

PROPOSED LEGISLATION ON CRITICAL ISSUES IN MEDIATION

PROPOSED LEGISLATION ON THE ENFORCEABILITY OF MEDIATED AGREEMENTS

Without some uniform guidelines concerning the enforceability of mediated agreements and agreements to mediate, the effectiveness of mediation as an alternative dispute resolution technique may be undermined. Symposium participants generally agreed that legislation would be appropriate to enforce such agreements, not only to preserve the hard work and efforts of the disputants and the mediator, but also to further the development of the mediation process. The following proposed legislation is an attempt to integrate the ideas presented at the symposium, the suggestions given by the participants, and legislative attempts of other jurisdictions.

AGREEMENTS TO MEDIATE; MEDIATED AGREEMENTS; AND THEIR ENFORCEABILITY

Alternative 1

A provision in a written contract to submit to mediation any controversy arising between the parties to the contract, with relation thereto, shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract. Such an agreement expressly made shall stand as a submission to mediation of any controversy arising under said contract not expressly exempt from mediation by the terms of the contract.

Endorsements:

Merton C. Bernstein
Lawrence R. Freedman
William P. Hobgood
J. Michael Keating, Jr.
John McCormac

John S. Murray
Nancy H. Rogers
Frank E.A. Sander
Linda R. Singer
Joseph B. Stulberg

Rejections:

Leonard L. Riskin

Alternative 2

An agreement reached as a result of mediation shall be enforceable under the laws which govern enforceability of agreements generally.

Endorsements:

Merton C. Bernstein	Eileen Pruett
Lawrence R. Freedman	Nancy H. Rogers
William P. Hobgood	Frank E.A. Sander
J. Michael Keating, Jr.	Linda R. Singer
John McCormac	Joseph B. Stulberg
John S. Murray	

Alternative 3

If any suit or proceeding be brought in any of the courts of the United States upon any issue to be submitted to mediation pursuant to a written agreement, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to mediation under such an agreement, shall on application of one of the parties stay the trial of the action until such mediation has been had in accordance with the terms of the agreement to mediate, providing the applicant for the stay is not in default in proceeding with the mediation.

Endorsements:

Merton C. Bernstein ¹	John S. Murray
Lawrence R. Freedman	Nancy H. Rogers
William P. Hobgood	Frank E.A. Sander ¹
Earl Johnson, Jr.	Linda R. Singer
John McCormac	Joseph B. Stulberg

¹ Indicates concern that the words "courts of the United States" preclude application of the legislation in state and local courts.

Alternative 4

A party aggrieved by the alleged failure, neglect, or refusal of another to mediate under a written agreement to mediate may petition any United States District Court that, but for the agreement to mediate would have jurisdiction under Title 28, to direct an order that such mediation proceed in the manner provided for in such agreement. Five days notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.

Endorsements:

William P. Hobgood
Earl Johnson, Jr.
John S. Murray

Nancy H. Rogers
Joseph B. Stulberg

PROPOSED LEGISLATION ON MEDIATOR LIABILITY

Most symposium participants expressed the view that a statutory rule imposing liability upon mediators is inappropriate at this time, primarily because (1) so many interests are included within the mediation forum that no single rule can apply to all situations, and (2) the standards of mediator conduct are so uncertain at this time that no statutory rule would be fair to both the mediators and the parties. Hence, a majority of participants agreed that courts should make case-by-case determinations based upon traditional legal analysis. Alternative 1 reflects this view.

However, because the focus of the symposium was to promulgate proposed legislation, Alternative 2 sets forth the rule which seemed most palatable to the majority of participants. This majority agreed that a balance between the mediator's need for freedom to use discretion and the parties' need for protection from a biased mediator must be struck. A bad faith standard will adequately protect both interests.

MEDIATOR LIABLE TO PARTIES

Alternative 1

A mediator liability statute is inappropriate at this time.

Endorsements:

Arthur A. Chaykin
Lawrence R. Freedman
William P. Hobgood
J. Michael Keating, Jr.
John McCormac

John S. Murray
Eileen Pruett
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Alternative 2

A mediator shall be liable to one or more parties to the mediation for acts in bad faith related to the mediation.

Notes

a. A mediator shall be liable for harm to a third party only when the mediator has acted with reckless or willful disregard for the rights or safety of another.

b. The rule does not apply to an attorney who gives legal advice in a mediation context.

c. Application of this standard of care will vary according to the context of the mediation, e.g., degree of formality, degree of mediator training, expectations of the parties. An appropriate code of ethics should be consulted to aid courts and mediators in determining whether mediator conduct in a specific context constitutes an act of bad faith.

Endorsements:

Merton C. Bernstein
Earl Johnson, Jr.
J. Michael Keating, Jr.¹
Alice Phalan

Frank E.A. Sander
Linda R. Singer
Joseph B. Stulberg²

¹ Opposes language indicating the mediator has a writ to "achieve just results."

² Supports a statute granting immunity to a mediator for all lawful acts conducted in a mediation context.

PROPOSED LEGISLATION ON CONFIDENTIALITY IN THE MEDIATION PROCESS

A majority of the symposium participants supported a rule of confidentiality in the mediation process. To insure this, the majority advocated both (1) the adoption of an amendment to Rule 408 of the Federal Rules of Evidence and (2) the enactment of a confidentiality statute. Both are reproduced below.

Several exceptions to a rule of confidentiality were voiced by the participants and were included in the proposed statute. The first exception occurs when the parties intelligently waive the privilege in writing. A second exception occurs when the privileged communication involves the contemplation of a future crime or harm. Finally, no privilege of confidentiality may be maintained when the communication concerns child abuse.

CONFIDENTIALITY BETWEEN MEDIATOR AND DISPUTANTS

Alternative 1

PROPOSED AMENDMENT TO FEDERAL RULE OF EVIDENCE 408

408(b)

Notwithstanding subsection (a), evidence of all offers, promises, conduct and statements, whether oral or written, made in the course of mediation, by any of the parties to the mediation, their agents, employees and attorneys, or the mediator is not admissible for any purpose.

This rule shall not act to exclude evidence if any one of the following conditions is met:

- 1) All parties involved provide written consent to disclose.
- 2) The communication involves the contemplation of a future crime or harmful act.
- 3) The communication indicates that a minor child has been or is a suspected victim of child abuse as defined by local statutes.
- 4) A party to the mediation brings an action for damages against a mediator arising out of the mediation, but only for the purposes of that action.

Endorsements:

Merton C. Bernstein¹
Lawrence R. Freedman²
William P. Hobgood
Earl Johnson, Jr.
J. Michael Keating, Jr.³
John McCormac
John S. Murray

Alice Phalan⁴
Michael L. Prigoff⁵
Eileen Pruett
Leonard L. Riskin
Frank E.A. Sander
Linda R. Singer⁶

¹ Rejects condition number 3.

² Rejects condition number 1.

³ Rejects use of the term "harmful act" in condition number 2 because of its vagueness.

⁴ Rejects condition number 2.

⁵ Rejects use of the term "harmful act" in condition number 2 because of its vagueness. Would limit each of the conditions to the privilege to the purposes of the disclosure, as done in (E)(4).

⁶ Suggests changing "contemplation" to "immediate or credible threat," in condition number 2.

Rejections:

Arthur A. Chaykin
Nancy H. Rogers

*Alternative 2***PROPOSED CONFIDENTIALITY STATUTE****A) Definitions. As used in this statute:**

1) "Mediation" is a process in which an impartial third person facilitates communication between two or more parties in conflict to promote reconciliation, settlement, compromise, or understanding.

2) A "mediator" is an impartial third party not involved in the conflict, dispute, or situation who engages in mediation as defined in this statute.

3) A "party to the mediation" is a person, public officer, corporation, association, or other organization or entity, either public or private, who is rendered mediation services by a mediator, or who consults a mediator with a view to obtaining his or her mediation services.

4) A "representative of the party" is one having authority to obtain mediation services, on behalf of the party or to act on advice rendered pursuant thereto.

5) A "representative of the mediator" is one employed by the mediator to assist in the rendition of mediation services.

6) A "communication" is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the mediation process or those reasonably necessary for the transmission of the communication.

B) General Rule of Confidentiality.

Any communication disclosed during the mediation process through files, reports, interviews, discussions, memoranda, case summaries, notes, work products of the mediator, or other communications or materials, oral or written, is confidential.

C) General Rule of Privilege.

A party to the mediation has a privilege to refuse to disclose and to prevent any other persons from disclosing confidential communications.

D) Who May Claim the Privilege.

The privilege may be claimed by a party, his guardian or conservator, the personal representative of a deceased party, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the mediator may claim the privilege but only on behalf of the party. His authority to do so is presumed in the absence of evidence to the contrary.

E) There is No Privilege under this Statute if Any One of the Following

PROPOSED MEDIATION LEGISLATION

Conditions is Met:

- 1) All the parties involved provide written consent to disclose.
- 2) The communication involves the contemplation of a future crime or harmful act.
- 3) The communication indicates that a minor child has been or is the suspected victim of child abuse as defined by local statute.

Endorsements:

Merton C. Bernstein¹
Lawrence R. Freedman²
William P. Hobgood
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J. Michael Keating, Jr.³
John S. Murray

Alice Phalan⁴
Michael L. Prigoff⁵
Leonard L. Riskin
Frank E.A. Sander
Linda R. Singer⁶

¹ Rejects condition number 3.

² Rejects condition number 1.

³ Rejects use of the term "harmful act" in condition number 2 because of its vagueness.

⁴ Rejects condition number 2.

⁵ Believes section (B) "General Rule of Confidentiality" should be broadened to include records of a mediation program which often contain information which may be sought for discovery by disappointed disputants.

Believes section (D) "Who May Claim the Privilege" should be broadened to allow the mediator and the mediation program to claim the privilege as to those documents which they generate or maintain.

⁶ Suggests changing "contemplation" to "immediate or credible threat," in condition number 2.

Rejections:

Arthur A. Chaykin
John McCormac
Nancy H. Rogers

**SYMPOSIUM ON CRITICAL ISSUES IN MEDIATION
LEGISLATION PARTICIPANTS**

Moderator

Frank E.A. Sander

- Bussey Professor of Law, Harvard University
- Director, Dispute Resolution Program, Harvard University
- Member, American Bar Association Special Committee on Dispute Resolution
- Board of Directors, American Arbitration Association

Presenters

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- Professor of Law, Northwestern University
- Mediator, Chicago Mediation Program

Eric D. Green

- Professor of Law, Boston University
- Former Task Force Chairman and Consultant, Center for Public Resources Legal Program

Linda R. Singer

- Founder and Executive Director, Center for Community Justice
- Former Adjunct Professor of Law, Georgetown University and American University

Panel

Merton C. Bernstein

- Walter D. Coles Professor of Law, Washington University
- Former Fulbright Professor, Lunden University
- Member, International Society for Labor Law and Legislation
- Member, National Academy of Arbitrators

Chris Carlson

- Kettering Foundation
- Architect of “Negotiated Investment Strategy,” a Process for Resolving Community-Wide Disputes

Arthur A. Chaykin

- Associate Professor of Law, Northern Illinois University
- Chairman, Grievance Committee for Prairie State Legal Services

PROPOSED MEDIATION LEGISLATION

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Whitmore Gray

- Professor of Law, University of Michigan
- Member, Panel of Commercial Arbitrators, American Arbitration Association
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William P. Hobgood

- Assistant Director, Labor Management Relations, John Gray Institute
- Former Assistant Secretary of Labor
- Member, Board of Directors, Mediation Research and Education Project, Northwestern University
- Former Director, Mediation Services for the Federal Mediation and Conciliation Service

Earl Johnson

- Judge, California Court of Appeals

J. Michael Keating, Jr.

- Consultant, National Institute for Dispute Resolution, American Arbitration Association, and Community Relations Service, U.S. Department of Justice
- Mediator, Arbitrator, Federal Court Master and National Consultant in Conflict Management and Corrections

Michael K. Lewis

- Deputy Director, National Institute for Dispute Resolution
- Adjunct Professor of Law, George Washington University and Georgetown University
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John McCormac

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- Former Dean, Capital University Law School
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- Founder and Project Director, Essex County Bar Association Community Dispute Resolution Project
- Member, New Jersey State Bar Association Dispute Resolution Committee

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- Director, Center for the Study of Dispute Resolution
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- Former Member, Special Committee on Alternatives to Court Resolution of Disputes, New York State Bar Association