

The Uniform Mediation Act

I. INTRODUCTION

In 1997, National Conference of Commissioners on Uniform State Laws (NCCUSL) President-Elect Gene Lebrun received a call from a mediator with a dilemma: the mediator had been subpoenaed to testify in an adjoining state regarding a mediation he had conducted in South Dakota.¹ The participants now faced the very real possibility that statements they made during mediation would be disclosed by the mediator in a court of law, despite their expectation of confidentiality. This expectation of confidentiality promotes the open and honest exchange of dialogue between the participants that is vital to the success of the mediation.² So important is that confidentiality that South Dakota enacted protections for certain mediation communications.³ However, that is South Dakota's law, and not all states have the same protections. Therefore, despite legislation protecting mediation communications in one jurisdiction, there exists the possibility that those same "confidential" communications may be compelled to be disclosed in another jurisdiction.⁴

The NCCUSL Scope and Program Committee authorized a drafting committee to solve the problem.⁵ The Drafting Committee soon learned that the Alternative Dispute Resolution Section of the American Bar Association (ABA) was also trying to address the problem, and the two organizations decided to collaborate in drafting a uniform act to deal with "inconsistent

¹ Transcript of Annual Meeting of the National Conference of Commissioners on Uniform State Laws (August 14, 2001) (on file with author) [hereinafter Transcript], at 2 (statement of Comm'r Michael P. Getty).

² Greg Dillard, *The Future of Mediation Confidentiality in Texas: Shedding Light on a Murky Situation*, 21 REV. LITIG. 137, 139 (2002).

Mediation is profoundly different in form and substance from other alternative dispute resolution processes. . . . [M]ediation is a facilitated negotiation rather than a process in which a third party determines the outcome. The use of a third party facilitator and the need for open and honest communication among participants illustrate the importance of confidentiality to the mediation process.

Id. at 138–39.

³ See, e.g., S.D. CODIFIED LAWS § 25-4-60 (LexisNexis 1999), which states in relevant part: "Any communication, oral or written, in a mediation proceeding pursuant to § 25-4-56 [relating to court-ordered mediation of custody or visitation disputes] is confidential and inadmissible as evidence in any proceeding."

⁴ Transcript, *supra* note 1, at 2 (statement of Comm'r Getty).

⁵ *Id.*

[state] mediation confidentiality provisions.”⁶ There were over 2500 state statutes and court rules on confidentiality, and 250 state statutes on privilege.⁷ Thus, the need for uniformity was great. Until all states offered the same protections in mediation, no promise of confidentiality or privilege would be effective, and party candor would be undermined.⁸

The Drafters selected the best attributes from different state statutes to create an act that could generate wide support from state legislatures.⁹ In addition, the drafting process was open and included input from a variety of interested parties, from bar associations, the mediation community, and government agencies to solo practitioners, in hopes of providing a well rounded, acceptable result.¹⁰ The process lasted over three years and included ten meetings of the Drafting Committee.¹¹ The resulting draft of the Uniform Mediation Act (UMA or Act)¹² was presented for approval at the 2001 NCCUSL Annual Meeting.

II. AUGUST 2001 MEETING TO APPROVE THE FINAL VERSION OF THE UMA: ANOTHER UNIFORM ACT IS BORN

On August 14 and 15, 2001, the Drafting Committee presented the draft of the UMA to the Committee of the Whole for section-by-section consideration.¹³ The language of the Act, as originally presented and as

⁶ Ellen E. Deason, *Uniform Mediation Act: Law Ensures Confidentiality, Neutrality of Process*, DISP. RESOL. MAG., Fall 2002, at 7, 8.

⁷ Transcript, *supra* note 1, at 3–4 (statement of Comm’r Getty).

⁸ *Id.* at 4. Commissioner Getty stated,

The simple fact is . . . a mediation may occur in a state, say California, that has broad protections, and the evidence may later be sought or offered in a proceeding in a state, say Illinois, that has no statutory protections. At the start of the mediation, however, the parties will not know where the evidence may become pertinent. As a result, no party to the mediation will know at the time of the mediation what law will apply and whether or not they can safely be candid.

In other words, a mediation privilege is not truly effective in any state until it is effective in all states.

Id.

⁹ *Id.* at 5.

¹⁰ *Id.* at 3. (The Drafters “received literally thousands of e-mails, faxes and letters, all of which were collated and considered.”)

¹¹ *Id.*

¹² UNIF. MEDIATION ACT (Annual Meeting Draft, June 5, 2001), available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last updated Jan. 31, 2003) [hereinafter Draft for Approval].

¹³ Transcript, *supra* note 1, at 1.

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ultimately adopted, is the focus of this section.¹⁴ While the discussion of the final language spanned two days, only those parts of the Act that created the most debate and controversy will be examined here.

A. *Elimination of the Purpose Clauses*

The Drafters of the UMA set out to create a uniform set of laws with several guiding principles in mind: to promote candor of parties through the promise of confidentiality, to encourage fast and amicable resolution of disputes while maintaining party self-determination, and to promote uniformity in mediation laws.¹⁵ These principles were originally included by the Drafters as section 2 to provide guidance in applying and construing the Act.¹⁶ Also, inclusion of these general principles had been crucial in gaining the support of various mediation groups.¹⁷ However, NCCUSL has a general policy against purpose clauses because “they throw a gloss of uncertainty over the entire act” and allow arguments that “a substantive section really doesn’t mean what it says.”¹⁸ The Committee of the Whole voted to delete the section,¹⁹ but the general principles were revived and included in the prefatory note of the Final Act.²⁰

B. *Definitions*

The debate over the definitions section started with the definition of “mediation communication,” which included not only discussions held during the actual mediation session, with the mediator present, but also those

¹⁴ In the interest of clarity, the UMA draft as originally presented by the Drafting Committee will be referred to as the Draft for Approval; the UMA as altered during the Conference will be referred to as the Final Act. The relevant text of each, where appropriate, will be provided in footnotes.

¹⁵ See Draft for Approval, prefatory note, *supra* note 12.

¹⁶ *Id.* § 2.

¹⁷ Transcript, *supra* note 1, at 16 (statement of Comm’r Getty) (explaining that the support of the mediation community was necessary to future efforts to enact the UMA in state legislatures).

¹⁸ *Id.* at 14 (statement of Comm’r James C. McKay, Jr.).

¹⁹ *Id.* at 17. The vote was 59 to 53 in favor of striking Section 2. *Id.*

²⁰ UNIF. MEDIATION ACT (Final Act, Feb. 4, 2002), available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last updated Jan. 31, 2003) [hereinafter Final Act].

communications made when considering or initiating mediation.²¹ Opponents argued that such a broad definition would confer privilege upon communications made outside the formal mediation for which the participants would have no reasonable expectation of confidentiality.²² Additionally, if a party was obstructing resolution or was “unduly litigious,” statements showing such abuse of the mediation process would be confidential as well.²³ Proponents of the broad definition pointed out that it is often difficult to tell “at what point a formal mediation begins” and that often parties disclose confidential information along the way, information that should be protected.²⁴ Ultimately, the Committee of the Whole elected to retain the broad definition, with only minor changes.²⁵

The definition of “mediator”²⁶ also was the subject of some debate. The Drafters had specifically included the phrase “of any profession or background” to indicate that the privilege, as well as the rest of the Act, applies “regardless of the background of the mediator.”²⁷ Members of the mediation community wanted it made clear that both attorneys and non-attorneys could serve as mediators.²⁸ Opponents felt the language “of any profession or background” was surplusage and advocated including this provision in a later substantive section rather than among the definitions.²⁹ However, that could potentially conflict with some existing state statutes or court rules that require in certain situations that the mediator be an attorney or meet other specific qualifications.³⁰ The Drafters agreed to make it clear in the comments that this definition was not intended to override any mediator qualification statutes.³¹ The motion to delete the definition of mediator

21 “‘Mediation communication’ means a statement, whether oral, in a record, verbal, or nonverbal, that is made or occurs during mediation or for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” Draft for Approval, *supra* note 12, § 3(3).

22 Transcript, *supra* note 1, at 19 (statement of Comm’r Battle R. Robinson).

23 *Id.*

24 *Id.* (statement of Mr. Frank E.A. Sander).

25 *Id.* at 19; Final Act, *supra* note 20, § 2(2).

26 “‘Mediator’ means an individual, of any profession or background, who conducts a mediation.” Draft for Approval, *supra* note 12, § 3(4).

27 Transcript, *supra* note 1, at 23 (statement of Comm’r Nancy H. Rogers).

28 *Id.* at 20 (statement of Comm’r Martha Lee Walters).

29 *Id.* at 21 (statement of Comm’r Peter J. Dykman).

30 *See id.* at 22 (statement of Comm’r Getty).

31 *Id.* at 23.

failed;³² however, the language in question was ultimately removed in the Final Act.³³

C. *The Scope of the Act*

What is and is not covered by the Act is described in the Scope section, which provides, in relevant part, that the “[Act] applies to a mediation in which the parties agree in a record to mediate or are required by statute or referred by a court, governmental entity, or arbitrator to mediate.”³⁴ The requirement that the parties “agree in a record” was challenged as being both under- and over inclusive. It was suggested that a significant number of informal but bona fide mediations would be excluded from coverage by the Act by this requirement.³⁵ The Drafters had included the language in part to prevent parties fraudulently claiming that a mediation had taken place when it actually had not,³⁶ but also because “[t]he idea of giving the great protection of a privilege with all its costs without at least having a writing is just a frightening thought.”³⁷

On the other hand, some thought it was too easy to fall under the Act without being aware of it. For example, Commissioner Harvey S. Perlman, as the Chancellor of the University of Nebraska, is often approached to help resolve problems between faculty members; if the parties agree to his help in resolving the dispute and say so in an e-mail, then the mediation is covered by the Act and the parties are bound by the confidentiality privilege—in a situation in which no one is even thinking about it.³⁸

Both points suggested that the scope of the Act needed to be better defined to avoid the potential difficulties raised by the Commissioners. In the

³² *Id.* at 24.

³³ *Id.* at 112 (vote). In the Final Act, the definition of mediator was simply reduced to “an individual who conducts a mediation.” Final Act, *supra* note 20, § 2(3). The “of any profession or background” language was included later in the Act: “This [Act] does not require that a mediator have a special qualification by background or profession.” *Id.* § 9(f).

³⁴ Draft for Approval, *supra* note 12, § 4(a).

³⁵ Transcript, *supra* note 1, at 24–27 (statements of Comm’r Harry L. Tindall).

³⁶ *Id.* at 25 (statement of Comm’r Getty).

³⁷ *Id.* at 26 (statement of Comm’r Peter F. Langrock).

³⁸ *Id.* at 33–35. (statements of Comm’r Harvey S. Perlman). Commissioner Perlman also pointed out that, as Chancellor of a public university, he could be considered a “government entity” as used in the referral prong of Section 4(a); therefore, if he were to refer individuals to another to solve a dispute, he would inadvertently create mediation privileges. *Id.* at 36.

Final Act, the language of sub-section (a) was broken down into three parts describing specific “triggering mechanisms” that initiate coverage by the Act for most common mediation situations.³⁹ The Drafters included an opt-out provision for those parties who agree that the UMA will not apply to their mediation.⁴⁰

D. *Privilege and Confidentiality*

Mediation, by definition, includes a mediator’s effort to facilitate communication between the parties.⁴¹ Frank exchange is impeded if the participants fear that their disclosures during mediation may ultimately be used against them later in court proceedings.⁴² The Drafters intended to address this concern by providing that “[a] mediation communication is confidential and, if privileged, is not subject to discovery or admissible in evidence in a proceeding.”⁴³

There was concern that dealing with both confidentiality and privilege in the same section was unnecessarily confusing.⁴⁴ Confidentiality has become one of the most important themes in mediation; participants are told that what is said in mediation will not be shared outside the mediation, and people therefore have a general expectation of confidentiality.⁴⁵ On the other

³⁹ Final Act, *supra* note 20, § 3(a).

- (a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:
- (1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;
 - (2) 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
 - (3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

Id.

⁴⁰ *Id.* § 3(c).

⁴¹ *Id.* § 2(1).

⁴² *Id.*, prefatory note, *supra* note 20.

⁴³ Draft for Approval, *supra* note 12, § 5(a).

⁴⁴ Transcript, *supra* note 1, at 46 (statement of Comm’r Tindall).

⁴⁵ *Id.* at 49 (statement of Comm’r Getty). “Confidentiality is the overriding tenor of mediation. . . . [T]he parties expect that what they say is not going to be in the newspaper tomorrow. That’s confidentiality, and it’s much, much broader than mere privilege.” *Id.*

hand, privilege is a way to ensure confidentiality.⁴⁶ The extent of confidentiality is something that can be negotiated between the parties—based on the circumstances surrounding the mediation, parties can agree not to disclose information that would otherwise be discoverable, such as party names.⁴⁷ Privilege is not something that can be negotiated—it is provided by statute, and that which is privileged is neither discoverable nor admissible.⁴⁸ Thus, there is the possibility of confusing confidential information with privileged information.

The Drafters had included the “is confidential” language for several reasons. Many state statutes use the word “confidential,” and the Drafters wanted to maintain the existing understanding of the protection.⁴⁹ Also, the Alternative Dispute Resolution Section of the ABA and several of the mediation provider groups supported the Act’s language because privilege was given without taking away the word “confidentiality” that most state statutes and participants in mediation use.⁵⁰ To reduce the potential for confusion, the Drafters agreed to remove the reference to confidentiality from the section on privilege⁵¹ and create a new section dealing separately with confidentiality.⁵²

E. *Exceptions to Privilege*

Certain mediation communications should not be protected by privilege, and the Drafters included in this category, *inter alia*, threats to inflict bodily injury, communications from mediations that were open to the public, communications that were used to plan or commit a crime, and agreements

⁴⁶ *Id.* at 4 (statement of Comm’r Getty). “The way the law traditionally protects such relations is through privilege, such as attorney-client or the doctor-patient privilege. Reflecting agreement with this approach, nearly every state that has enacted a mediation confidentiality protection has chosen to do so through the privilege mechanism.” *Id.*

⁴⁷ *See id.* at 50 (statement of Mr. Richard C. Reuben).

⁴⁸ *See id.* at 4 (statement of Comm’r Getty).

⁴⁹ *Id.* at 42.

⁵⁰ *Id.*

⁵¹ Final Act, *supra* note 20, § 4(a), which now reads: “Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence unless waived or precluded as provided by Section 5.”

⁵² *Id.* § 8 (providing that “[u]nless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State”).

evidenced by a signed writing.⁵³ A proposed amendment sought to add to this list an additional exception in cases of manifest injustice, thus giving the court “control to look at the circumstances and decide whether or not—to prevent a manifest injustice[—]the privilege should be overruled.”⁵⁴

The Drafters explained that the problem with an exception for manifest injustice is that the concept is not adequately defined, thereby allowing judges to make whatever interpretation they choose at the risk of setting aside valuable mediation privileges.⁵⁵ It was also suggested that inclusion of this exception would, in unsuccessful mediations, “invite an attempt in every case to go before the court and prove manifest injustice,”⁵⁶ thereby trying to admit through “the back door that which [one] can’t properly get under the privilege.”⁵⁷ The use of this amorphous standard would undermine privilege because everything would now be admissible to prove injustice.⁵⁸ Two ABA representatives present at the Conference stated that the ABA would refuse to indorse the UMA if it included the manifest injustice exception.⁵⁹ A motion to include the manifest injustice language failed 81 to 37.⁶⁰

Next, the Commission considered removing language that precludes a mediator from having to testify in cases where a party is trying to avoid the mediation settlement.⁶¹ The proponents of the motion were worried that, in

⁵³ Draft for Approval, *supra* note 12, § 7(a).

⁵⁴ Transcript, *supra* note 1, at 68 (statements of Comm’r Phillip Carroll). Commissioner Carroll proposed the amendment as follows:

There is no privilege under Section 5 if a court, administrative agency, or arbitration panel 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 and that there is a need for the evidence in the particular case to prevent a manifest injustice that outweighs the importance of protecting the confidentiality of the mediation process.

Id.

⁵⁵ *Id.* at 69 (statement of Comm’r Getty).

⁵⁶ *Id.* at 73 (statement of Comm’r Bryon D. Sher).

⁵⁷ *Id.* at 74 (statement of Comm’r Getty).

⁵⁸ *Id.* at 74.

⁵⁹ *Id.* at 69–70 (statements of Mr. Jose Feliciano and Chief Justice Thomas J. Moyer).

⁶⁰ *Id.* at 76.

⁶¹ Draft for Approval, *supra* note 12, § 7(c), which provides that “[a] mediator may not be compelled to provide evidence of a mediation communication that is not privileged under subsection (a)(7) or (b)(2).” Sub-section (b)(2) removes privilege in situations where the evidence is not otherwise available, the need for the evidence substantially outweighs the need for confidentiality, and the communication is sought in a

situations where a settlement agreement was procured through fraud, there would be no way to prove their case without the mediator's testimony.⁶² The Drafters explained that the impetus behind this language is the absolute importance of mediator neutrality; compelling a mediator to testify would cast that mediator in the uncomfortable position of tie-breaker, causing the mediator to be perceived as favoring one party over the other.⁶³ By a fairly close 52 to 46 margin, the Commissioners voted against the proposal.⁶⁴

F. *Disclosure by the Mediator*

The Draft for Approval contained several provisions dealing with a mediator's obligation to investigate and disclose potential conflicts of interest or other facts that might lead to an appearance of partiality.⁶⁵ Surprisingly, there are very few existing state statutes that require this sort of disclosure; as such the Drafters opted to include the novel language in brackets, leaving to the states the option whether to enact these provisions or not.⁶⁶ An important premise of mediation is that mediators should be neutral and impartial; therefore, having a provision that provides for at least minimum disclosure by the mediator about his or her impartiality is a "policy statement" the commissioners wanted to make in the Act.⁶⁷ Also, the policy of respecting party autonomy required that parties be given the necessary information to

proceeding regarding the reformation or avoidance of a settlement agreement. *Id.* § 7(b)(2).

⁶² Transcript, *supra* note 1, at 82–84 (statements of Comm'r David G. Nixon).

⁶³ *Id.* at 82 (statement of Comm'r Getty).

⁶⁴ *Id.* at 84 (vote).

⁶⁵ Draft for Approval, *supra* note 12, § 8(d). The draft provides

- (d) Before accepting a mediation an individual who is requested to serve as a mediator shall:
 - (1) 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 party or foreseeable participation in the mediation; and
 - (2) disclose as soon as is practical before accepting a mediation any such fact known.

Id.

⁶⁶ Transcript, *supra* note 1, at 92 (statement of Comm'r Rogers).

⁶⁷ *Id.* at 92 (statement of Comm'r Rex Blackburn).

make an informed decision about the mediator.⁶⁸ The motion was put to a vote, and the Committee of the Whole opted to remove the brackets.⁶⁹

G. Elimination of the Summary Enforcement Provision

The Drafters included the summary enforcement provision as a mechanism for reducing a mediated settlement agreement to judgment.⁷⁰ The United States is one of the few countries that does not have such a mechanism.⁷¹ However, the ABA seriously opposed this section because it had not been approved and commented upon by concerned observers as the other sections had.⁷² The motion to delete the section passed and it was deleted from the Final Act.⁷³

III. THE ASSOCIATION FOR CONFLICT RESOLUTION AND THE UNIFORM MEDIATION ACT

Throughout the three-year drafting process, mediation associations maintained a watchful eye on the actions of the ABA and NCCUSL. The associations had specific ideas about what should and what should not be included, and their support for the UMA fluctuated based on whether their concerns were met. The largest and most influential of the associations is the Association for Conflict Resolution (ACR), which was formed through the 2001 merger of the Society for Professionals in Dispute Resolution (SPIDR), the Academy of Family Mediators (AFM), and the Conflict Resolution Education Network (CREnet).⁷⁴

⁶⁸ *Id.* at 94 (statement of Comm'r Richard T. Cassidy). Commissioner Getty pointed out that in certain circumstances, parties may "want to have and knowingly agree to have somebody [as the mediator] who is obviously impartial." *Id.* at 94. (statement of Comm'r Getty).

⁶⁹ *Id.* at 95 (vote).

⁷⁰ Draft for Approval, *supra* note 12, § 11; *see also* Transcript, *supra* note 1, at 103 (statement of Comm'r Getty).

⁷¹ Transcript, *supra* note 1, at 103 (statement of Comm'r Getty).

⁷² *Id.* at 103–04 (statement of Mr. Feliciano).

⁷³ *Id.* at 106 (vote).

⁷⁴ Press Release, Association for Conflict Resolution, New Association Formed to Represent Broad Array of Conflict Resolution Professionals (Sept. 21, 2001), <http://www.acresolution.org/research.nsf/community!OpenView>. This new association represents over 7000 members worldwide and has considerable influence in shaping mediation policies. *Id.*

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One of the concerns mediators had in drafting a uniform mediation act was that lawyer-drafters would attempt to *legalize* mediation.⁷⁵ In August 2000 AFM and SPIDR warned the Commission that they would not support the UMA “if the proposed legislation goes too far.”⁷⁶ In effort “to encourage a conservative approach to the development of [the UMA],” AFM adopted in January 2000 a set of principles spelling out its concerns with the drafting process; SPIDR adopted nearly identical principles five months later.⁷⁷

In July 2001 ACR drafted an open letter to the Conference in response to the proposed Draft for Approval to be presented at NCCUSL’s annual meeting in August.⁷⁸ Basing its suggestions on the eleven principles set forth

⁷⁵ Thomas F. Gibbons, *Groups Set Conditions for Backing Mediation Act*, CHI. DAILY L. BULL., Aug. 16, 2000, at 5 (“The groups seek to protect their non-lawyer members, as well as the mediation process itself, from those in the legal profession who seek to make mediation, or at least certain acts within the mediation process, the practice of law.”).

⁷⁶ *Id.*

⁷⁷ Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265, 266 (2002). The principles are summarized as follows:

A Uniform Mediation Act, if adopted, should be one that would:

1. address only those areas (such as confidentiality) where uniformity is required;
2. preserve party empowerment and self-determination;
3. provide adequate, clear and specific confidentiality protections and, where necessary, limited and clearly defined exceptions that would maintain mediation as an effective confidential process in which people are free to discuss issues without fear or disclosure in legal or investigatory procedures;
4. reflect an understanding of the diversity of mediation styles and range of disputes mediated;
5. be easily understandable to mediation participants;
6. preserve mediation as a process that is separate and distinct from the practice of law, arbitration, and judicial proceedings;
7. provide that mediators may come from a variety of professional and nonprofessional backgrounds;
8. provide procedural protections for the disputants, the mediator, and the process when exceptions to confidentiality are raised;
9. adequately address how mediators, parties and representatives are to comply, if at all, with mandatory reporting requirements that may be required by law or professional ethical standards;
10. preserve the impartiality of the mediator; and
11. take into consideration the special concerns raised when the threat of violence is present.

Id. at 286.

⁷⁸ ACR Response to UMA Draft—July 24, 2001 (letter from Arnold Shienvold, President, Association for Conflict Resolution, to the Honorable Michael B. Getty, Chair, NCCUSL Uniform Mediation Act Committee, the Honorable Chief Justice Thomas J.

the year before, ACR proposed the addition of several sections to the UMA and voiced concern about specific sections already included in the Draft for Approval. While the Drafters did not add any of the proposed sections, ACR's concerns were largely addressed in the language of the final version of the UMA.

The first proposal was to add the word "impartial" to the definition of the word "mediator" to ensure the neutrality of the mediator and the process.⁷⁹ Though this was not done, the idea of impartiality is addressed in Section 9 of the Final Act, in which a mediator is instructed to disclose before accepting the mediation any conflicts of interest that may affect his or her impartiality.⁸⁰ While this is not the absolute requirement of impartiality that ACR desired, it does ensure that parties will be provided enough information to determine whether or not they want to proceed with a possibly biased mediator.

The next proposal was intended to ensure that mediation communications would continue to be confidential even if the mediator was discovered to be partial.⁸¹ Again, the proposed language was not added, but Sections 4, 5, and 6⁸² of the Final Act suggest that the protections already exist. Section 4(a) states in part, "[e]xcept as otherwise provided in Section 6, a mediation communication is privileged . . ."⁸³ Section 6 defines the exceptions to privilege, which are include an agreement in a signed writing, a public mediation, a threatening statement made by one of the parties, or statements that imply that mediation is being used to hide some sort of criminal activity.⁸⁴ Similarly, Section 5(a) makes it clear that privilege cannot be waived unless all the parties waive it.⁸⁵ Therefore, a mediator's failure to disclose conflicts should not waive the privilege for the other parties to the mediation because they have not waived their rights.

Moyer, Co-Chair, ABA Uniform Mediation Act Committee, and Ms. Roberta Cooper Ramo, Co-Chair, ABA Uniform Mediation Act Committee), <http://www.acresolution.org/research.nsf/Learning!OpenView> (last visited Jan. 31, 2003).

⁷⁹ *Id.*

⁸⁰ Final Act, *supra* note 20, § 9(a); *see also supra* Part II.F.

⁸¹ ACR Response to UMA Draft—July 24, 2001, *supra* note 78 (proposing that "[t]he protections of [the UMA] shall continue to apply even if a mediator is found to be partial or failed to act impartially").

⁸² These sections deal with privilege, waiver of privilege, and exceptions to privilege. Final Act, *supra* note 20, §§ 4–6.

⁸³ *Id.* § 4(a).

⁸⁴ *Id.* § 6.

⁸⁵ *Id.* § 5(a).

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ACR was also concerned that the Act would not make it clear that state legislatures could go beyond the Act's language and provide for stronger laws.⁸⁶ Though the Drafters did not add the specific language sought by ACR, it is clear from the prefatory note that the Drafters intended the Act to be a "floor rather than a ceiling," thus providing an acceptable minimum coverage while not precluding state legislatures from extending protection further if they wished.⁸⁷

Two of ACR's more specific concerns were quite appropriately fixed by direct changes to the Act's language. The Drafting Committee had provided that the Act would not apply to mediations "involving parties who are all minors which is conducted under the auspices of a primary or secondary school."⁸⁸ However, ACR pointed out that "exclusion of peer mediation programs should not be linked to the age of the students," many of whom reach the age of majority during high school.⁸⁹ The language was changed to apply to "students" rather than minors.⁹⁰

Under the Draft for Approval Section 8(c), "judicial officers" were exempted from provisions requiring them to disclose conflicts and prohibiting them from making reports about the mediation. ACR foresaw the possibility that court-appointed mediators, referees, and other court personnel acting as mediators might be deemed "judicial officers" by some courts.⁹¹ The exemption was narrowed from "judicial officers" to "judge[s]."⁹²

On February 4, 2002, the ABA's House of Delegates approved the UMA.⁹³ Not everyone was convinced; recent substantive changes had forced ACR to "revisit [its] position regarding the UMA" and issue a statement that

⁸⁶ ACR Response to UMA Draft—July 24, 2001, *supra* note 78 (suggesting language to make "clear to state legislature that they may retain confidentially protections that go beyond the UMA.").

⁸⁷ "[T]he 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." Final Act, prefatory note, *supra* note 20.

⁸⁸ Draft for Approval, *supra* note 12, § 4(b)(3).

⁸⁹ ACR Response to UMA Draft—July 24, 2001, *supra* note 78.

⁹⁰ Final Draft, *supra* note 20, § 3(b)(4)(A).

⁹¹ ACR Response to UMA Draft—July 24, 2001, *supra* note 78.

⁹² Final Draft, *supra* note 20, § 9(e).

⁹³ Press Release, National Conference of Commissioners on Uniform State Laws, ABA Approves Seven NCCUSL Acts (Feb. 6, 2002), <http://www.nccusl.org/nccusl/pressreleases/pr020602.asp>.

it neither indorsed nor opposed the Act.⁹⁴ On April 20, 2002, ACR conditionally approved the UMA, while suggesting that broader confidentiality protections, explicit impartiality requirements, and a privilege for protective services referrals would enhance the utility of the Act.⁹⁵

IV. PROS AND CONS OF THE UNIFORM MEDIATION ACT, AS VIEWED BY THE MEDIATION PRACTITIONER

As could be expected, members of the mediation community have been outspoken in their opinions on the UMA. The UMA has drawn much praise for certain forward-looking provisions. Open communication is an integral part of a successful mediation.⁹⁶ The confidentiality provision will actually encourage candor by providing maximum protection to party communication.⁹⁷ Also receiving praise is the language of Section 6(c), which allows the mediator to choose when to provide evidence of a mediation communication in cases where a party is trying to sue the mediator for misconduct or to repudiate a term of the settlement agreement.⁹⁸ Others praise the Act for providing “predictability through a coordinated approach

⁹⁴ ACR Response to UMA Draft—Feb. 4, 2001 (letter from Arnold Shienvold, President, Association for Conflict Resolution, to the Honorable Michael B. Getty, Chair, NCCUSL Uniform Mediation Act Committee, the Honorable Chief Justice Thomas J. Moyer, Co-Chair, ABA Uniform Mediation Act Committee, and Ms. Roberta Cooper Ramo, Co-Chair, ABA Uniform Mediation Act Committee), <http://www.acresolution.org/research.nsf/Learning!OpenView> (last visited Jan. 31, 2003). The letter laid out several areas with which ACR was most concerned. First, overall confidentiality language was not strong enough to imply that mediation is absolutely confidential. Also ACR was dissatisfied with the bracketing of the section requiring mediator impartiality suggested; the brackets suggest an option for states, therefore potentially removing a very important aspect of mediation, mediator impartiality, from the process. Finally, ACR was concerned that the mediator disclosure requirements in Section 9 were overly broad and vague, therefore not providing enough guidance to determine violations. The UMA also did not proscribe sanctions for failure to disclose. *Id.*

⁹⁵ Association for Conflict Resolution, *ACR Resolution on the Uniform Mediation Act (UMA)*, at <http://www.acresolution.org/research.nsf/key/UMAreolution> (April 20, 2002) (approving the UMA as “appropriate providing three modifications were made at the state level”).

⁹⁶ Dillard, *supra* note 2, at 139.

⁹⁷ Robert A. Creo, *The Uniform Mediation Act: Talking Points*, at <http://www.mediate.com/articles/creo.cfm> (last visited Jan. 31, 2003) (stating that the best way to promote open communication among parties is to provide maximum protection and comfort that whatever is said will not be shared with anyone).

⁹⁸ Final Act, *supra* note 20, § 6(c) (“A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).”).

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to confidentiality.”⁹⁹ Overall, the UMA has been praised for striking an “appropriate balance” between an absolute exception for parties and a permissive exception for mediators.¹⁰⁰

Of course, the UMA is not free from criticism. One of the more controversial provisions of the UMA is Section 6(a)(5), which allows the mediator to break confidentiality to defend a claim of misconduct filed against the mediator.¹⁰¹ It is argued that this special mediator’s privilege, which allows the mediator to break confidence and call the parties to the mediation as witnesses, makes the mediator “more equal than others” because the parties, if defending against a claim of misconduct, do not have the same power to compel the mediator to testify.¹⁰²

It has also been suggested that the interaction of Sections 6(a)(5) and 6(b)(2) could result in unintended consequences.¹⁰³ For example, a plaintiff seeking to rescind a settlement agreement under Section 6(b)(2) wants to depose the mediator; the mediator, however, cannot be compelled to provide evidence in such a situation¹⁰⁴ and can even block other parties from revealing communications made by the mediator.¹⁰⁵ There is no privilege for mediation communications sought to prove mediator misconduct—pursuant to Section 6(a)(5)—so suing the mediator for malpractice or professional misconduct may allow an end run around privilege, while subjecting mediators to spurious lawsuits.¹⁰⁶

V. CONCLUSION

Almost immediately upon the approval of the UMA in early 2002, five states began considering it in their legislative bodies. The five states are Nebraska, New York, Oklahoma, South Carolina, and Vermont. In addition,

⁹⁹ Ellen E. Deason, *Reply: The Quest for Uniformity in Mediation Confidentiality: Foolish Consistently or Crucial Predictability?*, 85 MARQ. L. REV. 79, 79 (2001).

¹⁰⁰ Creo, *supra* note 97.

¹⁰¹ Final Act, *supra* note 20, § 6(a)(5) (“There is no privilege . . . for a mediation communication that is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.”).

¹⁰² Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 64–65 (2001).

¹⁰³ *Id.* at 66.

¹⁰⁴ Final Act, *supra* note 20, § 6(c).

¹⁰⁵ *Id.* § 4(b)(2), stating in relevant part “[a] mediator . . . may prevent any other person from disclosing a mediation communication of the mediator.”

¹⁰⁶ Hughes, *supra* note 102, at 66–68.

Ohio currently has a committee working on making a recommendation to the Ohio legislature.

This is a good sign that states are looking to unify their legislation of mediation, and provide protections for mediation participants. While the Drafters of the UMA were continuously approached with changes and resistance, what has emerged is a comprehensive protection that states could codify verbatim or tailor to their own needs. In other words, the UMA might not be exactly what everyone wants, but it is a good start towards what everyone needs.

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