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COMMENTS

The Concern Over Confidentiality in Mediation--An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act¹

I. INTRODUCTION

In recent years, the scales of justice have become balanced by alternatives to a trial by judge or jury. These alternative forms have arisen to give parties other avenues for resolving disputes, and have become increasingly favored due to the costly expense, adversarial atmosphere and time consumption of litigation.² Mediation, a process among the current popular forms of alternative dispute resolution, is “a consensual process in which a neutral third party . . . works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute.”³ The mediator’s role is to facilitate the mediation process; the mediator does not impose a solution or judgment on the parties but instead helps them communicate, discover common ground, and invent solutions.⁴ Support for mediation has increased dramatically over the last twenty years,⁵ and now there are more than 2000 federal and state statutes regulating the field.⁶

Among the important features of mediation is the complex, multiple-tiered subject of confidentiality. While many states have enacted statutes addressing the

1. UNIF. MEDIATION ACT (Proposed Official Drafts 1999-2000) [hereinafter U.M.A.]. This Comment’s discussion is derived from the provisions of the January 2000 draft of the Uniform Mediation Act, with reference to the December 1999 and July 1999 drafts for purposes of comparison. While the January 2000 draft is the primary source of this Comment, any reference to reporter’s notes is derived from the December and July 1999 drafts. The most recent changes to the proposed act, set forth in the recently released March 2000 draft, are also discussed at the close of this Comment. These drafts and their reporter’s notes can be found at the following website: University of Pennsylvania Law School, *Index of /bll/ulc/mediat/* (visited May 9, 2000) <<http://www.law.upenn.edu/bll/ulc/mediat/>>. The Proposed U.M.A. was scheduled to come before the National Conference of Commissioners on Uniform State Laws in the summer of 2000, but it has been rescheduled to be decided upon in the summer of 2001.

2. John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 456 (1997).

3. *Id.* at 458 (quoting Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 2-3 (1994)).

4. *Id.*

5. NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* §§ 5:1-5:19 (2d ed. 1994 & Supp. 1999).

6. *See id.* at apps. A & B; *see also* U.M.A. app. (Proposed Official Draft Dec. 1999) (state confidentiality statutes consulted).

issue of confidentiality in mediation, these statutory provisions differ with respect to which individuals, communications, and contexts are encompassed within the privilege.⁷ This Comment will investigate the historical problems with confidentiality in mediation and evaluate the Proposed Uniform Mediation Act's (hereinafter "U.M.A." or "Act") approaches to remedying confidentiality issues. The reader should carefully note that the Uniform Mediation Act is in an on-going drafting phase at this time, and the content of the Act's drafts discussed herein are not final and are for discussion purposes only. This Comment's discussion will cover confidentiality in disclosure with respect to parties, waiver, and a mediator's duty of non-disclosure. This Comment will also compare the mechanisms the U.M.A. has put in place to govern confidentiality to mechanisms utilized in other fields, such as the attorney-client privilege and rules of evidence regulating the admission of compromise negotiations at trial.

II. THE HISTORY OF CONFIDENTIALITY IN MEDIATION

In order for the parties to reach an acceptable agreement, the process of mediation must provide both parties with a sense of trust and encourage them to make comments, verify facts, and discuss documents in the mediation.⁸ Because mediation is used for exploring settlement possibilities, the parties must be assured that potentially sensitive information discussed in the mediation will remain confidential.⁹ The rationale for providing this assurance is to protect the parties against harm in subsequent litigation, against distribution of proprietary and competitive information, and against creating judicial precedent or damaging publicity.¹⁰

Statutes were first enacted to address these concerns in the areas of family and labor law.¹¹ Presently, there are over 250 mediation confidentiality statutes.¹² Of these statutes, about half contain confidentiality provisions that are of general application, while the remaining statutes address specific subjects, such as only allowing the privilege in domestic relation cases.¹³ Due to the different approaches, lawyers and parties can encounter surprise and uncertainty if the dispute is governed by the law of a different state than where the mediation is conducted.¹⁴ Additionally,

7. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Rationales for a privilege covering mediation communications).

8. *Id.*

9. *Id.*

10. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 67 (1995).

11. Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 442 (1984).

12. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Rationales for a privilege covering mediation communications).

13. *Id.* See also ROGERS & MCEWEN, *supra* note 5, at apps. A and B; Pamela A. Kenra, *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 BYU L. REV. 715 app. (1997).

14. Alan Kirtley, *Best of Both Worlds: Uniform Mediation Privilege Should Draw From Both Absolute and Qualified Approaches*, DISP. RESOL. MAG., Winter 1998, at 5 (citing Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP.

it remains uncertain whether “a mediator can back up a promise that everything said in mediation will remain confidential if a dissatisfied participant later goes to court.”¹⁵ Existing differences in confidentiality among state statutes create conflicts in that one state may have a more liberal statute while another state may require a specific event to trigger its statutory privilege or may have no privilege at all.¹⁶

It can be argued that contract law or evidentiary rules can protect the parties’ expectations of confidentiality. While it is customary for parties to sign a contract at the start of the mediation, which addresses the confidentiality of the process, such a contract may not be a fool-proof method of preserving the parties’ expectations.¹⁷ In court, it cannot be guaranteed that a contract excluding evidence will be enforced because it could be interpreted as being against public policy in that “[a]greements between individuals are not permitted to restrict the court’s access to testimony in its pursuit of justice.”¹⁸ Parties may also have no protection against discovery by third parties seeking the content of their mediation, even if the contract is held to be enforceable against the contractual parties themselves.¹⁹

The same parties will not be guaranteed protection if they look to the evidentiary rules of the court. If a suit is later brought in federal court, their confidentiality privilege could be limited by the court under Federal Rule of Evidence 408.²⁰ Laws of evidence have traditionally excluded settlement negotiations from evidence, but the protection was limited “to the specific terms of the offer of compromise.”²¹ Rule 408 expanded this protection to allow “evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself” to also be excluded.²² However, Rule 408 allows for statements made during compromise discussions to be used for “other purposes,” such as bias or impeachment.²³ Furthermore, Rule 408, like the contract theory, does not protect mediation communications from discovery that are not privileged and does not provide protection for communications derived from proceedings which are not governed by the rules of evidence.²⁴ Ultimately, the gaps left by contract law and evidentiary Rule 408 prevent parties from having complete confidence that their communications inside the mediation process will be protected. Therefore, in an attempt to clarify and define confidentiality in mediation and make available a uniform approach to replace the “patchwork of state laws on mediation”²⁵ and other unreliable avenues, the Proposed Uniform Mediation Act was drafted.

RESOL. 157 (1994)).

15. Note, *supra* note 11, at 441.

16. Kirtley, *supra* note 14, at 5.

17. Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public Interest*, 1995 J. DISP. RESOL. 1, 10-11 (1995) (citing JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2194(b), at 77-78 (1961)).

18. *Id.* at 11 (citing JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2194(b), at 77-78 (1961)).

19. *Id.*

20. *Id.* at 11-12. See also FED. R. EVID. 408.

21. Kirtley, *supra* note 17, at 12.

22. *Id.* at 13. See also FED. R. EVID. 408.

23. Kirtley, *supra* note 17, at 13.

24. *Id.*

25. ABA Meeting Examines Uniform Mediation Act, DISP. RESOL. J., Nov. 1998, at 6.

III. THE UNIFORM MEDIATION ACT'S APPROACH TO CONFIDENTIALITY

The July and December drafts of the U.M.A. contained two separate provisions addressing confidentiality: one addressing privilege and its exceptions and waiver, and one addressing mediator disclosure.²⁶ These sections were combined into one detailed section in the January 2000 draft; this section provides guidance for confidentiality, privilege, waiver, evidentiary and discovery exclusions, nondisclosure, and exceptions to the privilege.²⁷

26. U.M.A. §§ 2 & 3 (Proposed Official Drafts July 1999 & Dec. 1999).

27. U.M.A. § 2 (Proposed Official Draft Jan. 2000). The confidentiality provision of the January 2000 draft, found in section 2, reads as follows:

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

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

(b) A mediator has a privilege to [refuse to disclose, and to prevent any other person from disclosing, the mediator's mediation communications and may] refuse to provide evidence of mediation communications in a civil judicial, administrative, or arbitration proceeding.

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

(2) A mediator may not disclose mediation communications unless all of the disputants agree, or the mediator reasonably believes that law, professional reporting requirements, or public policy requires the disclosure. A mediator also may not make a report, assessment, evaluation, recommendation, or finding regarding a mediation, to a judge, agency, or authority that refers the matter to mediation or employs that mediator and that may make rulings on or investigations into the dispute that is the subject of the mediation.

(c) Mediation communications are not subject to discovery or admissible in evidence in a civil, arbitration, or administrative tribunal if they are privileged and are not waived or subject to preclusion under subsection (a) or (b).

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

1. A court or prosecutor refers a criminal or juvenile delinquency case to mediation,
2. A public agency refers a dispute involving allegations of juvenile criminal activity to mediation, or
3. An entity charged by law to mediate criminal or juvenile cases accepts a case involving allegations of a crime.]

(e) There is no privilege or prohibition under subsections (a), (b), (c), or (d) of this section: (1) for a record of an agreement between two or more disputants;

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

(f) There is no privilege nor prohibition under subsections (a), (b), (c), or (d) of this section if a judicial, administrative, or arbitration tribunal finds, after an *in camera* hearing, that the disputant seeking discovery or the proponent of the evidence has shown that the

A. Privilege Structure and Holder Designation

Initially, the drafters examined the four differing approaches to privilege structure that are currently followed by the states' confidentiality statutes before shaping the structure of the U.M.A.²⁸ The majority approach extends the privilege to certain types of mediation, and has two variations.²⁹ The first variation provides a broad definition of mediation and permits the privilege to be lifted where a court deems fit to prevent injustice.³⁰ The second variation allows for a broad mediation definition that would be "inapplicable when loss of evidence would most damage the interests of justice."³¹ A second approach to privilege, which is in contrast to both variations of the majority approach, is to render the mediator "incompetent" to testify about the mediation.³² This strategy addresses the concern disputants may have that a mediator will divulge communications from the mediation without the

evidence is otherwise available, that there is an overwhelming need for the evidence that substantially outweighs the importance of the state's policy favoring the protection of confidentiality and the subject matter of the disclosure is limited to:

- (1) threats made by a participant to inflict violence or unlawful property damage;
- (2) a disputant or mediator who uses or attempts to use the mediation to plan or commit a crime;
- (3) a proceeding in which a public agency is protecting the interests of a child, disabled adult, or elderly adult protected by law, for mediation communications offered to prove or disprove abuse or neglect, unless that agency referred the case for mediation;
- (4) establishing or disproving a claim or complaint of professional misconduct or malpractice filed against a mediator, a disputant or a representative of a disputant based on conduct occurring during a mediation;
- (5) a proceeding in which fraud, duress, or incapacity are raised regarding the validity or enforceability of an agreement evidenced by a record and reached by the disputants as the result of a mediation, but only through evidence provided by persons other than the mediator of the dispute at issue.

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

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

(h) Information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.

Id.

28. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Approaches to mediation confidentiality; choice of the privilege structure).

29. *Id.*

30. *Id.* See, e.g., ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996, 5 U.S.C. § 574 (1994 & Supp. IV 1998); OHIO REV. CODE ANN. § 2317.023(c)(4) (Anderson 1999).

31. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Approaches to mediation confidentiality; choice of the privilege structure). See, e.g., CAL. EVID. CODE § 1119 (West 1998).

32. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Approaches to mediation confidentiality; choice of the privilege structure). See, e.g., MINN. STAT. ANN. § 595.02 (West 1988 & Supp. 2000); N.J. STAT. ANN. § 2A:23A-9(c) (West 1998).

consent of the parties.³³ Using this method, the mediator is regulated without disrupting or taking away any of the disputants' rights to privilege.³⁴ The default method is the third option that is utilized when mediation is not covered by a specific statute; Federal Rule of Evidence 408 serves this function and excludes evidence of compromise discussions.³⁵ Finally, the implementation of a "general evidentiary exclusion and discovery limitation on mediation communications"³⁶ can be used to protect mediation confidentiality. This approach is similar to provisions addressing compromise discussion, such as Rule 408 in the Federal and Uniform Rules of Evidence.³⁷ However, because this type of provision is so broad and may be used by parties to future litigations and even strangers to the mediation, the drafters chose to create a more traditional privilege structure.³⁸ After evaluating these different structures, the U.M.A. created a privilege that responds to the tensions among the approaches in three ways.³⁹ First, a narrow definition of mediation was implemented, requiring the appointment or engagement of a mediator as the triggering event.⁴⁰ Second, the U.M.A. is not applicable to adult felony proceedings, and, finally, courts are given the power to lift the privilege in extraordinary circumstances.⁴¹

Several approaches taken by the states were also investigated by the drafters before determining which of the mediation participants would "hold" the confidentiality privilege within the language of the U.M.A.⁴² Many state statutes fail to identify a "holder," or the person entitled to raise and waive the privilege.⁴³ In the states without an express definition of "holder," the parties are forced to look to judicial determinations to ascertain who holds the privilege.⁴⁴ Of the states that do designate a holder, two different approaches exist.⁴⁵ Statutes may assign the privilege solely to the parties to share jointly.⁴⁶ The rationale for making the disputants holders is that they come to the mediation expecting communications to be confidential and should control the privilege.⁴⁷ Other statutes allow the mediator

33. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Approaches to mediation confidentiality; choice of the privilege structure).

34. *Id.*

35. *Id.* See FED. R. EVID. 408.

36. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Approaches to mediation confidentiality; choice of the privilege structure). See, e.g., MO. REV. STAT. § 435.014 (1994).

37. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Approaches to mediation confidentiality; choice of the privilege structure).

38. *Id.*

39. *Id.*

40. *Id.* See U.M.A. § 1(3) (Proposed Official Draft Dec. 1999).

41. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Approaches to mediation confidentiality; choice of the privilege structure).

42. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(a) & (b). Privilege; waiver).

43. *Id.*

44. *Id.* See, e.g., 710 ILL. COMP. STAT. ANN. 20/6 (West 1999); KY. REV. STAT. § 336.153 (Michie 1990).

45. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(a) & (b). Privilege; waiver).

46. *Id.* See, e.g., FLA. STAT. ANN. § 61.183 (West 1997); KAN. STAT. ANN. § 23-606 (1995).

47. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(a) & (b). Privilege; waiver).

to be an additional holder of the privilege.⁴⁸ Because the mediator is expected to remain neutral with regard to both parties, it is argued that the mediator should also be able to exercise the privilege.⁴⁹

The U.M.A. has chosen to combine both approaches as shown in section 2(a) and (b). Under this compromise, the disputants hold a privilege that can be raised with regard to any communication in the mediation.⁵⁰ In addition, the mediator holds the privilege as it relates to his or her own communications and testimony.⁵¹ The combination of both approaches endorses a mixture of privilege rationales by giving all parties a privilege, allowing the disputants to waive or restrict their privilege by agreement “as it relates to any evidence. . . of mediation communications by anyone but the mediator.”⁵² The drafters correctly give all parties to the mediation access to a privilege, in that, each participant may fully engage in the mediation and to attempt to reach an agreement without being hindered by the possible effects of future disclosure by other participants. The disputants, however, are not allowed to expand their privilege through agreement because the agreement would be void as against public policy.⁵³

Section 2(b)(2) gives the mediator an additional avenue for disclosure apart from consent by the parties.⁵⁴ The mediator may disclose information if she “reasonably believes that law, professional reporting requirements, or public policy”⁵⁵ requires disclosure. From this language, it appears that the mediator is given broad discretion in determining what should be disclosed. However, this provision leaves open an avenue for the mediator to comply with other laws, make reports to the police, or warn potential victims if the situation arises.⁵⁶ Additionally, this subsection states that the mediator cannot give a report or reveal information to “a judge, agency or authority” who referred the matter to mediation, employs the mediator, or who may make an investigation or rulings on the mediation’s subject matter.⁵⁷ These prohibitions were put in place by the drafters because “such disclosures would undermine the disputants’ candor, create undesirable pressures to settle, and introduce *ex parte* hearsay into the judicial process.”⁵⁸

A recent case in California was controversial in addressing the issue of mediator testimony. In *Olam v. Congress Mortgage Co.*,⁵⁹ a mortgagor and mortgagee settled their suit through mediation, where the terms of the agreement were embodied in a

48. *Id. See, e.g.*, CAL. EVID. CODE § 1122 (West 1998); OHIO REV. CODE ANN. § 2317.023 (Anderson 1999).

49. U.M.A. § 2 reporter’s notes (Proposed Official Draft Dec. 1999) (Section 2(a) & (b). Privilege; waiver).

50. *Id. See, e.g.*, OHIO REV. CODE ANN. § 2317.023 (Anderson 1999).

51. U.M.A. § 2 reporter’s notes (Proposed Official Draft Dec. 1999) (Section 2(a) & (b). Privilege; waiver).

52. *Id.*

53. *Id. See* ROGERS & MCEWEN, *supra* note 5, at § 9:24.

54. U.M.A. § 2(b)(2) (Proposed Official Draft Jan. 2000).

55. *Id.* (emphasis added).

56. U.M.A. § 3 reporter’s notes (Proposed Official Draft Dec. 1999) ((a) and (b) prohibitions against disclosure by mediator; exceptions).

57. *Id.*

58. *Id.*

59. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

memorandum of understanding.⁶⁰ However, when the defendant sought to enforce the terms of the agreement, the plaintiff claimed undue influence.⁶¹ The court then sought to determine if it was appropriate to take testimony from the mediator about what occurred during the mediation.⁶²

The court looked to the California Evidence Code to determine whether mediation communications may be entered in a proceeding subsequent to a mediation. The court considered a section of the Code which states that any admission or writing made during the course of a mediation is not admissible or subject to discovery.⁶³ An exception to the admissibility provisions in the Code states that a written agreement is admissible if it is signed by the parties and intended to be binding.⁶⁴ In the present case, the parties made the mediation agreement with the intent that it have a binding effect; therefore, it was undisputed that the agreement was admissible in court.⁶⁵ However, the plaintiff further contested the agreement's validity because of her physical, emotional and mental condition at the time of the mediation.⁶⁶ While the parties' waivers after the mediation were not complete, they were sufficient to allow evidence regarding the plaintiff's condition during the mediation to be introduced at the undue influence evidentiary hearing.⁶⁷

The Code contains another provision, similar to the U.M.A.'s section 2(b), which states that no mediator shall be competent to testify in a subsequent proceeding related to a prior proceeding in which he or she was involved.⁶⁸ Although the parties waived their privilege to confidentiality, their waivers did not extend to the mediator, who holds a privilege independent to that of the parties.⁶⁹ Therefore, the court was forced to make an independent determination as to whether the mediator was competent to testify, regardless of whether the mediator invoked the privilege.⁷⁰ In *Olam*, the district court determined that it must conduct a two-step process,⁷¹ which was set forth in *Rinaker v. Superior Court*.⁷² The first stage of the test is to determine whether to compel the mediator to appear in an *in camera* hearing to tell the court precisely what testimony the mediator will provide. If a hearing is held, the court must then assess what values and interests would be harmed by the testimony, the magnitude of the harm, the importance of the rights and interests jeopardized by not allowing the testimony, and how much the

60. *Id.* at 1113.

61. *Id.* at 1118.

62. *Id.* After counsel for each side reviewed this issue, the plaintiff agreed to waive her attorney-client privilege and her mediation privilege, and the defendants limited their waiver to testimony regarding the mediator's and defendants' interactions with the plaintiff and her attorney for the purpose of determining whether undue influence was present during the mediation. *Id.* at 1118-19.

63. *Id.* at 1128. See also CAL. EVID. CODE § 1119 (West 1998).

64. 68 F. Supp. 2d at 1128. See also CAL. EVID. CODE § 1123 (West 1998).

65. 68 F. Supp. 2d at 1129.

66. *Id.*

67. *Id.* at 1129-30.

68. *Id.* at 1128. See also CAL. EVID. CODE § 703.5 (West 1998).

69. 68 F. Supp. 2d at 1130.

70. *Id.* See also CAL. EVID. CODE § 703.5 (West 1998).

71. 68 F. Supp. 2d at 1132.

72. 74 Cal. Rptr. 2d 464 (Cal. Ct. App. 1998). In *Rinaker*, the court held that the mediator could be compelled to testify to impeach the testimony of another witness in the interests of preventing perjury and injustice in a subsequent delinquency proceeding. *Id.* at 473.

testimony would contribute to protecting and advancing those rights.⁷³ The court stated that the balancing analysis should focus on the process of the mediation; here, a significant portion of the mediation was spent in caucus, with the mediator talking with one side at a time.⁷⁴ Ultimately, the court held that the mediator's testimony would substantially contribute to the evidentiary hearing to determine if the plaintiff was under undue influence in signing the mediation agreement.⁷⁵ The court's reasoning was premised on the fact that the mediator was the only party to the mediation who was truly neutral to the dispute and had spent time in private caucus with the plaintiff.⁷⁶ The result reached by the *Olam* court was in error in that the court penalized the mediator and the parties and pierced the mediation's confidentiality only because the mediator was a neutral party and the mediator engaged in caucuses to obtain information which might further settlement. These aspects of a mediator's role exist to make mediation a successful form of dispute resolution and confidentiality should not be dissolved merely because a mediator performs these functions.

As a mediator is barred in section 2(b) from disclosing communications to judges or agencies, disclosure to the general public is also barred as an option to the mediator in the July and December 1999 drafts.⁷⁷ The prohibition against disclosure to the general public is supported by numerous rationales. First, mediators are not licensed and are not typically subject to discipline so some measure of regulation must be put in place to govern their disclosure.⁷⁸ Second, the public disclosure limitation still enables mediators to comply with other laws requiring disclosure to the police, officials or warning victims of possible future harm.⁷⁹ However, despite these persuasive rationales, no express prohibition against disclosure to the general public by the mediator made the transition into the January 2000 draft.⁸⁰ Perhaps the drafters felt the issue was impliedly prohibited or addressed in the explicit exceptions to the prohibition of mediator disclosure. Regardless of the reasoning behind not excluding disclosure to the general public, the absence of the prohibition does not promote the parties' expectations. The privilege structure informs the parties they hold a privilege as to any communication in the mediation; however, allowing the mediator the opportunity to disclose communications to the general public leaves the parties vulnerable, in that, they may not foresee the disclosure or prevent possible repercussions, such as publicity.

Alternatively, it was argued that a prohibition of this type would create an interpretation problem in that the term "general public" could be difficult to interpret uniformly and parties could better contract for its meaning.⁸¹ A contract of this type

73. *Olam*, 68 F. Supp. 2d at 1132.

74. *Id.* at 1135.

75. *Id.* at 1138.

76. *Id.*

77. U.M.A. § 3 reporter's notes (Proposed Official Drafts July & Dec. 1999) ((a) and (b) prohibitions against disclosure by mediator; exceptions).

78. *Id.*

79. *Id.*

80. U.M.A. § 2 (Proposed Official Draft Jan. 2000).

81. U.M.A. § 3 reporter's notes (Proposed Official Drafts July & Dec. 1999) ((a) and (b) prohibitions against disclosure by mediator; exceptions).

could result in civil damages caused by a mediator's breach.⁸² Also, without a contract, a mediator could be liable for invasion of privacy if she violated the reasonable expectations of the parties. Additionally, mediators could be held liable for public disclosure because the disclosure would be an intentional act on the part of the mediator.⁸³

It is evident from the wording of the U.M.A. that there is also no provision addressing the disputants' disclosure of mediation communication to the general public.⁸⁴ The rationale for this omission is that parties are often one-time participants and they would not expect to be prohibited and liable for discussing the mediation.⁸⁵ While parties are always left with the option to contract for confidentiality in this area,⁸⁶ disputants may not realize the full effect of the statute's silence until a disclosure has been made and damage to personal or business reputation has occurred.

B. Privilege Coverage

Upon establishing that both parties and the mediator are holders of the privilege, sections 2(a) and (b) designate "mediation communications" as the type of information to be protected by the privilege.⁸⁷ This designation creates a broad coverage for the privilege that is beneficial to the parties because they "begin mediation knowing all their mediation communications will be confidential, except for specific types of information that can be identified in advance."⁸⁸ Covering all mediation communications is more effective than limiting the U.M.A.'s coverage to the "subject matter of the mediation" or "information relating to the mediation" because these provisions cover communications that are most in need of protection but do not extend to extraneous communications.⁸⁹ The broad language is also significant in that it will prevent problems found in Uniform Rule of Evidence 408.⁹⁰ Rule 408 provides that compromise negotiations are inadmissible to prove liability or invalidity of a claim but "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."⁹¹ The U.M.A.'s broad approach is the best way to promote mediation's purpose of protecting the parties' expectations. The parties can be forthcoming during the process because of the security of knowing that all mediation communications will be protected from disclosure except those specifically enumerated. This knowledge will encourage open communication that may

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. U.M.A. §§ 1(3), 2(a), 2(b) (Proposed Official Draft Jan. 2000).

88. Kirtley, *supra* note 17, at 38-39.

89. *Id.* at 38. *See, e.g.*, MO. REV. STAT. § 435.014(2) (1994); WIS. STAT. ANN. § 904.085(3) (West Supp. 1999).

90. UNIF. R. EVID. 408.

91. *Id.*

accelerate settlement in the mediation process. Additionally, the Act is explicit in stating that “[i]nformation otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.”⁹² Therefore, participants can be forthcoming with otherwise discoverable information without taking a risk that the information will later be precluded at trial.

The U.M.A. also lists the forums in which mediation communications are privileged. Sections 2(a) and (b) provide that the privilege applies to civil judicial, administrative and arbitration proceedings.⁹³ The December 1999 draft included juvenile and criminal misdemeanors among the forums, but they were removed from that section of the January 2000 draft and placed in section 2(d).⁹⁴ This new section places conditions on the admission of mediation communications in a criminal or juvenile delinquency proceeding. Communications may not be admitted if “a court or prosecutor refers a criminal or juvenile delinquency case to mediation, a public agency refers a dispute involving allegations of juvenile criminal activity to mediation, or an entity charged by law to mediate criminal or juvenile cases accepts a case involving allegations of crime.”⁹⁵

After addressing privilege and its coverage, the drafters turn to the issue of waiver. A party can waive his right to a privilege if he holds the privilege and performs the waiver in accordance with the statute. Section 2(a) and (b) of the U.M.A. allows the protection of mediation communications to be waived expressly by the parties and the mediator, either in a record or during a judicial, administrative, or arbitration proceeding.⁹⁶ The Act also takes up non-express waiver which some state statutes fail to address.⁹⁷ The July 1999 draft of the U.M.A. viewed any disclosure covered by the privilege as a waiver of the privilege, whether expressed or through conduct.⁹⁸ The reporter’s notes to the July 1999 draft relayed the following illustrative example:

[I]f A and B were the disputants in a mediation, and A affirmatively stated in court that B threatened A during the mediation, A would have effectively waived the protections of this statute regarding whether a threat occurred in mediation. If B decides to waive as well, evidence of A’s and B’s statements during mediation may be admitted.⁹⁹

The wording of the July 1999 U.M.A. draft would allow A to disclose communications from the mediation to the disadvantage of B, without clearly addressing whether B could respond to A’s attack.¹⁰⁰ However, the scope of the

92. U.M.A. § 2(h) (Proposed Official Draft Jan. 2000).

93. U.M.A. § 2(a), (b) (Proposed Official Draft Jan. 2000).

94. *Id.* § 2(a), (b), (d).

95. *Id.* § 2(d).

96. *Id.* § 2(a)(1), (b)(1).

97. *Id.*

98. U.M.A. § 2 reporter’s notes (Proposed Official Draft July 1999) (Section 2(a) & (b) compelled disclosure; waiver).

99. *Id.*

100. *Id.*

privilege was clarified in the December 1999 U.M.A. draft.¹⁰¹ In that draft, the drafters recognized that one disputant could use the privilege to the disadvantage of the other party.¹⁰² Therefore, the drafters remedied this problem so that if A's attorney states that A was threatened during the mediation, A will not be allowed to block the use of testimony to refute his statement that a threat occurred.¹⁰³ While the allowance of estoppel under the December 1999 draft appears to remedy the problem in preventing A from estopping B from disclosing mediation communications to respond to A's accusations, B is still forced to give up his privilege to mediation confidentiality in order to respond to A's accusations. While B may not want to jeopardize her situation by waiving her privilege to respond to A's accusations, she is given some assurance because waiver through conduct would not usually constitute waiver of any and all mediation communications, but only those communications relating in subject matter.¹⁰⁴ Therefore, B could waive her privilege to respond to A's specific accusation without opening up all mediation communications to disclosure.¹⁰⁵ The addition of the estoppel language provides a better result because it allows the parties to enter into and participate in the mediation with an understanding of what will happen if this particular situation arises. Without this language, courts would be left to determine the scope of estoppel within the privilege, and the uniformity that the Act seeks to establish would be lost.

C. Exceptions to the Privilege

After defining the scope of the privilege, the drafters of the U.M.A. found it necessary to provide enumerated exceptions in sections 2(e) and (f).¹⁰⁶ Section 2(e)(1) and (2) take away the privileges established under subsections (a), (b), (c) or (d) in two instances.¹⁰⁷ First, there is no privilege to preclude evidence of a recorded agreement relating to the mediation.¹⁰⁸ This provision was included to follow the current pattern of a majority of states,¹⁰⁹ and defines "recorded" agreement as any written or signed agreement, agreement recorded by tape recorder, and record created through the use of other methods.¹¹⁰ One type of agreement, oral agreements among parties, is not included in the exception.¹¹¹ If oral agreements were not

101. U.M.A. § 2(a), (b) (Proposed Official Draft Dec. 1999).

102. U.M.A. § 2 reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(a) & (b) compelled disclosure; waiver).

103. *Id.*

104. *Id.*

105. *Id.*

106. U.M.A. § 2(c)(1)-(9) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c). Generally).

107. U.M.A. § 2(e) (Proposed Official Draft Jan. 2000).

108. *Id.*

109. U.M.A. § 2(c)(1) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c)(1). Record of an agreement). *See, e.g.*, CAL. EVID. CODE § 1123 (West 1998); OR. REV. STAT. § 36.220(2)(a) (1998).

110. U.M.A. § 2(c)(1) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c)(1). Record of an agreement).

111. *Id.*

encompassed in the privilege, parties would be inhibited from being candid and forthcoming during the mediation in fear of any statement affecting the existence of an agreement or its content.¹¹² Second, mediation communications that are divulged in a mediation which must be open to the public by law, are not privileged.¹¹³

Section 2(f) of the U.M.A. excludes a second group of circumstances from the confidentiality privilege.¹¹⁴ The privilege is only removed upon the finding of the court in an *in camera* hearing that the material is either not otherwise discoverable or the need for the evidence outweighs the rationale and policy for the protection.¹¹⁵ The importance of an *in camera* viewing was recognized in *Rinaker v. Superior Court*.¹¹⁶ “[A]n *in camera* hearing maintains the confidentiality of the mediation process” while considering whether factors in the case compel “breach of the confidential mediation process.”¹¹⁷ The *Rinaker* court explained that an *in camera* hearing could serve several purposes.¹¹⁸ First, it allows the court to determine whether the mediator is competent to testify about the communication.¹¹⁹ Second, the court can assess the statement’s probative value and, finally, the court could determine whether the information could be introduced without breaching the mediation’s confidentiality.¹²⁰

The first exception in section 2(f) addresses threats of violence or unlawful property damage.¹²¹ The rationale for this exception is that mediation should be a civil proceeding and uncivil conduct by an individual should not be covered by the privilege.¹²² This exception is seen frequently in many state confidentiality statutes.¹²³ However, the scope of this exception is narrow in that it applies only to threats made during the mediation.¹²⁴ The drafters also entertained including an exception for admission of past conduct in this section; however, it was decided that this type of information can be disclosed through provisions already included in the U.M.A.¹²⁵ For instance, a mediator is required under law, or on the basis of public policy, to disclose felonies under section 2(b)(2), and anyone is allowed to testify at a felony trial since the Act’s privilege does not encompass felony criminal proceedings.¹²⁶

The second exception allows for disclosure of those mediation communications that pertain to the future commission of a crime.¹²⁷ Commission of future crimes is

112. *Id.*

113. U.M.A. § 2(e) (Proposed Official Draft Jan. 2000).

114. *Id.* § 2(f).

115. *Id.*

116. *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 472-73 (Cal. Ct. App. 1998).

117. *Id.* at 472.

118. *Id.* at 472-73.

119. *Id.* at 472.

120. *Id.* at 472-73.

121. U.M.A. § 2(f)(1) (Proposed Official Draft Jan. 2000).

122. U.M.A. § 2(c)(2) reporter’s notes (Proposed Official Draft Dec. 1999) (Section 2(c)(2). Threats of bodily injury or unlawful property damage).

123. *Id.* See, e.g., COLO. REV. STAT. § 13-22-307 (1999); KAN. STAT. ANN. § 23-606 (1995).

124. U.M.A. § 2(c)(2) reporter’s notes (Proposed Official Draft Dec. 1999) (Section 2(c)(2). Threats of bodily injury or unlawful property damage).

125. *Id.*

126. *Id.*

127. U.M.A. § 2(f)(2) (Proposed Official Draft Jan. 2000).

a common exception among the states.¹²⁸ The exception, however, is limited within the U.M.A., in that, the protection of the privilege is removed only if the actor utilizes the mediation itself to further the commission of a crime.¹²⁹ The drafters debated whether to include fraud in this crime exception, as is the current practice of some states.¹³⁰ However, the drafters reasoned that a civil suit could include a claim of fraud and a mediation's discussion could encompass the issue of fraud, so it was not included in this exception.¹³¹

Abuse and neglect is addressed in the third subsection of section 2(f).¹³² The scope of this exception includes child abuse, as well as elderly and disabled abuse if the particular state chooses to protect these two groups as a matter of public policy.¹³³ More particularly, protection of the elderly and the disabled is permitted only in public agency hearings as opposed to private proceedings.¹³⁴

The next exception addresses the issue of professional responsibility; it provides that any participant may provide information relating to professional misconduct.¹³⁵ This exception, set forth in the December 1999 draft, is similar to statutes in several states,¹³⁶ and was limited to "participant testimony to an investigation of professional misconduct that is conducted by an agency . . ." ¹³⁷ In drawing this narrow line, the drafters allowed mediation communications to remain confidential in proceedings related to malpractice, which include a wide range of claims under the rubric of professional misconduct.¹³⁸ Additionally, mediators themselves would not be prohibited from providing information required under statutory reporting obligations because this information would not be revealed in a court or administrative proceedings.¹³⁹ However, the January 2000 draft now reads that the privilege will be lifted for "professional misconduct or malpractice" suits, thereby broadening the exception's scope.¹⁴⁰

Allowing mediators to report misconduct is significant because many lawyers have become trained as mediators but are still bound by the Model Rules of

128. U.M.A. § 2(c)(3) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c)(3). Commission of a crime). However, the statutes in these states include broader exceptions than those provided for in the U.M.A. See, e.g., IOWA CODE § 216.15B(3) (1997); S.D. CODIFIED LAWS § 19-13-32 (Michie Supp. 1999).

129. U.M.A. § 2(c)(3) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c)(3). Commission of a crime).

130. *Id.*

131. *Id.*

132. U.M.A. § 2(f)(3) (Proposed Official Draft Jan. 2000).

133. U.M.A. § 2(c)(4) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c)(4). Evidence of abuse or neglect).

134. *Id.*

135. U.M.A. § 2(f)(4) (Proposed Official Draft Jan. 2000).

136. U.M.A. § 2(c)(6) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c)(6). Reports of Professional Misconduct). See, e.g., HAW. REV. STAT. § 671-16 (1993); UTAH CODE ANN. § 78-31(b)-(8)(2)(c)(i) (1996).

137. U.M.A. § 2(c)(6) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c)(6). Reports of Professional Misconduct).

138. *Id.*

139. *Id.*

140. U.M.A. § 2(f)(4) (Proposed Official Draft Jan. 2000).

Professional Conduct.¹⁴¹ Without this allowance, a lawyer will have the opportunity to use “the mediation session to cloak his or her misconduct in confidentiality or to attempt to settle a matter relating to his misconduct in a confidential manner.”¹⁴² Therefore, the existence of this exception is important and justified to uphold the integrity of the legal profession and protect participants from misuse of the process by attorneys.

The December 1999 version of the U.M.A. allowed for exceptions to the confidentiality privilege for claims against mediators and disputants.¹⁴³ Several states have adopted statutes that allow a mediator to defend herself against a claim by a disputant and allow the disputant access to evidence from the mediation.¹⁴⁴ However, the January 2000 draft of the U.M.A. removed these provisions and exceptions for claims against mediators and disputants and reworded the misconduct exception to include “establishing or disproving a claim . . . filed against a mediator, a disputant or a representative of a disputant based on conduct occurring during a mediation.”¹⁴⁵ The basic reasoning for this type of exception is that mediators could not be expected to fairly defend themselves against claims without disclosing mediation communications.¹⁴⁶ Furthermore, these communications should be available to the disputant to promote justified complaints against mediators because such complaints serve as a regulatory device for the mediation process.¹⁴⁷ Also, agency policies encourage allowing claims against disputants who are acting as representatives to particular individuals and who fail to fulfill their duties as agents.¹⁴⁸

The validity and enforceability of mediation agreements is the subject of the fifth exception.¹⁴⁹ Here, specific contract defenses are preserved, such as fraud, duress, and incapacity, that would otherwise dissolve under the privilege for communications within a mediation.¹⁵⁰ *Randle v. Mid Gulf, Inc.*,¹⁵¹ exemplifies the usefulness of the exception. In *Randle*, a disputant introduced evidence in support of a claim for duress that the mediator would not allow him to leave the mediation after he started experiencing chest pains.¹⁵² This exception is broader than the section 2(e)(1) exception for record of agreements in that 2(e)(1) only makes the

141. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1983). Rule 8.3(a) states that “a lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trust-worthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” *Id.*

142. Kentra, *supra* note 13, at 753.

143. U.M.A. § 2(c)(7) reporter’s notes (Proposed Official Draft Dec. 1999) (Section 2(c)(7). Complaints against the mediator); U.M.A. § 2(c)(9) reporter’s notes (Proposed Official Draft Dec. 1999) (Claims against a disputant).

144. *Id.*

145. U.M.A. § 2(f)(4) (Proposed Official Draft Jan. 2000).

146. U.M.A. § 2(c)(7) reporter’s notes (Proposed Official Draft Dec. 1999) (Section 2(c)(7). Complaints against the mediator).

147. *Id.*

148. U.M.A. § 2(c)(9) reporter’s notes (Proposed Official Draft Dec. 1999) (Section 2(c)(9). Claims against a disputant).

149. U.M.A. § 2(f)(5) (Proposed Official Draft Jan. 2000).

150. *Id.*

151. No. 14-95-01292-CV, 1996 WL 447954 (Tex. App. Aug. 8, 1996).

152. *Id.* at *1.

admissibility of the agreement exempt from the privilege, whereas 2(f)(5) allows other mediation communications to be divulged to establish or refute the validity of a mediation agreement.¹⁵³

The final and most controversial exception allows a court to negate the privilege in circumstances other than those set out in the U.M.A.¹⁵⁴ The July and December 1999 drafts both used the presence of "manifest injustice," which would be determined by the court, as a basis for removing the privilege.¹⁵⁵ However, the language was changed in the January 2000 draft, which now provides that there is an exception to the privilege in "extraordinary situation[s] . . . in which the general purposes of the state policy favoring mediation confidentiality is so outweighed by the need for disclosure."¹⁵⁶

The drafters deem this exception particularly significant because the Act provides for a deceptively broad definition of mediation, thereby allowing more discussions to be included within the privilege than individuals may expect, and the Act covers particular types of criminal proceedings which sets it apart from other confidentiality legislation.¹⁵⁷ Due to these differences from other previously adopted statutes, the Act gives the courts a tool with which to strip the privilege from a party in exceptional circumstances that may not have been foreseen by the drafters.¹⁵⁸

Without the inclusion of this exception, the U.M.A. confidentiality provision would be labeled an absolute privilege between the parties and the mediator.¹⁵⁹ The lawyer-client privilege is an example of an absolute privilege, in that, the information shared between a lawyer and a client is not subject to disclosure even if there is a societal need for the information.¹⁶⁰ However, the absolute privilege is normally accompanied by exceptions, such as those found within section 2(f)(1-3) of the U.M.A., which allow for disclosure when threats are made during the process, the mediation is utilized to further a crime or abuse is at issue.¹⁶¹ The presence of an additional exception in section 2(f)(5) converts the U.M.A.'s confidentiality provision into a qualified privilege.¹⁶² With a qualified privilege, disputants and mediators can look to the enumerated exceptions laid out in the statute to determine what will and will not be covered by the privilege at the onset of the mediation, but all parties must also be aware that they may have to turn to a judge if a dispute as to confidentiality arises that is not addressed in the Act's detailed exceptions.¹⁶³ It will then be the court's duty to perform a balancing test to determine if societal benefit requires disclosure of the disputed information.¹⁶⁴

153. U.M.A. § 2(c)(8) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c)(8). Validity and enforceability of agreement); U.M.A. § 2(e), (f) (Proposed Official Draft Jan. 2000).

154. U.M.A. § 2(f)(6) (Proposed Official Draft Jan. 2000).

155. U.M.A. § 2(c)(5) (Proposed Official Drafts July 1999 & Dec. 1999).

156. U.M.A. § 2(f)(6) (Proposed Official Draft Jan. 2000).

157. U.M.A. § 2(c)(5) reporter's notes (Proposed Official Draft Dec. 1999) (Section 2(c)(5). Manifest Injustice).

158. *Id.*

159. Kirtley, *supra* note 14, at 5-6.

160. *Id.*

161. *Id.* at 6. See U.M.A. § 2(f)(1)-(3) (Proposed Official Draft Jan. 2000).

162. Kirtley, *supra* note 14, at 6. See U.M.A. § 2(f)(5) (Proposed Official Draft Jan. 2000).

163. Kirtley, *supra* note 14, at 6.

164. *Id.*

The result of combining the absolute and qualified privileges illustrates that the drafters chose the best solution.¹⁶⁵ The drafters followed the approach of a majority of the states' statutes in providing for an absolute privilege with enumerated exceptions.¹⁶⁶ However, the drafters also placed a safeguard in the U.M.A. for the parties, the mediator, the court, the public, and themselves by allowing the courts to make an exception to the privilege in extraordinary situations. Ultimately, the drafters provided exceptions for common and significant situations, but also opened an avenue for an exception in situations they did not think would occur or did not envision.

The Ohio Supreme Court was first to address a provision relating to manifest injustice in *State ex rel. Schneider v. Kreiner*.¹⁶⁷ Following a custody mediation between a former husband and wife, the husband sought access to the mediation file upon facing criminal charges for violating the parties' agreement.¹⁶⁸ His request was denied and, upon a writ of mandamus, the court of appeals held the complaint form completed by the mediator was "mediation communication" and therefore not accessible to the husband.¹⁶⁹ The court found the form to be a mediation communication because it was completed by the mediator during the course of the mediation, it applied to the subject matter of the mediation and it reflected the thoughts of the mediator as to the process and outcome of the mediation.¹⁷⁰ The husband argued the complaint form should be accessible despite its classification as a mediation communication because a manifest injustice would result otherwise.¹⁷¹ The court did not find the husband's argument persuasive. "[T]he mere possibility that the relator may be involved in future litigation cannot possibly establish the presence of a manifest injustice . . . which is defined as a clear or openly unjust act."¹⁷² The court further reasoned that allowing this exception in this instance would open the door for manifest injustice claims in future cases involving agreements because any agreement reached by parties can be breached; therefore, the requirement of confidentiality was not outweighed by the need for disclosure.¹⁷³

D. The March 2000 Draft

In light of the above discussion, it is important to note that a new draft of the U.M.A. has been released.¹⁷⁴ The language providing for confidentiality is now found in section 4 through 8.¹⁷⁵ While the content of the confidentiality provisions

165. *Id.*

166. *Id.* at 5.

167. 699 N.E.2d 83 (Ohio 1998).

168. *Id.* at 84-87.

169. *Id.*

170. *Id.* at 85.

171. *Id.* at 86.

172. *Id.*

173. *Id.*

174. U.M.A. §§ 4-8 (Proposed Official Draft Mar. 2000).

175. *Id.* The confidentiality provisions of the March 2000 draft read as follows:

Section 4: Scope:

(a) Except as provided in subsection (b), this [Act] extends to all forms and types of mediation.

(b) This [Act] shall not apply to the mediation of:

- (1) disputes arising under, out of, or relating to a collective bargaining relationship; or
- (2) disputes involving minors that are conducted under the auspices of a primary or secondary school.

Section 5: Exclusion From Evidence and Discovery; Privilege:

(a) Mediation communications are not subject to discovery or admissible in evidence in a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding, if they are privileged under subsections (c) and (d), the privilege is not waived or estopped under [s]ection 6, and there is no exception under [s]ection 8.

(b) Information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.

(c) A disputant has a privilege to refuse to disclose, and to prevent any other person from disclosing, mediation communications in:

- (1) a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding;

[(2) a criminal or juvenile delinquency proceeding related to the matter mediated if:

- (i) a court or law enforcement official referred that case to mediation; or
- (ii) the mediation was done by a program supported by public funds to mediate criminal or juvenile cases;

[unless a court determines after a hearing *in camera* that the evidence is otherwise unavailable and that a miscarriage of justice would occur of such a magnitude as to substantially outweigh the state's policy favoring confidentiality in mediation.]

[(3) a proceeding in which a public agency is protecting the interests of a child, disabled adult, or elderly adult protected by law, if:

- (i) the case is referred by the court,
- (ii) the public agency participates in the mediation, or
- (iii) the case involves allegations of abuse, neglect, abandonment or exploitation and is mediated by an entity that is charged by law or a court to mediate such cases.]

(d) A mediator has a privilege to refuse to disclose, and to prevent any other person from disclosing, the mediator's mediation communications, in a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding. A mediator may also refuse to provide evidence of mediation communications in such a proceeding.

Section 6: Waiver and Estoppel:

(a) The disputants' privilege in [s]ection 5(c) may be waived, but only if expressly waived by all disputants, either in a record or during a judicial, administrative or arbitration tribunal. A disputant who makes a representation about or disclosure of a mediation communication that prejudices another person in a proceeding may be precluded from asserting the privilege, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(b) The mediator's privilege in [s]ection 5(d) may be waived, but only if expressly waived by all disputants and the mediator, either in a record or during a judicial, administrative or arbitration tribunal. A mediator who makes a representation about or disclosure of a mediation communication that prejudices another person in a proceeding may be precluded from asserting the privilege, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

Section 7: Nondisclosure Outside of Discovery and Evidentiary Proceedings:

(a) In addition to the prohibitions regarding proceedings described in [s]ections 5 and 6, a mediator may not disclose mediation communications unless all of the disputants agree, or the mediator reasonably believes that disclosure is required by law, a specific public policy established by statute or court decision, or professional reporting requirements.

(b) A mediator may not provide a report, assessment, evaluation, recommendation, or finding regarding a mediation to a court, agency, or authority that may make rulings on or investigations into a dispute that is the subject of the mediation, other than whether the

in the March 2000 draft is similar to the January 2000 draft, its presentation of some issues has been altered.

First, the March 2000 draft contains an additional section defining to which processes the U.M.A. extends.¹⁷⁶ Section 4 states that the Act applies to “all forms and types of mediation” except those within the collective bargaining context and disputes involving minors that are resolved within primary and secondary schools.¹⁷⁷ The addition of this section is significant in that it helps to further inform the parties before the mediation as to what mediation processes will trigger the Act. Also, it is to be noted that the Act’s mediation coverage is very broad, which is a departure from some state statutes that only regulate mediation in certain areas.¹⁷⁸ The Act exempts collective bargaining situations from the Act’s scope because that area

mediation occurred, a report of attendance at mediation sessions, whether the mediation has terminated, or whether settlement was reached, except as permitted under [s]ections 6 and 8.

[(c) This [Act] does not restrict the disclosure of mediation communications by disputants outside of discovery and evidentiary proceedings except as may be limited by the agreement of the disputants, or by court or administrative order.]

Section 8: Exceptions to Privilege and Nondisclosure:

(a) There is no privilege or prohibition against disclosure under [s]ections 5, 6, or 7 of this [Act]:

- (1) for a record of an agreement between two or more disputants;
 - (2) for the sessions of a mediation that must be open to the public under the law, or for sessions of a public policy mediation for which the disputants have no reasonable expectation of confidentiality;
 - (3) for threats made by a participant to inflict bodily harm or unlawful property damage;
 - (4) for any mediation participant who uses or attempts to use the mediation to plan or commit a crime;
 - (5) for mediation communications offered to prove or disprove abuse or neglect, except as provided in [s]ection 5(c)(3), in a proceeding in which a public agency is protecting the interests of a child, disabled adult, or elderly adult protected by law, or [(6) for mediation communications in a pretrial conference conducted by a judge or other judicial officer who may make or inform rulings on the subject matter of the conference.]
- (b) There is no privilege or prohibition under [s]ections (5), (6), or (7) of this [Act] if a judicial, administrative, or arbitration tribunal 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 importance of the state’s policy favoring the protection of confidentiality and:

- (1) the evidence is introduced to establish or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator, a disputant or a representative of a disputant based on conduct occurring during a mediation;
- (2) the evidence is offered in a proceeding in which fraud, duress, or incapacity is in issue regarding the validity or enforceability of an agreement evidenced by a record and reached by the disputants as the result of a mediation, but only if evidence is provided by persons other than the mediator of the dispute at issue; or
- (3) for mediation communication that evidence a significant threat to public health or safety.

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

176. U.M.A. § 4 (Proposed Official Draft Mar. 2000).

177. *Id.*

178. U.M.A. § 4 reporter’s notes (Proposed Official Draft Mar. 2000) (Section 4. Scope).

already has a well-developed mediation processes in place to address disputes.¹⁷⁹ Additionally, mediations within a school environment are excluded “because the supervisory needs of schools may not be consistent with the confidentiality provisions of the Act.”¹⁸⁰

Section 5 of the March draft, which sets forth when the privilege is applicable, also has new language. Section 5(c)(1) indicates a disputant’s privilege applies “in a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding.”¹⁸¹ Section 5(c)(2) goes a step further and applies the privilege to criminal or juvenile delinquency matters in government and community programs.¹⁸² While the drafters realize that the need for coverage may not be strong because disputants can discuss their “civil differences without getting into conversations that include discussions of criminal acts,” mediation of gang disputes and criminal acts may not be successful without allowing discussion of criminal acts.¹⁸³ Public policy supports settlement of these disputes and mediation as an avenue to reach settlement and, therefore, the communications within these mediations should be protected.¹⁸⁴ However, the disputants are the sole holders of this privilege and the mediator may not exercise it.¹⁸⁵ Additionally, the drafters qualified this privilege by including language that allows a court to lift the privilege in instances of injustice; the court, however, must first do a balancing test in light of the evidence in an *in camera* hearing.¹⁸⁶ The discretion handed the court is important because the right of litigants and the right to the privilege are strongly at odds in the context of criminal and juvenile delinquency matters.¹⁸⁷

The redrafting of the U.M.A. also leaves crystal clear the fact that a mediator is not allowed to make any disclosure concerning mediation communications outside the enumerated procedural contexts that allow a mediator to disclose.¹⁸⁸ Other exceptions, such as to report misconduct or for other reasons required by law, may also appropriately breach the default principle of non-disclosure to the general public.¹⁸⁹ The reader should reference the previous discussion on disclosure to the general public for the various rationales for and against prohibiting this type of disclosure.¹⁹⁰

The format for listing the enumerated exceptions to the privilege also changed in the March 2000 draft.¹⁹¹ The exceptions in section 8(a) apply automatically and relate to the record of an agreement, public sessions, threats, use of the mediation to commit a crime, abuse or neglect, and mediation communications in pretrial

179. *Id.*

180. *Id.*

181. U.M.A. § 5(c)(1) (Proposed Official Draft Mar. 2000).

182. U.M.A. § 5 & reporter’s notes (Proposed Official Draft Mar. 2000) (Subsection 5(c). Proceedings at which the privilege applies).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* See *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464 (Cal. Ct. App. 1998).

188. U.M.A. § 7 & reporter’s notes (Proposed Official Draft Mar. 2000) (In general).

189. *Id.*

190. See *supra* notes 77-83 and accompanying text.

191. U.M.A. § 8 (Proposed Official Draft Mar. 2000).

conferences.¹⁹² The exception for pretrial conferences is new and was added because the proceedings usually relate to case management and can be entered in the public record, so expectations of confidentiality are lacking.¹⁹³ However, these conferences can also take on characteristics that mirror mediation proceedings; therefore, the Act has been drafted to apply to mediations conducted by a judicial officer who may not make subject matter rulings.¹⁹⁴ The inclusion of pretrial conferences is important because settlement situations are often encountered by counsel on the road to trial and now parties and their counsel know that they must have a non-ruling judge oversee the conference and not make rulings for the Act's protection to activate.

The second group of exceptions in section 8 require evidence to be put on before the privilege can be raised.¹⁹⁵ Professional misconduct, the validity of a mediation agreement, and threats to public health or safety are the exceptions provided for in section 8(b).¹⁹⁶ Evidence of a health and safety risk would merit an exception to section 5 and 7; this provision differs from the exception for threats of harm or property damage in section 8(a)(3) because the court is required to perform a balancing test before letting mediation communications come forth regarding health and safety threats.¹⁹⁷

Upon surveying the March 2000 exceptions, the reader should realize that there is no longer an exception which allows the court to lift the privilege in "extraordinary situations." By deleting this provision, the language of the Act appears to turn the privilege held by the disputants and the mediator into an absolute privilege, unless one interprets sections 5(c)(2) and 8(b) as allowing the court to exercise its discretion when there is a societal need for the information. This move on the part of the drafters is puzzling because it appears that providing for a qualified privilege is the best result. With the qualified privilege, parties can come to the mediation table with knowledge that particular circumstances lift the privilege, but they can also be comforted in knowing that, if an event not foreseen by the drafters arises that will result in manifest injustice without disclosure, the court can remedy the situation. The presence of an absolute privilege may provide uniformity, but the parties may suffer for this result. However, one can read the March 2000 draft as combining the two types of privileges, as this author interprets the draft, by providing for particular instances when a court can exercise its discretion. With this result, the parties' interests are best served because they enter the mediation informed of which communications are protected, which exceptions automatically dissolve the privilege, and which exceptions lift the privilege if a court finds disclosure necessary after an *in camera* hearing. The parties are still left with avenues in which a court can utilize its discretion, but the avenue is simply narrowed and restricted to particular areas. Ultimately, the March 2000 draft no longer allows

192. *Id.*

193. U.M.A. § 8 & reporter's notes (Proposed Official Draft Mar. 2000) (Subsection 8(a)(6). Pretrial conferences).

194. *Id.*

195. U.M.A. § 8 (Proposed Official Draft Mar. 2000).

196. *Id.*

197. U.M.A. § 8 & reporter's notes (Proposed Official Draft Mar. 2000) (Subsection 8(b)(3). Significant Threat to Public Health and Safety).

for the court to make an exception in *any* circumstance in which it finds prejudice, but only in those instances stated in the U.M.A.

IV. CONCLUSION

Upon careful examination of the U.M.A.'s confidentiality provision and its subsections, it is this author's opinion that the U.M.A. will provide adequate protection for all parties involved in mediation. The drafters took into consideration state confidentiality statutes, case law and problems that currently exist within the scope of confidentiality. Careful examination led the drafters to adopt a "bifurcated" approach to the privilege, which allows both parties and the mediator to enforce the privilege. The U.M.A. then listed specific exceptions to the privilege, some of which will activate automatically and others that will be evaluated in an *in camera* hearing by the court. Although the Uniform Mediation Act is new and has yet to be adopted or interpreted by the courts, disputants and lawyers should be optimistic because this Act will hopefully create uniformity among the states and become a basis for determining what disputants and lawyers looking for confidentiality should expect from the mediation process. Additionally, mediators should feel more comfortable in their role because their interests are protected by the U.M.A. and they are also given avenues to uphold other laws which may require disclosure.

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