege statutes also tend to be the more recent of mediation confidentiality statutory provisions suggests that privilege may also be seen as the more modern approach taken by state legislatures. See, e.g., Ohio Rev. Code. Ann. Section 2317.023 (West 1996); Fla. Stat. Ann. Section 44.102 (1999); Wash. Rev. Code Ann. Section 5.60.072 (West 1993); see generally, Cole et al., supra, at Section 9:10-9:17. Moreover, States have been even more consistent in using the privilege structure for mediation offered by publicly funded entities, such as court-connected and community mediation programs. See, e.g., Ariz. Rev. Stat. Ann. Section 25-381.16 (West 1977) (domestic court); Ark. Code. Ann. Section 11-2-204 (Arkansas Mediation and Conciliation Service) (1979); Fla. Stat. Ann. Section 44.201 (publicly established dispute settlement centers) (West 1998); 710 Ill. Comp. Stat . Section 20/6 (1987) (non-profit community mediation programs); Ind. Code Ann. Section 4-6-9-4 (West 1988) (Consumer Protection Division); Iowa Code Ann. Section 216.15B (West 1999) (civil rights commission); Minn. Stat. Ann. Section 176.351 (1987) (workers' compensation bureau); Cal. Evid. Code Section 1119, et seq. (West 1997); Minn. Stat. Ann. Section 595.02 (1996).

The privilege structure carefully balances the needs of the justice system against party and mediator needs for confidentiality. For this reason, legislatures and courts have used the privilege to provide the basis for protection for other forms of professional communications privileges, including attorney-client, doctor-patient, and priest-penitent relationships. See Unif. R. Evid. R. 510-510 (1986); Strong, supra, at tit. 5. Congress recently used this structure to provide for confidentiality in the accountant-client context as well. 26 U.S.C. Section 7525 (1998) (Internal Revenue Service Restructuring and Reform Act of 1998). Scholars and practitioners have joined legislatures in showing 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). For a critical perspective, see generally 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).

b. Communications to which the privilege attaches

The privilege applies to a broad array of "mediation communications" including some communications that are not made during the course of a formal mediation session, such as those made for purposes of convening or continuing a mediation. See Reporter's Notes to Section 2(2) for further discussion.

c. Proceedings at which the privilege may be asserted.

The privilege under Section 4 applies in most legal "proceedings" that occur during or after a mediation covered by the Act. See Section 2(7). If the privilege is raised in a criminal felony proceeding, it is subject to a specialized treatment under Section 6(b)(1), and the Reporter's Notes to that Section should be consulted for further clarification.

3. Section 4(a). Description of effect of privilege.

The words "is not subject to discovery or admissible in evidence" in Section 4(a) make explicit that a court or other tribunal must exclude privileged communications that are protected under these sections, and may not compel discovery of them. Because the privilege is unfamiliar to many using mediation, this Section provides a description of the effect of the privilege provided in Sections 4(b), 5, and 6. It does not change the reach of the remainder of the Section.

4. Section 4(b). Operation of privilege.

As with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular communications. See generally Strong, supra, at Section 72; Developments in the Law - Privileged Communications, 98 Harv. L. Rev. 1450 (1985).

This blocking function is critical to the operation of the privilege. As discussed in more detail below, parties have the greatest blocking power and may block provision of testimony about or other evidence of mediation communications made by anyone in the mediation, including persons other than the mediator and parties. The evidence may be blocked whether the testimony is by another party, a mediator, or any other participant. However, if all parties agree that a party should testify about a party's mediation communications, no one else may block them from doing so, including a mediator or nonparty participant.

Mediators may block their own provision of evidence, including their own testimony and evidence provided by anyone else of the mediator's mediation communications, even if the parties consent.

Nonetheless, the parties' consent is required to admit the mediator's provision of evidence, as well as evidence provided by another regarding the mediator's mediation communications.

Finally, a nonparty participant may block evidence of that individual's mediation communication regardless of who provides the evidence and whether the parties or mediator consent. Once again, nonetheless, the nonparty participant may not provide such evidence if the parties do not consent. This is consistent with fixing the limits of the privilege to protect the expectations of those persons whose candor is most important to the success of the mediation process.

a. The holders of the privilege.

1. In general.

A critical component of the Act's general rule is its designation of the holder - i.e., the person who is eligible to raise and waive the privilege.

This designation brings both clarity and uniformity to the law. Statutory mediation privileges are somewhat unusual among evidentiary privileges in that they often do not specify who may hold and/or waive the privilege, leaving that to judicial interpretation. See, e.g., 710 Ill. Comp. Stat. Section 20/6 (1987) (community dispute resolution centers); Ind. Code Section 20-7.5-1-13 (1987) (university employee unions); Iowa Code Section 679.12 (1985) (general); Ky. Rev. Stat. Ann. Section 336.153 (1988) (labor disputes); 26 Me. Rev. Stat. Ann. Section 1026 (1999) (university employee unions); Mass. Gen. Laws ch. 150, Section 10A (1985) (labor disputes).

Those statutes that designate a holder tend to be split between those that make the parties the only holders of the privilege, and those that also make the mediator a holder. Compare Ark. Code Ann. Section 11-2-204 (1979) (labor disputes); Fla. Stat. Ann. Section 61.183 (1996) (divorce); Kan. Stat. Ann. Section 23-605 (1999) (domestic disputes); N.C. Gen. Stat. Section 41A-7(d) (1998) (fair housing); Or. Rev. Stat. Ann. Section 107.785 (1995) (divorce) (providing that the parties are the sole holders) with Ohio Rev. Code Ann. Section 2317.023 (West 1996) (general); Wash. Rev. Code Ann. Section 7.75.050 (1984) (dispute resolution centers (making the mediator an additional holder in some respects).

The Act adopts an approach that provides that both the parties and the mediators may assert the privilege regarding certain matters, thus giving weight to the primary concern of each rationale. See Ohio Rev. Code Ann. Section 2317.023 (West 1996) (general); Wash. Rev. Code Section 5.60.070 (1993) (general). In

addition, the Act provides a limited privilege for nonparty participants, as discussed in Section (c) below.

a2. Parties as holders.

The mediation privilege of the parties draws upon the purpose, rationale, and traditions of the attorney-client privilege, in that its paramount justification is to encourage candor by the mediation parties, just as encouraging the client's candor is the central justification for the attorney-client privilege. See Paul R. Rice, Attorney Client Privilege in the United States 2.1-2.3 (2d ed. 1999).

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because mediations involve parties whose interests appear to be adverse. However, the law of attorney-client privilege has considerable experience with situations in which multiple-client interests may conflict, and those experiences support the analogy of the mediation privilege to the attorney-client privilege. For example, the attorney-client privilege has been recognized in the context of a joint defense in which interests of the clients may conflict in part and yet one may prevent later disclosure by another. See Raytheon Co. v. Superior Court, 208 Cal. App.3d 683, 256 Cal. Rptr. 425 (1989); United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979), cert denied, 444 U.S. 898 (1979); Visual Scene, Inc. v. Pilkington Bros., PLC, 508 So.2d 437 (Fla. App. 1987); but see Gulf Oil Corp. v. Fuller, 695 S.W.2d 769 (Tex. App. 1985) (refusing to apply the joint defense doctrine to parties who were not directly adverse); see generally Patricia Welles, A Survey of Attorney-Client Privilege in Joint Defense, 35 U. Miami L. Rev. 321 (1981). Similarly, the attorney-client privilege applies in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. Desriusseaux v. Val-Roc Truck Corp., 230 A.D.2d 704 (N.Y. Supreme Ct. 1996); Paul R. Rice, Attorney-Client Privilege in the United States, 4:30-4:38 (2d ed. 1999).

It should be noted that even if the mediator loses the privilege to block or assert a privilege, the parties may still come forward and assert their privilege, thus blocking the mediator who has lost the privilege from providing testimony about the affected mediation. This Section should be read in conjunction with 9(d) below.

a3. Mediator as holders.

Mediators are made holders with respect to their own mediation communications, so that they may participate candidly, and with respect to their own testimony, so that they will not be viewed

as biased in future mediations, as discussed further in the Reporter's Prefatory Note. As noted above in Section 4(a)(2) above and in commentary to Section 9(d) below, even if the mediator loses the privilege to block or assert a privilege, the parties may still come forward and assert their privilege.

a4. Nonparty participants as holders.

In addition, the Act adds a privilege for the nonparty participant, though limited to the communications by that individual in the mediation. See 5 U.S.C. Section 574(a)(1). The purpose is to encourage the candid participation of experts and others who may have information that would facilitate resolution of the case. This would also cover statements prepared by such persons for the mediation and submitted as part of it, such as experts' reports. Any party who expects to use such an expert report prepared to submit in mediation later in a legal proceeding would have to secure permission of all parties and the expert in order to do so. This is consistent with the treatment of reports prepared for mediation as mediation communications. See Section 2(2).

a5. Contractual notice of intent to invoke the mediation privilege.

As a practical matter, a person who holds a mediation privilege can only assert the privilege if that person knows that evidence of a mediation communication will be sought or offered at a proceeding. This presents no problem in the usual case in which the subsequent proceeding arises because of the failure of the mediation to resolve the dispute because the mediation party would be one of the parties to the proceeding in which the mediation communications are being sought. To guard against the unusual situation in which a party or mediator may wish to assert the privilege, but is unaware of the necessity, the parties and mediator may wish to contract for notification of the possible use of mediation information, as is a practice under the attorney-client privilege for joint defense consultation. See Paul R. Rice, et. al., Attorney-Client Privilege in the United States Section 18-25 (2d ed. 1999) (attorney client privilege in context of joint representation).

5. Section 4(c). Otherwise discoverable evidence.

This provision acknowledges the importance of the availability of relevant evidence to the truth-seeking function of courts and administrative agencies, and makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a mediation. For purposes of the mediation privilege, it is the communication that is made in a mediation that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is

communicated in a mediation is subject to discovery, just as it would be if the mediation had not taken place.

There is no "fruit of the poisonous tree" doctrine in the mediation privilege. For example, a party who learns about a witness during a mediation is not precluded by the privilege from subpoenaing that witness. This is a common exemption in mediation privilege statutes, and is also found in Uniform Rule of Evidence 408. See, e.g., Fla. Stat. Ann. Section 44.102 (1999) (general); Minn. Stat. Ann. Section 595.02 (1996) (general); Ohio Rev. Code Ann. Section 2317.023 (West 1996) (general); Wash. Rev. Code Section 5.60.070 (1993) (general).

§10005. Waiver and preclusion of privilege

1. Waiver. A privilege under section 10004 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

A. In the case of the privilege of a mediator, it is expressly waived by the mediator; and

B. In the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

2. Prejudice; precluded. A person that discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 10004, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

3. Crime or criminal activity; precluded. A person that intentionally uses a mediation to plan, attempt to commit or commit a crime or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 10004.

REPORTER'S NOTES

1. Section 5(a) and (b). Waiver and preclusion.
Section 5 provides for waiver of privilege, and for a party, mediator, or nonparty participant to be precluded from asserting the privilege in situations in which mediation communications have been disclosed before the privilege has been asserted. Waiver must be express and either recorded through a writing or electronic record or made orally during specified types of proceedings. These rules further the principle of party autonomy

in that mediation participants may generally prefer not to waive their mediation privilege rights. However, there may be situations in which one or more parties may wish to be freed from the burden of privilege, and the waiver provision permits that possibility. See, e.g., Olam v. Congress Mortgage Co., 68 F.Supp.2d 1110, 1131-33 (N.D. Cal. 1999).

Significantly, these provisions differ from the attorney-client privilege in that the mediation privilege does not permit waiver to be implied by conduct. See Michael H. Graham, Handbook of Federal Evidence Section 511.1 (4th ed. 1996). The rationale for requiring explicit waiver is to safeguard against the possibility of inadvertent waiver, such as through the often salutary practice of parties discussing their dispute and mediation with friends and relatives. In contrast to these settings, there is a sense of formality and awareness of legal rights in all of the proceedings to which the privilege may be waived if the waiver is oral. They generally are conducted on the record, easing the difficulties of establishing what was said.

Read together with Section 4, the waiver operates as follows:

For testimony about mediation communications made by a party, all parties are the holders and therefore all parties must waive the privilege before a party or nonparty participant may testify or provide evidence; if that testimony is to be provided by a mediator, all parties and the mediator must waive the privilege.

For testimony about mediation communications that are made by the mediator, both the parties and the mediator are holders of the privilege, and therefore both the parties and the mediator must waive the privilege before a party, mediator, or nonparty participant may testify or provide evidence of a mediator's mediation communications.

For testimony about mediation communications that are made by a nonparty participant, both the parties and the nonparty participants are holders of the privilege and therefore both the parties and the nonparty participant must waive before a party or nonparty participant may testify; if that testimony is to be offered through the mediator, the mediator must also waive.

Earlier drafts included provisions that permitted waiver by conduct, which is common among communications privileges. However, the Drafting Committees deleted those provisions because of concerns that mediators and parties unfamiliar with the statutory environment might waive their privilege rights inadvertently. That created the anomalous situation of permitting the opportunity for one party to blurt out potentially damaging

information in the midst of a trial and then use the privilege to block the other party from contesting the truth.

To address this anomaly, the Drafters added Section 5(b), a preclusion provision to cover situations in which the parties do not expressly waive the privilege but engage in conduct inconsistent with the assertions of the privilege, and that cause prejudice. As under existing interpretations for other communications privileges, waiver through preclusion would not typically constitute a waiver with respect to all mediation communications, only those related in subject matter. See generally Unif. R. Evid. R. 510 and 511 (1986).

Critically, the preclusion provision applies only if the disclosure prejudices another in a proceeding. It is not intended to encompass the casual recounting of the mediation session to a neighbor that is not admissible in court, but would include disclosure that would, absent the exception, allow one party to take unfair advantage of the privilege. For example, if one party's attorney states in court that the other party admitted destroying evidence during mediation, that party should not be able to block the use of testimony to refute that statement later in that proceeding. Such advantage-taking or opportunism would be inconsistent with the policy rationales that support continued recognition of the privilege, while the casual conversation would not. Thus, if Andy and Betty were the parties in a mediation, and Andy affirmatively stated in court that Betty admitted destroying evidence during the mediation, Andy is precluded from asserting that A did not waive the privilege. If Betty decides to waive as well, evidence of Andy's and Betty's statements during mediation may be admitted.

Analogous doctrines have developed regarding constitutional privileges, Harris v. New York, 401 U.S. 222, 224 (1971) (shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances), and the rule of completeness in Rule 106 of the Uniform Rules of Evidence, which states that if one party introduces part of a record, an adverse party may introduce other parts when to do otherwise would be unfair.

Finally, it is worth noting that in arbitration, which is sometimes conducted without an ongoing record, it will be important for waiving parties to ask the arbitrator to note the waiver. Any individual who wants notice that another has received a subpoena for mediation communications or has waived the privilege can provide for notification as a clause in the agreement to mediate or the mediated agreement.

2. Section 5(c). Preclusion for use of mediation to plan or commit crime.

This preclusion reflects a common practice in the States of exempting from confidentiality protection those mediation communications that relate to the ongoing or future commission of a crime, as discussed in the Reporter's Notes to Section 6(a)(4). However, it narrows the preclusion, thus retaining broader confidentiality, and removes the privilege protection only when an actor uses or attempts to use the mediation itself to further the commission of a crime, rather than lifting the confidentiality protection more broadly to any discussion of crimes. For example, it would preclude gang members from claiming that a meeting to plan a drug deal was really a mediation that would privilege those communications in a later criminal or civil case.

This Section should be read together with Section 6(a)(4), which applies to particular communications within a mediation which are used for the same purposes. The two differ on the purpose of the mediation: Section 5(c) applies when the mediation itself is used to further a crime, while Section 6(a)(4) applies to matters that are being mediated for other purposes but which include discussion of acts or statements that may be deemed criminal in nature. Under Section 5(c), the preclusion applies to all mediation communications because the purpose of the mediation frustrates public policy. Under Section 6(a)(4), the preclusion only applies to those mediation communications that have a criminal character; the privilege may still be asserted to block the introduction of other communications made during the mediation. This rationale is discussed more fully in the Comments to Section 6(a)(4).

§10006. Exceptions to privilege

1. Exceptions. There is no privilege under section 10004 for a mediation communication that is:

A. In an agreement evidenced by a record signed by all parties to the agreement;

B. Available to the public under Title 1, chapter 13, subchapter 1 or made during a session of a mediation that is open, or is required by law to be open, to the public;

C. A threat or statement of a plan to inflict bodily injury or commit a crime of violence;

D. Intentionally used to plan a crime, attempt to commit or commit a crime or to conceal an ongoing crime or ongoing criminal activity;

E. Sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

F. Except as otherwise provided in subsection 3, sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant or representative of a party based on conduct occurring during a mediation; or

G. Sought or offered to prove or disprove abuse, neglect, abandonment or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the case is referred by a court to mediation and a public agency participates.

2. Evidence not otherwise available. There is no privilege under section 10004 if a court, administrative agency or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality and that the mediation communication is sought or offered in:

A. A court proceeding involving a murder or a Class A, B or C crime; or

B. Except as otherwise provided in subsection 3, a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

3. Mediator may not be compelled; certain situations. A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection 1, paragraph F or subsection 2, paragraph B.

4. Limitations. If a mediation communication is not privileged under subsection 1 or 2, only the portion of the mediation communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection 1 or 2 does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

REPORTER'S NOTES

1. In general.

This Section articulates specific and exclusive exceptions to the broad grant of privilege provided to mediation communications in Section 4. As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the Act contemplates that a court will hold an in camera proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended. See, e.g., Rinaker v. Superior Court, 74 Cal. Rptr.2d 464, 466 (Ct. App. 1998); Olam v. Congress Mortgage Co., 68 F.Supp.2d 1110, 1131-33 (N.D. Cal. 1999) (discussing whether an in camera hearing is necessary).

The exceptions in Section 6(a) apply regardless of the need for the evidence because society's interest in the information contained in the mediation communications may be said to categorically outweigh its interest in the confidentiality of mediation communications. In contrast, the exceptions under Section 6(b) would apply only in situations where the relative strengths of society's interest in a mediation communication and mediation participant interest in confidentiality can only be measured under the facts and circumstances of the particular case. In these situations, the Act establishes what is in effect a presumption of privilege, which may be rebutted in an off-the-record hearing in which the proponent of the evidence must meet a high standard of need by demonstrating that the evidence is otherwise unavailable and that the need for it in the case at bar substantially outweighs the state's interest in protecting the confidentiality of mediation. In other words, the exceptions listed in 6(b) include situations that should remain confidential but for overriding concerns for justice.

2. Section 6(a)(1). Record of an agreement.

This exception would permit evidence of a signed agreement, such as an agreement to mediate, an agreement regarding how the mediation should be conducted -- including whether the parties and mediator may disclose outside of proceedings, or, more commonly, written agreements memorializing the parties' resolution of the dispute. The exception permits such an agreement to be introduced in a subsequent court proceeding convened to determine whether the terms of that settlement agreement had been breached.

The words "agreement evidenced by a record" and "signed" refer to written and executed agreements, those recorded by tape recorded and ascribed to by the parties on the tape, and other electronic means to record and sign, as defined in Sections 2(9) and 2(10). In other words, a participant's notes about an oral agreement

would not be a signed agreement. On the other hand, the following situations would be considered a signed agreement: a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement.

Written agreements are commonly excepted from mediation confidentiality protections, permitting the Act to embrace current practices in a majority of States. See Ariz. Rev. Stat. Ann. Section 12-2238 (1993); Cal. Evid. Code Section 1120(1) (West 1997) (general); Cal. Evid. Code Section 1123 (West 1997) (general); Cal. Gov't. Code Section 12980(i) (West 1998) (housing discrimination); Colo. Rev. Stat. Section 24-34-506.5 (1993) (housing discrimination); Ga. Code Ann. Section 45-19-36(e) (1989) (fair employment); 775 Ill. Comp. Stat. Section 5/7B-102(E)(3) (1989) (human rights); Ind. Code Section 679.2 (1998) (general); Iowa. Code Ann. Section 216.15(B) (1999) (civil rights); Ky. Rev. Stat. Ann. Section 344.200(4) (1996) (civil rights); La. Rev. Stat. Ann. Section 9:4112(B)(1)(c) (1997) (general); La. Rev. Stat. Ann. Section 51:2257(D) (1998) (human rights); 5 Me. Rev. Stat. Ann. Section 4612(1)(A) (1995) (human rights); Md. Code 1957 Ann. Art. 49(B) Section 28 (1991) (human rights); Mass. Gen. Laws. ch. 151B, Section 5 (1991) (job discrimination); Mo. Rev. Stat. Section 213.077 (1992) (human rights); Neb. Rev. Stat. Section 43-2908 (1993) (parenting act); N.J. Stat. Ann. Section 10:5-14 (1992) (civil rights); Or. Rev. Stat. Ann. Section 36.220(2)(a) (1997) (general); Or. Rev. Stat. Ann. 36.262 (1989) (agricultural foreclosure); 42 Pa. Consol. Stat. Section 5949(b)(1) (1996) (general); Tenn. Code Ann. Section 4-21-303(d) (1996) (human rights); Tex. Gov't. Code Ann. Section 2008.057 (1999) (Administrative Procedure Act); Vt. R. Civ. P., Rule 16.3 (1998) (general civil); Va. Code Ann. Section 8.01-576.10 (1994) (general); Va. Code Ann. Section 8.01-581.22 (1988) (general); Wash. Rev. Code Section 5.60.070 (1)(e) and (f) (1993) (1993) (general); Wash. Rev. Code Section 26.09.015(3) (1991) (divorce); Wash. Rev. Code Section 49.60.240 (1995) (human rights); W.Va. Code Section 5-11A-11(b)(4) (1992) (fair housing); W.Va. Code Section 6B-2-4(r) (1990) (public employees); Wis. Stat. Section 767.11(12) (1993) (family court); Wis. Stat. Section 904.085(4)(a) (1997) (general).

This exception is noteworthy only for what is not included: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a mediation session 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 has the potential to swallow the rule of privilege. As a result, mediation participants might be less candid, not knowing whether a controversy later would erupt over an oral

agreement. Unfortunately, excluding evidence of oral settlements reached during a mediation session would operate to the disadvantage of a less legally sophisticated party who is accustomed to the enforcement of oral settlements reached in negotiations. Such a person might also mistakenly assume the admissibility of evidence of oral settlements reached in mediation as well. However, because the majority of courts and statutes limit the confidentiality exception to signed written agreements, one would expect that mediators and others will soon incorporate knowledge of a writing requirement into their practices. See Vernon v. Acton, 732 N.E.2d 805 (Ind., 2000) (citing draft Uniform Mediation Act); Ryan v. Garcia, 27 Cal. App.4th 1006, 1012 (1994) (privilege statute precluded evidence of oral agreement); Hudson v. Hudson, 600 So.2d 7,9 (Fla. App. 1992) (privilege statute precluded evidence of oral settlement); Ohio Rev. Code Ann. Section 2317.023 (West 1996). For an example of a state statute permitting the enforcement of oral agreements under certain narrow circumstances, see Cal. Evid. Code Section 1118, 1124 (West 1997) (providing that oral agreement must be memorialized in writing within 72 hours).

Despite the limitation on oral agreements, the Act leaves parties other means to preserve the agreement quickly. For example, parties can agree that the mediation has ended, state their oral agreement into the tape recorder and record their assent. See Regents of the University of California v. Sumner, 42 Cal. App. 4th 1209, 1212 (1996). This approach was codified in Cal. Evid. Code Section 1118, 1124 (West 1997).

The parties may still provide that particular settlements agreements are confidential with regard to disclosure to the general public, and provide for sanctions for the party who discloses voluntarily. See Stephen A. Hochman, Confidentiality in Mediation: A Trap for the Unwary, SB41 ALI-ABA 605 (1995). However, confidentiality agreements reached in mediation, like those in other settlement situations, are subject to the need for evidence and public policy considerations. See Cole et al., supra, Section 9.23, 9.25.

3. Section 6(a)(2). Mediations open to the public; meetings and records made open by law.

Section 6(a)(2) makes clear that the privileges in Section 4 do not preempt state open meetings and open records laws, thus deferring to the policies of the individual States regarding the types of meetings that will be subject to these laws. In addition, it provides an exception when the mediation is opened to the public, such as a televised mediation.

This exception recognizes that there should be no after-the-fact confidentiality for communications that were made in a meeting

that was either voluntarily open to the public - such as a workgroup meeting in a federal negotiated rule making that was made open to the general public, even though not required by Federal Advisory Committee Act (FACA) to be open - or was required to be open to the public pursuant to an open meeting law. For example, the Act would provide no privilege if an agency holds a closed meeting but FACA would require that it be open. This exception also applies if a meeting was properly closed but an open record law requires that the meeting summaries or other documents - perhaps even a transcript - be made available under certain circumstances, e.g. the Federal Sunshine Act (5 U.S.C. 552b (1995). In this situation, only the records would be excepted from the privilege, however.

4. Section 6(a)(3). Threats of bodily injury or to commit a crime of violence.

The policy rationales supporting the privilege do not support mediation communications that threaten bodily injury or crimes of violence. To the contrary, in cases in which a credible threat has been made disclosure would serve the public interest in safety and the protection of others. Because such statements are sometimes made in anger with no intention to commit the act, the exception is a narrow one that applies only to the threatening statements; the remainder of the mediation communication remains protected against disclosure.

State mediation confidentiality statutes frequently recognize a similar exception. See Alaska Stat. Section 47.12.450(e) (1998) (community dispute resolution centers) (admissible to extent relevant to a criminal matter); Colo. Rev. Stat. Section 13-22-307 (1998) (general) (bodily injury); Kan. Stat. Ann. Section 23-605(b)(5) (1999) (domestic relations) (mediator may report threats of violence to court); Or. Rev. Stat. Section 36.220(6) (1997) (general) (substantial bodily injury to specific person); 42 Pa. Cons. St. Ann. Section 5949(2)(I) (1996) (general) (threats of bodily injury); Wash. Rev. Code Section 7.75.050 (1984) (community dispute resolution centers) (threats of bodily injury); Wyo. Stat. Section 1-43-103 (c)(ii) (1991) (general) (future crime or harmful act).

5. Section 6(a)(4). Communications used to plan or commit a crime.

The policies underlying this provision mirror those underlying Section 5(c), and are discussed there. This exception applies to particular communications used to plan or commit a crime, whereas Section 5(c) applies when the mediation is used for these purposes. It includes communication intentionally used to conceal an ongoing crime or criminal activity.

Almost a dozen States currently have mediation confidentiality protections that contain exceptions related to a commission of a

crime. Colo. Rev Stat. Section 13-22-307 (1991) (general) (future felony); Fla. Stat. Ann. Section 723.038 (mobile home parks) (ongoing or future crime or fraud); Iowa Code Section 216.15B (1999) (civil rights); Iowa Code Section 654A.13 (1990) (farmer-lender); Iowa Code Section 679C.2 (1998) (general) (ongoing or future crimes); Kan. Stat. Ann. Section 23-605(b)(3) (1989) (ongoing and future crime or fraud); Kan. Stat. Ann. Section 44-817(c)(3) (1996) (labor) (ongoing and future crime or fraud); Kan. Stat. Ann. Section 75-4332(d)(3) (1996) (public employment) (ongoing and future crime or fraud); 24 Me. Rev. Stat. Ann. Section 2857(2) (1999) (health care) (to prove fraud during mediation); Minn. Stat. Section 595.02(1)(a) (1996) (general); Neb. Rev. Stat. Section 25-2914 (1994) (general) (crime or fraud); N.H. Rev. Stat. Ann. Section 328-C:9(III) (1998) (domestic relations) (perjury in mediation); N.J. Stat Ann. Section 34:13A-16(h) (1997) (workers' compensation) (any crime); N.Y. Lab. Laws Section 702-a(5) (McKinney 1991) (past crimes) (labor mediation); Or. Rev. Stat. Ann. Section 36.220(6) (1997) (general) (future bodily harm to a specific person); S.D. Codified Laws Section 19-13-32 (1998) (general) (crime or fraud); Wyo. Stat. Ann. Section 1-43-103(c)(ii) (1991) (future crime).

While ready to exempt attempts to commit or the commission of crimes from confidentiality protection, the Drafting Committees declined 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 state statutes do exempt fraud, although less frequently than they do crime. See, e.g., Fla. Stat. Ann. Section 723.038(8) (1994) (mobile home parks) (communications made in furtherance of commission of crime or fraud); Kan. Stat. Ann. Section 23-605(b)(3) (1999) (domestic relations) (ongoing crime or fraud); Kan. Stat. Ann. Section 44-817(c)(3) (1996) (labor) (ongoing crime or fraud); Kan. Stat. Ann. Section 60-452(b)(3) (1964) (general) (ongoing or future crime or fraud); Kan. Stat. Ann. Section 75-4332(d)(3) (1996) (public employment) (ongoing or future crime or fraud); Neb. Rev. Stat. Section 25-2914 (1994) (general) (crime or fraud); S.D. Codified Laws Section 19-13-32 (1998) (general) (crime or fraud).

Significantly, this exception does not cover mediation communications constituting admissions of past crimes, or past potential crimes, which remain privileged. Thus, for example, discussions of past aggressive positions with regard to taxation or other matters of regulatory compliance in commercial mediations remain privileged against possible use in subsequent or simultaneous civil proceedings. The Drafting Committees discussed the possibility of creating an exception for the related circumstance in which a party makes an admission of past conduct that portends future bad conduct. However, they decided

against such an expansion of this exception because such past conduct can already be disclosed in other important ways. The other parties can warn others, because parties are not prohibited from disclosing by the Act. The Act permits the mediator to disclose if required by law to disclose felonies or if public policy requires.

It is important to emphasize that the Act's limited focus as an evidentiary and discovery privilege, rather than a broader rule of confidentiality means that this privilege provision would not prevent a party from calling the police, or warning someone in danger.

Finally, it should be noted that this exception is intended to prevent the abuse of the privilege as a shield to evidence that might be necessary to prosecute or defend a crime. The Drafters recognize that it is possible that the exception itself could be abused. Such unethical or bad faith conduct would continue to be subject to traditional sanction standards.

6. Section 6(a)(5). Evidence of professional misconduct or malpractice by the mediator.

The rationale behind the exception is that disclosures may be necessary to promote accountability of mediators by allowing for grievances to be brought against mediators, and as a matter of fundamental fairness, to permit the mediator to defend against such a claim. Moreover, permitting complaints against the mediator furthers the central rationale that States have used to reject the traditional basis of licensure and credentialing for assuring quality in professional practice: that private actions will serve an adequate regulatory function and sift out incompetent or unethical providers through liability and the rejection of service. See, e.g., W. Lee Dobbins, The Debate Over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?, U. Fla. J. L. & Pub. Pol'y 95, 96-98 (1995).

7. Section 6(a)(6). Evidence of professional misconduct or malpractice by a party or representative of a party.

Sometimes the issue arises whether anyone may provide evidence of professional misconduct or malpractice occurring during the mediation. See In re Waller, 573 A.2d 780 (D.C. App. 1990); see generally Pamela Kentra, Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct, 1997 B.Y.U.L. Rev. 715, 740-751. The failure to provide an exception for such evidence would mean that lawyers and fiduciaries could act unethically or in violation of standards without concern that evidence of the misconduct would later be admissible in a proceeding brought for recourse. This

exception makes it possible to use testimony of anyone except the mediator in proceedings at which such a claim is made or defended. Because of the potential adverse impact on a mediator's appearance of impartiality, the use of mediator testimony is more guarded, and therefore protected by Section 6(c). It is important to note that evidence fitting this exception would still be protected in other types of proceedings, such as those related to the dispute being mediated.

Reporting requirements operate independently of the privilege and this exception. Mediators and other are not precluded by the Act from reporting misconduct to an agency or tribunal other than one that might make a ruling on the dispute being mediated, which is precluded by Section 8(a) and (b).

8. Section 6(a)(7). Evidence of abuse or neglect.
An exception for child abuse and neglect is common in domestic mediation confidentiality statutes, and the Act reaffirms these important policy choices States have made to protect their citizens. See, e.g., Iowa. Code Ann. Section 679c.3(4) (1998) (general); Kan. Stat. Ann. Section 23-605(b)(2) (1999) (domestic relations); Kan. Stat. Ann. Section 38-1522(a) (1997) (general); Kan. Stat. Ann. Section 44-817©)(2) (1996) (labor); Kan. Stat. Ann. Section 72-5427(e)(2) (1996) (teachers); Kan. Stat. Ann. Section 75-4332(d)(1) (1996) (public employment); Minn. Stat. Ann. Section 595.02(2)(a)(5) (1996) (general); Mont. Code Ann. Section 41-3-404 (1999) (child abuse investigations) (mediator may not be compelled to testify); Neb. Rev. Stat. Section 43-2908 (1993) (parenting act) (in camera); N.H. Rev. Stat. Ann. Section 328-C:9(III)(c) (1998) (marital); N.C. Gen. Stat. Section 7A-38.1(L) (1999) (superior court); N.C. Gen. Stat. Section 7A-38.4(K) (1999) (district courts); Ohio Rev. Code Ann. Section 3109.052(c) (West 1990) (child custody); Ohio Rev. Code Ann. Section 5123.601 (West 1988) (mental retardation); Ohio Rev. Code Ann. Section 2317.02 (1998) (general); Or. Rev. Stat. Section 36.220(5) (1997) (general); Tenn. Code Ann. Section 36-4-130(b)(5) (1993) (divorce); Utah Code Ann. Section 30-3-38(4) (2000) (divorce) (mediator shall report); Va. Code Ann. Section 63.1-248.3(A)(10) (2000) (welfare); Wis. Stat. Section 48.981(2) (1997) (social services): Wis. Stat. Section 904.085(4)(d) (1997) (general); Wyo. Stat. Section 1-43-103(c)(iii) (1991) (general). But see Ariz. Rev. Stat. Ann. Section 8-807(B) (West 1998) (child abuse investigations) (rejecting rule of disclosure).

By referring to "child and adult protective services agency," the exception broadens the coverage to include the elderly and disabled if that State has protected them by statute and has created an agency enforcement process. It should be stressed that this exception applies only to permit disclosures in public

agency proceedings in which the agency is a party or nonparty participant. The exception does not apply in private actions, such as divorce, because the need for the evidence is not as great as in proceedings brought to protect against abuse and neglect so that the harm can be stopped, and is outweighed by the policy of promoting candor during mediation. For example, in a mediation between Husband and Wife who are seeking a divorce, Husband admits to sexually abusing a child. Husband's admission would not be privileged in an action brought by the public agency to protect the child, but would be privileged in the divorce hearings.

The last bracketed phrases make an exception to the exception to privilege of mediation communications in certain mediations involving such public agencies. Child protection agencies in many States have created mediation programs to resolve issues that arise because of allegations of abuse. Those advocating the use of mediation in these contexts point to the need for privilege to promote the use of the process, and these alternatives provide it. National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving the Child Abuse and Neglect Court Process, 1995. These alternatives are bracketed and offered to the states as recommended model provisions because of concerns raised by some mediators of such cases that mediator testimony sometimes can be necessary and appropriate to secure the safety of a vulnerable party in a situation of abuse. See Letter from American Bar Association Commission on Mental and Physical Disability Law, November 15, 2000 (on file with Drafting Committees).

The words "child or adult protection" are bracketed so that States using a different term or encouraging mediation of disputes arising from abuse of other protected classes can add appropriate language.

Each state may chose to enact either Alternative A or Alternative B. The Alternative A exception only applies to cases referred by the court or public agency. In this situation, allegations already have been made in an official context and a court has made the determination that settlement of that case is in the public interest by referring it to mediation. In Alternative B exception, no court referral is required. A state enacting Alternative B would be adopting a policy that it is sufficient that the public agency favors settlement of a particular case by its participation in the mediation.

The term "public agency" may have to be modified in a State in which a private agency is charged by law to assume the duties to protect children in these contexts.

9. Section 6(b). Exceptions requiring demonstration of need.

The exceptions under this Section constitute less common fact patterns that may sometimes justify carving an exception, but only when the unique facts and circumstances of the case demonstrate that the evidence is otherwise unavailable, and the need for the evidence outweighs the policies underlying the privilege. Thus, Section 6(b) effectively places the burden on the proponent to persuade the court on these points. The evidence will not be disclosed absent a finding on these points after an in camera hearing. Further, under Section 6(d) the evidence will be admitted only for that limited purpose.

10. Section 6(b)(1). Felony [and misdemeanors].

As noted in the commentary to Section 6, point 5, the Act affords more specialized treatment for the use of mediation communications in subsequent felony proceedings, which reflects the unique character, considerations, and concerns that attend the need for evidence in the criminal process. States may also wish to extend this specialized treatment to misdemeanors, and the Drafters offer appropriate model language for states in that event.

Existing privilege statutes are silent or split as to whether they apply only to civil proceedings, apply also to some juvenile or misdemeanor proceedings, or apply as well to all criminal proceedings. The split among the States reflects clashing policy interests. One the one hand, mediation participants operating under the benefit of a privilege might reasonably expect that statements made in mediation would not be available for use in a later felony prosecution. The candor this expectation promotes is precisely that which the mediation privilege seeks to protect. It is also the basis upon which many criminal courts throughout the country have established victim-offender mediation programs, which have enjoyed great success in misdemeanor, and, increasingly, felony cases. See generally Nancy Hirshman, Mediating Misdemeanors: Big Successes in Smaller Cases, 7 Disp. Resol Mag. 12 (Fall 2000); Mark S. Umbreit, The Handbook of Victim Offender Mediation (2001). Public policy, for example, specifically supports the mediation of gang disputes, for example, and these programs may be less successful if the parties cannot discuss the criminal acts underlying the disputes. Cal. Penal Code Section 13826.6 (West 1996) (mediation of gang-related disputes); Colo. Rev. Stat. Section 22-25-104.5 (1994) (mediation of gang-related disputes).

On the other hand, society's need for evidence to avoid an inaccurate decision is greatest in the criminal context - both for evidence that might convict the guilty and exonerate the innocent -- because the stakes of human liberty and public safety are at their zenith. For this reason, even without this

exception, the courts can be expected to weigh heavily the need for the evidence in a particular case, and sometimes will rule that the defendant's constitutional rights require disclosure. See Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 466 (Ct. App. 1998) (juvenile's constitutional right to confrontation in civil juvenile delinquency trumps mediator's statutory right not to be called as a witness); State v. Castellano, 460 So.2d 480 (Fla. App. 1984) (statute excluding evidence of an offer of compromise presented to prove liability or absence of liability for a claim or its value does not preclude mediator from testifying in a criminal proceeding regarding alleged threat made by one party to another in mediation). See also Davis v. Alaska, 415 U.S. 308 (1974).

After great consideration and public comment, the Drafting Committees decided to leave the critical balancing of these competing interests to the sound discretion of the courts to determine under the facts and circumstances of each case. Critically, it is drafted in a manner to ensure that the same right to evidence introduced by the prosecution, thus assuring a level playing field. In addition, it puts the parties on notice of this limitation on confidentiality.

11. Section 6(b)(2). Validity and enforceability of settlement agreement.

This exception is designed to preserve traditional contract defenses to the enforcement of the mediated settlement agreement that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications. A recent Texas case provides an example. An action was brought to enforce a mediated settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to permit him 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). The exception might also allow party testimony in a personal injury case that the driver denied having insurance, causing the plaintiff to rely and settle on that basis, where such a misstatement would be a basis for reforming or avoiding liability under the settlement. Under this exception the evidence will not be privileged if the weighing requirements are met. This exception differs from the exception for a record of an agreement in Section 6(a)(1) in that Section 6(a)(1) only exempts the admissibility of the record of the agreement itself, while the exception in Section 6(b)(2) is broader in that it would permit the admissibility of other mediation communications that are necessary to establish or refute a defense to the validity of a mediated settlement agreement.

12. Section 6(c). Mediator not compelled. Section 6(c) allows the mediator to decline to testify or otherwise provide evidence in a professional misconduct and mediated settlement enforcement cases to protect against frequent attempts to use the mediator as a tie-breaking witness, which would undermine the integrity of the mediation process and the impartiality of the individual mediator. Nonetheless, the parties and others may testify or provide evidence in such cases.

This Section is discussed in the comments to Sections 6(a)(7) and 6(b)(2). The mediator may still testify voluntarily if the exceptions apply, or the parties waive their privilege, but the mediator may not be compelled to do so.

13. Section 6(d). Limitations on exceptions. This Section makes clear the limited use that may be made of mediation communications that are admitted under the exceptions delineated in Sections 6(a) and 6(b). For example, if a statement evidencing child abuse is admitted at a proceeding to protect the child, the rest of the mediation communications remain privileged for that proceeding, and the statement of abuse itself remains privileged for the pending divorce or other proceedings.

§10007. Prohibited mediator reports

1. Prohibited communication by mediator. Except as required in subsection 2, a mediator may not make a report, assessment, evaluation, recommendation, finding or other communication regarding a mediation to a court, administrative agency or other authority that may make a ruling on the dispute that is the subject of the mediation.

2. Permitted communication by mediator. A mediator may disclose:

A. Whether the mediation occurred or has terminated, whether a settlement was reached and attendance;

B. A mediation communication as permitted under section 10006; or

C. A mediation communication evidencing abuse, neglect, abandonment or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

3. Communication may not be considered. A communication made in violation of subsection 1 may not be considered by a court, administrative agency or arbitrator.

REPORTER'S NOTES

1. Section 7. Disclosures by the mediator to an authority that may make a ruling on the dispute being mediated. Section 7(a) prohibits communications by the mediator in prescribed circumstances. In contrast to the privilege, which gives a right to refuse to provide evidence in a subsequent legal proceeding, this Section creates a prohibition against disclosure.

Some states have already adopted similar prohibitions. See, e.g., Cal. Evid. Code Section 1121 (West 1997); Fla. Stat. Ann. Section 373.71 (1999) (water resources); Tex. Civ. Prac. & Rem. Code Section 154.053 (c) (West 1999) (general). Disclosures of mediation communications to a judge also could run afoul of prohibitions against ex parte communications with judges. See Code of Conduct for Federal Judges, Canon 3(A)(3), 175 F.R.D. 364, 367 (1998); American Bar Association Model Code of Conduct of Judicial Conduct at 9. The purpose of this Section is consistent with the conclusions of seminal reports in the mediation field condemn the use of such reports as permitting coercion by the mediator and destroying confidence in the neutrality of the mediator and in the mediation process. See Society for Professionals in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991); Center for Dispute Settlement, National Standards for Court-Connected Mediation Programs (D.C. 1992).

Importantly, the prohibition is limited to reports or other listed communications to those who may rule on the dispute being mediated. While the mediators are thus constrained in terms of reports to courts and others that may make rulings on the case, they are not prohibited from reporting threatened harm to appropriate authorities, for example, if learned during a mediation to settle a civil dispute. In this regard, Section 7(b)(3) responds to public concerns about clarity and makes explicit what is otherwise implied in the Act, that mediators are not constrained by this Section in their ability to disclose threats to the safety and well being of vulnerable parties to appropriate public authorities, and is consistent with the exception for disclosure in proceedings in Section 6(a)(7). Similarly, while the provision prohibits mediators from making these reports, it does not constrain the parties.

The communications by the mediator to the court or other authority are broadly defined. The provisions would not permit a mediator to communicate, for example, on whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. Section 7(b)(1), however, does permit disclosure of particular facts, including attendance and whether a settlement was reached. For example, a mediator may report that one party did not attend and another attended only for the first five minutes. States with "good faith" mediation laws or court rules may want to consider the interplay between such laws and this Section of the Act.

§10008. Confidentiality

Unless subject to Title 1, chapter 13, subchapter 1, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

REPORTER'S NOTES

This Section restates the general rule in the states regarding the confidentiality of mediation communications outside the context of proceedings.

Typically, confidentiality agreements are enforceable against a signatory under state contract law, through damages and sometimes specific enforcement. See, e.g., Doe v. Roe, 93 Misc.2d 201, 400 N.Y.S.2d 668 (1977). This furthers the Act's underlying policy of party self-determination by permitting the parties to determine whether, when, and how statements made in mediation may be disclosed to friends, family members, business associates, the media and other third parties -- outside the context of proceedings that are covered by the privilege. It also draws a clear line to better guide the parties.

Section 8 was the culmination of efforts in several drafts to understand and manage the reasonable expectations of mediation participants regarding disclosures outside of proceedings. Early drafts were criticized by some in the mediation community for failing to impose an affirmative duty on mediation participants not to disclose mediation communications to third persons outside of the context of the proceedings at which the Section 4 privilege applies. In several subsequent drafts, the Drafters attempted to establish a rule that would prohibit such disclosures, but found it impracticable to do so without imposing a severe risk of civil liability on the many unknowing mediation participants who might discuss their mediations with friends and family members, for example, for any number of salutary reasons.

In addition, the Drafters were deeply concerned about their capacity to develop a truly comprehensive list of legitimate and appropriate exceptions -- such as for the education and training of mediators, for the monitoring evaluation and improvement of court-related mediation programs, and for the reporting of threats to police and abuse to public agencies - as each draft drew forth more calls for legitimate and appropriate exceptions. Similarly, efforts to create a simpler rule with fewer exceptions but with greater judicial discretion to act as appropriate on a case-by-case basis to prevent "manifest injustice" also met severe resistance from many different sectors of the mediation community, as well as a number of state Bar ADR committees. Finally, recognizing the important role of non-lawyer mediators and the many people who participate in mediations without counsel or knowledge of the law, the Drafters were concerned about the intelligibility and accessibility of the provisions.

In the end, the Drafters ultimately chose to draw a clear line, and to follow the general practice in the states of leaving the disclosure of mediation communications outside of proceedings to the good judgment of the parties to determine in light of the unique characteristics and circumstances of their dispute.

Finally, special note should be made of the language "or provided by other law or rule of this State." This language has two critical effects. First, it makes clear that the Act does not preempt current court rules or statutes that may impose a duty of confidentiality outside of proceedings. See Texas Civ. Prac. & Rem. Section 154.073 (a) (arguably imposing a duty of non-disclosure outside the context of proceedings). Second, the language "or provided by other law or rule of this State" also puts parties on notice that the parties' capacity to contract for this aspect of confidentiality, while broad, is subject to the limitations of existing State law. This recognizes the important policy choices that the State already has made through its various mechanisms of law.

For example, such a contract would be subject to the rule in some states that would permit or require a mediator to reveal information if there is a present and substantial threat that a person will suffer death or substantial bodily harm if the mediator fails to take action necessary to eliminate the treat. See, e.g., Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976) (en banc) (permitting action against psychotherapist who knows of a patient's dangerousness and fails to warn the potential victim). The mediator in such a case may first wish to secure a determination by a court, in camera, that the facts of the particular case justify or indeed dictate divulging the information to prevent reasonably certain death or substantial bodily harm. See, for example, ABA Rule 1.6(b)(1) and

accompanying commentary; 5 U.S.C. Section 574(a)(4)(C). This result is consistent with the ABA/AAA/SPIDR Model Standards of Conduct for Mediators, and the American Bar Association's revised the Standards of Conduct for Attorneys.

In addition, under contract law the courts may make exceptions to enforcement for public policy reasons. See, e.g., Equal Employment Opportunity Commission v. Astra USA, 94 F.3d 738 (1st Cir. 1996). Such agreements are typically not enforceable by non-signatories. They are also not enforceable if they conflict with public records requirements. See, e.g. Anchorage School Dist. v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989); Pierce v. St. Vrain Valley School District, 1997 WL 94120 (Colo. Ct. App. Div. 1 1997). The use of mediation communications as evidence in proceedings is governed by Section 4-7, and the signatories of a confidential agreement cannot expand the scope of the privilege.

§10009. Mediator's disclosure of conflicts of interest; background

1. Conflicts of interest; inquiry; disclosure. Before accepting a mediation, an individual who is requested to serve as a mediator shall:

A. Make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

B. Disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

2. Disclosure after accepting mediation. If a mediator learns any fact described in subsection 1, paragraph A after accepting a mediation, the mediator shall disclose it as soon as is practicable.

3. Disclosure of qualifications. At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

4. Privilege unavailable. A person that violates subsection 1, 2, 3 or 7 is precluded by the violation from asserting a privilege under section 10004.

5. Application to judge. Subsections 1, 2, 3 and 7 do not apply to an individual acting as a judge.

6. Special qualification not required. This chapter does not require that a mediator have a special qualification by background or profession.

7. Impartial; agreement otherwise. A mediator shall be impartial, unless after disclosure of the facts required to be disclosed in subsections 1 and 2, the parties agree otherwise.

REPORTER'S NOTES

1. Sections 9(a) and 9(b). Disclosure of mediator's conflicts of interest.

a. In general.

This Section provides legislative support for the professional standards requiring mediators to disclose their conflicts of interest. See, e.g, American Arbitration Association, American Bar Association & Society of Professionals in Dispute Resolution, Model Standards of Conduct for Mediators, Standard III (1995); Model Standards of Practice for Family and Divorce Mediation, Standard IV (2001); National Standards for Court-Connected Mediation Programs, Standard 8.1(b) (1992). It is consistent with the ethical obligations imposed on other ADR neutrals. See Revised Uniform Arbitration Act (2000) Section 12; Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, Section 2(B) (1985) (required disclosures).

Sections 7(a)(2) and 7(b) make clear that the duty to disclose is a continuing one.

b. Reasonable duty of inquiry

The phrase in Section 9(b)(1) "make an inquiry that is reasonable under the circumstances" makes clear that the mediator's burden of inquiry into possible conflicts is not absolute, but rather is one that is consistent with the purpose of the Section: to make the parties aware of any conflict of interest that could lead the parties to believe that the mediator has an interest in the outcome of the dispute. Such disclosure fulfills the reasonable expectations of the parties, and furthers the Act's core principles of party self-determination and informed consent by assuring the parties that they will have sufficient information about the mediator's potential conflicts of interests to make the determination about whether that mediator is acceptable for the dispute at hand.

One may reasonably anticipate many situations in which parties are willing to waive a conflict of interest; indeed, depending

upon the dispute, the very fact that a mediator is familiar to both parties may best qualify the mediator to mediate that dispute. That choice, however, properly belongs to the parties after informed consent, and in preserving this autonomy, this provision not only confirms the integrity of the individual mediator, but also supports the integrity of the mediation process by providing a visible, fundamental, and familiar safeguard of public protection.

Critically, the reasonable inquiry language is also intended to convey the Drafters' intent to exclude inadvertent failures to disclose that would result in the loss of the mediator privilege. The duty of reasonable inquiry is specific to each mediation, and such an inquiry always would discover those conflicts that are sufficiently material as to call for disclosure. For example, stock ownership in a company that is a party to an employment discrimination matter that is being mediated would likely be identified under a reasonable inquiry, and should be disclosed to both parties under Section 9(a). On the other hand, less substantial or merely arguable conflicts of interest may not be discoverable upon reasonable inquiry and that may therefore result in inadvertent nondisclosure. In the foregoing hypothetical, for example, the mediator may not be aware, or have any reason to be aware, that he or she has membership in the same country club as an officer or board member of the company. The failure to disclose this arguable conflict would be inadvertent, not a violation of Section 9(a) or (b), and therefore not subject to the loss of privilege sanction in Section 9(d).

The reasonable inquiry also depends on the circumstances. For example, if a small claims court refers parties to a mediator who has a volunteer attorney standing in court, the parties would not expect that mediator to check on conflicts with all lawyers in the mediator's firm in the five minutes between referral and mediation. Presumably, only conflicts known by the mediator would affect that mediation in any event.

c. Conflicts that must be disclosed

Section 9(b)(1) expressly states that mediators should disclose financial or personal interests, and personal relationships, that a "reasonable person would consider likely to affect the impartiality of the mediator." However, the Drafters chose the word "including" to convey their intent that these types of conflicts not be viewed as an exclusive list of that which must be disclosed. Again, the standard is one of reasonableness under the circumstances, given the Section's purpose in furthering informed consent and the integrity of the mediation process.

It should be stressed that the Drafters recognize that it is sometimes difficult for the practitioner to know precisely what

must be disclosed under a reasonableness standard. Prudence, professional reputation, and indeed common practice would compel the practitioner to err on the side of caution in close cases. Moreover, mediators with full-time or otherwise extensive mediation practices may wish to avail themselves of the common technologies used by law firms to identify conflicts of interest. Finally in this regard, it is worth underscoring that this duty to disclose conflicts of interest is intended to further party self-determination and the integrity of the mediation process, and is not intended to provide a cover or vehicle for bad faith litigation tactics, such as fishing expeditions into a mediator's professional or personal background. Such conduct would continue to be subject to traditional sanction standards.

2. Section 9(c) and (f). Disclosure of mediator's qualifications

Sections 9(c) and (f) address the issue of mediator qualifications, and, like the conflicts of interest provision, are intended to further principles of party autonomy and informed consent. In particular, these Sections do not require mediators to have certain qualifications, specifically including a law degree; nor, unlike the conflicts of interest provision, do they impose an affirmative duty on the mediator to disclose qualifications. Rather, the mediator's obligation is responsive: if a party asks for the mediator's qualifications to mediate a particular dispute, the mediator must provide those qualifications.

In some situations, the parties may make clear that they care about the mediator's substantive knowledge of the context of the dispute, or that they want to know whether the mediator in the past has used a purely facilitative mediation process or instead an evaluative approach. Compare Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Negotiation L. Rev. 7 (1996) with Joseph B. Stulberg, Facilitative Versus Evaluative Mediator Orientations: Piercing The "Grid" Lock, 24 Fla. State Univ. L. Rev. 985 (1997); see generally Symposium, Fla. State Univ. L. Rev. (1997). Experience mediating would seem important to some parties, and indeed this is one aspect of the mediator's background that has been shown to correlate with effectiveness in reaching settlement. See, e.g., Jessica Pearson & Nancy Thoennes, Divorce Mediation Research Results, in Divorce Mediation: Theory and Practice, 429, 436 (Folberg & Milne, eds., 1988); Roselle L. Wissler, A Closer Look at Settlement Week, 4 Disp. Resol. Mag. 28 (Summer 1998).

It must be stressed that the Act 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. As clarified by Section 9(f),

mediators need not be lawyers. In fact, the American Bar Association Section on Dispute Resolution has issued a statement that "dispute resolution programs should permit all individuals who have appropriate training and qualifications to serve as neutrals, regardless of whether they are lawyers." ABA Section of Dispute Resolution Council Res., April 28, 1999.

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. See generally Cole et al., supra, Section 11.02 (discussing laws regarding mediator qualifications); Center for Dispute Settlement, National Standards for Court-Connected Mediation Programs (1992); Society for Professionals in Dispute Resolution Commission on Qualifications, Qualifying Neutrals: The Basic Principles (1989); Society for Professionals in Dispute Resolution Commission on Qualifications, Ensuring Competence and Quality in Dispute Resolution Practice (1995); Society for Professionals in Dispute Resolution, Qualifying Dispute Resolution Practitioners: Guidelines for Court-Connected Programs (1997).

The decision of the Drafting Committees 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 Act 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. It is not the intent of the Act to preclude a statute, court or administrative agency rule, arbitrator or contract between the parties from requiring that a mediator have a particular background or profession; those decisions are best made by individual states, courts, governmental entities, and parties.

3. Section 9(d). Violation of disclosure [and impartiality] requirements.

a. In general

This provision makes clear that the mediator who violates the disclosure requirements of Sections 9(a) or (b) may not refuse to disclose a mediation communication or prevent another person from disclosing a mediation communication of the mediator, pursuant to Section 4(b)(2). If a state adopts the impartiality provision of Section 9(f), a violation of that provision triggers the same denial of the privilege. Only those states adopting the impartiality provision should adopt the second bracket [(a), (b), or (g)]; all other states should adopt the first bracket [(a) or (b)].

b. Only mediator privilege lost; party, nonparty participant privileges remain intact

Crucially, while the mediator who fails to comply with the Act's conflicts of interest and impartiality requirements loses the privilege for purpose of that mediation, the parties and the non-party participants retain their privilege for that mediation. Thus, in a situation in which the mediator has lost the privilege, for example, the parties may still come forward and assert their privilege, thus blocking the mediator who has lost the privilege from providing testimony about the affected mediation. Similarly, to the extent the mediator's purported testimony would be about the mediation communications of a nonparty participant, the nonparty participant may block the testimony if the mediator has lost the privilege.

The only person prejudiced by the violation is the mediator who failed to disclose a conflict [or who had a bias in the dispute], and as such the loss of privilege provides an important but narrowly tailored measure of accountability. Section 9(d) makes clear that mediators cannot avoid testifying in such situations. The Drafters considered other sanctions for mediators who failed to disclose conflicts [or who were partial], such as criminal and civil sanctions. However, it rejected specifically providing for those options because of the possibility of discouraging people from becoming mediators, and because the loss of privilege sanction was deemed to be tailored to the precise harm caused by the violation.

c. Practical operation

The loss of privilege in this narrow context raises important practical questions with regard to how a party or a nonparty participant would know that the mediator may lose, or has lost, the privilege with respect to a particular mediation. This is significant because they should have the opportunity to decide whether they wish to assert their own privilege and block the mediator's testimony to the extent permitted by the privilege, or to permit the testimony, consistent with the Act's underlying premises of party autonomy and informed consent.

As a practical matter, notice is not likely to be a concern in the typical case in which the mediation communications evidence is being sought in an action to set aside the mediated settlement agreement, or in a professional misconduct proceeding or action, arising out of the conflict of interest. The parties would be aware of the loss of privilege, and indeed, the loss of the privilege is consistent with the exceptions permitting such testimony in cases to establish the validity of the settlement agreement or professional misconduct. See Sections 6(a)(6) and 6(b)(2).

However, in the more remote situation in which these exceptions would not be applicable, and the mediator's testimony is sought under a claim that the privilege has been lost by virtue of the mediator's failure to disclose a conflict of interest, the notice issue becomes more problematic. It may be expected that the mediator would give notice to the other mediation participants who may be affected by such a request. It may also be expected under usual customs and practices that the party seeking the privileged testimony would move the matter before a court and provide notice to all interested persons who would have the right to assert the privilege. For a challenge to the mediation privilege, those interested parties would be the mediator, parties, and nonparty participants. In any event, mediation participants are advised to consider including notice provisions in their agreements to mediate that call for participants who receive subpoenas for privileged testimony to provide notice to the other participants of such a request.

As with the exceptions recognized under this Act, the Act anticipates that the question of whether a privilege has been lost would typically be decided by courts in an in camera proceeding that would preserve the confidentiality of the mediation communications that may be necessary to establish the validity of the loss of privilege claim. The materiality of the failure to disclose is not likely to be in issue in the more common situations in which the mediator's testimony is being sought in a case other than to establish the invalidity of a mediated settlement agreement or professional misconduct arising from the failure to disclose. However, in those rare other situations in which the mediator's testimony is being sought, the proponent of the evidence may also need to establish the materiality of the failure to disclose.

4. Section 9(e). Individual acting as a judge.
This Section averts a legislative prohibition on certain judicial actions, and defers to other more appropriate regulation of the judiciary. It extends the principles embodied in Section 3(b)(3), which places mediations conducted by judges who might make a ruling on the case outside the scope of the Act. The rationales described therein apply with equal force in this context.

5. [Section 9(g). Mediator impartiality.]
This provision is a bracketed to signal that it is suggested as a model provision and need not be part of a Uniform Act. "Impartiality" has been equated with "evenhandedness" in the Model Standards of Practice approved by the American Bar Association, American Association of Arbitrators, and the Society of Professionals in Dispute Resolution (now Association for Conflict Resolution). The mediator's employment situation may present difficult issues regarding impartiality. A mediator who

is employed by one of the parties is not typically viewed as impartial, especially if the person who mediates also represents a party. In the representation situation, the mediator's overriding responsibility is toward a single party. For example, the parties' legal counsel would not be an impartial mediator. Ombuds often are obligated by ethical standards to be impartial, although they are employed by one of the parties.

While few would argue that it is almost always best for mediators to be impartial as a matter of practice, including such a requirement into a uniform law drew considerable controversy. Some mediators, reflecting a deeply and sincerely felt value within the mediation community that a mediator not be predisposed to favor or disfavor parties in dispute, persistently urged the Drafters to enshrine this value in the Act; for these, the failure to include the notion of impartiality in the Act would be a distortion of the mediation process. Other mediators, service providers, judges, mediation scholars, however, urged the Drafters not to include the term "impartiality" for a variety of reasons.

At least three are worth stressing. One pressing concern was that including such a statutory requirement would subject mediators to an unwarranted exposure to civil lawsuits by disgruntled parties. In this regard, mediators with a more evaluative style expressed concerns that the common practice of so-called "reality checking" would be used as a basis for such actions against the mediator. A second major concern was over the workability of such a statutory requirement. Scholarly research in cognitive psychology has confirmed many hidden but common biases that affect judgment, such as attributional distortions of judgment and inclinations that are the product of social learning and professional culturation. See generally, Daniel Kahneman and Amos Tversky, Choices, Values, and Frames (2000); Scott Plous, The Psychology of Judgment and Decision Making (1993). Similarly, mediators in certain contexts sometimes have an ethical or felt duty to advocate on behalf of a party, such as long-term care ombuds in the health care context. Third, some parties seek to use a mediator who has a duty to be partial in some respects--such as a domestic mediator who is charged by law to protect the interests of the children. It has been argued that such mediations should still be privileged.

For these and other reasons, the Drafting Committees determined that impartiality, like qualifications, was an issue that was important but that did not need to be included in a uniform law. Rather, out of regard for the gravity of the issue, the Drafting Committees determined that it was enough to flag the issue for states to consider at a more local level, and to provide model

language that may be helpful to states wishing to pursue the issue.

If this Section is adopted, the state should also chose the bracketed option with this Section in Section (d), so that a mediator who is not impartial is precluded from asserting the privilege. Section (e) makes this inapplicable to an individual acting as a judge, whose impartiality is governed by judicial cannons.

§10010. Participation in mediation

An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

REPORTER'S NOTES

The fairness of mediation is premised upon the informed consent of the parties to any agreement reached. See Wright v. Brockett, 150 Misc.2d 1031 (1991) (setting aside mediation agreement where conduct of landlord/tenant mediation made informed consent unlikely); see generally, Joseph B. Stulberg, Fairness and Mediation, 13 Ohio St. J. on Disp. Resol. 909, 936-944 (1998); Craig A. McEwen, Nancy H. Rogers, Richard J. Maiman, Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 Minn. L. Rev. 1317 (1995). Some statutes permit the mediator to exclude lawyers from mediation, resting fairness guarantees on the lawyer's later review of the draft settlement agreement. See, e.g., Cal. Fam. Code Section 3182 (West 1993); McEwen, et al., 79 Minn. L. Rev., supra, at 1345-1346. At least one bar authority has expressed doubts about the ability of a lawyer to review an agreement effectively when that lawyer did not participate in the give and take of negotiation. Boston Bar Ass'n, Op. 78-1 (1979). Similarly, concern has been raised that the right to bring counsel might be a requirement of constitutional due process in mediation programs operated by courts or administrative agencies. Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. Rev. 949, 1095 (April 2000).

Some parties may prefer not to bring counsel. However, because of the capacity of attorneys to help mitigate power imbalances, and in the absence of other procedural protections for less powerful parties, the Drafting Committees elected to let the parties, not the mediator, decide. Also, their agreement to exclude counsel

should be made after the dispute arises, so that they can weigh the importance in the context of the stakes involved.

The Act does not preclude the possibility of parties bringing multiple lawyers or translators, as often is common in international commercial and other complex mediations. The Act also makes clear that parties may be accompanied by a designated person, and does not require that person to be a lawyer. This provision is consistent with good practices that permit the pro se party to bring someone for support who is not a lawyer if the party cannot afford a lawyer.

Most statutes are either silent on whether the parties' lawyers can be excluded or, alternatively, provide that the parties can bring lawyers to the sessions. See, e.g., Neb. Rev. Stat. Section 42-810 (1997) (domestic relations) (counsel may attend mediation); N.D. Cent. Code Section 14-09.1-05 (1987) (domestic relations) (mediator may not exclude counsel); Okla. Stat. tit. 12, Section 1824(5) (1998) (representative authorized to attend); Or. Rev. Stat. Section 107.600(1) (1981) (marriage dissolution) (attorney may not be excluded); Or. Rev. Stat. Section 107.785 (1995) (marriage dissolution) (attorney may not be excluded); Wis. Stat. Section 655.58(5) (1990) (health care) (authorizes counsel to attend mediation). Several States, in contrast, have enacted statutes permitting the exclusion of counsel from domestic mediation. See Cal. Fam. Code Section 3182 (West 1993); Mont. Code Ann. Section 40-4-302(3) (1997) (family); S.D. Codified Laws Section 25-4-59 (1996) (family); Wis. Stat. Section 767.11(10)(a) (1993) (family).

As a practical matter, this provision has application only when the parties are compelled to participate in the mediation by contract, law, or order from a court or agency. In other instances, any party or mediator unhappy with the decision of a party to be accompanied by an individual can simply leave the mediation. In some instances, a party may seek to bring an individual whose presence will interfere with effective discussion. In divorce mediation, for example, a new friend of one of the parties may spark new arguments. In these instances, the mediator can make that observation to the parties and, if the mediation flounders because of the presence of the nonparty, the parties or the mediator can terminate the mediation. The pre-mediation waiver of this right of accompaniment can be rescinded, because the party may not have understood the implication at that point in the process. However, this provision can be waived once the mediation begins. Limitations on counsel in small claims proceedings may be interpreted to apply to the small claims mandatory mediation program. If so, the States may wish to consider whether to provide an exception for mediation conducted within these programs.

The right to accompaniment does not operate to excuse any participation requirements for the parties themselves.

§10011. Relation to electronic signatures in global and national commerce act

This chapter modifies, limits or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 United States Code Section 7001 et seq., but this chapter does not modify, limit or supersede Section 101(c) of that Act or authorize electronic delivery of any of the notices described in Section 103(b) of that Act.

REPORTER'S NOTES

This Section adopts standard language approved by the Uniform Law Conference that is intended to conform Uniform Acts with the Uniform Electronic Transactions Act (UETA) and its federal counterpart, Electronic Signatures in Global and National Commerce Act (E-Sign) (15 U.S.C 7001, etc seq. (2000).

Both UETA and E-Sign were written in response to broad recognition of the commercial and other use of electronic technologies for communications and contracting, and the consensus that the choice of medium should not control the enforceability of transactions. These Sections are consistent with both UETA and E-Sign. UETA has been adopted by the Conference and received the approval of the American Bar Association House of Delegates. As of December 2001, it had been enacted in more than 35 states.

The effect of this provision is to reaffirm state authority over matters of contract by making clear that UETA is the controlling law if there is a conflict between this Act and the federal E-sign law, except for E-sign's consumer consent provisions (Section 101(c) and its notice provisions (Section 103(b) (which have no substantive impact on this Act). Among other things, such clarification assures that agreements related to mediation - such as the agreement to mediate and the subsequently mediated settlement agreement - may not be challenged on the basis of a conflict between this Act and the federal E-sign law. Such challenges should be dismissed summarily by the courts.

§10012. Uniformity of application and construction

In applying and construing this chapter, consideration should be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

REPORTER'S NOTES

One of the goals of the Uniform Mediation Act is to simplify the law regarding mediation. Another is to make the law uniform among the States. In most instances, the Act will render unnecessary the other hundreds of different privilege statutes among the States, and these can be repealed. In fact, to do otherwise would interfere with the uniformity of the law.

However, the Drafters contemplate the Act as a floor in many aspects, rather than a ceiling, one that provides a uniform starting point for mediation but which respects the diversity in contexts, cultures, and community traditions by permitting states to retain specific features that have been tried and that work well in that state, but which need not necessarily be uniform. For example, as noted after Section 4, those States that provide specially that mediators cannot testify and impose damages from wrongful subpoena may elect to retain such provisions. Similarly, as discussed in the comments to Section 8, States with court rules that have confidentiality provisions barring the disclosure of mediation communications outside the context of proceedings may wish to retain those provisions because they are not inconsistent with the Act.

As discussed in the preface, point 5, the constructive role of certain laws regarding mediation can be performed effectively only if the provisions are uniform across the States. See generally James J. Brudney, Mediation and Some Lessons from the Uniform State Law Experience, 13 Ohio St. J. on Disp. Resol. 795 (1998). In this regard, the law may serve to provide not only uniformity of treatment of mediation in certain legal contexts, but can serve to help define what reasonable expectations may be with regard to mediation. The certainty that flows from uniformity of interpretation can serve to promote local, state, and national interests in the expansive use of mediation as an important means of dispute resolution.

While the Drafters recognize that some such variations of the mediation law are inevitable given the diverse nature of mediation, the specific benefits of uniformity should also be emphasized. As discussed in the Prefatory Notes, uniform adoption of the UMA will make the law of mediation more accessible and certain in these key areas. Practitioners and participants will know where to find the law, and they and courts can reasonably anticipate how the statute will be interpreted. Moreover,

uniformity of the law will provide greater protection of mediation than any one state has the capacity to provide. No matter how much protection one state affords confidentiality protection, for example, the communication will not be protected against compelled disclosure in another state if that state does not have the same level of protection. Finally, uniformity has the capacity to simplify and clarify the law, and this is particularly true with respect to mediation confidentiality. Where many states have several different confidentiality provisions, most of them could be replaced with an integrated Uniform Mediation Act. Similarly, to the extent that there may be confusion between states over which state's law would apply to a mediation with an interstate character, uniformity simplifies the task of those involved in the mediation by requiring them to look at only one law rather than the laws of all affected states.

§10013. Effective date

This chapter takes effect January 1, 2004.

REPORTER'S NOTES

The Uniform Mediation Act was drafted such that it can be integrated into the fabric of most state legal regimes with minimal disruption of current law or practices. In particular, it is not the intent of the UMA to disrupt existing law in those few states that have well-established mediation processes by statute, court rules, or court decisions. For example, its privilege structure, exceptions, etc., is consistent with most of the hundreds of privilege statutes currently in the states.

Many of these can simply be repealed, and this Section provides the vehicle for so doing. However, states should take care not to repeal additional provisions that may be embedded within their state laws that may be desirable and which are not inconsistent with the provisions of the Act. An Act is still uniform if it provides for mediator incompetency or provides for costs and attorneys fees to mediators who are wrongfully subpoenaed. For example, in Ohio the Act would seem to replace the need for the generic privilege statute, O.R.C. 2317.023, and that part of the domestic mediation statute O.R.C. 3109.052 relating to privilege, but not the public records exception, O.R.C. 149.43 or failure to report a crime, O.R.C. 3109.052.

In contrast, Alabama has fewer statutes that would be subsumed by the Act. For example, the Act would seem to replace the need for the confidentiality provision in Ala. Code 24-4-12 (communications during conciliation sessions of complaints

brought under Fair Housing Law are confidential unless parties waive in writing). The Act would also subsume certain sections of Ala.. Code 6-6-20, such as the definition of mediation and the provision permitting attorneys or support persons to accompany parties, but would not replace the provisions authorizing courts to refer cases to mediation under certain conditions and defining sanctions.

Many of the existing statutes deal with matters not covered by the Act and need not be repealed in order to provide uniformity because they would not be superceded by the Act. Common examples include authorization of mandatory mediation, standards for mediators, and funding for mediation programs. Similarly, the Act would not supercede statutes relating to mediator qualifications, such as O.R.C. 3109.052(A)(permitting local courts to establish mediator qualifications) and O.R.C. 4117.02(E)(authorizing state employment relations board to appoint mediators according to training, practical experience, education, and character). In such situations, an abundance of caution may counsel in favor of noting specifically in this Section which provisions of current state laws are not being repealed, as well as which ones are being repealed.

On the other hand, in those relatively few instances where the Act directly conflicts, or may directly conflict, with existing state law, states will want to consider the relationship between their current law and the Act. The most prominent examples include those states that have provisions barring attorneys from attending and participating in mediation sessions, and those states that current permit or require mediators to make reports to judges who may make rulings on the case.

§10014. Application to existing agreements or referrals

1. New referrals or agreements. This chapter governs a mediation pursuant to a referral or an agreement to mediate made on or after January 1, 2004.

2. All agreements. On or after July 1, 2004, this chapter governs an agreement to mediate whenever made.

SUMMARY

This bill enacts the Uniform Mediation Act, effective January 1, 2004.

Detailed explanations are included in the Prefatory Note and the Reporter's Notes for each section.