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THE UNIFORM MEDIATION ACT: TO THE SPOILED GO THE PRIVILEGES

SCOTT H. HUGHES

Negotiation, we may say, ought strictly to be viewed simply as a means to an end; it is the road the parties must travel to arrive at their goal of a mutually satisfactory settlement. But like other means, negotiation is easily converted into an end in itself; it readily becomes a game played... with so little reserve by those taken up with it that they will sacrifice their own ultimate interests in order to win it.1

First, consider the case of the Deceiving Defendant:

At the scene of a deadly automobile accident in which the father of two is killed, the State Police begin to unravel the facts. The driver of the other car may have been speeding at the time of the accident, but tire marks are inconclusive. No tickets are issued. Two months later, the grieving widow seeks the counsel of a young attorney in their small town who eagerly agrees to take the case. In accordance with the local Alternative Dispute Resolution (ADR) rule of the District Court, which requires all parties to utilize some form of ADR prior to filing a lawsuit, counsel contacts the insurance carrier for the defendant about scheduling a mediation.

In a cost cutting measure, the insurance company delays turning the matter over to trial counsel until after a lawsuit has been filed. Instead,

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1. Assistant Professor of Law, University of New Mexico School of Law. B. Architecture, Arizona State University; J.D., Creighton University School of Law; LL.M., Temple University School of Law. Professor Hughes is a member of the Executive Council of the Dispute Resolution Section of the American Bar Association and an Official Observer on behalf of the Society of Professionals in Dispute Resolution (now merged into the Association for Conflict Resolution) to the drafting of the Uniform Mediation Act. My thanks to Samantha Adams, Stephanie Fuchs, and Lisa Dials, my terrific research assistants. Also, thank you to Bobbi McAdoo, Sharon Press, Richard Reuben, Andrea Schneider, and Nancy Welsh for their helpful comments. I wish to acknowledge the University of New Mexico School of Law for providing financial support for this project. Finally, I want to thank my spouse, Peggy, and my two daughters for their limitless patience while I finished this project.

the manager of the claims department assigns the matter to a young adjuster who is under pressure to keep loss-payables at a minimum. Together, the adjuster and the attorney choose a mediator from a list of certified mediators maintained by the court administrator and set a date for the mediation.

After completing her opening statement at the start of the mediation, plaintiff's counsel begins to lay out the case. As to liability, counsel states that he obtained the opinion of an accident reconstruction expert, who will state at trial that the defendant was going forty-five miles per hour (mph) in a thirty-five mph zone just prior to the accident. At the end of his presentation, he makes an opening demand of $500,000. The adjuster responds that liability is by no means clear and that the decedent's employment record does not warrant those excessive damages. Considering the questionable liability and the amount of damages, he responds with an offer of $35,000.

The mediator then begins to explore the strengths and weaknesses of each side's case, but the parties make little progress. After several hours of mediation, the plaintiff has come down to $350,000 and the defendant up to $75,000. Finally, the mediator meets in caucus with the adjuster and asks him to call the company for more authority. After doing so, the adjuster comes back to general session and says that he has convinced his supervisors to settle for $100,000, which represents the limits of liability under the contract of insurance, plus an additional payment from the defendant personally of $2,500 in return for a full release. Although disappointed with the lack of adequate coverage, the widow's counsel reluctantly recommends that she accept the offer. Nearly destitute and with little prospect of recovering more, the widow agrees and a settlement agreement is drafted.

Unfortunately, the adjuster lied. About six months after the settlement, the widow hears a rumor from a friend of a friend that the adjuster has defrauded her and that policy limits were $250,000, not $100,000. Somewhat disgruntled by the idea that her attorney did not know the exact policy limits, she seeks the advice of a top plaintiff's attorney in the distant state capital. New counsel prepares to file suit against the insurance company for fraud, but first telephones the insurance company and sets up the obligatory mediation. Understandably, the session quickly breaks down after just a few minutes of acrimonious exchange.

In analyzing the strengths and weaknesses of the case, plaintiff's counsel recognizes that the plaintiff's testimony will be seen as self-serving, thereby reducing the case to a contest of credibility between the
two disputants. This would be a coin toss. On the other hand, the testimony of the mediator will be highly significant to carrying the day for the plaintiff. When the plaintiff's attorney files the lawsuit on the heels of the failed mediation, she provides the required list of prospective witnesses and also issues a subpoena for the mediator's testimony and notices the defendant.

Prior to the scheduled time for the deposition, attorneys for the mediator file a motion seeking a protective order to stop the mediator's deposition, asserting the confidentiality of the mediation process. This motion is joined by the insurance company which also files a motion in limine to assert the mediation privilege. The motion seeks a court order prohibiting the plaintiff from testifying about anything the adjuster said. Should the subpoena be quashed by the district court preventing the plaintiff from obtaining this important evidence from the mediator? Should the plaintiff be prohibited from testifying about what she heard the adjuster say about the policy limits? Does the need for protecting the confidentiality of the parties and the institution of mediation outweigh the needs of the individual who is damaged by the wrongful conduct of an adverse party?

Under recent case law, both the mediator and the plaintiff would most likely testify. Under the statutes of some states, they would certainly testify; however, under others, it is unclear. Unfortunately,


5. See IOWA CODE ANN. § 679C.2 (West Supp. 2000). This section states:

If a mediation is conducted pursuant to a court order, a court-connected mediation program, a written agreement between the parties, or a provision of law, all mediation communications and mediation documents are privileged and confidential and not subject to disclosure in any judicial or administrative proceeding except under any of the following circumstances:

6. When a mediation communication or mediation document is relevant to the legal claims of a party against a mediator or mediation program arising out of a breach of the legal obligations of the mediator or mediation program.

7. When a mediation communication or mediation document is relevant to
determining the existence of an agreement that resulted from the mediation or is relevant to the enforcement of such an agreement.

Id.; see also LA. REV. STAT. ANN. § 9:4112 (West Supp. 2001). The statute reads:

B. (1) The parties, counsel, and other participants therein shall not be required to testify concerning the mediation proceedings and are not subject to process or subpoena, issued in any judicial or administrative procedure, which requires the disclosure of any communications or records of the mediation, except with respect to the following:

... (c) A judicial determination of the meaning or enforceability of an agreement resulting from a mediation procedure if the court determines that testimony concerning what occurred in the mediation proceeding is necessary to prevent fraud or manifest injustice.

Id.; see also 42 PA. CONS. STAT. ANN. § 5949 (West 2000). This statute reads:

(a) General rule.—Except as provided in subsection (b), all mediation communications and mediation documents are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process. . . .

(b) Exceptions.

... (3) The privilege and limitation set forth under subsection (a) does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.


6. See CONN. GEN. STAT. ANN. § 52-235d (West Supp. 2001). This statute states:

(a) As used in this section, "mediation" [sic] means a process, or any part of a process, which is not court-ordered, in which a person not affiliated with either party to a lawsuit facilitates communication between such parties and, without deciding the legal issues in dispute or imposing a resolution to the legal issues, which assists the parties in understanding and resolving the legal dispute of the parties.

(b) Except as provided in this section, by agreement of the parties or in furtherance of settlement discussions, a person not affiliated with either party to a lawsuit, an attorney for one of the parties or any other participant in a mediation shall not voluntarily disclose or, through discovery or compulsory process, be required to disclose any oral or written communication received or obtained during the course of a mediation, unless . . . (4) the disclosure is required as a result of circumstances in which a court finds that the interest of justice outweighs the need for confidentiality, consistent with the principles of law.

Id.; OHIO REV. CODE ANN. § 2317.023(c)(4) (Anderson 1998). This statute reads:

[The privilege or confidentiality does not apply]

... (t)he disclosure of a mediation communication if a court, after a hearing, determines that the disclosure does not circumvent Evidence Rule 408, that the
under the terms of the proposed Uniform Mediation Act (UMA), the mediator would not have to fret about testifying. The secrets of the Deceiving Defendant would be safe with the mediator. The UMA may also prevent the plaintiff from testifying about the adjuster's statements.

Consider a Slight Variation on the Theme:

As is the case with many court-annexed mediations involving purely distributive issues, such as personal injury litigation, the mediator conducts the mediation entirely in caucus after hearing the parties' opening statements and initial demands. The mediation proceeds by the mediator shuttling back and forth between the parties, and conveying offers and demands. By a process which varies from empathetic listening to barely veiled arm twisting, the parties proceed along the same path. The only difference is that the adjuster's misrepresentation about the policy limits is made to the mediator in caucus and not in general session. The plaintiff learns about the policy limits from the mediator alone and not from the adjuster. The plaintiff accepts, the

disclosure is necessary in the particular case to prevent a manifest injustice, and that the necessity for disclosure is of sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

Id.; Wis. Stat. Ann. § 904.085(4)(e) (West Supp. 2000). This statute reads: "In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally."


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).

8. Id. § 6(b) (creating a hurdle that requires the proponent to show that the need for the evidence "substantially outweighs the interest in protecting confidentiality"); see infra Part II.A.
settlement agreement is signed, and the parties depart without further contact.

Now, only the mediator can provide proof of the adjuster's fraud. The mediator's testimony, once highly significant, has become absolutely pivotal to the plaintiff's case. Should the mediator testify? Under the current language of the UMA, the mediator will not have to testify. Without the mediator's testimony, the adjuster will successfully perpetrate a fraud on the plaintiff.

Consider a Second Variation on the Theme:

During one of the early caucuses with the adjuster, the mediator looks down at the table upon which the adjuster's file is spread. Something catches her eye—something highlighted in the corner of the file. Not intending to pry, she immediately averts her eyes, but not before realizing what she has seen: the policy limits are $250,000. Only later, when the adjuster offers to settle for policy limits of $100,000, does she realize the significance of what she saw earlier in the mediation. The adjuster is lying. Does the mediator confront the adjuster? Assume for a moment that she does, but the adjuster fails to come clean, what does she do now? Does she terminate the mediation and, if so, upon what foundation does she act? Has the self-determination of the parties been fatally compromised?

Compare this with the first hypothetical in which the mediator was unaware of the real policy limits and the fraudulent conduct. A mediator acts inconsistently if she terminates the mediation in this context to prevent fraud, but then refuses to testify in a later trial to set aside a settlement agreement where the adjuster successfully defrauded the plaintiff by misrepresenting the policy limits. Does terminating the mediation in one instance, and refusing to testify in the other, reward the stealthy liar? Does it provide impetus for mediators concerned with their settlement rates to "bury" any improprieties?

Next, consider the case of the Negligent Neutral:

After months of squabbling, two partners trying to split up their rare and ancient art business reluctantly succumb to the urging of the company's accountant and attempt mediation. In the early stages of the mediation, while trying to get a handle of the value of the various components of the business, the mediator states, "I am not a tax lawyer,
but doesn't this issue on taxes have some value that could be considered in your division of assets?"

"We hadn't thought of that," both partners chime in.

"Now, you should confirm this with your attorneys, but I think it's worth using," the mediator confirms.

The partners work all day long while the bargaining becomes increasingly contentious. Late into the evening they work. Patience is running thin and tempers are frayed. The parties, and the mediator, are obviously exhausted. Many issues have been addressed, but the two are split over a prized Grecian urn. Although it has a value of $20,000, the parties have held it as a hallmark of their business since shortly after they first opened their doors. Each refuses to give up their claim to it. The mediator, trying to break the dam, mentions the tax issue again, but fails to attach his previous admonition about seeking a separate opinion.

"All right, all right, if you give me the tax break, you can have it." Near tears, one of the partners continues, "That urn is so special, but I can use the $30,000 tax break to help care for my mother. I think she has Alzheimers." After another two hours of drafting, an agreement is signed at 1:00 a.m. before the parties leave the mediation.

Unfortunately, the mediator is wrong and no such tax incentive exists. After the parties learn the truth, the disgruntled partner sues to void the agreement and recover the Grecian urn under the theory of mutual mistake of the law. As an alternative remedy, the plaintiff's attorney joins the mediator as a co-defendant alleging malpractice arising from the negligent opinion about the tax incentive. As expected, counsel for both the other partner and the mediator assert the mediation privilege and move to dismiss the petition. Should the confidentiality afforded the mediation process prevent the disgruntled partner from her day in court?

I. INTRODUCTION

Over the past three decades, the United States has experienced a remarkable growth in the use of mediation as a method of resolving


10. Definitions of mediation run from simple and straightforward to complex. See, e.g., KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 23 (1994) (Mediation is "simply the facilitation of a settlement between individuals."); KARL A. SLAKEU, WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES xiii (1996) ("In its simplest form, mediation is a process through which a third party assists two or more others in working out their own solution to a conflict."); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS:
disputes. From community settings to court-annexed programs, from matters in small claims courts to huge, multi-party disputes involving complicated issues of public policy, parties increasingly find help from third parties. Accompanying this growth in the use of mediation, we have witnessed a parallel proliferation of statutes throughout the country containing provisions relating to mediation. As of 1994, the legislatures of the several states and the federal government had enacted
2000 statutes, more than double the number from five years prior.\textsuperscript{13} Although 1994 is the last year for which there are actual statistics, estimates now raise the number of statutes with provisions affecting mediation to 2500.\textsuperscript{14} When all of the court rules, agency regulations, executive orders, and court decisions are added together, it becomes clear that the body of law in this field is growing dramatically.\textsuperscript{15}

Many early statutes accommodated special interests. Examples include an Iowa mediation program in which lenders were mandated to use mediation prior to foreclosing secured agricultural debt,\textsuperscript{16} a public works mediation act in New Mexico,\textsuperscript{17} and legislation for mediation of disputes involving Native American burial sites in Nevada.\textsuperscript{18} Other acts created regimes for mediation of mobile home park disputes in Colorado,\textsuperscript{19} radioactive waste management difficulties in New Hampshire,\textsuperscript{20} complaints arising from dental work in Oklahoma,\textsuperscript{21} and more.\textsuperscript{22} California alone has forty-two statutes covering forty-two specific subjects for mediation including truancy,\textsuperscript{23} regulation of pesticides,\textsuperscript{24} gangs,\textsuperscript{25} and Native American historical and sacred sites,\textsuperscript{26} among others.\textsuperscript{27} Additionally, nearly half of the states have now passed

\begin{itemize}
\item \textsuperscript{13} ROGERS & MCEWEN, supra note 12, § 13.01.
\item \textsuperscript{14} SEPTEMBER 2001 DRAFT; supra note 11, at Prefatory Note, § 2.
\item \textsuperscript{15} ROGERS & MCEWEN, supra note 12, § 13.01.
\item \textsuperscript{16} IOWA CODE ANN. § 654.2C (West 1995) (originally enacted in 1986).
\item \textsuperscript{17} N.M. STAT. ANN. § 13-4C-1 (Michie 1997) (originally enacted in 1992).
\item \textsuperscript{18} NEV. REV. STAT. ANN. 383.160 (Michie 1999) (originally enacted in 1989).
\item \textsuperscript{19} COLO. REV. STAT. ANN. § 38-12-216 (West 2000) (originally enacted in 1981).
\item \textsuperscript{21} OKLA. STAT. ANN. tit. 59, § 328.60 (West 2000) (originally enacted in 1991).
\item \textsuperscript{23} See CAL. EDUC. CODE § 48263.5 (West 1993 & Supp. 2001); CAL. WELF. & INST. CODE § 601.3 (West 1998).
\item \textsuperscript{24} See CAL. FOOD & AGRIC. CODE §§ 13127, 13146 (West 2001).
\item \textsuperscript{25} See CAL. PENAL CODE § 13826.6 (West 2000).
\item \textsuperscript{26} See CAL. PUB. RES. CODE § 5097.94 (West 1984).
\item \textsuperscript{27} See CAL. BUS. & PROF. CODE § 129 (West 1990) (complaints about licentiates), § 465 (West 1990) (community dispute resolution), § 6086.14 (West Supp. 2001) (attorney discipline), § 6200 (West 2001) (attorney's fees); CAL. CIV. CODE § 852 (West Supp. 2001) (rights and obligations of owners), § 1354 (West Supp. 2001) (property disputes); CAL. CIV. PROC. CODE §
generic legislation enabling the broad use of mediation. This trend has been encouraged by the development of programs in which the courts refer cases directly to court-annexed mediation programs.

This rapid proliferation has been accompanied by many mediation statutes that are poorly worded, unclear, incomplete, or internally inconsistent.


30. See, e.g., CAL. EVID. CODE § 1152 (West 1995); CAL. EVID. CODE §§ 1115(b), 1122(b) (West Supp. 2001) (definition of mediator § 1115 refers, in part, to "a neutral person" and § 1122(b) cites to "a neutral person" without invoking the defined term "mediator"); OHIO REV. CODE ANN. § 2317.02 (Anderson 1998); OHIO REV. CODE ANN. § 2317.02.3 (Anderson 1998).
inconsistent. Further, substantial discrepancies exist between acts


33. See, e.g., Ariz. Rev. Stat. Ann. § 12-2238 (West 1994) (structuring "confidentiality" apparently as a privilege, an evidentiary exclusion, and a testimonial privilege; if a privilege, the statute is unclear if the parties or the mediator hold the privilege); Ark. Code Ann. § 16-7-206 (Michie 1999) (structuring "confidentiality" apparently as both a privilege and an evidentiary exclusion); Cal. Evid. Code §§ 1115-1126 (West Supp. 2001) (structuring "confidentiality" apparently as a privilege, an evidentiary exclusion, and a testimonial incapacity; if a privilege, the statute is unclear if the parties or the mediator hold the privilege). But see Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (holding that a mediator holds a separate privilege); Me. R. Court Rule 408 (West 2000) (structuring "confidentiality" apparently as both a privilege and as a confidential negotiation under Rule 408); Minn. Stat. Ann. § 595.02 (West 2000) (structuring "confidentiality" apparently as both a privilege and a testimonial incapacity); Mo. Ann. Stat. § 435.014 (West 1992) (structuring "confidentiality" apparently as a privilege, an evidentiary exclusion, and a confidential negotiation; if a privilege, the statute is unclear if the parties or the mediator hold the privilege); Neb. Rev. Stat. § 25-2914 (1995) (structuring "confidentiality" apparently as a privilege, an evidentiary exclusion, and a confidential negotiation under Rule 408); Nev. Rev. Stat. Ann. 48.109 (Michie 1996) (structuring
within the same state purporting to accomplish similar goals.\textsuperscript{34} Thus, it is not hard to imagine both the vast differences that exist in the mediation schemes from state to state and the problems that these differences may present.

Inconsistently worded statutes create the most difficulty when applying privileges to disputes mediated in one state and subsequently litigated in another. In these situations, whose law of confidentiality applies? Should the forum state apply the rule of privilege from the mediation state or its own rule when determining what, if any, mediation communications should be admitted? The most troubling scenario involves communications made during mediation in one jurisdiction which provides for confidentiality, but which may not be protected in the forum state. Under the \textit{Restatement (Second) of Conflict of Laws}, the evidence would "be admitted unless there is some special reason why the forum policy favoring admission should not be given effect."\textsuperscript{35} In the absence of such a showing, parties mediating in a jurisdiction with extensive protections and few exceptions to confidentiality may later be compelled to testify in another state which offers such protections.\textsuperscript{36}

\textsuperscript{34} See, e.g., \textsc{Cal. Evid. Code} § 703.5 (West 1995) (stating rule in terms of competency), § 1119 (West Supp. 2001) (written as an exclusionary rule). \textit{But see Olam}, 68 F. Supp. 2d at 1132 (concluding that the California Court of Appeals in Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464 (1998), viewed the two provisions as "analytically redundant").

\textsuperscript{35} \textsc{Restatement (Second) of Conflict of Laws} § 139(2) (1971). In determining whether or not to give effect to the policy of the forum and allow admission, the court should consider four factors: "(1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved and (4) fairness to the parties." \textit{Id.} at cmt. d; see also Joshua P. Rosenberg, \textit{Note, Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws}, 10 \textsc{Ohio St. J. on Disp. Resol.} 157, 168–71 (1994).

In an effort to address these problems, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Dispute Resolution Section of the American Bar Association (ABA) engaged in a unique, joint effort to draft a Uniform Mediation Act. Founded more than a century ago, NCCUSL's stated purpose is to "promote uniformity in the law among the states on subjects as to which uniformity is desirable and practicable." No law student graduates from the nation's law schools without some exposure to the Uniform Commercial Code (UCC), the grandparent of all uniform acts in the United States, originally adopted by NCCUSL. Composed of unpaid commissioners appointed from all fifty states, Washington, D.C., and Puerto Rico, NCCUSL does not enact legislation, but adopts proposed uniform acts after extensive research and deliberation. After adoption, the commissioners then urge passage of the various acts by their respective legislatures in order to "promote uniformity" throughout the United States.

NCCUSL has had a long and close relationship with the ABA, growing out of an 1889 decision by the ABA "to work for uniformity of the laws through voluntary state action." Despite their close ties, the two organizations had never collaborated so closely as when they agreed in 1998 to create two Drafting Committees to work jointly on drafting a

37. SEPTEMBER 2001 DRAFT, supra note 11, at Prefatory Note § 4. The document explains that:

The Mediation Act results from an historic collaboration. The Uniform Law Commission Drafting Committee, chaired by Judge Michael Getty, was joined in the drafting of this Act by a Drafting Committee sponsored by the American Bar Association, working through its Section of Dispute Resolution, which was co-chaired by former American Bar Association President Roberta Cooper Ramo ... and Chief Justice Thomas Moyer of the Supreme Court of Ohio.

Id. At the time this Article went to press, the UMA had been adopted by NCCUSL at its annual meeting. The Act awaits review by the House of Delegates of the American Bar Association at its mid-year meeting scheduled for February 2002.


40. Id. at 797. Each commissioner must be a member of their respective bar. Id. Further, each state determines the method of selection, number of commissioners, and tenure. Id. at n.9.

41. HANDBOOK, supra note 38, at 1278-79.

42. Brudney, supra note 39, at 796 (citing WALTER P. ARMSTRONG JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS 18 (1991)).
The NCCUSL\textsuperscript{44} and the ABA\textsuperscript{45} Drafting Committees have a few interlocking members\textsuperscript{46} and have deliberated jointly throughout the entire process of drafting the UMA. Also, the two Drafting Committees received advice from leading academicians from across the nation.\textsuperscript{47} Ultimately, members of the mediation community (from leading professional and provider organizations) have participated in the meetings of the Drafting Committees and provided extensive and extremely influential input.\textsuperscript{48} At the time this Article was going to press, the Drafting Committees had completed their work and the Act had been adopted by NCCUSL at their annual meeting in August 2001. The

\textsuperscript{43} Getty et al., \textit{supra} note 12, at 787-88.

\textsuperscript{44} \textit{SEPTEMBER 2001 DRAFT}, \textit{supra} note 11. Members of the NCCUSL Drafting Committee include: The Honorable Michael B. Getty, Judge (Ret.), Chicago, Illinois, Chair; Phillip Carroll, Little Rock, Arkansas; Jose Feliciano, Cleveland, Ohio, American Bar Association Member; Stanley M. Fisher, Cleveland, Ohio, Enactment Coordinator; Roger C. Henderson, Tucson, Arizona, Committee on Style Liaison; Elizabeth Kent, Honolulu, Hawaii; Richard C. Reuben, Columbia, Missouri, Associate Reporter; Nancy H. Rogers, Columbus, Ohio, National Conference Reporter; Frank E.A. Sander, Cambridge, Massachusetts, American Bar Association Member; Byron D. Sher, Sacramento, California; Martha L. Walters, Eugene, Oregon; and Joan Zeldon, Washington, D.C. Ex officio members include: John L. McClaugherty, Charleston, West Virginia, President of NCCUSL and Leon M. McCorkle, Jr., Dublin Ohio, Division Chair of NCCUSL. \textit{Id.}

\textsuperscript{45} \textit{Id.} Members of the ABA Drafting Committee include: The Honorable Chief Justice Thomas J. Moyer, Columbus, Ohio, Co-Chair; Roberta Cooper Ramo, Albuquerque, New Mexico, Co-Chair; The Honorable Michael B. Getty, Judge (Ret.), Chicago, Illinois, NCCUSL Representative; The Honorable Chief Judge Annice M. Wagner, Washington, D.C.; James Diggs, Pittsburgh, Pennsylvania; Jose Feliciano, Cleveland, Ohio; Richard C. Reuben, Columbia, Missouri, Reporter; Nancy H. Rogers, Columbus, Ohio, Coordinator, Faculty Advisory Committee; Judith Saul, Ithaca, New York; Frank E.A. Sander, Cambridge, Massachusetts. \textit{Id.}

\textsuperscript{46} \textit{Compare supra} note 44 \textit{with supra} note 45. Individuals serving on both committees include: The Honorable Michael B. Getty, Judge (Ret.), Jose Feliciano, Frank E.A. Sander, and Nancy H. Rogers.

\textsuperscript{47} \textit{SEPTEMBER 2001 DRAFT}, \textit{supra} note 11, at Prefatory Note § 4. Institutions represented include: Bowdoin College in Maine and the law schools from Harvard University, University of Missouri—Columbia, Ohio State University, Pennsylvania State University, University of Texas, and University of Washington. \textit{Id.}

\textsuperscript{48} \textit{Id.} Organizations sending representatives to the meeting of the Drafting Committees have included the Association for Conflict Resolution, formerly the Society of Professionals in Dispute Resolution; National Council of Dispute Resolution Professional Organizations; American Arbitration Association; JAMS/Endispute; Federal Mediation and Conciliation Service; CPR Institute for Dispute Resolution; Academy of Family Mediators; National Association of Family and Community Mediators; Academy of Mediators; and the California Dispute Resolution Council. Although not representing provider organizations, other observers to the Drafting Committees included these sections of the American Bar Association: Administrative Law and Regulatory Practice, Labor and Employment Law, Litigation, and the Senior Lawyer Division. Finally, other observers included representatives of the American Trial Lawyers Association, Equal Employment Advisory Council, International Academy of Mediators, and the Society of Professional Journalists. \textit{Id.}
House of Delegates of the ABA will most likely consider the UMA at its mid-year meeting in February 2002 where approval is anticipated.

Although the overall goal of NCCUSL is to promote the uniformity of mediation laws among the states, the Committees' specific intent was to act consistently with the public policies of the states. As illustrated by the Prefatory Note to the September 2001 draft of the UMA, the Act seeks to assure three fundamental obligations: (1) "the reasonable expectations of participants regarding confidentiality ...", (2) the fairness and integrity of the mediation process, and (3) the self-determination of the parties.

The drafters have more than fulfilled the expectations regarding confidentiality. Unfortunately, they have done so in a manner that will result in damage to the long term integrity of the mediation process. Further, by far surpassing the expectations of confidentiality, the UMA creates degrees of secrecy that will destroy the self-determination of the parties in crucial, and unacceptable, circumstances.

This Article will analyze two short, but significant, provisions of the UMA which cause the most difficulty. Both of these provisions relate to

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49. Id. at Prefatory Note § 1 ("In particular, the law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated.... Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications.").

50. Id. The Prefatory Note continues:

Because the privilege makes it more difficult to offer evidence to challenge the settlement agreement, the drafters viewed the issue of confidentiality as tied to provisions that will help increase the likelihood that the mediation process will be fair. Fairness is enhanced if it will be conducted with integrity....

The Act promotes the integrity of the mediation process by suggesting model provisions that require the mediator to disclose conflicts of interest and be candid about qualifications.

51. Id.

In some limited ways, the law can also encourage the use of mediation as part of the policy to promote the private resolution of disputes through informed self-determination.

Self-determination is encouraged by provisions that limit the potential for coercion of the parties to accept settlements ... and that allow parties to have counsel or other support persons present during the mediation session." Id.
exceptions to the mediation privilege contained in the UMA. The structure and content of these two exceptions to mediation confidentiality speak volumes about the inability of the drafters to balance the means of confidentiality and the ends of self-determination. Part II provides a short explanation of confidentiality and privileges. Part III addresses these two exceptions to the mediation privilege and Part IV analyzes confidentiality in mediation, self-determination of the parties, and the conflict between the two.

II. A SHORT EXPLANATION OF CONFIDENTIALITY AND PRIVILEGES

Before discussing "the reasonable expectations of participants regarding the confidentiality of the mediation process," it is necessary to understand the term "confidentiality" as used in the context of mediation. Confidentiality is constructed from two distinct, but intertwined principles which arise out of certain professional relationships such as: attorney-client, clergy-penitent, doctor-patient.

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; or
(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;

(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 protective 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 (a)(6) or (b)(2).

Id.

53. SEPTEMBER 2001 DRAFT, supra note 11, at Prefatory Note § 1.
54. Id.
55. 1 MCCORMICK ON EVIDENCE § 91 (John W. Strong et al. eds., 1999) [hereinafter MCCORMICK].
and now, mediator-disputant. Confidentiality represents, first, a positive duty not to disclose secret communications and, second, the freedom to refuse to answer questions in court.

A. Confidentiality: The Duty to Keep Secrets

Confusingly, the obligation to keep secrets is also referred to as a duty of confidentiality. For instance, Rule 1.6 of the Model Rules of Professional Conduct for attorneys is entitled, "Confidentiality of Information," and imposes on the attorney an ethical duty not to divulge, among other things, the contents of confidential communications with a client to others (whether it is the opposing side, the local newspaper, or the neighbor).

A confidential relationship may arise in a formal, professional

62. See, e.g., Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962); Liebergesell v. Evans, 613 P.2d 1170, 1176 (Wash. 1980) ("A fiduciary relationship arises as a matter of law between an attorney and his client or a doctor and his patient, for example."). The confidential relationship may arise as a matter of fact in others. See Indermill v. United Sav., 451 N.E.2d 538, 541 (Ohio App. 1982) ("A confidential relationship is one in which one person comes to rely on and trust another in his important affairs and the relations there involved are not necessarily legal, but may be moral, social, domestic or merely personal.") (quoting Taylor v. Shields, 111 N.E.2d 594 (Ohio App. 1951)); Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 594 (Tex. 1992); Adickes v. Andreoli, 600 S.W.2d 939, 946 (Tex. Civ. App. 1980). "A confidential relationship may arise not only from the technical relationships, but may also arise informally from moral, social, domestic, or purely personal relationships." Id. (citing Thigpen v. Locke, 363 S.W.2d 247 (Tex. 1962)); see also Roy Ryden Anderson, The Wolf at the Campfire: Understanding Confidential Relationships, 33 SMU L. REV. 315, 316 (2000).

63. See AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS AND CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS § 5.05 (1998) ("The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree .... The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law."); see also STEDMAN'S MEDICAL DICTIONARY 799 (26th ed. 1995) (stating the Hippocratic Oath as: "All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal."); Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 488–90 (Cal. 1990) (en banc); Shadrick v. Coker, 963 S.W.2d 726, 736 (Tenn. 1998); Charles E. Cantu & Margaret H. Jones Hopson, Bitter Medicine: A Critical Look at the Mental Health Care Provider's Duty to Warn in Texas, 31 St. Mary's L.J. 359, 404 (2000). But see generally Alissa R. Spielberg, Online Without a Net: Physician-Patient Communication by Electronic Mail, 25 AM. J.L. & MED. 267, 285 (1999) ("As others [sic] commentators and legislators have pointed out, the current medical system cannot adequately sustain the special confidential relationship between physician and patient.").


66. NATIONAL ASSOCIATION OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE § 1–9 (2000), available at homesnj.com/ethics.htm (last visited July 12, 2001) ("[Realtors] shall not knowingly, during or following the termination of professional relationships..."
psychiatrist-patient,\textsuperscript{63} nurse-patient,\textsuperscript{69} and psychologist-patient\textsuperscript{70} relationships. On the other hand, the common business relationship is the antithesis of the confidential relationship, even if there has been a long standing, cordial relationship. In such a relationship, it is anticipated that each party will put their own interests as primary and not subjugate them to the other.\textsuperscript{71}

A confidential relationship arises when an individual justifiably places his or her trust in an agent, expecting the agent to place the principal's interest above his or her own,\textsuperscript{72} and the agent accepts the responsibility "to advise, counsel, and protect the weaker party."\textsuperscript{73} For many professions, the duty of confidentiality is imposed upon members of the respective professions by codes of ethics\textsuperscript{74} or by statutes.\textsuperscript{75} Besides creating a cause of action for breach of the duty, failing to fulfill the obligation of confidentiality may cause the imposition of penalties such

\begin{itemize}
\item with their clients: 1) reveal confidential information of [their] clients \ldots \).\end{itemize}

\textsuperscript{67}. AMERICAN INSTITUTE OF ARCHITECTS, CODE OF ETHICS AND PROFESSIONAL CONDUCT R. 3.401 (1997), \textit{available at} http://www.e-architect.com/institute/codeethics.asp. ("Members shall not knowingly disclose information that would adversely affect their client or that they have been asked to maintain in confidence, except as otherwise allowed or required by this Code or applicable law.").


\textsuperscript{69}. AMERICAN NURSES ASSOCIATION, CODE FOR NURSES § 2 (1985) ("The nurse safeguards the client's right to privacy by judiciously protecting information of a confidential nature.").

\textsuperscript{70}. \textit{See} AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 5.02 (1992), \textit{available at} http://www.apa.org/ethics/code.html (last visited July 12, 2001) ("Psychologists have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult, recognizing that confidentiality may be established by law, institutional rules, or professional or scien-tific [sic] relationships.").

\textsuperscript{71}. Anderson, \textit{supra} note 62, at 353–54.

\textsuperscript{72}. \textit{See generally} RESTATEMENT OF CONTRACTS § 472 cmt. c (1932) ("A fiduciary position \ldots includes not only the position of one who is a trustee, executor, administrator, or the like, but that of agent, attorney, trusted business adviser, and indeed any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.").

\textsuperscript{73}. \textit{See} Swerhun v. Gen. Motors Corp., 812 F. Supp. 1218, 1223 (M.D. Fla. 1993); \textit{see also} United States v. Reed, 601 F. Supp. 685, 715 (S.D.N.Y. 1985), \textit{rev'd in part on other grounds}, 773 F.2d 477 (2d Cir. 1985) ("The mere unilateral investment of confidence by one party in the other ordinarily will not suffice to saddle the parties with the obligations and duties of a confidential relationship."); \textit{see also} CODE OF ETHICS OF THE AMERICAN SOCIETY OF CHARTERED LIFE UNDERWRITERS & CHARTERED FINANCIAL CONSULTANTS § 1.1(B), \textit{available at} http://cesp.iit.edu/codes/col/asclu-a.htm (last visited July 17, 2001) ("In a conflict of interest situation the interest of the client must be paramount.").

\textsuperscript{74}. \textit{See supra} notes 59–70 and accompanying text.

\textsuperscript{75}. \textit{See supra} notes 59–70 and accompanying text.
as censure or expulsion from a professional organization, or, in a regulatory setting, license suspension or revocation. ⁶⁶

Within mediation, the scope of the duty to keep secrets may be treated differently from other professional relationships where the duty rests upon the professional only and not on the client or patient. For instance, within the attorney-client relationship, the client is free to disclose to others whatever took place during her conferences with her attorney, although the attorney is constrained from doing so. ⁷⁷ Similarly, existing mediation ethical codes such as the Standards of Practice for Family and Divorce Mediation of the Academy of Family Mediators, Ethical Standards of Professional Responsibility of the Society of Professionals in Dispute Resolution, and the AAA/ABA/SPIDR Standards of Conduct of Mediators impose the duty on the mediator only. ⁷⁸ Several state rules require only the mediator to keep secrets. ⁷⁹ The trend for state statutes is not as clear. In Oklahoma, only the mediator (and employees) have the duty, ⁸⁰ while in Montana, both the mediator and the disputants have the duty. ⁸¹ In Oregon, the statute is not clear: "[M]ediation communications are confidential and may not be disclosed to any other person." ⁸²

Following the general trend, the earliest draft of the UMA required the mediator, but not the disputants, to keep secrets while providing extensive and detailed exceptions. ⁸³ Over the next several sessions, the

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⁸⁰ OKLA. STAT. ANN. tit. 12, § 1805 (West 1993).
⁸³ NCCUSL, DRAFT UMA §§ (d)–(e) (April 16, 1998) [hereinafter APRIL 1998 DRAFT]. The sections state:

(d) General Rule of Non-Disclosure. A mediator shall not disclose mediation communications other than the parties' written and signed agreement to others,
Drafting Committees struggled with the structure of this provision and its exceptions. First, they worked to craft the list of exceptions to strike the appropriate balance between keeping secrets and the occasional needs for disclosure. Next, in December 1999, instead of a separate list of exceptions, they limited the list and incorporated a reference to the list of exceptions to the mediation privilege. Then, the March 2000
Draft went through a radical simplification: "[A] mediator may not disclose mediation communications unless all of the disputants agree, or the mediator reasonably believes that disclosure is required by law, a specific public policy established by statute or court decision, or professional reporting requirements."\(^{86}\) Contemporaneous with the late present [sic] a manifest injustice of such a magnitude as to substantially outweigh the importance of protecting the confidentiality of mediation communications;

[(6) in a report required to be made to an entity charged by law to oversee professional misconduct for mediation communications evidencing professional misconduct that occurs during the mediation session.]

[(7) to the extent found necessary by a court, arbitrator, or agency if the disputant files a claim or complaint against a mediator or mediation program alleging misconduct arising from the mediation.]

[(8) as to evidence provided by the disputants, to the extent found necessary by a court, arbitrator, or agency in a proceeding in which defenses of fraud or duress are raised regarding an agreement evidenced by a record and reached by the disputants as the result of the mediation.]

[(9) to the extent found necessary by a court or administrative agency hearing officer if a person who is not a disputant and to whom a disputant owes a duty files a claim or complaint against the disputant related to the disputant's conduct in the mediation.]

[(10) for the sessions of a mediation that must be open to the public under the law or that the disputants agree to make open to the public and in which the disputants discuss changing decisions of government agencies that have general applicability and future effect.]

Section 3. CONFIDENTIALITY.

(a) A mediator may not disclose mediation communications, including a report, assessment, evaluation, recommendation or finding regarding a mediation, to anyone, including disclosure to a judge or to an agency or authority that refers the matter to mediation or employs that mediator and that may make rulings on or investigations into the dispute that is the subject matter of the mediation.

(b) There is an exception to the prohibition in subsection (a) if:

1. The parties agree to the disclosure,
2. For public policy reasons,
3. A mediator [reasonably] believes that disclosure is required by law or professional reporting requirements, or
4. An exception is provided in section 2(c).

Id.

86. NCCUSL, DRAFT UMA § 7(a) (March 2000) [hereinafter MARCH 2000 DRAFT].
This draft contained the following provision:

A mediator may not provide a report, assessment, evaluation, recommendation, or finding regarding a mediation, to a court, agency, or authority that may make rulings on or investigations into a dispute that is the subject of the mediation, other than whether the mediation occurred, a report of attendance at mediation sessions, whether the mediation has terminated, or whether settlement was reached. . . .

Id. § 7(b).
1999 and early 2000 changes, the drafts specifically negated any inference that a duty of confidentiality extended to the disputants. For instance, the March 2000 Draft stated that the UMA "does not restrict the disclosure of mediation communications by disputants outside of discovery and evidentiary proceedings except as may be limited by the agreement of the disputants, or by court or administrative order."^87

Finally, the drafters had had enough, and the general prohibition against disclosure (with limited exceptions) was removed from the draft in August 2000, leaving only a narrower provision preventing the mediator from providing "a report, assessment, evaluation, recommendation, or finding regarding a mediation to a court ... other than whether the mediation occurred, a report of attendance at mediation sessions, whether the mediation has terminated, and whether settlement was reached, except as permitted [by the parties or under the exceptions to the mediation privilege]."^88 As a result, a mediator was prohibited from giving opinions about who was right or wrong and was also prohibited from characterizing the conduct of the parties. Beyond that, the mediator had no duty to keep secrets.

The disclosure provision remained relatively unchanged until the last drafting session in February 2001. The Drafting Committees, under pressure from the mediation community,"^89 inserted a brief, five word

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^87. Id. § 7(c); see also DECEMBER 1999 DRAFT, supra note 85, § 3(c) ("Except as limited by agreement or court or administrative order, a disputant may disclose mediation communications outside of civil, juvenile, criminal misdemeanor, arbitration, or administrative proceedings.").

^88. NCCUSL, DRAFT UMA § 10(b) (August 2000) [hereinafter AUGUST 2000 DRAFT].

^89. Memo from Emily Haynes, Reporting Coordinator for NCCUSL, to "Those Following the Uniform Mediation Act" § 5 (February 13, 2001) (on file with author) (reporting on the substantive changes to the UMA made by the Drafting Committees at their February 2001 drafting session in New Orleans and stating that the addition of a confidentiality provision was in "response to significant observer concerns that the draft did not emphasize the confidential nature of mediation."); see also letter from Dr. Arnold Shienvold, President, Association for Conflict Resolution (formerly SPIDR), to Judge Michael Getty, Chair of the NCCUSL Drafting Committee (February 5, 2001) (on file with author). This letter states:

[T]he ACR believes that the UMA should set forth and provide the general rule that what is said in mediation is confidential. The notion that communication in mediation will remain private and confidential is inherent in the mediation process itself. For several years, mediations have been conducted with the understanding that, except for specifically articulated public policy reasons, what is said during the mediation process will not be disclosed to anyone.

As has been the practice in several states ... the UMA should contain a general confidentiality provision. We believe that this provision should broadly apply to all participants in mediation ....
mediation confidentiality provision in the section dealing with privileges: "A mediation communication is confidential . . . ."Interestingly, the drafters failed to carve out any exceptions to this rule. However, the final draft that NCCUSL adopted at its annual meeting in August, 2001, removed this language and added a new section which leaves the question of confidentiality very much in the air.

However, as we shall see, the issue of keeping secrets represents only a small problem when compared to the difficulties faced when trying to establish a mediation privilege.

**B. Privileges: Freedom from Involuntary Testimony**

The second principle of confidentiality is the freedom from involuntary testimony provided for in the statutes and evidentiary rules regarding privileges. Most rules of evidence are intended to aid an adjudicative body's search for truth by distinguishing unreliable information from more probative evidence; rules of privilege, in

We believe that providing for confidentiality of the mediation process in this manner is a far better mechanism for assuring parties that they can be completely candid in mediation, then leaving it to a case-by-case confidentiality contract between the parties . . . . Therefore, we strongly recommend that the Drafting Committee add a general confidentiality provision to the Act.

*Id.*

90. NCCUSL, DRAFT UMA § 5(a) (May 2001) [hereinafter MAY 2001 DRAFT].

91. UMA, *supra* note 7, § 8 ("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.").

92. MCCORMICK, *supra* note 55, § 72. I have chosen the term "privilege" to include all freedom from involuntary testimony although such freedom can take several forms including privileges, exclusionary rules, and testimonial incapacity. The Drafting Committees have structured the protections against such compulsion as a privilege. For a more thorough explanation of the distinctions between privileges, exclusionary rules, and testimonial incapacity, see MARCH 2000 DRAFT, *supra* note 86, § 5 Reporter's Working Notes § 3; SCOTT H. HUGHES, REPORT TO SPIDR ON THE PROCESS OF DRAFTING A UNIFORM MEDIATION ACT 17-29 (January 25, 1999) (copy on file with author) (containing discussion of the scope of who can invoke protections and the policy considerations behind the types of protection); *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450 (1985).

93. See JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2175 (1961) (rev. by John T. McNaughton) [hereinafter WIGMORE]. Wigmore explains that:

The rules of admissibility . . . fall into three general groups: (1) Those which determine the *relevancy* of circumstantial and testimonial evidence—this is, the fundamental quality without which no evidential data are to be allowed to be considered by the jury . . . . (2) Those *auxiliary rules of probative policy* which impose artificially some added conditions of admissibility, but are directed solely to
contrast, exclude information which may be extremely helpful to the
court in its search for the truth. Privileges do not promote the search
for the truth through reliable evidence. Rather, "their effect is to
obstruct . . . the search for truth, and in that this effect is consciously
accepted as less harmful on the whole than the extrinsic disadvantages
which would ensue to other interests of society if no such limitations
existed." When a privilege attaches to a confidential relationship, a
normative choice has been made that society is better served by
fostering the relationship even though this may deprive the court of
valuable, or even conclusive, evidence.

The twin principles of the duty of confidentiality and privilege are
not identical and, therefore, generate confusion in the field of
mediation. In professional relationships, three general distinctions
should be kept in mind. First, as stated above, the duty of
confidentiality in other professional relationships is imposed upon the
professional and not on the person being served. There is no

improving the quality of proof and strengthening the probabilities of ascertaining
the truth as the result of investigation . . . . And, (3) the [the rules of privilege and
others]—those rules which rest on no purpose of improving the search after truth
but on the willingness to yield to requirements of extrinsic policy. They forbid the
admission of various sorts of evidence because some consideration extrinsic to the
investigation of truth is regarded as more important and overpowering.

Id.

94. See Delaware ex rel. State Dep't Highway v. 62.96247 Acres of Land, 193 A.2d 799, 806
(Del. Super. Ct. 1963). This court notes:

There are many exclusionary rules of evidence that are intended to withhold
evidence which is regarded as unreliable or regarded as prejudicial or misleading,
but rules of privileged communications have no such purpose. Such rules of
privilege preclude the consideration of competent evidence which could aid in
determining the outcome of a case, and privilege in no way can be justified as a
means of promoting a fair settlement of disputes.

Id.

95. WIGMORE, supra note 93, § 2175.

96. See Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)
("Limitations are properly placed upon the operation of this general principle only to the very
limited extent that permitting a refusal to testify or excluding relevant evidence has a public good
transcending the normally predominant principle of utilizing all rational means for ascertaining
truth.").

97. See, e.g., OHIO REV. CODE ANN. § 2317.02.3(B) (Anderson 1998) ("A mediation
communication is confidential . . . . [N]o person shall disclose a mediation communication in a
civil proceeding or in an administrative proceeding.").

98. See Alan B. Vickery, Note, Breach of Confidence: An Emerging Tort, 82 COLUM. L.
REV. 1426, 1456 (1982) ("A duty of confidentiality could arise whenever personal information is
received from another in confidence.... Anyone in whom 'confidence [is] reposed' is liable for
unprivileged disclosure or use of a trade secret or an unpublished literary work.") (alteration in
reciprocal duty on the client, penitent, or patient; each is free to disclose at will. However, disclosure by the principal may have an adverse impact on the ability to assert a privilege later on.99 Second, although the professional is bound by ethical codes or statutory authority to keep client confidences, a duty of confidentiality does not bind third parties who may seek to compel involuntary testimony about the matters covered by the duty of confidentiality.100 Finally, while privileges are designed to protect individuals from involuntary disclosure in court or administrative proceedings, like the duty of confidentiality, they do not prohibit the principal from making voluntary disclosures outside the courtroom.101 Such disclosure, however, may be an impediment to later asserting the privilege.102

C. Within the Uniform Mediation Act

During the Committee's deliberations, there was little debate that the mediator-disputant relationship should be treated with the normal accouterments of other professional relationships. A high level of candor by and between the disputants is essential both for the functioning of the mediator-disputant relationship and the mediation process.103 Candor is created and fulfilled only "by maintaining the disputants' and mediators' expectations regarding confidentiality of mediation communications."104 The logic behind mediation confidentiality is more fully explored below.105

There is no doubt that confidentiality (both keeping secrets and
avoiding testimony) represents the principle thrust of the UMA. Of the nine substantive sections of the Act,106 five deal exclusively with confidentiality.107 Two more sections, "Definitions"108 and "Scope,"109 have been debated and structured primarily by their relationship to confidentiality. Of the five substantive definitions contained in the UMA,110 three ("Mediation Communication,"111 "Nonparty participant,"112 and "Mediation party")113 have also been written and structured to deal principally with confidentiality.

This notion that confidentiality is the principle driving force behind the Committees' drafting effort is supported by the language of the


107. Id. The five sections which deal exclusively with confidentiality are: § 4. Privilege Against Disclosure; Admissibility; Discovery; § 5. Waiver and Preclusion of Privilege; § 6. Exceptions to Privilege; § 7. Prohibited Mediator Reports; § 8. Confidentiality. Id.

108. Id. § 2.

109. Id. § 3. The heart of this section, which excludes certain types of mediation, grew out of concerns about the impact that confidentiality might have in these arenas. Specifically, the exclusion of school-based peer mediation programs was drafted because the specific responsibilities of schools to children might conflict with the confidentiality provisions of the UMA. SEPTEMBER 2001 DRAFT, supra note 11, at Reporter's Notes § 3.

110. UMA, supra note 7. The five substantive definitions are: § 2(1) "Mediation"; § 2(2) "Mediation Communication"; 2(3) "Mediator"; § 2(4) "Nonparty participant"; and § 2(5) "Mediation party."

111. Id. § 2(2). "This definition is aimed primarily at the privilege provisions of Sections 4–6. SEPTEMBER 2001 DRAFT, supra note 11, § 2 Reporter's Notes § 2.

112. UMA, supra note 7, § 2(4). "This definition is pertinent to the privilege accorded nonparty participants in Section 4(b)(3)." SEPTEMBER 2001 DRAFT, supra note 11, § 2 Reporter's Notes § 4.

113. UMA, supra note 7, § 2(5). The Reporter's Notes of the September draft explain:

The Act defines "party" to be a person who participates in a mediation and has some stake in the resolution of the dispute, or whose agreement is necessary to resolve the dispute. These limitations are designed to prevent someone with only a passing interest in the mediation, such as a neighbor ... from attending the mediation and then blocking the use of information or taking advantage of rights meant to be accorded to parties. ... Because of these structural limitations on the definitions of parties, participants who do not meet the definition of "party", [sic] such as a witness or expert on a given issue, do not hold the privilege ...
Prefatory Note to the UMA. For the three fundamental obligations of the UMA (to ensure confidentiality, integrity, and self-determination), the Prefatory Note has twenty-five references to confidentiality. On the other hand, process integrity and self-determination garner only five apiece, some of which are relegated to the final paragraphs of the Prefatory Note where the Drafting Committees stress the need to "keep[] the Act shorter by leaving some discretion in the courts." If protecting confidentiality represented the predominant mission of the Drafting Committees, the creation of a mediation privilege and the protections it will provide for mediators epitomizes the heart and soul of this effort. "The primary focus of this Act is a limited one — to provide a privilege that assures confidentiality in legal proceedings." The Act does this, not only by creating a privilege for the disputant, but also by creating one for the mediator, as well. On this point, the drafters are not following any trend. Many state statutes do not clearly designate the holder of the privilege.

114. SEPTEMBER 2001 DRAFT, supra note 11, at Prefatory Note. This is further reinforced by an examination of one of the earliest drafts of the UMA. In the first textual discussion contained in the draft, the section is entitled "Rationale for a Statute on Mediation Confidentiality." APRIL 1998 DRAFT, supra note 83.

115. See supra notes 49–51 and accompanying text.

116. SEPTEMBER 2001 DRAFT, supra note 11, at Prefatory Note (including references to privileges).

117. Id. at Prefatory Note § 5. The Prefatory Note explains: "[T]he drafters sought to make the provisions accessible and understandable to readers from a variety of backgrounds, sometimes keeping the Act shorter by leaving some discretion in the courts to apply the provisions in accordance with the general purposes of the Act." Id.

118. Id. at Prefatory Note § 1.

119. UMA, supra note 7, § 4(b)(1) ("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.").

120. Id. § 4(b)(2)–(3) ("In a proceeding, the following privileges apply: ... (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."). This rather convoluted language was crafted to allow the parties to waive the privilege jointly, but only as to their own communications, but not the mediator's. Interestingly, the Act also creates a privilege for individuals who are neither parties or mediators, such as experts, but only as to their own statements or reports. SEPTEMBER 2001 DRAFT, supra note 11, § 4(b), Reporter's Notes §§ 3, 4(c).

121. See 710 ILL. COMP. STAT. ANN. 20/6 (West 1998) (not-for-profit dispute resolution centers); IND. CODE ANN. § 20-7.5-1-13 (Michie 1997) (certificated educational employee bargaining); IOWA CODE ANN. § 679.12 (West Supp 2000) (general); ME. REV. STAT. ANN. tit. 26, § 1025 (West 1988) (university labor relations); MASS. GEN. LAWS ANN. ch. 150, § 10A (West 1996) (labor disputes).
those that make the disputants the only holders of the privilege,122 and those that also make the mediator a holder."123 However, the idea of extending the privilege to the agent or helper is unique among all of the professional relationships.124 The argument for a separate mediator privilege rests upon the continuing need for impartiality:

Although objectively neutral and accurate, any testimony by the mediator will almost certainly be favorably perceived by one side and not so favorably by the other. The consequences will usually occur after the completion of the mediation and so any negative impact on the perceived impartiality will not be detrimental to a mediator vis-à-vis one-time disputants, but may adversely affect a mediator who works in a small community or is frequently employed by the same parties. Further, this may have unfortunate repercussions for mediation as an institution if the disputants misconstrue this testimony as an indictment of mediation in general and pass on their unfavorable opinions to others. In essence, the mediator should be free from having to take sides. These conclusions, nonetheless, are based upon theory only and not upon empirical data. The extent of any detrimental impact on mediator impartiality has not been demonstrated.

Conversely, the mediator serves as the agent of the parties, as servant if you will, and, therefore, should have no rights separate from those derived from the parties. The disputants should have the freedom to choose and to make silly mistakes. If this position is accepted, the mediator should not have a separately


124. See MUELLER & KIRKPATRICK, supra note 76, § 5.6. The authors elaborate:

With respect to professional privileges, the holder is usually the recipient of the professional services rather than the provider. It is the client—not the lawyer, the patient—not the psychotherapist, who decides whether the privilege will be waived or asserted. The professional person lacks authority to . . . assert a privilege that the holder has waived.

Id. (citations omitted); MCCORMICK, supra note 55, § 92.
assertable privilege and should testify if the privilege is waived by all parties.\textsuperscript{125}

However, as we shall see in the following portions of the paper, these are not the most glaring problems with the UMA.

III. EXCEPTIONS TO PRIVILEGES IN THE UMA

A. The Artificial Division of Exceptions

1. The Need That Substantially Outweighs

The key to understanding the UMA can be found in section 6 which contains the exceptions to the privileges created in section 4. The exceptions are divided into two groups, with subsection 6(a) covering the less controversial exceptions, including agreements reached during mediation, sessions which by law must be open to the public, threats, plans to commit a crime, abuse of a protected individual, complaints of professional malpractice (other than the mediator), and mediator misconduct.\textsuperscript{126} Section 6(b),\textsuperscript{127} on the other hand, contains two more

\textsuperscript{125} See Hughes, \textit{supra} note 92, at 20-21; see also March 2000 DRAFT, \textit{supra} note 86, \S 5 Reporter's Working Notes ("[T]he perceived neutrality of the mediator is a key justification for the privilege, which leads to the conclusion that the mediator should be a holder of the privilege.").

\textsuperscript{126} UMA, \textit{supra} note 7, \S 6(a). This section states:

\begin{itemize}
\item [(a)] There is no privilege under Section 4 for a mediation communication that is:
\begin{itemize}
\item [(1)] in an agreement evidenced by a record signed by all parties to the agreement;
\item [(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;
\item [(3)] a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
\item [(4)] intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
\item [(5)] sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
\item [(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 upon conduct occurring during a mediation; or
\item [(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
\end{itemize}
\end{itemize}
To better understand the exception for contractual misconduct, it is important to trace its history along with an additional exception, mediator malpractice. While the exception to the privilege for contractual misconduct is now screened by the language contained in section 6(b), the exception for claims against the mediator is not restricted. However, this was not always the case. The mediator malpractice section started without restrictions, was prefaced by the screening test for many drafts, but is unfettered in the draft adopted by the NCCUSL.

From the time that the exceptions for contractual misconduct and mediator malpractice first appeared until January 2000, access to both exceptions was unfettered. The first mention of the mediator malpractice exception appears in the draft of April 16, 1998, and is listed along with nine other exceptions and introduced with a simple lead-in phrase: "There is no privilege under this statute... (9)... [t]o the degree ruled necessary by the court, if a party files a claim against the

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].

Id. (alteration in original).

127. Id. § 6(b). This section identifies the exceptions to the 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:

(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.

Id. (alteration in original).

128. See, e.g., DECEMBER 1999 DRAFT, supra note 85, § 2(c). This section which contained all of the exceptions to the mediation privilege, was introduced with this language: "There is no privilege... nor prohibition against disclosure." Id.
mediator on issues arising from the mediation." The mediator malpractice exception appears without restraints in all nine subsequent drafts of the UMA through December 1999, with increasingly elaborate language. The December 1999 Draft contains this language: "There is no privilege... nor prohibition against disclosure... (7) to the extent found necessary by a court, arbitrator, or agency if the disputant files a claim or complaint against a mediator or mediation program alleging misconduct arising from the mediation." The contractual misconduct exception to the mediation privilege has a much more recent history, having first appeared in the March 20, 1999 Draft after a recommendation by the Academic Advisory Committee. It joined mediator malpractice and seven others as a simple exception without a gateway test: "There is no [exception]... [t]o establish the validity or invalidity of a recorded agreement." The provision appears

129. APRIL 1998 DRAFT, supra note 83, § (c)(9).

130. These drafts include NCCUSL, DRAFT UMA (Nov. 1998); NCCUSL, DRAFT UMA (Nov. 14, 1998); NCCUSL, DRAFT UMA (Feb. 19, 1999); MARCH 1999 DRAFT, supra note 84; NCCUSL, DRAFT UMA (Mar. 20, 1999) [hereinafter MARCH 20, 1999 DRAFT]; NCCUSL, DRAFT UMA (Mar. 21, 1999) [hereinafter MARCH 21, 1999 DRAFT]; NCCUSL, DRAFT UMA (Apr. 1999) [hereinafter APRIL 1999 DRAFT]; NCCUSL, DRAFT UMA (June 1, 1999) [hereinafter JUNE 1, 1999 DRAFT]; and DECEMBER 1999 DRAFT, supra note 85. In the drafts starting with March 21, 1999 the exceptions (among others) are contained in brackets. This does not appear to be an attempt to limit the access to the exception since section 2(c)(7) of the Reporter's Notes states: "The drafters seek comment on whether this issue is sufficiently covered by the exception for manifest injustice ... and is therefore unnecessary." See, e.g., APRIL 1999 DRAFT, supra § 2 Reporter's Working Notes § 2(c)(7). Starting with the DECEMBER 1999 DRAFT, the title page states that bracketed language is offered for discussion only and "has not been even tentatively approved by either Drafting Committee." DECEMBER 1999 DRAFT, supra note 85, at title page. The disclaimer about tentative approval is a misnomer because the language had been tentatively approved by the Drafting Committees and, as stated above, appeared in several drafts. See, e.g., MARCH 20, 1999 DRAFT, § 2(c)(4).

131. DECEMBER 1999 DRAFT, supra note 85, § 2(c)(7).

132. MARCH 1999 DRAFT, supra note 84, § 2(d). See also APRIL 1999 DRAFT, supra note 130, § 2 Reporter's Working Notes § 2(c)(7). The Working Notes explain:

This provision is designed to preserve contract defenses, which otherwise would be unavailable if based on mediation communications. A recent Texas case provides an example. An action brought to enforce a mediation settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to leave because of chest pains and a history of heart trouble, and that the mediator had refused to let him leave the mediation session. See Randle v. Mid Gulf, Inc., No. 14–95–01292, 1996 WL 447954 (Tex. App. 1996) (unpublished).

Id. (citation in original).

133. MARCH 1999 DRAFT, supra note 84, § 2(d) Reporter's Working Notes § 2(d)(7) (alteration in original).
in the April\textsuperscript{134} and June 1, 1999\textsuperscript{135} drafts, although with slightly more elaborate language: "There is no protection ... (8) [t]o establish the validity or invalidity, or the enforceability or nonenforceability of an agreement reached by the disputants as the result of the mediation session if the agreement is evidenced by a record."\textsuperscript{136}

Finally, in the December 1999 Draft, both the mediator malpractice and contractual misconduct exceptions appear without reservations, along with eight others:

There is no privilege ... nor prohibition against disclosure ... 

... .

[(7) to the extent found necessary by a court, arbitrator, or agency if the disputant files a claim or complaint against a mediator or mediation program alleging misconduct arising from the mediation.]

[(8) as to evidence provided by the disputants, to the extent found necessary by a court, arbitrator, or agency in a proceeding in which defenses of fraud or duress are raised regarding an agreement evidenced by a record and reached by the disputants as the result of the mediation.]\textsuperscript{137}

The drafters significantly narrowed the scope of contractual defenses and the source of testimony to prove those defenses. By limiting the exception to fraud or duress, the drafters eliminated common law defenses such as unconscionability, misrepresentation, impossibility, overreaching, mistake, rescission, reformation, and others.\textsuperscript{138} For instance, the case of the Negligent Neutral (which is based upon mutual mistake) would not fall within this exception even though the damage is

\textsuperscript{134} APRIL 1999 DRAFT, supra note 130, § 2(c)(8).
\textsuperscript{135} JUNE 1, 1999 DRAFT, supra note 130, § 2(c)(8).
\textsuperscript{136} See, e.g., APRIL 1999 DRAFT, supra note 130 § 2(c).
\textsuperscript{137} DECEMBER 1999 DRAFT, supra note 85, § 2(c) (brackets in original).
\textsuperscript{138} See Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1132, 1140 (N.D. Cal. 1999). See generally E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.2–28 (2d ed. 1998); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS ch. 9 (4th ed. 1998). Although Olam's defense to enforcing the agreement reached in mediation sounded in duress, Ms. Olam alleged "undue influence" and sought rescission under California Civil Code § 1689(b)(1) which provides: "A party to a contract may rescind the contract in the following cases: (1) If the consent of the party rescinding ... was ... obtained through ... undue influence, exercised by or with the connivance of the party as to whom he rescinds." CAL. CIV. CODE § 1689(b)(1) (West Supp. 2001). Is it necessary to trigger a statute whose terminology fits within the ambit of "fraud or duress" as contained within the UMA or is it sufficient that the underlying action sounds within the crucial words?
no less grievous than if it had resulted from fraud or duress. Further, under this language ("evidence provided by the disputants ..."), the parties would be prohibited from calling the mediator in an attempt to prove any contractual defenses because evidence can only be "provided by the disputants."\(^{139}\)

As work continued on the UMA and the participation by observers increased, many in the mediation community expressed a fear that some exceptions to the privilege may be subject to abuse by attorneys. If an attorney brought an action regarding the mediation, they surmised, the attorney could use an unrestricted exception to open up the entire mediation to discovery and eradicate the original protections intended by the creation of the privilege. Further, such actions would require those resisting any subpoenas or other discovery efforts to take affirmative steps and seek a protective order.

In response to this fear, the drafters, for the first time (in the January 2000 Draft) segregated these exceptions (and others) and imposed a screening test for some of the exceptions:

There is no privilege nor prohibition... if a judicial, administrative, or arbitration tribunal finds, after an in camera hearing, that the disputant seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is an overwhelming need for the evidence that substantially outweighs the importance of the state's policy favoring the protection of confidentiality.\(^{140}\)

Other than two minor changes, this screening test has remained substantively unchanged. While the first words of the current section 6(a)\(^{141}\) merely introduce a list of exceptions to the mediation privilege, section 6(b) requires a preliminary screening before access to the exceptions can be obtained:

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

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139. *See infra* Part III.B.
140. NCCUSL, DRAFT UMA § 2(f) (Jan. 2000) [hereinafter JANUARY 2000 DRAFT].
141. UMA, *supra* note 7, § 6(a).
is sought or offered in . . . . 142

The provision imposes both a procedural burden and a substantive test before a court can allow a litigant to subpoena the disputants or the mediator. Procedurally, the seeker of the evidence must show, in camera, "that the evidence is not otherwise available" 143 before the court will allow any discovery. The remainder of section 6(b) then imposes a substantive test which requires the court to find that the "need for the evidence . . . substantially outweighs the interest in protecting confidentiality." 144

The list of exceptions to the mediation privilege screened by this provision and its predecessors has varied widely from one draft to another. When it originally appeared in the January 2000 draft, the list included threats, planning a crime, abuse or neglect, professional malpractice (including mediator malpractice), contractual misconduct (limited to fraud, duress, or incapacity), and other extraordinary situations. 145 During the drafting session in January 2000, the Drafting Committees agreed to remove the exceptions for threats, planning a crime, and abuse and neglect from the screening test and place them in the regular list of exceptions. 146 The list of screened exceptions then included professional malpractice, contractual misconduct, and one new exception, significant threats to public health or safety. 147 This list of screened exceptions remained relatively unchanged until drafting sessions in 2001, when the drafters moved the professional malpractice exception to the regular (unscreened) list, 148 added an exception for felony criminal proceedings, 149 and all together eliminated the exception for threats to public health and safety. 150

The screening test contained in section 6(b) of the UMA creates an artificially high and totally inappropriate standard which arguably abrogates common law contractual defenses. Two fundamental questions arise from this language. First, what is sufficient "need for the evidence"? Is it the magnitude of the injustice being alleged? In other

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142. Id. § 6(b).
143. Id.
144. Id.
145. JANUARY 2000 DRAFT, supra note 140, § 2(f).
146. MARCH 2000 DRAFT, supra note 86, § 8(a)–(b).
147. Id. § 8(b)(3).
148. UMA, supra note 7, § 6(a)(5)–(6).
149. Id. § 6(b)(1).
150. Id. § 6.
words, are parties with little injustices denied access to the evidence because they did not suffer enough while those with big injustices are granted access? If so, how do you separate little injustices from big injustices—is it merely a measure of damages? Second, what is "the interest in protecting confidentiality"? And, does the interest in protecting confidentiality rise or fall on the need for the court to clear its docket?

Second, what should the burden of proof be on the proponent during the in camera hearing? Where the language reads "substantially outweighs," is the standard similar to probable cause or a prima facie case? Or does the language require a preponderance of the evidence, a clear and convincing showing, or an even greater level such as "beyond a reasonable doubt"? On both issues, the Reporter's Working Notes merely restate the standard in slightly different, but no less vague terms: "The exceptions under this subsection constitute unusual fact patterns that may sometimes justify carving an exception, but only when the need is strong, the evidence is otherwise unavailable, and these considerations outweigh the policies underlying the privilege and prohibitions from disclosure."  

A recent federal case will help illustrate this dilemma. In Olam v. Congress Mortgage Co., U.S. Magistrate Judge Wayne Brazil, one of the most erudite members of the ADR community, set aside the mediator's privilege and required him to testify whether the defendant had been coerced into settling during a mediation. Before agreeing to mediate in September of 1998, Congress Mortgage and Donna Olam conducted a running battle over more than five years of negotiations, work-out and extension agreements, injunctions, aborted settlement discussions, and the instant lawsuit. Finally, after nearly fifteen hours of mediation, the parties signed an agreement at 1:00 a.m. Ms. Olam later repudiated the agreement reached in mediation, alleging she was,  

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152. See MUELLER & KIRKPATRICK, supra note 61, § 3.4.
154. See id. § 340, at 515–16.
155. See 4 WHARTON'S CRIMINAL PROCEDURE, supra note 151, § 468, at 41.
156. SEPTEMBER 2001 DRAFT, supra note 11, § 6 Reporter's Notes § 9.
158. Id. at 1139.
159. Id. at 1116–17.
160. Id. at 1113–16.
quoting the court, "incapable (intellectually, emotionally, and physically) of giving legally viable consent . . . [due to] physical pain and emotional distress that rendered her incapable of exercising her own free will."  

After the parties expressly waived any protections they had arising from California law, Judge Brazil faced two overlapping provisions from the California Evidence Code, sections 703.5 and 1119. Relying upon a California Court of Appeals case, the court found that both sections had the effect of creating a separate privilege on behalf of the mediator which is enforceable irrespective of the parties' wishes. The court did not ask the mediator, a federal court employee, whether he wished to raise the privilege, but raised the privilege for him. Before proceeding, the court stated that section 703.5 "is framed in terms of competence to testify." Having previously interpreted this section, (along with section 1119) as creating a privilege on behalf of the mediator, the court determined that section 703.5 "would require courts, on their own initiative, to determine whether it would be lawful to compel or permit a mediator to testify about matters occurring within a

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161. Id. at 1118.
162. Id. at 1119–28. Judge Brazil conducted a rather exhaustive analysis of the choice of law rules to determine that California law applies, based upon the issues surrounding the enforcement of, and defenses to, a contract. Id.
163. CAL. EVID. CODE § 703.5 (West 1995) ("No . . . mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding . . . .")
164. CAL. EVID. CODE § 1119 (West Supp. 2001). This section provides:

Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made . . . in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any . . . noncriminal proceeding. . . . (b) No writing . . . prepared . . . in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any . . . noncriminal proceeding. . . . (c) All communications . . . by and between participants in the course of a mediation . . . shall remain confidential.

Id.

166. Olam, 68 F. Supp. 2d, at 1130 ("It follows that, under California law, a waiver of the mediation privilege by the parties is not a sufficient basis for a court to permit or order a mediator to testify. Rather, an independent determination must be made before testimony from a mediator should be permitted or ordered."). Interestingly enough, the court points out that section 1122 can be read to extend a privilege to everyone who participates in the mediation, even non-parties, such as experts, relatives, or observers. Id. at 1129 n.23.
167. Id. at 1130.
168. Id. at 1130–31.
mediation.\textsuperscript{169}

After finding that the privilege was qualified\textsuperscript{170} and that the court could compel the mediator to testify despite his statutory incompetency,\textsuperscript{171} the court stated that its burden:

\begin{quote}
[was] to weigh and comparatively assess (1) the importance of the values and interests that would be harmed if the mediator was compelled to testify (perhaps subject to a sealing or protective order, if appropriate), (2) the magnitude of the harm that compelling the testimony would cause to those values and interests, (3) the importance of the rights or interests that would be jeopardized if the mediator's testimony was not accessible in the specific proceedings in question, and (4) how much the testimony would contribute toward protecting those rights or advancing those interests—an inquiry that includes, among other things, an assessment of whether there are alternative sources of evidence of comparable probative value.\textsuperscript{172}
\end{quote}

When deciding whether to compel a mediator's testimony, a court must determine whether the damage to the mediation process is outweighed by the damage to the individual's interests. The mediation process is damaged by the injury inflicted upon the perceived impartiality of the mediator.\textsuperscript{173} However, the risk of such harm is highly contextual and depends both upon the nature of the mediator's testimony\textsuperscript{174} and the mediator's style of mediation,\textsuperscript{175} which seem to be as

\begin{footnotes}
\item[169] \textit{Id.} at 1131.
\item[170] \textit{Id.} at 1130 (relying on Rinaker, 74 Cal. Rptr. 2d at 468).
\item[171] \textit{Id.} at 1131.
\item[172] \textit{Id.} at 1132.
\item[173] \textit{Id.} at 1133-34.
\item[174] \textit{Id.} at 1134. Is the testimony sought to aid the court to determine if a party was under duress, thereby tending to relate to the appearance and demeanor of the person, or is the testimony sought to prove the basis for fraud, thereby relating to what specific dialogue actually occurred? If the former, the risk of damage to the trust may be less certain than if the mediator was called upon to be a tie breaker in a case of "He said. She said," although the exact reason this may be the case is not clear from Judge Brazil's reasoning.
\item[175] \textit{Id.} at 1135. The court stated:
\end{footnotes}

Moreover, the methods some mediators use to explore underlying interests and feelings and to build settlement bridges are in some instances intentionally distanced from the actual historical facts. In some mediations, the focus is on feelings rather than facts. The neutral may ask the parties to set aside pre-occupations with what happened as she tries to help the parties understand underlying motivations and needs and to remove emotional obstacles through exercises in venting. Some
numerous as the blades of grass on a well-manicured lawn.\textsuperscript{176}

Potential damage to the parties' interests must be factored by the risk that it would actually occur in any given situation. Judge Brazil emphasized that after more than fifteen years of responsibility for administering ADR programs in the federal court, \textit{Olam} represented the first such instance where a mediator had been compelled to testify: "Based on that experience, my partially educated guess is that the likelihood that a mediator or the parties in any given case need fear that the mediator would later be constrained to testify is extraordinarily small."\textsuperscript{177}

On the opposite side of the scale, the court delineated and quantified the individual's interests in having the mediator testify. Olam's interests "could hardly be more fundamental."\textsuperscript{178} Enforcing an agreement she alleges was unconscionable "would render her homeless and virtually destitute."\textsuperscript{179} Conversely, failure to enforce the agreement would officially sanction years of Olam's conduct, which cost Congress Mortgage company thousands of dollars.\textsuperscript{180}

However, the universe of potential interests must be more broadly defined than just by those of the individual disputants. "It is the fundamental duty of a public court in our society to do justice—to mediators use hypotheticals that are expressly and intentionally not presented as accurate reflections of reality—in order to help the parties explore their situation and the range of solution options that might be available. A mediator might encourage parties to "try on" certain ideas or feelings that the parties would contend have little connection with past conduct, to experiment with the effects on themselves and others of expressions of emotions or of openness to concessions or proposals that, outside the special environment of the mediation, the parties would not entertain or admit. All of this... can have precious little to do with historical accuracy or "truth.""

\textit{Id.} Additionally, the court continued in a footnote:

\textit{[T]he "mediations" that occur in at least some federal court ADR programs are likely to be quite a bit more "evaluative" than the purely facilitative model would contemplate. In fact, I suspect that in a good many "mediations" of cases filed in federal court, the parties and the neutral pay considerable attention to evidence and law—and that the negotiations revolve around fairly traditional analysis of positions—as much as the mediators might want to shift focus to underlying interests and to searches for creative solutions.}\textit{Id.} at n.38.

\textsuperscript{176} See \textit{id.} at 1135.
\textsuperscript{177} \textit{id.} at 1134.
\textsuperscript{178} \textit{id.} at 1136.
\textsuperscript{179} \textit{id.}
\textsuperscript{180} \textit{id.} at 1136-37.
resolve disputes in accordance with the law when the parties don't.\textsuperscript{181} Determining the facts in a case is central to doing justice.\textsuperscript{182} The court felt it was in a position to fulfill this key duty because,

the mediator is positioned in this case to offer what could be crucial, certainly very probative, evidence about the central factual issues in this matter. There is a strong possibility that his testimony will greatly improve the court's ability to determine reliably what the pertinent historical facts actually were. [The mediator's testimony, as a result,] would provide the court with the evidentiary confidence it needs to enforce the agreement.\textsuperscript{183}

The court then turned its attention to the impact such a decision would have on mediation:

A publicly announced decision to enforce the settlement would, in turn, encourage parties who want to try to settle their cases to use the court's mediation program for that purpose. An order appropriately enforcing an agreement reached through the mediation also would encourage parties in the future to take mediations seriously, to understand that they represent real opportunities to reach closure and avoid trial, and to attend carefully to terms of agreements proposed in mediations. In these important ways, taking testimony from the mediator could strengthen the mediation program.\textsuperscript{184}

Although this language patently favors the company and presages the court's ultimate decision to enforce the settlement agreement,\textsuperscript{185} its essence is crucially important. For the first time, a court considered the positive impact upon the institution of mediation which would result from piercing the mediation privilege and compelling the testimony of a key, tie-breaking witness.

Consider the alternative. What might the negative impact on mediation be if the court failed to allow the testimony of the mediator? In order to do justice, the court must seek to avoid a disconnect between the facts of the mediation and the ultimate decision. This is important

\textsuperscript{181} Id. at 1136.
\textsuperscript{182} See id.
\textsuperscript{183} Id. at 1136-37.
\textsuperscript{184} Id. at 1137.
\textsuperscript{185} Id. at 1139.
not only because of the affect upon the public perception of the courts, but also on the public perception of mediation itself. Failure to gather all of the relevant testimony, especially when the court finds that the mediator's testimony is the "only source of presumptively disinterested, neutral evidence," would certainly create a substantial risk that any final decision would not comport with the facts. Any alignment between the facts and the final result would be attributable more to happenstance than to a close scrutiny of the evidence available to the trier of fact.

 Nonetheless, it is important to remember that what is perceived as real is real in its consequences. The actual correspondence between the facts and the court's ultimate decision in any given case is of less importance than the overall public perception of mediation, especially if the public perceives that the court failed to consider relevant information that was available. Notwithstanding the reason for the court's denial of access to the crucial testimony (the impartiality of the mediator, the integrity of the process, or a failure to meet the test that the need substantially outweigh the interests of confidentiality), the aggrieved party (or, as in Olam, aggrieved parties) will contend that the rules of the institution of mediation wrongfully prevented access to critical evidence. This perception will arise because the impediments to the evidence are constructed within mediation itself, ultimately sowing seeds of distrust for mediation as a viable form of dispute resolution. While the mediation community sees a mediator's testimony as potentially damaging to his or her individual neutrality, the disputant sees the refusal to testify as damaging to the institutional neutrality of mediation. The members of the mediation community, in supporting the screening provisions found in section 6(b), have put their individual interests before the interests of mediation as an institution.

 Does Judge Brazil's decision to compel the testimony of the mediator add any value to this debate? On the negative side, the case involved an express waiver by both parties of their individual privileges. The court stated that the consideration of the issues would have been complicated had one of the parties objected to the mediator testifying.

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186. Id. at 1138.
187. UMA, supra note 7, § 6(b).
188. Olam, 68 F. Supp. 2d at 1133. After the court discussed the importance of maintaining confidentiality in order to promote candor between the parties, it stated:

While this court has no occasion or power to quarrel with these generally applicable pronouncements of state policy, we observe that they appear to have appreciably
How it would be more difficult and what additional matters should be considered are not clear. The court's conclusion mistakenly presumes, however, that the interests of the mediator and of mediation are of less value than that of the parties. The calculus should not change when one party objects to the disclosure. If the primary interest in preventing the mediator's testimony is to preserve his or her neutrality, it would seem that this interest resides more completely with the mediator than with any of the parties. Certainly, the lessons to be learned from Olam are applicable whether all the parties waive the privilege or not.

By weighing the interests for and against the mediator's testimony, the Olam court created a simple "interests of justice" exception to the mediator privilege. This is similar to the exception that appeared in the April 16, 1998 Draft of the UMA.\footnote{Id. APRIL 1998 DRAFT, supra note 83, at Reporter's Notes (c)(1)–(10).} The court, however, was not burdened with the test in section 6(b) of the UMA, which requires that the need for the evidence "substantially outweighs the interest in protecting confidentiality."\footnote{Id. supra note 7, § 6(b).} We have no way of knowing if the decision would have been different had the court been faced with a test which called for this different measure.\footnote{Id. This discussion completely disregards the fact that the defenses raised by Ms. Olam, although sounding in duress as required by the UMA, supra note 7, § 6(b)(2), invoked a statutory defense based upon undue influence. Olam, 68 F. Supp. 2d at 1140–92. It is unclear whether this would have been sufficient to invoke the provisions of the UMA.} Consider whether the interests of justice and the probative value of the mediator's testimony, combined with the rarity of the occurrence, outweigh or substantially outweigh the policy favoring confidentiality.

Judge Brazil's decision effectively demonstrates the hollowness of the UMA's requirement that the need for disclosure substantially outweigh the interests of protecting confidentiality. By thoroughly analyzing the factors for and against disclosure, Judge Brazil demonstrated that a mere "weighing" of the need to disclose is sufficient. The court took seriously its duty to consider all arguments before ordering disclosure and then did so in a manner which was highly sensitive to the needs of all, including the mediator.

Further, Judge Brazil, following up on the California Court of Appeals Decision in Rinaker v. Superior Court,\footnote{74 Cal. Rptr. 2d 464 (Ct. App. 1998).} created an interest of
justice exception to the mediation privilege where none existed before.\textsuperscript{193} As discussed above,\textsuperscript{194} the court was faced with two statutory provisions, one which read in terms of mediator incompetency\textsuperscript{195} and the other as an exclusionary rule.\textsuperscript{196} Neither provision permitted the otherwise applicable exceptions; neither resembled a traditional privilege. For instance, section 1119 of the California Evidence Code reads in part: "Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made... in the course of, or pursuant to, a mediation... is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any... noncriminal proceeding."\textsuperscript{197} When confronted with what appears to be an impenetrable barrier, the court interpreted the statute as creating a qualified privilege. Judge Brazil then created an exception in the "interests of justice" for contractual misconduct, and determined that the mediator should be compelled to testify.

Under this provision, how would the hypothetical widow fare in her lawsuit against the Deceiving Defendant? Does her need for the mediator's testimony substantially outweigh the interests in protecting confidentiality? If so, is there anything about the case which can be generalized to other cases to provide guidance for other disputants and mediators? If not, does her need merely outweigh, as opposed to substantially outweigh, the interests in protecting confidentiality? And how could the balance of the scale be tipped in her favor to show that her needs satisfy the test in the UMA? Would a better story help? More heinous conduct on the part of the Deceiving Defendant? A more heart-rending plight of the widow? Bigger damages? These questions reinforce the argument that the UMA test is unworkable.

The questions that arise in the case of the Deceiving Defendant also arise in the case of the Negligent Neutral. Consider the art dealer who lost the precious Grecian urn and the tax break. Does her need for the evidence substantially outweigh the UMA's interests in protecting confidentiality? Why or why not? Plaintiffs should not be denied access to the court merely because mediators want to avoid the inconvenience

\textsuperscript{193} Id. at 469 (creating exception for constitutional right to impeachment arising in a juvenile court proceeding deemed by the court to be a civil action).
\textsuperscript{194} See supra notes 162-171 and accompanying text.
\textsuperscript{195} CAL. EVID. CODE § 703.5 (West 1995) ("[N]o... mediator[shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceedings.").
\textsuperscript{196} See CAL. EVID. CODE § 1119 (West Supp. 2001).
\textsuperscript{197} Id.
of testifying in court. Failure to allow the mediator's testimony will visit more damage on the institution of mediation than the reverse.

2. The Overwhelming Need

A predictable and consistent interpretation of section 6(b) is further complicated by language in the Prefatory Note which states: "In accordance with these state policies, the provisions of the Act should be applied and construed in such manner as to: [] promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests."198 The Drafting Committees originally had this language in the text of the UMA, but NCCUSL moved the language to the Prefatory Note before they adopted the UMA at their 2001 annual meeting.199 This prefatory language attempts to frame the UMA's approach to the tension imbedded within any construction of confidentiality. On one side of the scale, this language seeks to protect confidentiality (a broader term meant to encompass both privileges and keeping secrets).200 This protection is then weighed against "specific and compelling societal purposes" for disclosure. The following table provides a comparison of the introductory language of the September 2001 draft of the UMA with the balancing test contained in section 6(b) of the NCCUSL approved draft that is being sent to the ABA House of Delegates for their approval:

198. SEPTEMBER 2001 DRAFT, supra note 11, at Prefatory Note § 1.
199. MAY 2001 DRAFT, supra note 90, § 2(1). The section in its entirety read:

SECTION 2. APPLICATION AND CONSTRUCTION.
In applying and construing this [Act], consideration must be given to:
(1) the need to promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests;
(2) the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with the principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties;
(3) the policy that the decision-making authority in the mediation process rests with the parties; and
(4) the need to promote uniformity of the law with respect to its subject matter among States that enact it.

Id. Interestingly, the order of the considerations have been changed in this draft of the UMA. The November 2000 Draft had the first two reversed, with the integrity of the process and self-determination consideration listed before the confidentiality provision. NCCUSL, DRAFT UMA § 2 (Nov. 2000).
200. See supra Part II.A.
TO THE SPOILED GO THE PRIVILEGES

Prefatory Note § 1 | § 6(b) Exceptions to Privilege
---|---
Against Disclosure | promote candor through confidentiality of the mediation process | interest in protecting confidentiality
Balancing Test | subject only | substantially outweighs
Favoring Disclosure | need to accommodate specific and compelling societal interests | need of party for evidence

The factors weighing against disclosure, although worded differently, both aim at protecting confidentiality. Unfortunately, any similarity between the two provisions ends here. When considering the factors favoring disclosure, the Prefatory Note contains a test which is both stiffer and broader than that found in section 6(b). It requires the interests to be specific and compelling while also requiring them to be aimed at wider societal interests. Section 6(b) differs substantially in that it addresses only the needs of the one seeking the evidence. Certainly, the need to "accommodate specific and compelling societal purposes" as found in the Prefatory Note would include "doing justice," 201 which Judge Brazil, in Olam v. Congress Mortgage Co., found to be "an interest of considerable magnitude." 202 Why is this consideration absent from section 6(b), which deals with privileges, evidence, and, ultimately, doing justice? Do the drafters intend to limit the application of broader societal purposes to keeping secrets and not to privileges? Inclusio unius est exclusio alterius?

The balancing tests between the two provisions are also different. The Prefatory Note requires a simple balancing while section 6(b) of the

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202. Id. The court explained that,

Establishing reliably what the facts were is critical to doing justice (here, justice means this: applying the law correctly to the real historical facts). It is the fundamental duty of a public court in our society to do justice—to resolve disputes in accordance with the law when the parties don't. Confidence in our system of justice as a whole, in our government as a whole, turns in no small measure on confidence in the courts' ability to do justice in individual cases. So doing justice in individual cases is an interest of considerable magnitude.

Id.
The ultimate impact of the tests from these two provisions is by no means clear. Considered together, they make any determination of when a privilege should be disallowed that much murkier. These two provisions will decimate predictability. Using different language in different parts of the Act referring to the same concept only invites litigation to sort out these two provisions.

The tests are totally unworkable and will result in two unfortunate circumstances. First, even if the language receives uniform enactment by the states, which is doubtful, it will not receive uniform interpretation by the courts. This defeats the declared intent of the drafters to "promote uniformity" of the law of mediation. Second, and more problematic, this language will adversely impact parties who might otherwise rightfully litigate their claims of contractual misconduct. The good cases, the cases where the smoking gun admission will not get to court, will settle. This language will eliminate most, if not all, borderline cases. In addition, it may foreclose the somewhat better cases where the parties are not as well represented and/or financed.

3. Manifest Injustice

An exploration of the short and tragic life of an exception for manifest injustice may further expose the problems imbedded within the UMA. One of the earliest drafts of the UMA contained an exception to the mediation privilege for the "interests of justice." This catchall provision, which transformed an absolute privilege to a qualified privilege, was modeled after an Ohio statute. This exception

203. MAY 2001 DRAFT, supra note 90, at Prefatory Note § 1.
204. APRIL 1998 DRAFT, supra note 83, at Reporter's Notes (c)(10).
205. Id.
206. OHIO REV. CODE ANN. § 2317.02.3(C) (Anderson 1998). This section, in part, states:

Division (B) of this section does not apply in the following circumstances:

(4) To the disclosure of a mediation communication if a court, after a hearing, determines that the disclosure... is necessary in the particular case to prevent a manifest injustice, and that the necessity for disclosure is of a sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in
disappeared, however, and did not reappear until the Faculty Advisory Committee urged the Drafting Committees in March 1999 to add an exception "to prevent a manifest injustice of such magnitude as to outweigh the importance of protecting the confidentiality in mediation proceedings." The provision had been transformed from the "interests of justice" to "manifest injustice" and a test was added that the need must outweigh the importance of mediation confidentiality.

The drafters intended the new manifest injustice exception to cover "exigent, unforeseen, or exceptional" circumstances, because the protections of the Act were to be extended to mediators in a mostly unregulated profession. Further, throughout the drafting process, the Drafting Committees employed a very broad definition of mediation to include discussions that the public would not want protected, such as mediations containing important public policy issues. Finally, proponents of the exception asserted that it would provide for reasoned judicial balancing that would otherwise take place in a vacuum. This

 mediation proceedings.

*Id.* The Ohio Supreme Court has interpreted this provision to mean a "clear or openly unjust act." Schneider v. Kreiner, 699 N.E.2d 83, 86 (Ohio 1998).

207. See *supra* note 47 and accompanying text.

208. MARCH 1999 DRAFT, supra note 84, § 2(d) Reporter's Working Notes, at Last Sentence. "The Faculty Advisory Committee urges the Drafting Committee to adopt" a manifest injustice exception. *Id.*

209. *Id.* § (3)(d) Reporter's Working Notes § (d)(8) ("There is no protection under subsections (c); . . . (8) When the court determines, after a hearing, that disclosure is necessary to prevent a manifest injustice of such magnitude as to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.").

210. DECEMBER 1999 DRAFT, supra note 85, at Reporter's Working Notes § 2(c)(5) ("The Drafting Committee decided to continue this modern trend, to give courts the sound discretion to meet exigent, unforeseen, or exceptional situations requiring individualized consideration.").

211. MARCH 1999 DRAFT, supra note 84, § 2(d) Reporter's Working Notes, at Last Sentence, ("The exception for 'manifest injustice' seems necessary to take care of unforeseen problems. This is particularly important because the confidentiality has been extended to mediators who are neither connected to any public agency nor have been certified or licenced by any governmental body."); See also Alan Kirtley, *Best of Both Worlds: Uniform Mediation Privilege Should Draw from Both Absolute and Qualified Approaches*, 5 DISP. RESOL. MAG. 5, 5 (1998) (recognizing inconsistency among mediation regulations).

212. See UMA, supra note 7, § 2(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.").

213. See DECEMBER 1999 DRAFT, supra note 85, at Reporter's Working Notes § 2(c)(5) ("This exception permits the courts to recognize exceptional situations that have not been fully anticipated by the Drafting Committee but which would involve such serious injustice that the need for the evidence outweighs the purposes served by the privilege.").
was especially important considering that "mediation privileges are relatively new." The language of the manifest injustice section implemented a very high standard for breaching the confidentiality of mediation. The Reporters Working Notes of July 1999 state: "Given the fundamental nature of advocacy, the Drafting Committee anticipates that many if not most such claims of manifest injustice will fail."

To say that the mediation community voiced opposition to the manifest injustice provision would be a vast understatement. Opponents of the test considered it unworkable and fraught with problems. They feared it would open the floodgates of litigation as each opportunist lawyer attempted to take advantage of the provision to pierce the sanctity of the mediation process. Mediation would surely suffer horrendously if such a provision were enacted. The existence of this provision quickly became the mediation community's "hill to die on." Through 1999, the opposition continued to mount. To a number, the mediation organizations acting as Official Observers to the drafting of the UMA came out in opposition to the provision. The Executive Council of the Dispute Resolution Section of the ABA, which is the sponsoring Section for the ABA Drafting Committee, voted overwhelmingly to direct the committee to remove the section. Even

214. Id.; see also MARCH 1999 DRAFT, supra note 84, at Reporters Working Notes § 2(d), (noting that such an exception, "adds an element . . . of judicial balancing, and therefore some uncertainty in the application of the privilege. Even then, however, the Draft strikes a balance between competing policies by requiring the proponent of the exception to meet the higher 'manifest injustice' standard of proof").

215. Id.

216. JUNE 1, 1999 DRAFT, supra note 130, at Reporters Working Notes § 2(o)(5).

217. See, e.g., Hughes, supra note 92, at 30 ("A privilege applied inconsistently is worse than no privilege at all.").

218. Memorandum from Richard C. Reuben, Reporter for the ABA Drafting Committee, to the ABA/NCCUSL Uniform Mediation Act Drafting Committees 3 (October 18, 1999) (on file with author).

[Manifest Injustice] has been extraordinarily controversial, with most in the mediation community opposed to the current provision. If the provision remains as currently drafted, I have serious doubts as to whether the Act would be approved by the ABA Section of Dispute Resolution, and therefore by the ABA House of Delegates, and whether it would be enacted by the states over the largely uniform opposition of the mediation community. This provision will be this community's "hill to die on."

Id.

219. For a list of those observers, see supra note 48.

220. See Memorandum from Richard C. Reuben, Reporter for the ABA Drafting
with this vociferous opposition, the provision did not suffer a swift and painless death. Instead, it suffered on, based primarily on the support of the Chair of the NCCUSL Drafting Committee. Believing a consensus might be generated if the test were made more stringent, the drafters strengthened the language in the December 1999 Draft:

There is no privilege ... (5) if a court determines, after a hearing with consideration of the mediation communications occurring only under seal, that the proponent has shown that the evidence is not otherwise available and there is overwhelming need for disclosure to present [sic] a manifest injustice of such a magnitude as to substantially outweigh the importance of protecting the confidentiality of mediation communications.

When this language failed to pass muster during the December 1999 meeting of the Drafting Committees, the Chair formed a task force (comprised of members of the Drafting Committees and Official Observers) to explore further alternatives. The task force sanitized the language in the January 2000 Draft by removing the buzz words "manifest injustice," and providing for an exception in "[a]n


221. See supra note 44.

222. DECEMBER 1999 DRAFT, supra note 85, § 2(c)(5) (emphasis in original to denote changes in draft language). The Reporter's Working Notes state, "that the privilege should yield in unusual and exceptional circumstances." Id. at Reporter's Working Notes § 2(c)(5). After citing the federal Administrative Dispute Resolution Act and several state laws with manifest injustice-like exceptions, the notes state, "[t]he draft provision is narrower than these existing statutes." Id. (emphasis in original to denote changes in draft language). The Notes continue:

The Drafting Committee decided to continue this modern trend, to give courts the sound discretion to meet exigent, unforeseen, or exceptional situations requiring individualized consideration, and to keep the Act simple and accessible by eliminating the need for an extensive list of highly detailed exceptions. However, it adopts a high standard to reflect the Drafting Committee's intent that the confidentiality protections the Act provides only be lifted by post hoc judicial determination in narrow and exceptional circumstances, thus preserving the disputants' reasonable expectations of confidentiality.... Given the fundamental nature of advocacy, the Drafting Committee anticipates that many if not most such claims of manifest injustice will fail.

Id. The quoted textual material refers to a singular Drafting Committee because the drafts of the UMA are published by NCCUSL, although the NCCUSL and the ABA Committees are drafting in tandem. See supra notes 44–48 and accompanying text.

extraordinary situation not within these enumerated exceptions in which the general purposes of the state policy favoring mediation confidentiality is so outweighed by the need for disclosure that the interests of justice will be served only if disclosure is compelled."

To opponents, the new language was simply manifest injustice under a different name. "A wolf in sheep's clothing!" they cried. This language limped through the late January 2000 meeting of the Drafting Committees (in the January 28 and January 29 drafts) and then finally, ignominiously disappeared when the Drafting Committees voted it down for the last time. The ill-fated manifest injustice exception to confidentiality presented an unpalatable test for almost all members of the mediation community. It was a test that provided, in their minds, an open drawbridge which would inevitably result in hoards of attorneys swarming over the parapets of mediation and ultimately destroying it. No matter that the moat might be wide, deep and infested with alligators, the opponents still saw the exception as an unacceptable lowering of the gate, which could only lead to ruin.

The opposition of the mediation community to the balancing test found in the manifest injustice exception is in stark contrast to their embrace of the "substantially outweighs" test for the mediator malpractice and contractual misconduct exceptions found in section 6(b) of the UMA. Not surprisingly, there is a link between the death of manifest injustice and the rise of the substantial need test in section 6(b). While the supporters of the manifest injustice exception fought a

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224. JANUARY 2000 DRAFT, supra note 140, § 2(f)(6).
225. Notes from telephone conference with members of the SPIDR Committee observing the drafting of the UMA (identity of speaker unknown) (Jan. 20, 2000) (on file with author).
228. One vestigial remnant relating only to criminal misdemeanors appeared in a memo dated February 12, 2000 suggesting language for the Act, but even this failed to appear on the draft that went to the next drafting session in Jacksonville, Florida on March 31–April 2, 2000. Memorandum from Nancy Rogers and Richard Reuben, Uniform Mediation Act Reporters, to ABA/NCCUSL Drafting Committee Members, ABA Section of Dispute Resolution Council, Academic Advisory Faculty, Official Observers § 8(b)(3) (Feb. 12, 2000) (on file with author) (providing for an exception to confidentiality "in criminal misdemeanor proceedings, for those situations not within these enumerated exceptions in which the general purposes of the state policy favoring mediation confidentiality is so outweighed by the need for disclosure that the interests of justice will be served only if disclosure is compelled.") This draft was labeled "Not an Official Draft," but was still widely distributed.
229. See supra Part III.A.1.; see also UMA, supra note 7, § 6(b).
rearguard action by continually strengthening the language, the exceptions to the privilege for contractual misconduct (although somewhat narrowed) remained readily available and were not subject to any test. The December 1999 Draft contained this language:

There is no privilege . . . nor prohibition against disclosure . . .

(5) if a court determines, after a hearing with consideration of the mediation communications occurring only under seal, that the proponent has shown that the evidence is not otherwise available and there is overwhelming need for disclosure to present [sic] a manifest injustice of such a magnitude as to substantially outweigh the importance of protecting the confidentiality of mediation communications;

...  

[(7) to the extent found necessary by a court, arbitrator, or agency if the disputant files a claim or complaint against a mediator or mediation program alleging misconduct arising from the mediation.]  

[(8) as to evidence provided by the disputants, to the extent found necessary by a court, arbitrator, or agency in a proceeding in which defenses of fraud or duress are raised regarding an agreement evidenced by a record and reached by the disputants as the result of the mediation.]\(^{230}\)

At this point several things must be kept in mind. First, all ten exceptions to the mediation privilege were placed in one section and, as indicated by the introductory language, no gateway or balancing tests restricted access to any exception other then manifest injustice. Second, the bold face language in the manifest injustice exception was added in this draft in an attempt to mollify its opponents. The Reporter’s Notes state that the manifest injustice language was drafted more narrowly than similar state statutes.\(^{231}\) And, third, the manifest injustice exception is strikingly similar to the restrictions that eventually restrict access to the contractual misconduct exception found in section 6(b).\(^{232}\) There must now be an overwhelming need to prevent a manifest injustice which must substantially outweigh the need to protect confidentiality.

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230. DECEMBER 1999 DRAFT, supra note 85, § 2(c) (brackets in original) (emphasis in original to denote changes in Draft).
231. Id. § 2(c) Reporter’s Working Notes § 2(c)(5).
232. UMA, supra note 7, § 6(b).
The drafters restructured the UMA in the January 2000 Draft and created a bifurcated system of exceptions. For the first time, the non-controversial exceptions appear without restrictions and the balancing test acts as a gateway to the more difficult exceptions:

There is no privilege... if a judicial, administrative, or arbitration tribunal finds, after an in camera hearing, that the disputant seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is an overwhelming need for the evidence that substantially outweighs the importance of the state's policy favoring the protection of confidentiality and the subject matter of the disclosure is limited to:

... (4) establishing or disproving a claim or complaint of professional misconduct or malpractice filed against a mediator, a disputant or a representative of a disputant based on conduct occurring during a mediation;
(5) A proceeding in which fraud, duress, or incapacity are raised regarding the validity or enforceability of an agreement evidenced by a record and reached by the disputants as the result of a mediation, but only through evidence provided by persons other than the mediator of the dispute at issue.
[(6) An extraordinary situation not within these enumerated exceptions in which the general purposes of the state policy favoring mediation confidentiality is so outweighed by the need for disclosure that the interests of justice will be served only if disclosure is compelled.]

As related earlier, the manifest injustice provision was in its death throes during the late-January meeting of the Drafting Committees. It was finally killed before adjournment. However, this was not before the Drafting Committees engrafted the balancing test onto the contractual

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233. January 2000 Draft, supra note 140, § 2(e) ("There is no privilege or prohibition... (1) for a record of an agreement between two or more disputants; (2) for the sessions of a mediation that must be open to the public under the law.").

234. Id. § 2(f) (brackets in original). Interestingly, when this subsection first appeared, it was extended to cover three other exceptions: mediation communications relating to threats to inflict violence, the planning of a crime, and protection of children, disabled adults and the elderly. Id. § 2(f)(1)-(3). Since these exceptions were obvious and presented little controversy they were quickly moved to a provision of the UMA without a balancing test and now appear in section 6(a) of the Act. See UMA, supra note 7, § 6(a)(3)-(4), (7).

235. See supra notes 207-216 and accompanying text.
misconduct exceptions, among others. This balancing test is the ancestor of the "substantially outweighs" test which now appears in the UMA:

There is no privilege... if a court... 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.\textsuperscript{236}

Consider the test in section 6(b) which requires a showing that the need for the information "substantially outweighs the interest in protecting confidentiality"\textsuperscript{237} with the rejected test dealing with the manifest injustice test. That test required "an overwhelming need for disclosure to present [sic] a manifest injustice of such a magnitude as to substantially outweigh the importance of protecting the confidentiality of mediation communications."\textsuperscript{238} Both tests are equally unfathomable, opaque, and incapable of quantification. The interpretation and implementation of each may have more to do with chance than with any identifiable or objectifiable standards evident within the language of the tests.

In the creation of one exception to confidentiality, that of manifest injustice, a vague and difficult test was rejected. But in the creation of others, including contractual misconduct, an equally vague and difficult test was embraced. Why should the idea of a test, which is contemptible in the creation of one exception, be commendable in the creation of another? For three reasons.

First, the mediation community, with its huge impact on the creation of the Uniform Mediation Act, had the political will to get the job done. The community had the power to destroy the manifest injustice exception, but not to eliminate exceptions for mediator malpractice or mediator misconduct.

Second, the manifest injustice exception is much more ephemeral, dealing with "unusual and exceptional circumstances."\textsuperscript{239} The circumstances which might invoke the manifest injustice exception are much less concrete than those of contractual misconduct and mediator

\begin{itemize}
\item \textsuperscript{236} UMA, supra note 7, § 6(b).
\item \textsuperscript{237} Id.
\item \textsuperscript{238} DECEMBER 1999 DRAFT, supra note 85, § 2(c)(5).
\item \textsuperscript{239} Id. § 2(c)(5) Reporter's Working Notes § 2(c)(5).
\end{itemize}
malpractice. If you cannot imagine a horrifying hypothetical, it must not be a problem. If they cannot be foreseen, why worry about them? The risk of invoking the section is so remote, the mediation community should not be endangered by it. Even the supporters found it somewhat difficult to get in a lather about it.

Conversely, several cases exist which demonstrate the need for exceptions dealing with contractual misconduct. Each mediator can conjure up frightening hypothetical scenarios which bring more immediacy to the problem. If one party attempts to defraud or coerce the other in the course of reaching a mediated settlement agreement, the parties should be able to litigate or defend the claim without fear that the rules will limit the ability of one or the other to prove the offending conduct.

In *Randle v. Mid Gulf, Inc.*, a 1996 Texas case, the plaintiff brought an action to enforce a mediated settlement agreement. The respondent defended the lawsuit by alleging that he had been coerced into a settlement agreement. The respondent, after complaining of chest pains and relating a history of heart trouble, asked for the mediation to be adjourned. Allegedly, the mediators refused to allow him to leave "until a settlement was reached." The plaintiff moved for summary judgment by asserting the confidentiality of the proceedings (under the Texas mediation statute). Since the proceedings are meant to be confidential, the plaintiff asserted that the trial court could not inquire into the circumstances of the defendant's health and the conduct of the

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241. *See* *Olam*, 68 F. Supp. 2d at 1138–39 (finding that, after both parties waived any privilege, mediator's separate privilege should give way to the court's needs for the evidence to decide a party's claim of undue influence in the creation of an agreement reached in mediation).


243. *Id.* at *1.

244. *Id.*

245. *Id.*

246. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (a) (Vernon Supp. 2001)). The statute states:

Except as provided by Subsections (c), (d), and (e), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

*Id.*
mediator. In its unpublished decision, the Texas Court of Appeals breached the confidentiality and reversed the trial court's granting of plaintiff's motion for summary judgment. The court reasoned that the plaintiff could not have it both ways; it could not seek to enforce the mediation settlement agreement on one hand and then assert the secrecy of the mediation proceedings on the other.

In cases of contractual misconduct, the parties and the mediator should be able to prosecute and defend without the unilateral imposition of the mediation privilege which would ultimately nullify any potential claim. When parties assert a mediation privilege to prevent any inquiry, as Mid Gulf, Inc. did, it is impossible to determine if they are legitimately protecting the mediator-disputant relationship or attempting to conceal wrongful conduct that occurred within the mediation. The malefactors would only need to assert the secrecy of the mediation process and be shielded from any claim.

As a third reason for rejecting manifest injustice while embracing a test for contractual misconduct, the mediation community realized that seeking to eliminate the exception for contractual misconduct would amount to overreaching and unacceptable favoritism for mediators. It became apparent that it would be impossible to draft a uniform act without this exception since the courts with their inherent powers would create such an exception. Nonetheless, the mediation community distrusted the court's ability to fairly and consistently interpret these exceptions. Accordingly, in its effort to preserve the integrity of the mediation process, the community sought to impose an overwhelming test upon the courts in an attempt to cabin this problem as much as possible. The odious test from manifest injustice was suddenly sweeteningly embraceable to constrict the unavoidable exception of contractual misconduct. As a result, the mediation community has done indirectly what it could not do directly. By imposing this difficult test, it may have eliminated the claims for most disputants damaged by contractual misconduct.

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247. Id.
248. Id.
249. Id.
B. The Artificial Distinction Between the Exceptions for Mediator Malpractice and Contractual Misconduct

1. We Are All Equal Here, But Mediators Are More Equal Than Others

There is one distinction between the exceptions for mediator malpractice and contractual misconduct which merits further examination. In a claim against the mediator, the mediator can both testify and have access to the other parties who did not join in the complaint against the mediator. The mediator has all the weapons at his or her disposal to defend against any claim. In a proceeding over mediator malpractice, the testimony of the other party will hardly be neutral and unbiased. When such claims are made, the injured party brings the claim because of a perceived disadvantage resulting from the mediator's conduct. In such a case, the other party is most likely advantaged by the acts of the mediator. If the advantaged party is called to support the mediator's position, his or her testimony will also have the intended effect of protecting the gains resulting from the mediator's malpractice. The party aiding the mediator will have a vested interest in the status quo.

On the other hand, if a claim of contractual misconduct is made, either party can provide their own testimony and that of any of the other parties to the mediation to prosecute or defend against attack, but not that of the mediator. While a mediator may testify in a proceeding arising from a complaint of mediator malpractice, none of the parties

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250. UMA, supra note 7, § 6(a)(5) ("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.").

251. Id. § 6(b)(2) ("There is no privilege ... if ... 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.").

252. Id. § 6(b)(2), (c). Section 6 states:

(b) There is no privilege ... if ... 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).

Id.
can call the mediator in an action involving contractual misconduct.

As discussed earlier, Judge Brazil, in *Olam v. Congress Mortgage Co.*, found the mediator's testimony as the "only source of presumptively disinterested, neutral evidence."253

Certainly, the mediator has some motivation to want to uphold the integrity of the mediation, but these pressures are slight in comparison to those confronting a party. In discussing this point, Judge Brazil stated:

[A] mediator might have interests or motives that could affect the accuracy of his or her testimony in a setting like this .... [I]t is reasonable to assume that at least some mediators want to perceive themselves as both sensitive and fair—so they would be unhappy if the court found that they had failed to understand that a party to the mediation was in acute or disabling emotional distress at the decisive juncture in the mediation, or was mentally incompetent to make the kinds of decisions and commitments the mediator called upon the party to make. Similarly, we should expect good mediators not to want a court to find that they had permitted a truly disabled party to sign a contract under duress, or to execute an agreement whose essentials they did not understand, or to be unfairly victimized by an obviously more powerful or sophisticated opponent .... A natural reaction by a mediator to ... claims [of incapacity or undue influence] would be denial—an assertion that the mediator would never let something like that happen. Such a defensive reaction could infect testimony.254

The court then measured the mediator's testimony in the case at bar:

The question is not whether [the mediator] might have felt some of these emotions—the question is whether he permitted any such emotions to play any meaningful role in how he testified .... I have concluded, after considering all the evidence, that [the mediator] resisted any temptation he might have felt to defend his work and that he testified carefully and accurately about what occurred during the mediation.255

253. 68 F. Supp. 2d at 1138.
254. Id. at 1127 n.22.
255. Id.
While not entirely free from pressure that may influence testimony, the mediator can be the neutral tie breaker. The same can hardly be said for a party's testimony supporting a mediator in defense of a malpractice claim.

If Olam was decided under the regime found in section 6(b)(2) and 6(c), the mediator's testimony would not be allowed no matter how overwhelming the need might be. Judge Brazil would have been forced to reject the mediator's testimony even though doing so might prevent the court from doing justice in the case. When faced with statutory language that was designed with a similar intent, Judge Brazil determined that the interests of justice required access to the mediator, the one person whose testimony was crucial to the outcome of the dispute. The same results would hold true in the case of the Negligent Neutral. If sections 6(b)(2) and 6(c) control, precluding the mediator's testimony, any lawsuit against the other dealer will likely fail. The confidentiality afforded the mediation process should not abrogate common law contract principles and result in the destruction of the self-determination of the disputant.

After examining the two provisions, a party who has either been defrauded or wrongfully accused of fraud is alone in the wilderness and prevented by the statute from using the mediator to prove his or her position. On the other hand, were the mediator accused of malpractice, all the individuals at the mediation table could be called upon to testify in defense of the mediator's conduct. The natural conclusion is one of protectionism on behalf of mediators; the well-being of the mediator is of greater value than that of any of the other parties.

2. The Rule of Unintended Consequences

The combination of sections 6(a)(5) and 6(b)(2) may have some unnerving and unintended consequences. An astute lawyer, upon examining these two provisions, will naturally conclude that the mediator needs to be joined as a co-defendant. If a plaintiff is unable to depose the mediator in a simple lawsuit against the other party, this problem can easily be overcome by suing the mediator as well. After joining the mediator all of the individuals in the mediation, mediator included, can be deposed. As a result, the mediator will not only have to worry about getting a protective order to avoid a deposition or trial testimony, but will also have to hire an attorney and prepare to defend

256. UMA, supra note 7, § 6(b)(2), (c).
257. Id.
the lawsuit.

This scenario is not far fetched as is demonstrated by a further examination of the Randle v. Mid Gulf, Inc.258 and Olam v. Congress Mortgage Co.259 cases. Both cases involved claims between the parties, but also either directly or indirectly, implicated mediator misconduct. In Randle, the plaintiff sued to enforce the settlement agreement and, in response, the defendant alleged that the mediator coerced him into staying until the agreement was signed.260 In Olam, the defendant asserted that she was under duress when the agreement was signed after midnight.261 As that mediation progressed, most of the mediation took place in caucuses with the mediator shuttling back and forth between parties.262 Although there were no allegations of mediator misconduct, it is reasonable to assume that any pressure to settle was at the hands of the mediator. If either suit had been brought under the terms of section 6(b)(2) of the UMA, the defendants would have been foreclosed from deposing the mediator in an attempt to prove coercion or distress. The plaintiff's only recourse, then, would have been to name the mediator as a co-defendant. This would invoke the provisions of 6(a)(5) dealing with mediator malpractice and permit the plaintiff to gain access to the mediator's testimony. As these two cases illustrate, this is more than an intellectual exercise. If either lawsuit would have been tried under the provisions of the UMA, it is impossible to avoid the conclusion that the mediator would have been defending a personal lawsuit instead of worrying about seeking a protective order.263

In the cases of the Negligent Neutral and the Deceiving Defendant, the mediator may end up being named as a party defendant. Certainly, the disgruntled art dealer may wish to only claim mutual mistake against the other dealer and hopefully use the mediator as a nonhostile witness. Regardless of the dealer's motivation and strategy, the unavailability of the mediator precludes this choice, resulting in the mediator being joined in the lawsuit.

In the case of the Deceiving Defendant, the mediator cannot testify, nor can the plaintiff testify about what the mediator said took place

261. Olam, 68 F. Supp. 2d at 1114, 1117.
262. Id. at 1142-43.
263. Such a result would create tremendous difficulty for the court to instruct the jury. Is the jury instructed that the mediator's testimony can only be used as evidence of the claim against the mediator and not as to the claim against the other party?
during the caucus with the adjuster. Such testimony would be hearsay. If the Deceiving Defendant had hatched his plan ahead of time, he could have taken advantage of the UMA by making any fraudulent statements to the mediator in caucus outside the presence of the widow. Section 6(c)\(^\text{264}\) would insulate him from his bad acts because the mediator would not be available to testify. This encourages lying and other contractual misconduct. Beyond creating a bare license to misbehave, the combination of this section and caucuses may cause the disgruntled disputant to conclude both that a conspiracy exists between the mediator and the other party and that the only viable course of action is to sue them both. Upon final analysis, the plaintiff may not be able to prevail against the mediator. Nevertheless, this will not prevent some lawsuits from being filed. The confluence of these forces will only coarsen mediation and increase the level of mistrust between the parties which may very well reverse the trend toward early settlement and reduction of costs.\(^\text{265}\)

IV. CONFIDENTIALITY AND SELF-DETERMINATION IN CONFLICT

In the overwhelming majority of cases, confidentiality and self-determination co-exist and are self-supporting. If we assume for a moment that confidentiality is necessary to promote candor and the kind of honest and open discussion necessary for mediation to succeed, then confidentiality must exist to promote self-determination. However, these two values come into conflict when the parties or the mediator misbehave during mediation. As Professor Fuller says, they "sacrifice their own ultimate interests in order to win it."\(^\text{266}\) This section discusses the foundation of confidentiality and self-determination and then analyzes the potential conflict.

A. The Three Foundations of Confidentiality

The arguments supporting privileges in mediation rest on three main points. First, confidentiality promotes candor in mediation. Second, mediation privileges are necessary to protect the mediator's impartiality. And, third, the parties often have an expectation of privacy which should be fulfilled by mediation. Although not a part of standard

\(^{264}\) UMA, \textit{supra} note 7, § 6(c).

\(^{265}\) See, e.g., Barbara McAdoo & Nancy Welsh, \textit{Does ADR Really Have a Place on the Lawyer's Philosophical Map?}, 18 \textit{HAMLiNE J. PUB. L. & POL'Y} 376 (1997).

\(^{266}\) Fuller, \textit{supra} note 2, at 82.
definitions of mediation, mediation confidentiality is, proponents assert, inextricably woven into the very fabric of mediation and is fundamental to the success of the process. The discussions that take place during mediation often range far beyond the core of the dispute in order to reveal interests and concerns that may not be discussed during positional negotiation or other, more adversarial processes. Within

267. See supra note 10.


269. Positional negotiation involves the parties focusing on prices and terms, conceding slowly, deliberately, and uniformly, and finally compromising in order to reach an agreement. See ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 3-9 (2d ed. 1991). This bargaining behavior is then contrasted with interest-based negotiation which focuses on the parties' interests, needs, and motivations, the "why" of a dispute and not the "what" or "how much." Id. at 10. This latter form of negotiation has been labeled "principled" by Fisher and Ury. Id. Other commentators have provided us with similarly dichotomous labels for the ends of the negotiation spectrum. See GERALD WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 48-54 (1983) ("competitive" and "cooperative"); HOWARD RAFFA, THE ART AND SCIENCE OF NEGOTIATION 33, 131 (1982) ("distributive" and "integrative"); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 30-33 (1986) ("value creators" and
this far-ranging discussion, parties may reveal secrets they might not otherwise disclose in a normal negotiation. A lack of confidentiality would squelch discussion and curtail the parties' ability to continue engaging in creative and interest-based problem solving. This would greatly impede settlement possibilities. In other words, if the parties have to be wary of what they say during mediation, both the process and the resulting outcomes suffer. This limits the efficacy and the efficiency of mediation.

Second, the success of mediation relies heavily on the duty of the mediator to remain impartial.271 The mediator must refrain from advocating in favor of one party and against others, and must retain the appearance of facilitating both sides equally. This duty attaches from the moment the mediation begins and continues throughout the entire process. No matter how objectively neutral, the mediator's testimony will not be so construed by the disadvantaged party. This damages the mediator's impartiality, both in the disputant's eyes and those of similarly situated parties. It is crucial, the argument concludes, that the future vitality of mediation depends heavily on creating and enforcing privileges in order to prevent any adverse impact on the principle of impartiality.

The first two arguments are bolstered by the final argument. Parties enter mediation with an expectation of confidentiality. This expectation may shape their discussions, their joint problem solving abilities, and their perception of the mediator's impartiality. The mediation should meet the confidentiality expectations of the parties in order both fulfill the objectives of mediation and provide for the mediator's continuing impartiality.

B. The Primary Objective of Mediation

Self-determination of the parties is a principle goal of mediation,272 if


270. Kirtley, supra note 100, at 9.


not the primary goal.\footnote{273} To affect self-determination, the parties must make voluntary\footnote{274} and informed decisions\footnote{275} which are based upon full disclosure.\footnote{276} What does it mean to make a voluntary and informed decision? The Ethical Standards for Mediators from Georgia addressed self-determination in terms of "complete information."\footnote{277} These standards posed a hypothetical example to demonstrate the conflict between self-determination and confidentiality:

A party reveals to the mediator in caucus that he has cancer and that he does not want his ex-wife to know about it. He is not sure how long he will be working because of his illness. This information could be very important to the wife. She may need to make other plans for the time when that money is not coming in. Because of the confidentiality, the mediator feels that she cannot say anything.

Recommendation: This presents the classic dilemma of the collision between the promise of confidentiality and the need of
the parties for complete information if they are to enter into an agreement voluntarily. The mediator is placed in the position of keeping a confidence of one party at the expense of the self-determination of the other party. If the mediation is terminated, there is no guarantee that the husband's condition would be revealed at trial.\textsuperscript{278}

Based upon these definitions, a party is not exercising self-determination if they do not have complete information, or at least the pertinent information in question. Any decision arising from this situation is neither voluntary or informed. If greater certainty is required, Florida's Rules for Certified and Court-Appointed Mediators speaks directly to this issue in the Committee Notes:

It is critical that the parties' right to self-determination (a free and informed choice to agree or not to agree) is preserved during all phases of mediation. A mediator must not... knowingly allow a participant to make a decision based on misrepresented facts or circumstances, or in any other way impair or interfere with the parties' right of self-determination.\textsuperscript{279}

Self-determination, which arises from voluntary and informed decision-making, represents the cornerstone of all mediation. To this proposition, there is no debate.

\textbf{C. When Confidentiality and Self-Determination Conflict}

As we saw in \textit{Randle v. Mid Gulf, Inc.}\textsuperscript{280} there is a downside to confidentiality when it is used to conceal negligent or intentional misconduct by either the parties or the mediator. If a malefactor is successful in using the provisions of confidentiality to conceal wrongful conduct, the other party will not be making a voluntary and informed decision, thus destroying the self-determination of the endangered party. In those cases, the dispute may eventually result in a lawsuit so that the courts can unravel the matter. It is here that the two principles face their biggest test. If the mediator had, in fact, coerced Mr. Randle

\textsuperscript{278} \textit{Id.}
\textsuperscript{279} FLA. R. OF CT. § 10.310 comm. notes (West 2001) (continuing, the notes state: "While mediation techniques and practice styles may vary from mediator to mediator and mediation to mediation, a line is crossed and ethical standards are violated when any conduct of the mediator serves to compromise the parties' basic right to agree or not to agree.").
to stay in the mediation, the terms of the UMA would have compelled the court to enforce an agreement that was the antithesis of self-determination.

The same holds true for the cases of the Negligent Neutral and the Deceiving Defendant. Under the provisions of section 6(b)(2) and 6(c), the art dealer in the second hypothetical may be unable to prove the case without the mediator's testimony; accordingly, she will be denied justice. Aside from the plaintiff's cause of action against the mediator for negligence, consider whether the confidentiality afforded the mediation process should be allowed to abrogate the common law contractual defense of fraud? If so, this would result in the loss of her lawsuit to set aside the agreement reached in mediation, resulting in the destruction of her self-determination.

This is pertinent to the case of the Deceiving Defendant, as well, especially if the adjuster made the misrepresentations to the mediator in private caucus. Under 6(c), the mediator cannot testify and the plaintiff cannot testify about what the mediator said during caucus about the policy limits because such testimony would be hearsay. This is true even if the mediator knows the adjuster lied. Should the institution of mediation condone the adjuster's conduct? Should it condone the denial of the widow's self-determination?

The reverse of these hypothetical cases also supports this argument. Claims of fraud, coercion, mistake, or other forms of contractual misconduct may be unfounded. A disputant should not be able to make a false accusation and then invoke confidentiality to hide the truth. Assume that instead of lying about the policy limits, the adjuster bargains aggressively and the widow accepts the settlement of $102,500. Later, the widow has buyer's remorse and alleges fraud when the insurance company seeks to enforce the settlement agreement. Without the mediator's testimony, there is a greater chance the court will decide in favor of the widow, thereby denying justice to the company. *Olam v. Congress Mortgage Co.* applies here. Judge Brazil, without the benefit of hearing what the mediator witnessed, may have found merit to Mrs. Olam's claims of coercion and rendered a decision that was counter to the facts.

An examination of two versions of the case of the Deceiving Defendant will crystallize the dichotomy between self-determination

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281. UMA, *supra* note 7, § 6(b)(2), (c).
282. *Id.* § 6(c).
283. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).
and confidentiality. In the original version, the adjuster successfully misrepresents the policy limits and obtains a fraudulent settlement. In the final version, the mediator glimpses at the adjuster's file and sees the truth about the insurance policy and rightfully concludes that the adjuster is lying and is attempting to defraud the plaintiff while the mediation is still in session. When the mediator uncovers the deceit, should he or she withdraw from the mediation? Certainly withdrawing may not stop the parties from reaching an agreement outside the mediation room, but it will not bear the imprimatur of the mediation process.

The choice, nonetheless, is clear: if the mediator cannot negate the attempted fraud, the mediator should terminate the mediation and refuse to sanction the wrongful conduct. There is a broad spectrum of guidance on this issue. The Florida Rules for Certified and Court-Appointed Mediators refers to the "Integrity of the Agreement," and uses familiar principles of contract law: "The mediator shall not knowingly assist the parties in reaching an agreement which for reasons such as fraud, duress, overreaching, the absence of bargaining ability or unconscionability would be unenforceable."\(^{284}\) The Mediator's Revised Code of Professional Conduct of the Colorado Council of Mediators and Mediation Organizations states: "If the parties reach an agreement which the mediator feels is... the result of false information or the result of bad faith bargaining, the mediator should withdraw or terminate the mediation."\(^{285}\) The Standards of Practice for Family Mediators adopted by the Family Law Section of the ABA require termination if the "process would harm or prejudice one or more of the participants."\(^{286}\) As a specific consideration to this mandate, the

\(^{284}\) FLA. R. OF CT. § 10.110(a)(3) (West 2001); see also KAN. CT. R. & PROC. 903(f) cmt. (West 2001) ("A mediator shall withdraw from mediation or postpone a session if the mediation is being used to further illegal conduct."); N.C. STDS. OF PROF'L CONDUCT FOR MEDIATORS R. 8 (2000). The standard elaborates:

When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party... nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality.

Id.; S.C. FAM. CT. R., Std. VI. (1998) ("A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct.").

\(^{285}\) COLORADO REVISED CODE, supra note 273, § VI. cmt.

Standards from the Family Law Section state that "[t]he mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative... negotiation techniques utilized by either of the participants."\(^{287}\) Similarly, the Model Standards of Practice for Divorce and Family Mediators of The Association of Family and Conciliation Courts requires termination "if a party's conduct indicates that the party is not participating in the mediation in good faith."\(^{288}\) SPIDR's Ethical Standards of Professional Responsibility, in a section titled: "The Settlement and its Consequences," requires that "[t]he neutral... must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process."\(^{289}\) Any agreement completed where the mediator is aware of contractual misconduct would impugn the integrity of mediation. What would the widow think of the mediator, and mediation in general, if she learned later that the mediator knew about the fraud and did nothing? Finally, echoing a prior discussion, the Virginia Standards require the mediator to withdraw from a mediation "under circumstances in which the mediator believes that manifest injustice would result if the agreement was signed as drafted."\(^{290}\)

Some states, although not requiring termination, have raised the issue and permit the mediator to terminate in these instances. In the Alabama Code of Ethics for Mediators, "[a] mediator may withdraw if the mediator believes any agreement reached would be the result of

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\(^{287}\) Stat. Ann. tit. 12, Ch. 37 App. A. § B.1.(e)(1) (West 1993) ("The mediator suspends or terminates mediation when it appears that continuation would harm or prejudice any party.").

\(^{288}\) See Conciliation Courts, supra note 273, at Standard XII A.5; see also Iowa Rules, supra note 79, at R. 1. D ("If the mediator or one of the parties is not able or willing to participate in good faith, then either participant, or the mediator, has the right to suspend or terminate the process at any time.").

\(^{289}\) See also California Ethical Standards, supra note 273, § 3 ("If a [m]ediator believes that... the integrity of the process has been compromised, then the [m]ediator shall inform the parties and shall discontinue the mediation, without violating the obligation of confidentiality.").

\(^{290}\) Virginia Standards, supra note 273, at I.
fraud, duress, overreaching, the absence of bargaining ability, or unconscionability.\(^{291}\) Oregon addresses the problem in terms of full disclosure,\(^{292}\) while North Carolina's has created a catchall standard for permissive termination:

If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.\(^{293}\)

Now, compare the situation where the mediator discovers the attempted deception during a caucus to a scenario in which the mediator remains ignorant of the fraud and only learns of it later when a subpoena is served. It is inconsistent for a mediator to terminate the former mediation, but refuse to testify in the latter. If this rule is to apply, mediators should be instructed to tell disputants, "if one party tries to defraud the other and we discover it, we will try to help. If we don't discover it, sorry, but you are on your own in court, because we won't testify." While mediators are intent upon explaining to the parties that mediation is a confidential process, should parties also understand where the rules may fail them? Should they also hear where the rules will reward the wrongful conduct of others?

Before completing this discussion, it is important to revisit one of the three foundations of confidentiality, the duty of impartiality. Contrary to the common wisdom, a refusal to testify in a subsequent lawsuit represents a betrayal of this duty. When a mediator's impartiality is threatened, he or she must withdraw.\(^{294}\) If a mediator discovers contractual misconduct during the mediation and cannot resolve the situation, the mediator must withdraw to avoid becoming partial. In fulfilling the duty of impartiality, a "mediator has an obligation to avoid an unreasonable result."\(^ {295}\)

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291. ALABAMA CODE OF ETHICS FOR MEDIATORS 3(b) (1995).
292. OREGON STANDARDS, supra note 276, at I.
V. Conclusion

Under the language in the UMA, confidentiality, as a means, is no longer promoting the ends of self-determination. To the extent that mediation confidentiality impairs the parties' self-determination, the mediation privilege should yield to self-determination and to the court's ability to determine the truth. If the parties access to justice is hampered, or is so restricted by the UMA as to be virtually non-existent, any relationship between the results achieved in mediation and self-determination will be merely coincidental. This is not acceptable. The UMA, as currently written and approved by NCCUSL, may unnecessarily cause the destruction of self-determination in many cases. The provisions demonstrate favoritism for mediators and may result in damage to the integrity of the process. Further, the nature of the provisions restricting the parties access to the exceptions to the privilege may both increase the number of lawsuits against mediators and also encourage wrongful behavior on the part of disputants. None of this will ultimately inure to the benefit of mediation as an institution.

If it is necessary to have a privilege for mediation, certain elements should be adopted. First, the mediation process is not well served by a separate privilege for mediators. Second, clear exceptions should be drafted to cover contractual misconduct. Third, although a procedural step prior to accessing testimony (such as an in camera hearing or sealed proceedings) is appropriate, no substantive hurdles should hinder access to normal common law contract remedies or impair self-determination. Finally, when challenges arise to an agreement reached in mediation, the mediator should be treated like all other mediation participants—he or she should be required to testify. The UMA should not allow the artificial distinction between the mediator malpractice and the contractual misconduct exceptions.