

Memorandum 2014-24

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Implementation of the Uniform Mediation Act

As directed by the Legislature, the Commission¹ has been examining the law of other jurisdictions on the relationship between mediation confidentiality and attorney malpractice and other misconduct.² An earlier memorandum provided an introduction to the Uniform Mediation Act (“UMA”), which was drafted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL,” now known as the Uniform Law Commission or “ULC”).³ This memorandum discusses the implementation of the UMA in the United States.

The following materials are attached for convenient reference by the Commissioners and other interested persons:

Exhibit p.

- National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (as amended in 2003; without Comments, Prefatory Note, or introductory material) 1
- “UMA States” chart (prepared by CLRC staff) 7

The full text of the UMA (including Comments, Prefatory Note, and introductory material) is attached to the earlier memorandum.⁴ To facilitate comparison, that memorandum also includes the text of the California statutes on protection of mediation communications, as well as the corresponding Commission Comments.⁵

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).

3. Memorandum 2014-14.

4. Memorandum 2014-14, Exhibit pp. 11-90.

5. Memorandum 2014-14, Exhibit pp. 1-10.

Although this memorandum refers to some commentary on the UMA, it is not intended as an evaluation of the UMA's approach to attorney misconduct. In future memoranda, the staff is planning to:

- (1) Describe the approaches used in non-UMA jurisdictions (including the federal courts, non-UMA states, and perhaps some other countries).
- (2) Describe some California sources not yet discussed in detail.
- (3) Examine scholarly work in the area (including scholarly discussions of the UMA).

At that point, we will have completed most, if not all, of the background work outlined in the legislative resolution directing this study.⁶ Then we will prepare a memorandum comparing and contrasting possible approaches, so that the Commission can provide guidance on how to draft a tentative recommendation. **If anyone has suggestions or concerns regarding this plan, please bring them to our attention.**

SUMMARY OF THE UMA

Before describing the implementation of the UMA, it might be helpful to provide a brief reminder regarding its content. Memorandum 2014-14 concluded with the following summary:

The UMA is more complicated and nuanced than California's approach to protecting mediation communications. It creates a privilege restricting the admissibility and discoverability of such communications, but it generally lets the mediation parties determine whether their mediation discussions will or will not be confidential. With regard to admissibility and discoverability, the UMA level of protection varies depending on the status of a mediation participant: mediation parties have the most control over the use of mediation communications, mediators have an intermediate degree of control, and nonparty participants receive the least protection. The UMA includes more exceptions to the statutory protection for mediation communications than in California. Some of those exceptions include alternative options for enactment, some are inapplicable to a mediator, and some apply only upon a specific showing of need. Of particular relevance to the Commission's ongoing study, the UMA includes an exception relating to professional misconduct at a mediation. The UMA

6. See 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).

protection can also be waived in more ways than in California, and is subject to certain limits on its coverage and scope.⁷

The staff will provide additional detail on features of the UMA as appears appropriate in the course of this memorandum. For a more complete discussion, please refer back to the earlier memorandum.

IMPLEMENTATION OF THE UMA

The UMA has been enacted in the District of Columbia and eleven states: Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.⁸ According to the U.S. Census Bureau, the combined population of those states in 2013 was about 53.3 million people, which was approximately 16.9% of the country's total population.⁹ In comparison, California is currently the most populous state in the country, with about 38.3 million people or approximately 12.1% of the total population.¹⁰

Nebraska was the first state to implement the UMA. Its version became operative in August 2003. By the end of 2006, the UMA was also enacted in the District of Columbia, Illinois, Iowa, New Jersey, Ohio, Utah, Vermont, and Washington. South Dakota's version of the UMA became operative in 2008, as did Idaho's version. Hawaii just enacted the UMA last year. UMA bills are currently pending in Massachusetts and New York.

As best the staff has been able to determine, none of the UMA jurisdictions afforded absolute or near-absolute protection to mediation communications before enacting the UMA. Instead, at the time of enacting the UMA, these jurisdictions appear to have afforded less protection for mediation communications than the UMA, or at least to have had a less well-developed body of law on the subject than the UMA. That finding is consistent with what we heard previously from Casey Gillice of the ULC.¹¹

In the discussion that follows, we first examine the general extent to which uniformity exists among the UMA jurisdictions. Next, we focus on how those jurisdictions have implemented the exceptions to the UMA privilege that seem

7. Memorandum 2014-14, p. 27.

8. See Exhibit pp. 7-8.

9. See *id.* The population figures in the chart are available at <http://www.census.gov/popest/data/state/totals/2013/index.html>. The total population of the United States for the same time period was approximately 316.1 million people. See *id.*

10. See data available at <http://www.census.gov/popest/data/state/totals/2013/index.html>.

11. See First Supplement to Memorandum 2014-14, Exhibit p. 1.

most relevant to the Commission's study: (1) the exception for professional misconduct,¹² (2) the exception for mediator misconduct,¹³ and (3) the exception relating to the validity and enforceability of a mediated settlement agreement.¹⁴ Finally, we provide some additional information on each UMA jurisdiction.

Degree of Uniformity

In general, the UMA enactments stick pretty close to the uniform text.¹⁵ There is nonetheless some variation,¹⁶ primarily because the uniform text includes alternative versions of several provisions.¹⁷ Of particular note, there is variation in the extent to which the UMA privilege for mediation communications applies when a mediation communication is sought or offered in a criminal case:

In [some] states, a court, administrative agency, or arbitrator will conduct a balancing test to see if privilege should apply in proceedings that involve both felonies and misdemeanors. Therefore, it is possible for privilege to apply, or not to apply, for both felonies and misdemeanors. Other states have omitted the words "or misdemeanor" when adopting this Section of UMA. In these states, privilege will always apply in court proceedings involving misdemeanors and a balancing test will occur in felony proceedings.... Furthermore, one state has adopted provisions that exempt privilege in all felony cases and adopted a provision that allowed the balancing test for misdemeanors. Lastly, some states have adopted privilege provisions that apply to crimes in state statutes, or criminal proceedings in district court.¹⁸

In contrast, the key California statute does not restrict the introduction of mediation communications in any type of criminal case.¹⁹ Information on other

12. UMA § 6(a)(6).

13. UMA § 6(a)(5).

14. UMA § 6(b)(2).

15. "Aside from a few modifications, most states ... have adopted versions of the Act that largely parallel the NCCUSL version." Gary Provencher, *The Uniform Mediation Act: An Analysis of Current State Acts*, Mayhew-Hite Report on Dispute Resolution & the Courts, vol. 5, no. 1 (2006-07), available at <http://moritzlaw.osu.edu/epub/mayhew-hite/vol5iss1/student.html>.

16. See *id.*

17. See UMA §§ 6(a)(7) (two alternatives for exception relating to evidence of abuse or neglect), 6(b)(2) (exception for criminal case can be limited to felonies or applied to both misdemeanors and felonies), 9(g) (optional requirement of mediator impartiality). See also Provencher, *supra* note 15.

18. Provencher, *supra* note 15 (footnotes omitted). See also Haw. Rev. Stat. § 658H-6(b)(1) (balancing test applies in court proceeding involving felony or misdemeanor); Idaho Code Ann. § 9-806(b)(2) (same); (S.D. Codified Laws § 19-13A-6(b)(1) (balancing test applies in court proceeding involving court proceeding involving felony or class I misdemeanor).

19. See Evid. Code § 1119; see also Evid. Code § 703.5; *Cassel v. Superior Court*, 51 Cal. 4th 113, 135 n.11, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011); *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 72 Cal. Rptr. 2d 464 (1998).

ways in which the UMA enactments differ from the uniform text is available in an article focusing on that point.²⁰

As yet, there are not many written decisions interpreting the UMA. The staff found only 23 court opinions that squarely address and apply the UMA's protections for mediation communications (two of which are in the same case), and many of those opinions are unpublished.²¹ There are also a few opinions in which the court referred to the UMA (or a draft of it) for guidance or applied UMA concepts, even though UMA legislation did not govern the case.²²

Some scholars say that the small number of opinions interpreting the UMA is evidence that the act is functioning well.²³ Other explanations are also possible. We will explore this point more thoroughly when we examine the pros and cons of various possible approaches to the topic of this study.

Because there are so few published opinions, the staff will refer to both published and unpublished opinions in the course of this memorandum. *By*

20. See Provencher, *supra* note 15.

21. See Nachar v. PNC Bank, N.A., 901 F. Supp. 2d 1012 (2012); Pension Advisory Group, Ltd. v. Country Life Ins. Co., 771 F. Supp. 2d 680 (S.D. Tex. 2011); Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC, 215 N.J. 242, 71 A.3d 888 (N.J. Sup. Ct. 2013); City of Akron v. Carter, 190 Ohio App. 3d 420, 942 N.E.2d 409 (Ohio Ct. App. 2010).

See also Mustafa v. Mac's Convenience Stores, LLC, 2014 U.S. Dist. LEXIS 34871 (N.D. Ill. 2014); Miller v. Patterson, 2013 U.S. Dist. LEXIS 40553 (D. Utah 2013); Western & Clay, LLC v. Landmark Am. Ins. Co., 2010 U.S. Dist. LEXIS 55817 (W.D. Wash. 2010); A&H Mgmt. Services v. Chafflose Corp., 2009 U.S. App. LEXIS 2046 (6th Cir. 2009); Professional Recreation Org. v. Nat'l Union Fire Ins. Co., 2008 U.S. Dist. LEXIS 80266 (E.D. Wash. 2009); Mutual of Enumclaw v. Cornhusker Casualty Ins., 2008 U.S. Dist. LEXIS 80266 (E.D. Wash. 2008); Society of Lloyd's v. Moore Revocable Trust, 2006 U.S. Dist. LEXIS 80963 (S.D. Ohio 2006); Rutigliano v. Rutigliano, 2012 N.J. Super. Unpub. LEXIS 2319 (N.J. Super. Ct. App. Div. 2012); Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC, 421 N.J. Super. 445 (N.J. Super. Ct. App. Div. 2011), *aff'd*, 215 N.J. 242, 71 A.3d 888 (N.J. Sup. Ct. 2013); FCDB LBPL 2008-1 Trust v. Remely, 2013-Ohio-4960, 2013 Ohio App. LEXIS 5163 (Ohio Ct. App. 2013); BAC Home Loans Servicing, L.P. v. Testa, 2012-Ohio-5330, 2012 Ohio App. LEXIS (Ohio Ct. App. 2012); J.P. Morgan Chase Bank v. Hunter, 2012-Ohio-5222, 2012 Ohio App. LEXIS 4590 (Ohio Ct. App. 2012); Allied Erecting & Dismantling Co. v. Qwest Communications Int'l, Inc., 2010-Ohio=5939, 2010 Ohio App. LEXIS 4995 (Ohio Ct. App. 2010); Anthony v. Andrews, 2009-Ohio-6378, 2009 Ohio App. LEXIS 5352 (Ohio Ct. App. 2009); Aurora Loan Services, LLC v. Kirkpatrick, 2013 Vt. Super. LEXIS 17, at *12 n.10 (Vt. Super. Ct. 2013); In re Estate of Simonds, 2013 Vt. Super LEXIS 1 (Vt. Super. Ct. 2013); Schmitt v. Force, 2011 Vt. Super. LEXIS 32, at *11-*12 (Vt. Super. Ct. 2011); *In re Marriage of Mayo*, 2012 Wash. App. LEXIS 1008 (Wash. Ct. App. 2012); Pryde v. Bjorn, 2007 Wash. App. LEXIS 3039 (Wash. Ct. App. 2007).

The staff found many of these cases through a LEXIS search for "Uniform Mediation Act." It is possible that we missed some pertinent cases because they do not use that phrase.

22. See, e.g., Vernon v. Acton, 732 N.E.2d 805, 809-10 (Ind. Sup. Ct. 2000); State v. Williams, 184 N.J. 432, 444-46, 877 A.2d 1258 (N.J. Supreme Ct. 2005); Lehr v. Afflito, 382 N.J. Super. 376, 392-96 (N.J. Super. Ct. App. Div. 2006); Reese v. Tingey Construction, 177 P.3d 605, 609-10 (Utah Sup. Ct. 2008).

23. See, e.g., Justin Kelly, *The Uniform Mediation Act Turns 10 This Year*, JAMS Dispute Resolution Alert (Summer 2011), p. 3 (comments of Nancy Rogers, UMA reporter; comments of James Coben, law professor), available at <http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2011-06.pdf#Depth>.

referring to unpublished opinions, we do not mean to imply that those opinions have any precedential value in their respective jurisdictions. Rather, we are merely bringing the unpublished opinions to the Commission's attention so that it can consider them to the extent, if any, that they shed light on how to frame California law.

Due to the small number of written decisions, it is too early to tell how much variation there will be in interpreting the UMA protections from state to state. Some degree of such variation is probably inevitable, and there are already indications of this.

For example, in *Society of Lloyd's v. Moore Revocable Trust*,²⁴ the plaintiff argued that Ohio's UMA privilege was inapplicable to an email sent during a mediation because the email discussed matters beyond the scope of the mediation agreement.²⁵ The court rejected that idea and interpreted the privilege broadly:

The very nature of mediation calls for an uninhibited process wherein parties may explore various solutions to their disputes. It is neither uncommon nor unforeseeable that in trying to reach a settlement as to specific claims, parties may engage in a discussion of other related claims. *To hold that Ohio Rev. Code § 2710.03 shields only communications regarding matters specifically contemplated and set forth by parties prior to entering mediation would unduly hinder the ability of parties to freely and openly discuss settlement options.* It is precisely for this reason that courts have traditionally recognized a broad privilege surrounding mediation and other settlement communications.²⁶

In contrast, *Mutual of Enumclaw v. Cornhusker Casualty Ins.*²⁷ involved an attempt to use evidence from a mediation session to show that an insurer acted in bad faith in connection with a personal injury claim. The insurer argued that Washington's UMA privilege barred use of that evidence. The court disagreed, explaining that the privilege only protects a communication made at a mediation if the communication *relates to the dispute that the parties intended to resolve* at the mediation:

The UMA does not protect communications other than those related to the underlying dispute. Therefore, *Defendant's communications and alleged conduct at the mediation is only privileged under the UMA to the extent it pertains to the mediated dispute.* Contrary to Defendant's argument ..., the only "dispute" to be

24. 2006 U.S. Dist. LEXIS 80963 (S.D. Ohio 2006).

25. *Id.* at 7-8.

26. *Id.* at 9-10 (emphasis added).

27. 2008 U.S. Dist. LEXIS 80266 (E.D. Wash. 2008).

resolved at the mediation was the issue of damages for the Greens' injuries. *The mediation was not intended to resolve issues of insurance coverage.* While Defendant was clearly a "mediation party" participating in the mediation process regarding damages for the Greens' injuries, the "dispute" at issue did not involve insurance coverage. The Court finds that any communications involving insurance coverage are unrelated to the dispute being mediated, damages for the Greens' injuries. Consequently, Plaintiff should not be prohibited by a protective order from obtaining discovery concerning Defendant's statements during the mediation at issue which were separate from the dispute being mediated.²⁸

Two subsequent cases interpreting Washington's UMA appear more consistent with *Society of Lloyd's* than with *Enumclaw*. In one of them, the court rejected an argument that the act only prohibits disclosure of mediation communications to prove liability for the claims mediated. The court expressly stated that it had reviewed *Enumclaw* but "d[id] not find its reasoning persuasive."²⁹ In the other case, involving a slightly different argument, the court interpreted the UMA privilege broadly and sought to distinguish *Enumclaw*.³⁰

Whether *Enumclaw* was a one-time aberration or will lead to a significant split of authority remains to be seen. For now, the contrast between it and the other cases simply demonstrates the potential for differing views on interpretation of the UMA privilege. As yet, however, there appears to be extensive but not total uniformity from one UMA jurisdiction to the next, and almost all of the differences that do exist are attributable to legislative determinations rather than judicial decisions.

28. *Id.* at 8-9 (emphasis added; citation omitted).

29. *Professional Recreation Org. v. Nat'l Union Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 80266 (E.D. Wash. 2008), at 8 n.3.

30. See *Western & Clay, LLC v. Landmark Am. Ins. Co.*, 2010 U.S. Dist. LEXIS 55817 (W.D. Wash. 2010), at 3-5 (citations omitted):

Defendants argue the [mediation statement] is not privileged because mediation communications are only privileged if the previous mediation dealt with the same dispute now before this Court. The sole case on which Defendants rely lends no support to their strained reading of the Mediation Act's privilege.... In [*Enumclaw*], the court rejected application of the mediation privilege because the disputed statement was not actually made for purposes of "considering, conducting, participating in, initiating, continuing, or reconvening a mediation...." Here, the mediation statement was prepared exclusively to mediate the dispute that existed between Plaintiffs. A clearer application of the Mediation Act's privilege is difficult to imagine. The Court DENIES Defendants' motion to compel production of this document.

Exception for Professional Misconduct (UMA § 6(a)(6), (c))

The current study focuses on the relationship between mediation confidentiality and attorney malpractice and other misconduct. Consequently, the UMA's exception for professional misconduct is of particular interest.

That exception is framed as follows:

SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

....
(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation

....
(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6)

As we discussed in April, the exception (1) applies to evidence of "professional misconduct" not just evidence of attorney misconduct, (2) includes both evidence tending to prove a claim of professional misconduct and evidence tending to disprove such a claim, and (3) does not permit a party to compel a mediator to testify on the matter.³¹

To date, every UMA jurisdiction has enacted this exception without deviating from the uniform text.³² There is thus complete uniformity on the point, at least for the time being.

The staff was unable to find any case law interpreting the UMA's exception for professional misconduct. Similarly, Casey Gillece of the ULC previously reported that she did not find "any case law addressing attorney misconduct in a proceeding under the UMA."³³

That dearth of authority is not surprising. In part, it may be attributable to the relative newness of the UMA: The act has only been operative in Nebraska for slightly more than a decade, and the other UMA states have had it in place for shorter time periods. Thus, there has not been much time for disputes relating to the exception to arise, and, if a dispute has arisen, it might not yet have ripened to the point of generating a written opinion.

31. For further discussion of this exception, see Memorandum 2014-14, pp. 19-20.

32. See Exhibit pp. 7-8.

33. First Supplement to Memorandum 2014-14, Exhibit p. 1.

More importantly, the very existence of the professional misconduct exception may deter a party from attempting to argue that the UMA privilege applies to a professional misconduct case. There is essentially no ambiguity about the matter, so such an argument is unlikely to be successful. As a result, written decisions construing the professional misconduct exception may be few and far between, even in the future.

If courts do issue such decisions, the staff suspects that most of them will focus not on the actual exception,³⁴ but instead on its limitation: the rule precluding a party from compelling a mediator to provide evidence of a mediation communication for purposes of proving or disproving professional misconduct.³⁵ While that seems like a straightforward prohibition, it will preclude some parties from presenting potentially helpful evidence, and might thus prompt creative challenges that result in written decisions.

Although the professional misconduct exception does not appear to have led to much litigation, it might (or might not) have had other effects, beyond the desired effect of facilitating proof of professional misconduct. In particular, it would be interesting to know whether the exception has chilled mediation communications to any degree. Unfortunately, that type of evidence is hard to obtain. We will explore this point more extensively later in this study.

Exception for Mediator Misconduct (UMA § 6(a)(5))

As we discussed in April, the UMA also includes an exception for evidence of mediator misconduct:

SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

....
(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator
....

Unlike the exception for professional misconduct, this exception does not provide special treatment for a mediator: As best we can tell, a court may compel a mediator to testify regarding a claim of mediator malpractice or other misconduct, just like anyone else.³⁶

34. UMA § 6(a)(6).

35. UMA § 6(c).

36. For further discussion of this exception, see Memorandum 2014-14, p. 20.

Almost every UMA jurisdiction has enacted the mediator misconduct exception without deviating from the uniform text.³⁷ The lone counterexample is New Jersey, which revised the exception to apply whenever a mediation communication is “sought or offered to prove or disprove a claim or complaint filed against a mediator arising out of a mediation.”³⁸ This does not strike the staff as a very significant deviation.

The staff was unable to find any case law interpreting the UMA’s exception for mediator misconduct. As with the exception for professional misconduct, that lack of authority is not surprising, given the newness of the UMA and the clear terms of the exception.

Exception Relating to the Validity and Enforceability of a Mediated Settlement Agreement (UMA § 6(b)(2), (c))

A third UMA exception of particular interest in the context of this study is the exception relating to the validity and enforceability of a mediated settlement agreement:

SECTION 6. EXCEPTIONS TO PRIVILEGE.

....
(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

....
(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection ... (b)(2).

This exception is more complicated than the ones for professional misconduct and mediator misconduct.

It permits the introduction of a mediation communication in a proceeding to prove a claim to rescind or reform, or a defense to avoid liability on, a contract arising out of a mediation. But the exception only applies if the proponent of the evidence proves at an *in camera* hearing that the evidence is not otherwise available and the need for the evidence substantially outweighs the interest in

37. See Exhibit pp. 7-8.

38. N.J. Rev. Stat. § 2A:23C-6(a)(5).

protecting confidentiality. Further, the exception cannot be used to compel a mediator to testify.³⁹

Almost all of the UMA jurisdictions enacted this exception without deviating from the uniform text.⁴⁰ Ohio changed the standard of proof for the *in camera* hearing: The proponent must show that “the disclosure is necessary in the particular case to prevent a manifest injustice,” not “there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.”⁴¹ In Washington, a court must conduct the *in camera* hearing; an administrative agency or arbitrator cannot do so.⁴² Idaho incorporated the exception into both a statute⁴³ and a court rule.⁴⁴ The court rule, but not the statute, says that “[t]his exception to privilege does not apply to any statement made in the course of a criminal mediation under Rule 18.1 of the Idaho Rules of Criminal Procedure or Rule 12.1 of the Idaho Juvenile Rules.”⁴⁵

There is not much case law discussing the UMA exception relating to the validity and enforceability of a mediated settlement agreement, but there is a little. In a case that arose in New Jersey under pre-UMA law, a New Jersey court compelled a mediator to testify regarding a mediation, so that it could evaluate whether there was a basis for disturbing a property settlement agreement.⁴⁶ On appeal, the plaintiff argued that this violated the confidentiality requirement of the parties’ mediation agreement. The appellate court agreed based on the terms of the mediation agreement, as well as on the basis of “subsequently developed public policy.”⁴⁷ In particular, it pointed out that although New Jersey had recently enacted the UMA, and the UMA privilege includes an exception for evidence needed in a proceeding to rescind, reform, or avoid liability on a contract arising out of a mediation, “*even then, [a] mediator may not be compelled to provide evidence of a mediation communication[.]*”⁴⁸ Thus, it concluded that the trial court had erred in forcing the mediator to testify.⁴⁹

39. For further discussion of this exception, see Memorandum 2014-14, pp. 20-22.

40. See Exhibit pp. 7-8 (District of Columbia, Hawaii, Illinois, Iowa, Nebraska, New Jersey, South Dakota, Utah, and Vermont).

41. Ohio Rev. Code Ann. § 2710.01(B)(2).

42. See Wash. Rev. Code § 7.07.050(2).

43. Idaho Code Ann. § 9-806(b)(2).

44. Idaho R. Evid. 507(5)(b)(2).

45. Compare Idaho R. Evid. 507(5)(b)(2) with Idaho Code Ann. § 9-806(b)(2).

46. *Addressa v. Addressa*, 392 N.J. Super. 58, 66, 919 A.2d 885 (N.J. Super. Ct. App. Div. 2007).

47. *Id.* at 66-67.

48. *Id.* at 67, quoting N.J. Stat. Ann. § 2A:23C-6(c) (emphasis added by CLRC staff).

49. *Addressa*, 392 N.J. Super. at 68.

Similarly, in a case arising under the Ohio UMA,⁵⁰ a party brought a motion *in limine* to exclude certain mediation communications, and the trial court partially denied that motion in reliance on the UMA exception under discussion. The appellate court reversed that ruling, explaining:

Application of the (B)(2) exception requires the trial court to make three determinations: (1) that the evidence is not otherwise available, (2) that the disclosure is necessary to prevent a manifest injustice, and (3) that the information is sought in “a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.” There is no indication in the record that the trial court considered the first two requirements. In regard to the final requirement, Mr. Carter has correctly argued that the exception under (B)(2) does not apply because the City did not seek the mediation communications “in a proceeding to prove a claim to rescind or reform” a contract arising out of mediation nor did it seek them “in a proceeding to prove ... a defense to avoid liability on a contract arising out of the mediation.” The City sought the information in an effort to prove that an oral contract of settlement arose out of the mediation in order to persuade the trial court to enforce that claimed oral contract against Mr. Carter. Therefore, the trial court incorrectly applied Section 2710.05(B)(2).⁵¹

In addition to the New Jersey and Ohio cases discussed above, in which the courts ultimately conclude that the UMA protects the mediation communications in question, the staff found a case in which an Indiana appeals court relied on the UMA Section 6(b)(2) exception as support for its conclusion that mediation evidence of a drafting mistake was admissible.⁵² The appeals court explained that admitting such evidence was good policy and consistent with the UMA:

[P]ublic policy favors the use of mediation and other amicable settlement techniques that allow parties to resolve their disputes without resorting to litigation, and promote party autonomy and decrease the strain on our courts. Although confidentiality is an important part of mediation, strict adherence to confidentiality would produce an undesirable result in this context—parties would be denied the opportunity to challenge issues relating to the integrity of the mediation process, such as mistake, fraud, and duress. *Allowing the use of mediation communications to establish these traditional contract defenses provides parties their day in court and encourages, rather than deters, participation in mediation.*

50. *City of Akron v. Carter*, 190 Ohio App. 3d 420, 942 N.E. 2d 409 (Ohio Ct. App. 2010).

51. *Id.* at 428 (citations omitted).

52. *Horner v. Carter*, 969 N.E.2d 111 (Ind. Ct. App. 2012), *aff'd in part & vacated in part*, 981 N.E.2d 1210 (Ind. Supreme Ct. 2013).

Our holding is consistent with Section 6(b)(2) of the Uniform Mediation Act ..., which provides an exception for testimony of parties to mediation that is similar to Rule 2.11, although more expansive The comment to Section 6(b)(2) explains that the exception “is designed to preserve traditional contract defenses to the enforcement of the mediated settlement agreement that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications.”⁵³

On appeal, the Indiana Supreme Court reversed.⁵⁴ It pointed out that Indiana had not enacted the UMA, and it declined to follow the UMA approach of preserving traditional contract defenses with respect to a mediated settlement agreement.⁵⁵

Rather, the Court explained that “Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces *a robust policy of confidentiality* of conduct and statements made during negotiation and mediation.”⁵⁶ According to the Court, “[t]he benefits of compromise settlement agreements *outweigh the risks* that such policy may on occasion impede access to otherwise admissible evidence on an issue.”⁵⁷

Thus, the Indiana Supreme Court held that proffered evidence, seeking to establish and enforce an oral agreement allegedly reached in mediation, was confidential and inadmissible.⁵⁸ The Court noted, however, that efforts were underway by the Alternative Dispute Resolution Section of the Indiana State Bar Association and the Alternative Dispute Resolution Committee of the Judicial Conference of Indiana to review and possibly propose modifications to the Indiana Rules for Alternative Dispute Resolution.⁵⁹

The staff will attempt to learn the status of those efforts as this study proceeds. As yet, however, Indiana remains a non-UMA jurisdiction and it does not appear to have enacted any privilege exception similar to UMA Section 6(b)(2), relating to the validity and enforceability of a mediated settlement agreement.

53. *Id.* at 117-18 (emphasis added; citations omitted).

54. *Horner v. Carter*, 981 N.E.2d 1210 (Ind. Sup. Ct. 2013).

55. *Id.* at 1210 n.1.

56. *Id.* at 1210 (emphasis added).

57. *Id.* (emphasis added).

58. *Id.* (emphasis added).

59. *Id.* at 1210 n.1.

Additional Information on Implementation of the UMA

The remainder of this memorandum provides some additional information about each of the UMA jurisdictions. We discuss the jurisdictions in chronological order based on the date on which each one enacted or adopted the UMA:

- Nebraska (2003)
- Illinois (2003)
- New Jersey (2004)
- Iowa (2005)
- Ohio (2005)
- Vermont (2005)
- Washington (2005)
- District of Columbia (2006)
- Utah (2006)
- South Dakota (2007)
- Idaho (2008)
- Hawaii (2013)

Nebraska

Nebraska's version of the UMA⁶⁰ became operative in August of 2003. At the time, Nebraska already had a Dispute Resolution Act,⁶¹ which created a system of approved mediation centers. A mediation conducted by an approved center was, and still is, subject Nebraska Revised Statutes Section 25-2914, relating to confidentiality:

25-2914. Any verbal, written, or electronic communication made in or in connection with matters referred to mediation which relates to the controversy or dispute being mediated and agreements resulting from the mediation, whether made to the mediator, the staff of an approved center, a party, or any other person attending the mediation session, *shall be confidential*. Mediation proceedings shall be regarded as settlement negotiations, and *no admission, representation, or statement made in mediation, not otherwise discoverable or obtainable, shall be admissible as evidence or subject to discovery*. A mediator *shall not be subject to process* requiring the disclosure of any matter discussed during mediation proceedings unless all the parties consent to a waiver. Confidential communications and materials are subject to disclosure when all

60. Neb. Rev. Stat. §§ 25-2930 to 25-2942.

61. Neb. Rev. Stat. §§ 25-2901 to 25-2921.

parties agree in writing to waive confidentiality regarding specific verbal, written, or electronic communications relating to the mediation session or the agreement. *This section shall not apply if a party brings an action against the mediator or center, if the communication was made in furtherance of a crime or fraud, or if this section conflicts with other legal requirements.*⁶²

Although this provision protects mediation communications, it does not appear to govern all Nebraska mediations, and it is subject to some exceptions. Of particular importance, the provision is inapplicable if it “conflicts with other legal requirements.”

In a 1997 case,⁶³ a federal district court construed Section 25-2914, as well as a Mediation Plan applicable in that district, which said that mediation sessions would be conducted in accordance with Nebraska’s Dispute Resolution Act, “[e]xcept as may be specifically provided herein.”⁶⁴ The issue before the court was the extent to which mediation evidence would be admissible in connection with a motion to sanction defendants for failing to participate in good faith in a court-ordered mediation.

The court acknowledged the value of protecting mediation communications:

The need for confidentiality in mediation is simply the need for the parties and their representatives to have an open, candid discussion about the dispute, the legal strengths and weaknesses of the case, and any proposals for settlement. If any comments about the dispute made during the negotiation process were later to be construed as admissions, or even to be used to show bias, as permitted in Fed. R. Evid. 408, the posturing of the parties in the negotiations could well reduce or eliminate any likelihood of settlement, or even serious negotiation, for the parties would be extremely cautious about advancing a settlement proposal that might be used against them. Thus, they may never get beyond their “positions” even if they both may genuinely want to settle their dispute.⁶⁵

The court concluded, however, that evidence of whether the defendants brought someone with settlement authority to the mediation was not protected under Section 25-2914 or the Mediation Plan, because “[t]he limits of a representative’s

62. Neb. Rev. Stat. § 25-2914 (emphasis added).

63. Doe v. State of Nebraska, 971 F. Supp. 1305 (D. Neb. 1997).

64. *Id.* at 1305.

65. *Id.* at 1307.

authority do not ‘relate’ to the ‘controversy or dispute being mediated,’ but rather, to the representative’s ability to mediate.”⁶⁶

The court further decided that evidence of “the nature of the parties’ offers and counteroffers to compromise and settle” was also admissible for purposes of determining whether to impose sanctions.⁶⁷ In reaching that conclusion, the court relied in part on the Mediation Plan’s exception to the Nebraska Dispute Resolution Act.⁶⁸ Nonetheless, the court said that “[n]either the language of the statute nor that of the Plan, ... precludes the admission or consideration of evidence related to the parties’ settlement proposals, in a proceeding concerning a motion for sanctions such as is pending before me.”⁶⁹

The court thus appeared to construe Section 25-2914 to permit introduction of mediation offers and counteroffers when determining whether a party participated in a mediation in good faith. But the court recognized “a very important caveat,” as explained below:

Obviously the protections of the confidentiality provisions would be undermined if they could be circumvented by filing a motion for sanctions and the confidential information could later be used in the litigation in any way against either of the parties. To assure that does not happen, the evidentiary materials, briefs, and recording of any hearings held in connection with the motion for sanctions *will be kept under seal and will not be made available to the presiding trial judge.*⁷⁰

The court therefore considered it sufficient to prevent the mediation evidence from being conveyed to the *particular judge* who would try the mediated dispute. In contrast, the UMA expressly precludes a mediator (but not others) from reporting to “a court ... or other authority that may make a ruling on the dispute that [was] the subject of the mediation” regarding “whether a particular party engaged in ‘good faith’ negotiation, or ... whether a party had been ‘the problem’ in reaching a settlement.”⁷¹ Further, there is no exception to the UMA privilege for evidence bearing on whether a party mediated in good faith (as opposed to whether a mediator or other person engaged in professional misconduct at a mediation).⁷²

66. *Id.*

67. *Id.* at 1307-08.

68. *Id.*

69. *Id.* at 1308 (emphasis added).

70. *Id.*

71. UMA § 7 & Comment (emphasis added).

72. See UMA § 6.

The staff did not find any other pre-UMA Nebraska cases that are pertinent to this study, nor did we find any cases construing Nebraska's version of the UMA. Although Section 25-2914 remains in the Nebraska code, by its terms it is inapplicable if it "conflicts with other legal requirements," which presumably would include the UMA. While Nebraska's version of the UMA differs in some respects from the uniform text, it does not appear necessary to describe those differences here.⁷³

Illinois

The Illinois UMA⁷⁴ was enacted in 2003 and became operative the following year. It "parallels the NCCUSL version more than that of any other state."⁷⁵

Michael Leech, an Illinois mediator, summarizes the status of mediation confidentiality in his state as follows:

Three Kinds of Confidentiality. There are three kinds of mediation confidentiality, and they are not on an equal footing under Illinois law.

- The first is the protection against having statements made during mediation repeated in court.
- The second is the obligation of the mediator, the parties and the participants to keep what is said and done in the mediation to themselves and not disclose it to third parties.
- The third is the obligation of the mediator not to disclose information provided by a party or participant to the mediator in confidence.

Different Legal Status of Different Kinds of Confidentiality. Only the first of these is protected by statute. The others depend on the agreement of the parties to the mediation, but that agreement, whatever it is, may be enforced under the governing statute. The statute recognizes that there may be situations in mediation when the second or third kind of confidentiality is not desired by the parties and thus leaves them to the parties to decide.⁷⁶

Mr. Leech goes on to provide a succinct yet informative description of the UMA and the other protections referred to above.⁷⁷

Similarly, Illinois attorney Robert Kreisman points out that in Illinois, privilege and confidentiality are different, yet intertwined.⁷⁸ He notes that

73. For further information on this point, see Provencher, *supra* note 15.

74. 710 Ill. Comp. Stat. 35/1 to 35/99.

75. Provencher, *supra* note 15.

76. Michael J. Leech, *Mediation Confidentiality in Illinois*, <http://talk-sense.com/mediation-confidentiality-2> (last visited May 16, 2014).

77. *Id.*

although the UMA only protects mediation communications from admissibility and discoverability in legal proceedings, without providing confidentiality, “[s]ome of the local court rules blend privilege and confidentiality together and refer back to the UMA in doing that.”⁷⁹ Likewise, he notes that a statute governing mediations conducted by the Center for Conflict Resolution⁸⁰ complements the UMA by providing for confidentiality.⁸¹

The staff did not find any cases interpreting the confidentiality provisions of the Illinois UMA. However, we did find an advisory opinion prepared by the Illinois State Bar Association (“ISBA”),⁸² which is quite relevant to the Commission’s study.

The hypothetical in that opinion involved a mediator who is licensed to practice law in Illinois. Under Illinois law, if a lawyer knows that another lawyer has (1) committed a “criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,”⁸³ or (2) engaged in “conduct involving dishonesty, fraud, deceit or misrepresentation,”⁸⁴ the first lawyer must report the other lawyer’s wrongful conduct to “the appropriate professional authority.”⁸⁵ The threshold question in the ISBA opinion was whether that reporting obligation applies when a lawyer is serving as a mediator.

The ISBA’s short answer to that question was “yes.”⁸⁶ The ISBA supported that answer by citing to various Illinois authorities indicating that the duty to report a fellow lawyer’s misconduct is “absolute.”⁸⁷

The ISBA then noted that “[b]oth the Uniform Mediation Act and the Not-For-Profit Mediation Center Act⁸⁸ have provisions that provide for confidentiality of certain communications made during mediation.”⁸⁹ Thus, the

78. Robert Kreisman, *Illinois Mediations Governed by the Illinois Uniform Mediation Act; Privilege and Confidentiality are Different Yet Intertwined*, <http://injury.robertkreisman.com/2014/01/illinois-mediations-governed-illinois-uniform-mediation-act-privilege-confidentiality-different-yet-intertwined.html> (last visited May 16, 2014).

79. *Id.* (referring to Cook County Circuit Court Rule 20.07 & Cook County Rule 21.07 for the Chancery Division Mediation Program).

80. 710 Ill. Comp. Stat. 20/6.

81. Kreisman, *supra* note 78.

82. Illinois State Bar Ass’n, Advisory Opinion on Professional Conduct No. 11-01 (Jan. 2011), <http://www.isba.org/sites/default/files/ethicsopinions/11-01.pdf> (hereafter, “ISBA Opin. No. 11-01”).

83. Ill. R. Prof. Conduct 8.4(b).

84. Ill. R. Prof. Conduct 8.4(c).

85. Ill. R. Prof. Conduct 8.3.

86. ISBA Opin. No. 11-01, *supra* note 82, at 2.

87. ISBA Opin. No. 11-01, *supra* note 82, at 2-3.

88. 710 Ill. Comp. Stat. 20.

89. ISBA Opin. No. 11-01, *supra* note 82, at 2.

next question it considered was: “Do [the] confidentiality provisions in the Uniform Mediation Act or Not-For-Profit Dispute Resolution Act override a lawyer-mediator’s obligation to report another lawyer’s violation of Illinois Rule of Professional Conduct 8.4(c) during a mediation?”⁹⁰

The ISBA concluded that “neither of these provisions would prevent the lawyer-mediator from disclosing that a lawyer who represented a party in the mediation violated Rule 8.4(c).”⁹¹ It explained that although UMA Section 6(c) “bar[s] a party ... from subpoenaing a mediator and forcing the mediator to testify about the mediation proceeding in a disciplinary proceeding,” the mediator “remains capable ... of disclosing a lawyer’s misconduct to disciplinary authorities.”⁹² The ISBA interpreted the Not-For-Profit Dispute Resolution Center Act similarly, noting that “[t]o find otherwise would be to find that lawyers may be immune from repercussions for false statements made before a mediator whereas if the same statements were made before a judge, the lawyer would face possible sanctions.”⁹³

Finally, the ISBA further explained:

The Committee decided to reach these issues out of a sense of necessity, so that lawyers will have guidance on such issues. The Committee further believes that *disclosure is appropriate based upon (1) the importance the Illinois Supreme Court has placed on the obligation of lawyers to report serious misconduct by other lawyers, (2) the fact that the mediator has no fiduciary relationship with any person in the mediation whose rights might be compromised by effecting the duty to report, and (3) recognition that a lawyer should not be able to subvert the mediation process by engaging in misconduct, and then avoid discipline for such misconduct because of the confidentiality provisions contained in the Acts.*⁹⁴

The ISBA thus put a high value on protecting the public against attorney misconduct.

The precise quandary addressed in the ISBA opinion (the conflict between mediation confidentiality and an explicit professional duty to report another attorney’s misconduct) would not arise under current California law, because California does not appear to have a comparable reporting requirement.⁹⁵

90. *Id.*

91. ISBA Opin. No. 11-01, *supra* note 82, at 3.

92. *Id.*

93. *Id.* at 4.

94. *Id.* (emphasis added).

95. California currently relies on a self-reporting system. See Bus. & Prof. Code § 6068(o) (attorney’s duty to self-report (1) imposition of judicial sanctions exceeding \$1,000, (2) entry of

Nonetheless, **the ISBA opinion is noteworthy because it involved the same type of balancing that the Commission will have to do in this study:** A balancing between (1) the interest in holding an attorney accountable for misconduct (particularly professional misconduct in the mediation context) and (2) the interest in promoting voluntary settlement of a dispute by assuring the disputants that they can speak freely at a mediation, without reason to fear that their comments will be disclosed and perhaps used against them.

New Jersey

New Jersey was the third state to enact the UMA, in 2004.⁹⁶ At the time, certain court-ordered mediations were governed by New Jersey Court Rule 1:40-4(c), which then provided:

Except as otherwise provided by this rule and unless the parties otherwise consent, *no disclosure made by a party during mediation shall be admitted as evidence against that party in any civil, criminal, or quasi-criminal proceeding.* A party may, however, establish the substance of the disclosure in any such proceeding by independent evidence.... *No mediator may participate in any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter.*⁹⁷

judgment against attorney in civil action for “fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity,” and (3) filing of three or more lawsuits alleging attorney engaged in malpractice or other wrongful conduct in professional capacity); see also State Bar of California, Proposed Rules of Professional Conduct, Proposed Rule 8.3. Reporting Professional Misconduct (proposed rule requiring lawyer to inform disciplinary authorities when lawyer knows another lawyer committed felonious criminal act raising substantial question as to honesty or fitness as lawyer, but subject to exceptions, including one for “information gained during a mediation”), <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=mNFPfYWhJRQ%3D&tabid=2161> (last visited 5/19/14).

96. See N.J. Rev. Stat. §§ 2A:23C-1 to 2A:23C-13. For details on how the New Jersey statute compares to the uniform text, see Provencher, *supra* note 15.

97. See *Lehr v. Afflitto*, 382 N.J. Super. 376, 392, 889 A.2d 462 (N.J. Super. App. Div. 2006) (emphasis in original); see also *State v. Williams*, 184 N.J. 432, 442, 877 A.2d 1258 (N.J. Supreme Ct. 2005).

New Jersey Rule of Court 1:40-4(c)-(d) now provides:

(c) Evidentiary Privilege. A mediation communication is not subject to discovery or admissible in evidence in any subsequent proceeding except as provided by the New Jersey Uniform Mediation Act, N.J.S.A. 2A:23C-1 to -13. A party may, however, establish the substance of the mediation communication in any such proceeding by independent evidence.

(d) Confidentiality. Unless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator, or other participant in a mediation may disclose any mediation communication to anyone who was not a participant in the mediation. A mediator may disclose a mediation communication to prevent harm to others to the extent such mediation communication would be admissible in a court proceeding. A mediator has the duty to disclose to a proper authority information obtained at a mediation session if required by law or if the mediator has a reasonable belief that such disclosure will prevent a participant from committing a

The staff did not find any court opinions construing this rule before New Jersey enacted the UMA, but we did find some post-UMA appellate decisions in which the trial court ruling predated the UMA.

In those decisions, the appellate court looked to the UMA for guidance, even though it was not in force when the trial court rendered its decision.⁹⁸ In *Williams*, for example, the New Jersey Supreme Court considered whether to “relax” Rule 1:40-4(c)’s prohibition on mediator testimony so as to allow a criminal defendant to present such testimony at trial. In answering that question, the Court noted that “the UMA principles, in general, are an appropriate analytical framework for the determination whether defendant can overcome the mediator’s privilege not to testify.”⁹⁹ After carefully analyzing those principles, the Court concluded on a 5-2 vote that “Defendant’s need for the mediator’s testimony does not outweigh the interest in mediation confidentiality, and defendant has failed to show that the evidence was not otherwise available.”¹⁰⁰ Among other things, the Court stressed that “[s]uccessful mediation ... depends on confidentiality perhaps more than any other form of ADR,”¹⁰¹ and “the appearance of mediator impartiality is imperative.”¹⁰² The dissent contended, however, that the mediator’s testimony was essential to the defense of the criminal charges, because “[t]he mediator’s position as the only objective witness placed him in an entirely distinct role from the other witnesses in the case.”¹⁰³

Williams is of particular interest because it precluded use of mediation communications in a *criminal* case involving certain facts. In this respect, New Jersey law and the UMA provide greater protection to mediation communications than California law, which does not restrict the use of mediation communications in any type of criminal case.

Williams is also of interest because it exposes some procedural questions relating to the *in camera* balancing approach used in two exceptions to the UMA

criminal or illegal act likely to result in death or serious bodily harm. No mediator may appear as counsel for any person in the same or any related matter. A lawyer representing a client at a mediation session shall be governed by the provisions of RPC 1.6 [specifying when lawyer must disclose information and when lawyer must keep information confidential].

98. See *Williams*, 184 N.J. at 444-49; *Lehr*, 382 N.J. Super. at 392-96; see also *Addessa*, 392 N.J. Super. at 67-68 (described above, in discussion of “Exception Relating to the Validity and Enforceability of a Mediated Settlement Agreement”).

99. *Williams*, 184 N.J. at 444-45.

100. *Id.* at 454.

101. *Id.* at 447.

102. *Id.* at 448.

103. *Id.* at 455 (Long, J., dissenting).

privilege: (1) the exception for a mediation communication offered in a court proceeding involving a felony or misdemeanor (UMA § 6(b)(1)), and (2) the exception for a mediation communication offered in “a proceeding to rescind or reform or a defense to avoid liability on a contract arising out of the mediation” (UMA § 6(b)(2), discussed earlier in this memorandum). As a New Jersey mediator explained:

[An] area of concern focuses on the proper procedure for requesting a court to conduct the balancing analysis and to admit a mediator’s testimony. Unfortunately, the opinion in *Williams* does not provide much detail as to what actually occurred at trial. Apparently, the defense counsel spoke to the mediator during a break in the proceedings and then sought the court’s permission to call the mediator as a witness. The court then interviewed the mediator outside the presence of the jury before deciding to bar the testimony. Both the trial court and the Supreme Court were critical of counsel’s conduct: the trial judge found that both the mediator and defense counsel had breached the confidentiality of the mediation proceedings, and the Supreme Court likewise found that by asking the mediator to divulge the disputants’ statements made during mediation, the defense induced the mediator’s breach of confidentiality without first seeking the court’s permission. However, *neither the trial court nor the Supreme Court offered any guidance on what counsel should have done, and the UMA is silent on the issue.* In any event, the Court’s criticism of counsel seems unwarranted. In *Williams*, presumably the defendant had advised his counsel as to what was said at the mediation before his counsel ever spoke to the mediator. Thus, the mediator’s discussion with counsel was not truly a disclosure of “confidential” information, but rather confirmation of what counsel had already been told. Even assuming that such a discussion was an improper disclosure, the Supreme Court’s suggestion that counsel should have sought permission from the court before speaking with the mediator offers little in the way of protection for the mediation communication or fairness to the client or counsel. Presumably, the Court meant that the trial judge should have interviewed the mediator independently and then made a ruling. But how is a disclosure to the judge any less of a breach of confidentiality than a discussion between the mediator and counsel? Also, how can counsel adequately protect his client’s trial and appellate rights if a court makes a ruling to bar the testimony outside the presence of the attorneys, providing no opportunity to hear what the mediator has to say and argue as to its admissibility?

The better course, which should be adopted by courts in the future or added to the UMA by amendment, is for an attorney whose client has advised that there is a need for the mediator’s testimony or who knows from his or her own participation in a

mediation on behalf of the client that the testimony is needed to request an interview of the mediator in the presence of the trial judge and counsel with the understanding that the mediation communications at issue will not be disclosed further unless authorized by the judge. The confidentiality of the disclosures can be preserved by sealing that portion of the record containing the testimony. In this way, the communications are preserved as much as possible, while at the same time counsel's ability to protect his or her client's trial and appellate rights remains intact.¹⁰⁴

If the Commission eventually decides to propose an *in camera* balancing approach, whether along the lines of the UMA or some other lines, **it should consider the points raised above and attempt to provide clear guidance on the practicalities of the approach.**

Shortly after *Williams*, the Appellate Division of the New Jersey Superior Court concluded in *Lehr* that a trial judge had erred in permitting a mediator to testify in a matrimonial action.¹⁰⁵ As in *Williams*, only Rule 1:40-4(c) governed the trial, but the Appellate Division also looked to the UMA's confidentiality provisions for guidance. It concluded that "[a]lthough these provisions of the UMA are more elaborate and specific than the confidentiality provisions contained in R. 1:40-4(c), they embody the same underlying principles of public policy."¹⁰⁶ Thus, the Appellate Division did not consider the UMA a significant change in New Jersey policy; instead, it saw the UMA as an expansion of pre-existing policy.

However, other sources emphasize that the 2004 enactment of the UMA was a major change in New Jersey law. For example, a New Jersey family law practitioner not only noted that "the UMA is much more comprehensive than Court Rule 1:40," but also wrote:

The UMA is significant in that it essentially codifies the best practices from all sources. Most importantly, it clarifies concepts of privileges and confidentiality that were previously left to contractual engagements between private mediators and participants in the mediation process. It should clearly help us avoid situations as described in the recent Appellate Division decision of *Lehr v. Afflitto*.¹⁰⁷

104. David Tomeo, *Be Careful What You Say: One Court's Look at Confidentiality Under the Uniform Mediation Act*, 31 Seton Hall Legislative J. 65, 79-80 (2006) (emphasis added; footnotes omitted).

105. *Lehr*, 382 N.J. Super. at 395.

106. *Id.* at 394 (emphasis added).

107. Christopher Musulin, *The Uniform Mediation Act*, <http://www.burlintoncountydivorce.com/The-Uniform-Mediation-Act.pdf> (last visited 5/19/14).

Similarly, another New Jersey attorney says:

UMA-NJ represents a significant change in New Jersey law, which previously gave no confidentiality protection and no statutory privilege regarding mediation communications in the private sector, and only limited protection in the court-referred setting. The new law protects confidentiality of communications and creates enforceable privileges for all participants and the mediator.¹⁰⁸

The attorney goes on to describe in detail why the UMA “is of vital importance to New Jersey’s citizens.”¹⁰⁹

In an article focusing on New Jersey environmental litigation, another author expressed a different view:

Although UMA and other state mediation confidentiality provisions are a step in the right direction, in that they clarify the rules of an ambiguous game, there are still many instances and avenues by which parties and nonparties can circumvent the confidentiality of mediation communications. *While some guidelines provided by UMA are better than the previous alternative, which provided no statutory guidelines, there still remains uncertainty as to when and whether “confidential” mediation provisions are really confidential.*¹¹⁰

She thus warned that “the potential for loss of confidentiality protection in subsequent litigation, even in the presence of a properly executed confidentiality agreement, will most likely have a ‘chilling effect’ on the frank exchange of information and accessibility to mediators by the average citizen that is so vital to the success of ADR proceedings”¹¹¹

Two recent cases governed by New Jersey’s UMA arguably lend support to her perspective. In *Willingboro Mall Ltd. v. 240/242 Franklin Ave., L.L.C.*,¹¹² the New Jersey Supreme Court considered the enforceability of an oral agreement reached in mediation. The UMA makes clear that only “a record signed by all parties to the agreement” is unprivileged and thus enforceable.¹¹³ Applying that

108. Hanan Isaacs, *The Uniform Mediation Act: Strengthening Mediation in New Jersey*, <http://www.hanaisaacs.com/Press-Room/The-Uniform-Mediation-Act-Strengthening-Mediation-in-New-Jersey.shtml> (last visited 5/20/14); see also Kelly, *supra* note 23, at 3-4 (reporting that Hanan Isaacs considers UMA huge success in New Jersey).

109. *Id.*

110. Allison Britt, *Are “Confidential” Mediation Proceedings Really Confidential? Will the Uniform Mediation Act Really Keep Mediation Communications Out of Court in Subsequent Environmental Litigation?*, 3 Rutgers Conflict Resolution L.J. 1, 20 (2005), available at <http://pegasus.rutgers.edu/~rcrlj> (emphasis added).

111. *Id.*

112. 215 N.J. 242, 71 A.3d 888 (N.J. Sup. Ct. 2013).

113. See UMA § 6(a)(1) & Comment; N.J. Rev. Stat. § 2A:23C-6(a)(1).

principle, the New Jersey Supreme Court concluded that “going forward, a settlement that is reached at mediation but not reduced to a signed, written agreement will not be enforceable.”¹¹⁴ But the Court declined to apply that rule in the case before it, finding instead that the privilege had been waived: “A party that not only expressly waives the mediation-communication privilege, but also discloses privileged communications, cannot later complain that it has lost the benefit of the privilege it has breached.”¹¹⁵ Thus, the Court enforced the oral settlement agreement and twice warned that “a party seeking to benefit from the mediation-communication privilege must timely assert it.”¹¹⁶

Rutigliano v. Rutigliano,¹¹⁷ an unpublished decision rendered a year earlier by the Appellate Division of the New Jersey Superior Court, involved a similar result and reasoning. In that case, however, the plaintiff had “objected to defendant, the mediator, or the parties’ attorneys testifying at the hearing concerning the terms of the settlement; he refused to testify; and he declined the opportunity to cross-examine the defendant.”¹¹⁸ The Appellate Division nonetheless found that the plaintiff had *expressly* waived the UMA privilege (as required for a waiver under the UMA) because the plaintiff had consented to permit the mediator to notify the court that the case had been settled.¹¹⁹

Together, *Willingboro* and *Rutigliano* underscore that the UMA privilege in New Jersey can be lost through waiver, perhaps on less-than-compelling evidence of an intent to voluntarily allow full disclosure of what happened during the mediation. The staff did not find any other New Jersey decisions that include significant discussion of the UMA protections for mediation communications.¹²⁰

We did, however, find a case in which a party sought to overturn a mediated marital settlement agreement on the ground that the mediator was biased and failed to make required conflict-of-interest disclosures before the mediation.¹²¹ The court noted that the UMA disclosure requirement, rather than the provision

114. *Id.* at 262.

115. *Id.* at 263.

116. *Id.* at 245; see also *id.* at 263.

117. 2012 N.J. Super. Unpub. LEXIS 2319 (N.J. Super. Ct. App. Div. 2012).

118. *Id.* at *9.

119. *Id.* at *10.

120. A few cases refer briefly to the UMA protections for mediation communications. See, e.g., *Minkowitz v. Israeli*, 433 N.J. Super. 111, 77 A. 3d 1189 (N.J. Super. Ct. App. Div. 2013) (holding that signed mediated settlement agreement was enforceable); *Hudson City Savings Bank v. Colyer*, 2013 N.J. Super. Unpub. LEXIS 263 (N.J. Super. Ct. Chancery Div. 2013) (noting that parties had mutually agreed to waive UMA protection).

121. See *N.H. v. N.H.*, 418 N.J. Super. 262, 13 A.3d 399 (N.J. Super. Ct. App. Div. 2011).

cited by the party, appeared to apply.¹²² But the court upheld the settlement agreement and firmly rejected the claim of mediator misconduct, without invading the confidentiality of the mediation.¹²³ The case is an example of a situation in which a party suffering from buyer's remorse used a wide range of arguments, including a claim of mediator misconduct, in an unsuccessful attempt to undo a mediated settlement agreement.¹²⁴

Iowa

In 1998, Iowa enacted an act on "Confidentiality in the Mediation Process."¹²⁵ Key provisions in that act were:

- A section defining "mediation," "mediation communication," and "mediation document."
- A section making mediation communications and mediation documents privileged and confidential subject to certain exceptions (including an exception for evidence relevant to a claim against a mediator, but no exception specifically for evidence relevant to a claim against an attorney).
- A section governing mediator testimony.
- A section creating mediator immunity.¹²⁶

The act did not specify who held the mediation privilege, or whether and how the privilege could be waived.

In 2005, Iowa repealed the above provisions and enacted the UMA.¹²⁷ "The Iowa version of the UMA is nearly identical to the NCCUSL version with the exception of an added provision regarding mediator immunity."¹²⁸ The staff did not find any case law construing the protections for mediation communications in Iowa's UMA or Iowa's 1998 act on "Confidentiality in the Mediation Process."¹²⁹

122. See *id.* at 289 n.11.

123. See *id.* at 289-90.

124. See *id.* at 284 (wife's "after-the-fact remorse entitles her to no remedy because it lacks provenance in the law, and more importantly, in equity"); see also *id.* at 278-90 (discussing and rejecting wife's arguments).

125. 1998 Iowa ch. 1062 (77th Gen. Asm., 2d Sess., House File 2478).

126. Former Iowa Code §§ 679C.1 to 679C.4.

127. Iowa Code §§ 679C.101 to 679C.115.

128. Provencher, *supra* note 15; see Iowa Code § 679C.115.

129. The staff did find an unpublished case construing the definition of "mediation party" in the Iowa UMA. See *In re Marriage of Pebbles*, 2004 Iowa App. LEXIS 1304 (Iowa Ct. App. 2004).

Ohio

Like Iowa, Ohio enacted the UMA in 2005.¹³⁰ Before then, Ohio had another statute relating to mediation communications,¹³¹ which said that a mediation communication is confidential and expressly prohibited the disclosure of a mediation communication in a civil or administrative proceeding, subject to certain exceptions.¹³² In particular, a disclosure was permissible if a court, after a hearing, determined that the disclosure would not circumvent Evidence Rule 408 (restricting the admissibility of settlement negotiations), the disclosure was necessary to prevent a manifest injustice in the particular case, and the necessity for disclosure was of sufficient magnitude to outweigh the importance of protecting confidentiality in mediation proceedings.¹³³

Many written decisions involve that statute, including some published decisions.¹³⁴ In many of those pre-UMA decisions, the appellate court excluded or otherwise protected mediation communications,¹³⁵ but there were some exceptions.¹³⁶

130. Ohio Rev. Code Ann. §§ 2710.01 to 2710.10. For details on how the Ohio statute compares to the uniform text, see Provencher, *supra* note 15.

131. Former Ohio Rev. Code Ann. § 2317.023. For information on the effective date of this statute, see Schumacker v. Zoll, 2001 Ohio App. LEXIS 4498 (Ohio Ct. App. 2001).

132. See *Schumacker*, 2001 Ohio App. LEXIS at *4. The former statute defined a “mediation communication” as “a communication made in the course of and relating to the subject matter of a mediation.” See *id.*, quoting former Ohio Rev. Code 2317.023.

133. See *O’Donnell Constr. Co. v. Stewart*, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App. 2006).

134. See, e.g., *State ex rel. Schneider v. Kreiner*, 83 Ohio St. 3d 303, 699 N.E.2d 83, 1998-Ohio-271 (1998); *O’Donnell Constr. Co. v. Stewart*, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App. 2006); *Scibelli v. Pannuzio*, 2006-Ohio-5652, 2006 Ohio App. LEXIS 5650 (Ohio Ct. App. 2006); *Brooks-Lee v. Lee*, 2005-Ohio-2288, 2005 Ohio App. LEXIS 2188 (Ohio Ct. App. 2005); *Reason v. C.A. Wilson Concrete Products, Inc.*, 2004-Ohio-2744, 2004 Ohio App. LEXIS 2437 (Ohio Ct. App. 2004); *Bowden v. Weickert*, 2003-Ohio-3223, 2003 Ohio App. LEXIS 2871 (Ohio Ct. App. 2003); *Duncan v. Vernon Township Trustees*, 2001 Ohio App. LEXIS 90 (Ohio Ct. App. 2001); *Schumacker v. Zoll*, 2001 Ohio App. LEXIS 4498 (Ohio Ct. App. 2001); *Carver v. Township of Deerfield*, 139 Ohio App. 3d 64, 742 N.E.2d 1182 (Ohio Ct. App. 2000).

135. See *Kreiner*, 699 N.E.2d at 85-87 (denying party’s request for disclosure of form prepared by mediator); *O’Donnell*, 2006 Ohio App. LEXIS 1686 (holding that trial court abused its discretion in ordering disclosure of mediation communications); *Reason*, 2004 Ohio App. LEXIS 2437 (upholding trial court’s decision to revoke attorney’s pro hac vice status due to attorney’s deliberate disclosure of mediation communications); *Bowden*, 2003 Ohio App. LEXIS 2871 (reversing arbitration award that was based on mediation communications); *Duncan*, 2001 Ohio App. LEXIS 90, at *2 n.1 (chastising appellants for disclosing mediation communications, which “are confidential and shall not be disclosed, subject to very limited exceptions”); *Schumacker*, 2001 Ohio App. LEXIS 4498 (holding that trial court erred in considering mediation communications); *Carver*, 139 Ohio App. 3d at 72 (concluding that mediation communications are confidential and “a court-ordered mediation conference does not fall within the open meeting requirement of R.C. 121.22”).

136. See *Scibelli*, 2006 Ohio App. LEXIS 5650, at **63 to **75 (court may consider mediation evidence in deciding whether party made good faith effort to settle case and thus is entitled to prejudgment interest); *Brooks-Lee*, 2005 Ohio App. LEXIS 2188, at **19 to **22 (trial court’s

One pre-UMA decision is notable because the court in that case, like the California Supreme Court in *Cassel v. Superior Court*,¹³⁷ made clear that the statute protecting mediation communications encompassed attorney-client discussions made during a mediation.¹³⁸ Another pre-UMA decision is notable because it involves a “common sense argument” that using mediation confidentiality to prevent a party from proving he made a settlement offer (as required to obtain prejudgment interest in Ohio) is “akin to suing for malpractice and then trying to bar the defendant from testifying based on the doctor-patient privilege.”¹³⁹ People have raised similar arguments in California, with regard to using mediation confidentiality to exclude evidence bearing on whether someone committed misconduct during a mediation (*e.g.*, evidence pertaining to whether an insurer unreasonably refused to settle).

Although the general principle of protecting mediation communications was well-established in Ohio before the state enacted the UMA, its pre-UMA statute was not as detailed as the UMA. As the Ohio Supreme Court website explains: “[T]he UMA reflects the growth of and changes within the mediation field over the past two decades and is much more comprehensive than the Ohio statute it replaces.”¹⁴⁰

After Ohio enacted the UMA in 2005, litigation in this area of the law continued. In addition to the two post-UMA cases from Ohio discussed earlier in this memorandum (*Society of Lloyd’s* and *City of Akron*), the staff found five Ohio opinions in which the court determined how the UMA provisions protecting mediation communications applied to a particular fact situation.¹⁴¹ We also found two federal cases applying Ohio’s UMA privilege.¹⁴²

admission of mediation evidence was not “plain error” when defendant failed to timely object in trial court).

137. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

138. See *O’Donnell*, 2006 Ohio App. LEXIS 1686, at **13.

139. *Scibelli*, 2006 Ohio App. LEXIS 5650, at **16.

140. *The Uniform Mediation Act-ORC Sections 2710.1-2710.10*, <http://www.supremecourtsohio.gov/JCS/disputeResolution/resources/uma/> (last visited May 28, 2014).

141. See FCDB LBPL 2008-1 *Trust v. Remely*, 2013-Ohio-4960, 2013 Ohio App. LEXIS 5163 (Ohio Ct. App. 2013); *BAC Home Loans Servicing, L.P. v. Testa*, 2012-Ohio-5230, 2012 Ohio App. LEXIS 4671 (Ohio Ct. App. 2012); *JP Morgan Chase Bank, N.A. v. Hunter*, 2012-Ohio-5222, 2012 Ohio App. LEXIS 4590 (Ohio Ct. App. 2012); *Allied Erecting & Dismantling Co. v. Qwest Communications Int’l, Inc.*, 2010-Ohio-5939, 2010 Ohio App. LEXIS 4995 (Ohio Ct. App. 2010); *Anthony v. Andrews* 2009-Ohio-6378, 2009 Ohio App. LEXIS 5352 (Ohio Ct. App. 2009).

The staff also found two Ohio decisions in which the court determined that the UMA privilege did not apply to certain communications because those communications were not made in a “mediation” as defined in the UMA. See *Kuhn v. 21st Century Ins. Co.*, 2012-Ohio-2598, 2012 Ohio App. LEXIS 2284 (Ohio Ct. App. 2012); *Hopes v. Barry*, 2011-Ohio-6688, 2011 Ohio App. LEXIS 5523 (Ohio Ct. App. 2011). Another Ohio case refers to a mediator’s invocation of the UMA

Of the nine written opinions we found that construe Ohio's version of the UMA, seven were issued by appellate courts. In four of those seven cases, the trial court allowed use of mediation evidence, but the Ohio court of appeal overturned that ruling.¹⁴³ Another case was a 2-1 decision, in which the dissenting justice criticized the majority and the trial court for relying on mediation information without an express waiver of the UMA privilege (as opposed to a waiver implied from participation in a mandatory mediation program).¹⁴⁴

Thus, there have been some disagreements about application of the UMA in Ohio. In general, the end result has supported the protection of mediation communications. In reaching that result, however, mediation communications have repeatedly been disclosed at the trial level.

Although we have not systematically analyzed the matter, this strikes the staff as a recurring pattern, not only in Ohio but elsewhere: Our hunch is that trial courts are more inclined to admit or allow disclosure of mediation communications than appellate courts, perhaps because trial judges are closely focused on achieving justice with regard to the particular parties that look them in the eye, while appellate justices are more readily able to see beyond the immediate dispute and accept the cost of the mediation privilege (i.e., the loss of relevant evidence) as a tradeoff for its perceived societal benefits. We will discuss this hypothesis in more depth when we review the scholarly work on this topic, including in particular some articles by Professor James Coben and others that present data on mediation-related litigation.¹⁴⁵

privilege, but does not appear to have involved a dispute over whether or how to apply the UMA protections for mediation communications. See *Triplex Co. v. R.L. Pomante Contractor, Inc.*, 2008-Ohio-6301, 2008 Ohio App. LEXIS 5267 (Ohio Ct. App. 2008).

142. See *Nachar v. PNC Bank, N.A.*, 901 F. Supp. 2d 1012 (2012); *A&H Mgmt. Services v. Chafflose Corp.*, 2009 U.S. App. LEXIS 2046 (6th Cir. 2009). In another federal case, the court applied Ohio law on some points, but did not appear to do so with regard to mediation confidentiality. See *Tocci v. Antioch Univ.*, 2013 U.S. Dist. LEXIS 121188, at *40, *46 n.7 (S.D. Ohio 2013).

143. See *City of Akron*, 942 N.E.2d at 414-16 (trial court erred in determining that mediation evidence was admissible under Ohio Rev. Code Ann. § 2710.05(B)(2)); *BAC*, 2012 Ohio App. LEXIS 4672 (trial court erred in relying on mediation information reported in violation of Ohio UMA); *JP Morgan*, 2012 Ohio App. LEXIS 4590 (same); *Anthony*, 2009 Ohio App. LEXIS 5352, at **8 (trial court "cannot rule based on mediation communication or an improper mediation report," thus it abused discretion in imposing sanctions).

144. *FCDB*, 2013 Ohio App. LEXIS 5163 (O'Toole, J., dissenting).

145. See, e.g., Noble Foster & Selden Prentice, *The Promise of Confidentiality in Mediation: Practitioners' Perceptions*, 2009 J. Disp. Resol. 163 (2009); James Coben & Peter Thompson, *Mediation Litigation Trends: 1999-2007*, *World Arbitration & Mediation Review*, vol. 1, no. 3, pp. 395-414 (2007); Andrew Weisberg, *The Secret to Success: An Examination of New York State Mediation-Related Litigation*, 34 *Fordham Urban L.J.* 1549 (2007); James Coben & Peter Thompson,

Vermont

Vermont is another state that enacted the UMA in 2005.¹⁴⁶ From the standpoint of this study, two pre-UMA Vermont cases are of particular interest.

In the first case, *Lawson v. Brown's Day Care Center, Inc.*,¹⁴⁷ the Vermont Supreme Court considered whether to uphold a trial court decision imposing sanctions on an attorney for filing an unsealed document with the court, in which the attorney disclosed mediation communications and alleged that opposing counsel had violated certain disciplinary rules during the mediation. The Supreme Court reversed, explaining that "it was error for the court to have imposed sanctions without finding any improper motives or bad faith"¹⁴⁸ The Court remanded for a determination of whether the attorney had acted in bad faith.

On remand, the trial court determined that the attorney acted in bad faith. It explained that if the attorney felt obligated to report disciplinary violations, he should have done so in other fora, not by making an *ex parte* communication with the court.¹⁴⁹ It further explained that "[t]he specific conduct for which Attorney Kilmartin was sanctioned was repeatedly *filing with the court* documents containing information protected by the confidentiality of the mediation process."¹⁵⁰ On appeal, the Supreme Court upheld the determination of bad faith and the award of sanctions.¹⁵¹

What is interesting about this case is that the Vermont Supreme Court seemed to indicate that mediation communications are *not* insulated from disclosure when a party in good faith seeks to address criminal or ethical misconduct. In its first opinion, it explained:

[O]ur evidence rules make information disclosed in mediation inadmissible, but not privileged. The parties could not create an evidentiary privilege by agreement. *Even if they could, it would be a large stretch to interpret an informal oral agreement as creating an evidentiary privilege that insulates a party to a mediation from the*

Disputing Irony: A Systematic Look at Litigation About Mediation, 11 Harv. Negotiation L. Rev. 43 (2006); Paula Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 Ohio St. J. on Disp. Resol. 721 (2006).

146. See Vt. Stat. Ann. tit. 12, §§ 5711-5723.

147. 172 Vt. 574, 776 A.2d 390 (Vt. Sup. Ct. 2001).

148. *Id.* at 578.

149. *Lawson v. Brown's Home Day Care Center*, 2003 Vt. Super. LEXIS 15, at *20-*27 (Vt. Super. Ct. 2003), *aff'd*, 177 Vt. 528, 861 A.2d 1048 (Vt. Sup. Ct. 2004).

150. See *id.* at *34 (emphasis added).

151. *Lawson v. Brown's Home Day Care Center*, 177 Vt. 528, 861 A.2d 1048 (Vt. Sup. Ct. 2004).

consequences of criminal or ethical misconduct. The duty of disclosure is even broader under the Rules of Professional Conduct. Rule 8.3(c) requires disclosure unless the information is covered by the lawyer confidentiality rule, Rule 1.6. There is no exception for mediation proceedings, even where mediation is covered by an evidentiary privilege.¹⁵²

The Court went on to criticize the trial court's original decision, in which the trial court imposed sanctions without requiring a showing of bad faith:

The unstated assumption behind the decision of the court is that an attorney in Kilmartin's position could never disclose anything that occurred in the mediation for any reason. *The court's order is broad enough to make a person who commits professional misconduct, even criminal misconduct, during a mediation immune from disciplinary sanction or prosecution because no one can lawfully disclose the misconduct.*¹⁵³

The Court thus intimated that in some circumstances, the policy interest in punishing professional misconduct would trump the interest in mediation confidentiality.

In a later case, *Brady v. CU York Ins. Co.*,¹⁵⁴ a Vermont trial court followed this aspect of *Lawson*. The *Brady* plaintiffs refused to comply with a mediated agreement. They raised numerous arguments, including a claim that the mediated agreement was unenforceable because of threats that opposing counsel made during the mediation.

The trial court noted that by disclosing the alleged threats, the plaintiffs had violated the terms of the mediation agreement, which said that the mediation would be "entirely confidential."¹⁵⁵ Citing *Lawson*, the court nonetheless decided to consider the evidence.¹⁵⁶ It ultimately concluded that there was no misconduct and none of the plaintiffs' arguments had merit.¹⁵⁷ The case is thus an example of one in which a party's expectation of mediation confidentiality was defeated due to an opponent's allegations of professional misconduct, which proved groundless and were apparently prompted by buyer's remorse.

152. 172 Vt. at 575 n.2 (emphasis added; citation omitted).

153. *Id.* at 576 (emphasis added).

154. 2005 Vt. Super. LEXIS 53 (Vt. Super. Ct. 2005).

155. *Id.* at *5.

156. *Id.* at *5-*6.

157. *Id.* at *6, *16.

Vermont's version of the UMA closely tracks the NCCUSL text.¹⁵⁸ The staff found four opinions referring to Vermont's UMA protections for mediation communications.

One of those cases involved allegations that the mediator was biased and improperly communicated with the small claims judge. The superior court rejected those allegations, without requiring disclosure of any mediation communications.¹⁵⁹ The other post-UMA Vermont cases are not especially pertinent to this study.¹⁶⁰

Washington

Washington also enacted the UMA in 2005.¹⁶¹ Here again, "the UMA's predecessor statute ... was less protective of mediation communications than the UMA."¹⁶² In at least three published cases issued shortly before the UMA enactment, courts upheld the admission of mediation communications.¹⁶³ One of those cases made clear that counsel for a mediation party could not assert the pre-UMA statutory privilege.¹⁶⁴

The Washington UMA deviates from the NCCUSL text in a number of respects, none of which appears important for purposes of this study.¹⁶⁵ As discussed earlier in this memorandum, the staff found three federal cases interpreting Washington's UMA privilege (*Enumclaw* and the two cases declining to follow *Enumclaw*). In addition, we found two Washington cases construing the UMA privilege, neither of which seems particularly relevant to this study.¹⁶⁶

158. See Provencher, *supra* note 15.

159. Schmitt v. Force, 2011 Vt. Super. LEXIS 32, at *11-*12 (Vt. Super. Ct. 2011).

160. See Chester v. Weingarten, 2013 Vt. Unpub. LEXIS 211 (Vt. Sup. Ct. 2013) (declining to decide whether UMA privilege applied to certain emails); Aurora Loan Services, LLC v. Kirkpatrick, 2013 Vt. Super. LEXIS 17, at *12 n.10 (Vt. Super. Ct. 2013) (explaining that to extent email exchanges are mediation communications and subject to the UMA privilege, "it appears that all parties waive the privilege by asking the court to consider the content of the communication"); *In re Estate of Simonds*, 2013 Vt. Super. LEXIS 1, at *2 (Vt. Super. Ct. 2013) (concluding that "parties were not justified in believing that the Act would confer an evidentiary privilege upon the *results* of the mediation") (emphasis in original).

161. See Wash. Rev. Code §§ 7.07.010 to 7.07.904.

162. Foster & Prentice, *supra* note 145, at 166.

163. *Id.* at 165; see Hogle v. Meeks, 170 P.3d 37, 49 (Wash. Ct. App. 2007); Sharbono v. Universal Underwriters Ins. Co., 161 P.3d 406, 424-25 (Wash. Ct. App. 2007); Ladiser v. Huff, 2004 Wash. App. LEXIS 956 (Wash. Ct. App. 2004).

164. See Hogle, 170 P.3d at 49.

165. For details, see Provencher, *supra* note 15.

166. See *In re Marriage of Mayo*, 2012 Wash. App. LEXIS 1008, at *4-*6 (Wash. Ct. App. 2012) (sustaining objection based on WUMA privilege); Pryde v. Bjorn, 2007 Wash. App. LEXIS 3039, at *21 (Wash. Ct. App. 2007) (holding that mediator properly testified as to whether mediation occurred or terminated and whether settlement was reached).

District of Columbia

The UMA was enacted in the District of Columbia in 2006.¹⁶⁷ Its version of the UMA is inapplicable to some types of consumer complaint mediations.¹⁶⁸

Five years after the UMA was enacted there, John Bickerman, a local attorney and mediator, said he had not seen much impact of the act on mediation practice. According to him, the most significant issue is confidentiality, but the UMA did not have as big an effect as people expected.¹⁶⁹

The staff did not find any case law interpreting District of Columbia's UMA. We did find one pre-UMA case in which an appellate court vacated a sanction a judge imposed on a party for failure to participate in a mandatory mediation in good faith. In explaining that there was inadequate proof of bad faith, the appellate court noted that the mediation session was not recorded and was governed by a document stating that "[m]ediation ... sessions are confidential" and "[a]ll proceedings at the mediation ... are privileged."¹⁷⁰ From that comment, we infer that there probably was no statutory protection for the mediation communications in question.

We also found an interesting pre-UMA District of Columbia case (*In re Waller*)¹⁷¹ in which an attorney-mediator disclosed to the Board of Professional Responsibility that a lawyer who had appeared before him in a mediation had a possible conflict of interest. The mediator learned of the possible conflict during the mediation, which was governed by a mediation order that included a confidentiality requirement.¹⁷² A disciplinary proceeding was filed against the lawyer, the lawyer was sanctioned for misrepresentations in that proceeding, and the District of Columbia Court of Appeals later adopted the opinion rendered by the Board of Professional Responsibility.

In that opinion, the Board concluded that the confidentiality requirement in the mediation order was not "intended to preclude disclosures such as that made by the mediator to the Judge in this case."¹⁷³ But the Board did not explain how it

167. D.C. Code §§ 16-4201 to 16-4213.

168. Gary Provencher, *The Uniform Mediation Act: An Analysis of Current State Acts*, Mayhew-Hite Report on Dispute Resolution & the Courts, vol. 5, issue 1 (2006-07), available at <http://moritzlaw.osu.edu/epub/mayhew-hite/vol5iss1/student.html>.

169. Justin Kelly, *The Uniform Mediation Act Turns 10 This Year*, JAMS Dispute Resolution Alert (Summer 2011), available at <http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2011-06.pdf#Depth>.

170. *In re Bolden*, 719 A.2d 1253, 1253 & n.1 (D.C. Ct. App. 1998).

171. 573 A.2d 780 (D.C. Ct. App. 1990).

172. *Id.* at 785 n. 5.

173. *Id.*

reached that conclusion or give guidance on how to apply a similar confidentiality requirement in the future.

A commentator criticized the Board's failure to give guidance on how to balance confidentiality considerations against the interest in punishing attorney misconduct:

Understandably, in a blatant misconduct case such as this, the judges wished to sanction Waller and were not going to let a confidentiality provision stop them. However, it leaves troubling questions for the attorney-mediator. The court did not directly address the question of confidentiality or the protections to be given to an attorney advocate, nor the parameters surrounding reporting misconduct. In the end, the attorney-mediator made a judgment call and the court supported him. This may not happen in all cases, and this remains a troubling question for many attorney-mediators.¹⁷⁴

The UMA drafters also took notice of the *Waller* decision. In the Comment to UMA Section 6(a)(6), which creates a professional misconduct exception to the UMA privilege, they pointed to *Waller* as a situation in which “the issue arises whether anyone may provide evidence of professional misconduct or malpractice occurring during the mediation.” The drafters cautioned that an exception to the UMA privilege is necessary in such a situation, because otherwise “lawyers and fiduciaries could act unethically or in violation of standards without concern that evidence of the misconduct would later be admissible in a proceeding brought for recourse.” They further explained:

Reporting requirements operate independently of the privilege and this exception. *Mediators and other are not precluded by the Act from reporting misconduct to an agency or tribunal other than one that might make a ruling on the dispute being mediated, which is precluded by Section 8(a) and (b).*¹⁷⁵

Utah

Utah was the next state to enact the UMA, in 2006.¹⁷⁶ According to a commentator writing in 2007, “[p]rior to May 1, 2006, attorneys relied on the evidentiary rule that evidence of conduct or statements in compromise

174. David Hofstein, *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?*, 141 Am. Acad. Matrimonial Law 267, 317 (1997) (footnote omitted).

175. UMA § 6(a)(6) Comment (emphasis added).

176. The Utah UMA is currently codified at Utah Code Ann. §§ 78B-10-101 to 78B-10-114. It was originally numbered as Utah Code Ann. §§ 78-31c-101 to 78-31c-114.

negotiations is not admissible.”¹⁷⁷ However, certain other protections also appear to have existed. For instance, a 1999 Utah case refers to a court order restricting disclosure of mediation communications and emphasizes the importance of such protection.¹⁷⁸ The same case says that “a statutory bar against such disclosure by the appellate mediator ... becomes effective July 1, 1999.”¹⁷⁹

In a post-UMA case applying pre-UMA law, the Utah Supreme Court found strong protection for mediation communications in Utah’s Alternative Dispute Resolution Act and Utah’s Rules of Court-Annexed Alternative Dispute Resolution.¹⁸⁰ In a carefully researched opinion, the Court stressed that “candid exchange of information and ideas can be achieved only when the parties are assured that their communications will be protected from postmediation disclosure.”¹⁸¹ The Court also “recognize[d] existing statutory exceptions to th[e] general rule of mediation confidentiality,” and further “recognize[d] that in certain circumstances, for example, if duress, fraud, or another credible contract defense is alleged, the interests of justice may outweigh the parties’ need for confidentiality in determining whether a settlement agreement was reached.”¹⁸² The Court determined that none of those exceptions applied in the case before it, and an agreement reached in mediation must be in writing and signed by all of the parties to be enforceable.¹⁸³

In fairness to the commentator previously quoted, she did refer to Utah’s Alternative Disputes Resolution Act and Utah’s Rules of Court-Annexed Alternative Dispute Resolution as sources of protection for mediation communications, as well as the Utah Rules of Judicial Administration and the just-enacted UMA.¹⁸⁴ Those sources of protection continue to exist today.¹⁸⁵ It is not entirely clear to the staff how the various provisions interrelate.

177. Karin Hobbs, *Mediation Confidentiality and Enforceable Settlements: Deal or No Deal?*, 20 Utah Bar J. 37, 40 (2007); see Utah R. Evid. 408, which Ms. Hobbs says (p. 40, n. 20) is “identical to Federal Rule of Evidence 408.”

178. *Lyons v. Booker*, 982 P.2d 1142, 1144 (Utah Ct. App. 1999).

179. *Id.*

180. *Reese v. Tingey Construction*, 177 P.3d 605 (Utah Sup. Ct. 2008).

181. *Id.* at 608; see also *id.* at 611 (“We are concerned, in the context of the statutory mandate of confidentiality, by the ease with which the parties and the trial court discussed mediation communications.”).

182. *Id.*

183. *Id.* at 608, 611.

184. Hobbs, *supra* note 177, at 38.

185. See Utah Code Ann. § 78B-6-208 (confidentiality provision of Alternative Dispute Resolution Act); Utah R. Ct. ADR 103 (confidentiality in nonbinding court-annexed ADR proceedings); Utah R. Ct. ADR 104, Canon IV (“ADR Providers Should Be Faithful to the Relationship of Trust and Confidentiality Inherent in that Appointment”); Utah Judicial Admin. R. 4-510.05(7) (no ADR provider may be required to testify).

In a recent case, *Moss v. Parr Wadoups Brown Gee & Loveless*, the Utah Court of Appeals determined that an oral agreement allegedly reached in a mediation could not be enforced due to a confidentiality agreement.¹⁸⁶ A later case, in which a federal court applied Utah law, distinguished *Moss*.¹⁸⁷ The court concluded that a term sheet memorializing a mediated agreement was admissible and enforceable under the Utah UMA, because it was evidenced by a record signed by all parties to the agreement.¹⁸⁸ Aside from this decision, the staff did not find any cases interpreting the Utah UMA's protections for mediation communications.

South Dakota

South Dakota's UMA became effective on January 1, 2008.¹⁸⁹ At that time, it already had an evidence provision relating to mediation communications, which said:

All verbal or written information relating to the subject matter of a mediation which is transmitted between any party to a dispute and a mediator or any agent, employee, or representative of a party or a mediator is confidential. Any mediation proceeding shall be regarded as settlement negotiations, and no admission, representation, or statement made in meditation not otherwise discoverable is admissible as evidence or subject to discovery. A mediator is not subject to process requiring the disclosure of any material matter discussed during the mediation proceeding unless all the parties consent to a waiver. A meeting held to further the resolution of a dispute may be closed to the public at the discretion of the mediator. *This section does not apply if a party brings an action against the mediator or if the communication was made in furtherance of a crime or fraud.* This section does not apply to mediations conducted pursuant to chapter 25-4 [relating to support and visitation].¹⁹⁰

The quoted provision remains in the code in the same form shown above. It appears to provide considerable protection to mediation communications. As the italicized language indicates, however, that protection does not extend to an action against a mediator or a communication made in furtherance of a crime or fraud. There is no express exception specifically focusing on attorney misconduct.

186. 197 P.3d 659 (Utah Ct. App. 2008).

187. *Miller v. Patterson*, 2013 U.S. Dist. LEXIS 40553 (D. Utah 2013).

188. *Id.* at *6-*13 (relying on Utah Code Ann. § 78B-10-106).

189. S.D. Codified Laws §§ 19-13A-1 to 19-13A-15.

190. S.D. Codified Laws § 19-13-32 (emphasis added).

The staff did not find any cases explaining how the quoted provision interrelates with South Dakota’s version of the UMA. Nor did we find any pertinent pre-UMA South Dakota cases, or any cases construing any aspect of South Dakota’s UMA protections for mediation communications.

Idaho

Idaho enacted the UMA in 2008.¹⁹¹ The state also has an evidentiary rule that closely, but not exactly, parallels its UMA.¹⁹²

The staff did not find any pertinent pre-UMA Idaho cases, nor did we find any cases referring to Idaho’s UMA protections for mediation communications. However, we did find a case in which the Idaho Supreme Court relied on the parallel evidentiary rule in concluding that “the district court correctly refused to consider mediation communications in making its prevailing party determination.”¹⁹³ In that case, the Court pointed out that “Idaho Rule of Evidence 507(3) creates an express privilege for mediation communications.”¹⁹⁴ The Court then explained that “[a]s mediation has become increasingly popular as an alternative dispute resolution process, courts and legislatures have recognized the need to ensure the confidentiality of the mediation process.”¹⁹⁵ The Court quoted from commentary on the subject, and concluded: “Simply put, mediation will not be successful if participants fear that their own statements will subsequently be used against them in litigation.”¹⁹⁶

Hawaii

Hawaii just enacted the UMA in 2013 and clarified one provision earlier this year.¹⁹⁷ Testimony in support of the bill makes clear that the UMA was widely expected to increase the level of protection for mediation communications, and thus promote effective mediation.¹⁹⁸

191. See Idaho Code Ann. §§ 9-801 to 9-814.

192. See Idaho R. Evid. 507. Unlike the statute, this rule says that the privilege exception relating to rescinding, reforming, or avoiding liability on a mediated settlement “does not apply to any statement made in the course of a criminal mediation under Rule 18.1 of the Idaho Rules of Criminal Procedure or Rule 12.1 of the Idaho Juvenile Rules.”

193. *Jorgenson v. Coppedge*, 148 Idaho 536, 542, 224 P.3d 1125 (2010).

194. *Id.*

195. *Id.*

196. *Id.*

197. See Haw. Rev. Stat. § 658H-1 to to 658H-13.

198. See Testimony to the House Committee on Judiciary re HB 418 (Feb. 28, 2013), http://www.courts.state.hi.us/docs/news_and_reports_docs/legislative_update/SB966JUD.pdf.

For example, the Hawaii Association of Realtors commented that “H.B. 418 strengthens the confidentiality protections of the parties and the mediators who participate in mediation,” and thus “may help to encourage more people to utilize mediation as a valuable tool in resolving disputes amicably and cost effectively.”¹⁹⁹ Similarly, one Hawaii mediator said:

Because of gaps in coverage of existing Court rules/guidelines and in the absence of any statutes regulating mediation, the participants in mediations (parties, legal counsel, mediators and non-party participants) cannot count on confidentiality of their communications during mediation. Without confidentiality, mediations are doomed to fail or worse, likely to create more problems, because there will not be the essential trust for open dialogue to resolve any dispute. Recent experiences of mediators being compelled to testify and produce their mediation notes highlight the need for this legislation.²⁰⁰

The mediator went on to provide a detailed description of Hawaii law as it existed before the UMA.²⁰¹ Other testimony was similar but less detailed,²⁰² although at least one Hawaii mediator (James Hoenig) argued that the UMA would not provide enough protection for mediation communications.

The staff is not aware of any case law interpreting Hawaii’s version of the UMA. That is not surprising, given the newness of the legislation.

SUMMARY REGARDING IMPLEMENTATION OF THE UMA

The UMA has been enacted in the District of Columbia and eleven states, representing approximately 16.9% of the country’s total population. Before enacting the UMA, those jurisdictions appear to have had less protection for mediation communications, or less well-developed law on that subject, than the UMA provides.

Nebraska has been using the UMA for just over a decade; the other UMA states have had it in place for a shorter time. As yet, there are not many court opinions (particularly published opinions) interpreting or applying the UMA.

There are some differences between the various versions of the UMA, but much similarity. It is too early to tell how much variation there will be in

199. *Id.*

200. *Id.* (comments of Charles Hurd).

201. *Id.*

202. *Id.* (comments of West Hawaii Mediation Center, Mediation Center of the Pacific, Hawaii’s Uniform Law Commissioners, Honolulu Board of Realtors, and Mediation Services of Maui).

interpreting the UMA protections from state to state. Some such variation already appears to exist, as well as disagreements between courts in the same state (particularly disagreements between trial courts and appellate courts).

The UMA privilege for mediation communications is subject to an exception relating to professional misconduct (UMA § 6(a)(6), (c)). Every UMA jurisdiction has enacted that exception without deviating from the uniform text. So far, there does not appear to be any case law interpreting the exception.

The UMA privilege is also subject to an exception relating to mediator misconduct (UMA § 6(a)(5)). Every UMA jurisdiction but one has enacted that exception without deviating from the uniform text; the revisions made by the remaining jurisdiction do not appear significant. There does not yet appear to be any case law interpreting this exception.

Another UMA exception of interest in this study relates to the validity and enforceability of a mediated settlement agreement (UMA § 6(b)(2), (c)). Ohio, Washington, and Idaho deviated from the way NCCUSL worded that exception. There are a couple of written opinions that discuss the exception to some extent; as yet, there does not appear to be any opinion from a UMA jurisdiction in which an appellate court relied on this exception in admitting or disclosing mediation communications.

Although there do not appear to be any written opinions interpreting the UMA exceptions for professional misconduct and mediator misconduct, there are some materials from UMA jurisdictions that discuss the intersection between the policy interest in protecting mediation communications and the policy interest in holding attorneys, mediators, or other persons accountable for misconduct. In particular, an opinion of the Illinois State Bar Association, a pre-UMA opinion of the Vermont Supreme Court (*Lawson*), and a pre-UMA opinion from the District of Columbia (*Waller*) emphasize the importance of accountability.

Other materials stress the importance of protecting mediation communications. Among these are an Indiana Supreme Court opinion declining to follow the UMA approach that preserves traditional contract defenses to a mediated settlement agreement (*Horner*), a New Jersey Supreme Court decision excluding mediation communications in a criminal case (*Williams*), and a New Jersey case rejecting a party's claim of mediator misconduct without requiring disclosure of mediation communications (*N.H.*).

Several cases highlight particular aspects of the UMA, such as the fact that the UMA privilege can be waived, perhaps unwittingly (e.g., through failure to timely assert it (*Willingboro*), or by consenting to permit a mediator to notify the court that the case was settled (*Rutigliano*)). The New Jersey Supreme Court's decision in *Williams* prompts a different consideration: the need for guidance on the practicalities of the *in camera* procedure required by certain exceptions to the UMA privilege.

The staff will provide further analysis of the UMA (particularly its approach to attorney misconduct) later in this study, after we receive further input on it from the ULC, or when we begin to compare different approaches for possible use in California. For the Commission's August meeting, we plan to discuss approaches used in other United States jurisdictions. We do not intend to exhaustively examine the law of each state, but rather to focus on cases, statutes, and other materials that appear particularly relevant to this study. **As always, we welcome suggestions and other input from the Commission and persons interested in this study.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

UNIFORM MEDIATION ACT

SECTION 1. TITLE. This [Act] may be cited as the Uniform Mediation Act.

SECTION 2. DEFINITIONS. In this [Act]:

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

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

(3) “Mediator” means an individual who conducts a mediation.

(4) “Nonparty participant” means a person, other than a party or mediator, that participates in a mediation.

(5) “Mediation party” means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

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

(7) “Proceeding” means:

(A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (B) a legislative hearing or similar process.

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

(9) “Sign” means: (A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or (B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

SECTION 3. SCOPE.

(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.

(b) The [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

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

(B) a correctional institution for youths if all the parties are residents of that institution.

(c) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections 4 through 6 do not apply to the mediation or part agreed upon. However, Sections 4 through 6 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

Legislative Note: To the extent that the Act applies to mediations conducted under the authority of a State's courts, State judiciaries should consider enacting conforming court rules.

SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.

(a) 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 in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

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

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

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

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

Legislative Note: The Act does not supersede existing state statutes that make mediators incompetent to testify, or that provide for costs and attorney fees to mediators who are wrongfully subpoenaed. See, e.g., Cal. Evid. Code Section 703.5 (West 1994).

SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

[Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

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

Legislative Note: If the enacting state does not have an open records act, the following language in paragraph (2) of subsection (a) needs to be deleted: "available to the public under [insert statutory reference to open records act] or".

SECTION 7. PROHIBITED MEDIATOR REPORTS.

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

(b) A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under Section 6; or

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

(c) A communication made in violation of subsection (a) may not be considered by a court, administrative agency, or arbitrator.

SECTION 8. CONFIDENTIALITY. Unless 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.

SECTION 9. MEDIATOR’S DISCLOSURE OF CONFLICTS OF INTEREST; BACKGROUND.

(a) 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 mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator’s qualifications to mediate a dispute.

(d) A person that violates subsection [(a) or (b)][(a), (b), or (g)] is precluded by the violation from asserting a privilege under Section 4.

(e) Subsections (a), (b), [and] (c), [and] [(g)] do not apply to an individual acting as a judge.

(f) This [Act] does not require that a mediator have a special qualification by background or profession.

[(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.]

SECTION 10. PARTICIPATION IN MEDIATION. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

SECTION 11. INTERNATIONAL COMMERCIAL MEDIATION.

(a) In this section, “Model Law” means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on 28 June 2002 and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002, and “international commercial mediation” means an international commercial conciliation as defined in Article 1 of the Model Law.

(b) Except as otherwise provided in subsections (c) and (d), if a mediation is an international commercial mediation, the mediation is governed by the Model Law.

(c) Unless the parties agree in accordance with Section 3(c) of this [Act] that all or part of an international commercial mediation is not privileged, Sections 4, 5, and 6 and any applicable definitions in Section 2 of this [Act] also apply to the mediation and nothing in Article 10 of the Model Law derogates from Sections 4, 5, and 6.

(d) If the parties to an international commercial mediation agree under Article 1, subsection (7), of the Model Law that the Model Law does not apply, this [Act] applies.

Legislative Note. The UNCITRAL Model Law on International Commercial Conciliation may be found at www.uncitral.org/en-index.htm. Important comments on interpretation are included in the Draft Guide to Enactment and Use of UNCITRAL Model Law on International Commercial Conciliation. The States should note the Draft Guide in a Legislative Note to the Act. This is especially important with respect to interpretation of Article 9 of the Model Law.

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [Act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but this [Act] does not modify, limit, or supersede Section 101(c) of that Act or authorize electronic delivery of any of the notices described in Section 103(b) of that Act.

SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration should be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 14. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 15. EFFECTIVE DATE. This [Act] takes effect

SECTION 16. REPEALS. The following acts and parts of acts are hereby repealed:

- (1)
- (2)
- (3)

SECTION 17. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.

(a) This [Act] governs a mediation pursuant to a referral or an agreement to mediate made on or after [the effective date of this [Act]].

(b) On or after [a delayed date], this [Act] governs an agreement to mediate whenever made.

UMA STATES

STATE	2013 POPULATION (US CENSUS BUREAU)	UMA CITE	ENACTMENT DATE	MODIFICATION OF KEY EXCEPTIONS: UMA § 6(a)(6) (professional misconduct), (a)(5) (mediator misconduct), (b)(2) (claim to rescind, reform, or avoid liability on mediation contract)
District of Columbia	646,449	D.C. Code §§ 16-4201 to 16-4213	Enacted in 2006	The District of Columbia enacted these UMA exceptions without modification. See D.C. Code § 16-4205(a)(5), (6), (b).
Hawaii	1,404,054	Haw. Rev. Stat. §§ 658H-1 to 658H-13	Enacted in 2013	Hawaii enacted these UMA exceptions without modification. See Haw. Rev. Stat. § 658H-6(a)(5), (6), (b)(2).
Idaho	1,612,136	Idaho Code Ann. §§ 9-801 to 9-814; Idaho R. Evid. 507	Statute enacted in 2008; rule adopted in 2008 and amended in 2012	Idaho enacted these UMA exceptions without modification. See Idaho Code Ann. § 9-806(a)(5), (6), (b)(2); see also Idaho R. Evid. 507(5)(a)(5), (6). However, the exception in Idaho R. Evid. 507(5)(b)(2) (claim to rescind, reform, or avoid liability on mediation contract) “does not apply to any statement made in the course of a criminal mediation under Rule 18.1 of the Idaho Rules of Criminal Procedure or Rule 12.1 of the Idaho Juvenile Rules.”
Illinois	12,882,135	710 Ill. Comp. Stat. 35/1 to 35/99	Enacted in 2003	Illinois enacted these UMA exceptions without modification. See 710 Ill. Comp. Stat. 35/6(a)(5), (6), (b)(2).
Iowa	3,090,416	Iowa Code §§ 679C.101 to 679C.115	Enacted in 2005	Iowa enacted these UMA exceptions without modification. See Iowa Code § 679C.106(1)(e), (f), 2(b).
Nebraska	1,868,516	Neb. Rev. Stat. §§ 25-2930 to 25-2942	Enacted in 2003	Nebraska enacted these UMA exceptions without modification. See Neb. Rev. Stat. § 25-2935(a)(5), (6), (b)(2).
New Jersey	8,899,339	N.J. Rev. Stat. §§ 2A:23C-1 to 2A:23C-13; see also N.J. R. Ct. 1:40-4	Enacted in 2004	New Jersey enacted UMA § 6(a)(6) (professional misconduct) & (b)(2) (claim to rescind, reform, or avoid liability on mediation contract) without modification. See N.J. Rev. Stat. § 2A:23C-6(a)(6), (b)(2). It deleted the reference to “professional misconduct or malpractice” in UMA § 6(a)(5) (mediator misconduct). See N.J. Rev. Stat. § 2A:23C-6(a)(5) (referring just to “a claim or complaint filed against a mediator arising out of a mediation”).

UMA STATES

STATE	2013 POPULATION (US CENSUS BUREAU)	UMA CITE	ENACTMENT DATE	MODIFICATION OF KEY EXCEPTIONS:
Ohio	11,570,808	Ohio Rev. Code Ann. §§ 2710.01 to 2710.10	Enacted in 2005	UMA § 6(a)(6) (professional misconduct), (a)(5) (mediator misconduct), (b)(2) (claim to rescind, reform, or avoid liability on mediation contract) Ohio enacted UMA § 6(a)(5) & (6) without modification. See Ohio Rev. Code Ann. § 2710.01(A)(5), (6). Ohio revised UMA § 6(b)(2) (claim to rescind, reform, or avoid liability on mediation contract). The proponent must show that “the disclosure is necessary in the particular case to prevent a manifest injustice,” not “there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.” Ohio Rev. Code Ann. § 2710.01(B)(2).
South Dakota	844,877	S.D. Codified Laws §§ 19-13A-1 to 19-13A-15	Enacted in 2007	South Dakota enacted these UMA exceptions without modification. See S.D. Codified Laws § 19-13A-6(a)(5), (6), (b)(2).
Utah	2,900,872	Utah Code Ann. §§ 78B-10-101 to 78B-10-114	Enacted in 2006 as §§ 78-31c-101 to 78-31c-114; renumbered in 2008	Utah enacted these UMA exceptions without modification. See Utah Code Ann. § 78B-10-106(a)(e), (f), (2).
Vermont	626,630	Vt. Stat. Ann. tit. 12, §§ 5711 to 5723	Enacted in 2005	Vermont enacted these UMA exceptions without modification. See Vt. Stat. Ann. tit. 12, § 5717(a)(6), (7), (b)(4).
Washington	6,971,406	Wash. Rev. Code §§ 7.07.010 to 7.07.904	Enacted in 2005	Washington enacted UMA § 6(a)(5) (mediator misconduct) and (a)(6) (professional misconduct) without modification. See Wash. Rev. Code § 7.07.050(1)(e), (f). Washington revised UMA § 6(b)(2) (claim to rescind, reform, or avoid liability on mediation contract). In Washington, the <i>in camera</i> hearing must be conducted by a court, not by a “court, administrative agency, or arbitrator.” See Wash. Rev. Code § 7.07.050(2).