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## Dancing with the One That Brung Us - Why the Texas ADR Community Has Declined to Embrace the UMA

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# Dancing with the One that “Brung Us” – Why the Texas ADR Community Has Declined to Embrace the UMA

Brian D. Shannon\*\*

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## I. INTRODUCTION

Suppose that you are sitting in a conference room at the beginning of a mediation session. You are either a party to the dispute that is being mediated or counsel to one of the parties. The mediator is giving his or her opening statement setting forth the parameters of the process. After providing a variety of information including the ground-rules for the proceeding, the mediator then delivers one or the other of the following two statements:

**Alternative I.** Let me now turn to the topic of confidentiality. You should be aware that under state law, except for a few narrow exceptions, everything that we discuss here today is confidential. In general, that means you are not supposed to talk about what we say and do here today once we conclude the mediation. In particular, the relevant state law makes all communications at this mediation – both verbal and nonverbal – that relate to this pending dispute confidential. Our communications are not subject to disclosure and cannot be used as evidence in any later court or agency proceeding. These confidentiality rules apply to both you and me. The governing statute states very explicitly that I have to maintain

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\* Darryl Royal, the longtime football coaching legend of the University of Texas, is reputed to have stated in response to a reporter's query about changing strategy, "You dance with the one who 'brung' you." See, e.g., Editorial, *Bush Back*, HOUS. CHRON., Nov. 4, 1998, at A42. (attributing statement to Royal); *Texas, Southern Cal Coaches on Hot Seat*, CHI. TRIB., Aug. 17, 1986, at C4 (similar attribution).

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confidentiality with respect to any of the communications here today that relate to this dispute. Additionally, that same law requires that unless both sides later agree, all matters covered here today, including the conduct and demeanor of all those who are present, are confidential, and I cannot disclose them to anyone, including the court. Similarly, if we break into caucus sessions, as I described earlier in my overview, if you tell me something in confidence at that time, I am not allowed to disclose that information to the opposing side without your permission. In general, the only exceptions set out in the law relate to situations in which some other law might require disclosure – for example, there is another law that requires the reporting of child or elder abuse or neglect. Moreover, a court will not allow an exception to confidentiality unless it first holds a non-public and in camera hearing to consider the applicability of the exception or need for disclosure. You should also be aware that our state confidentiality statute might not be applicable in the event of some type of federal criminal investigation.

When our state legislature enacted our first comprehensive alternative dispute resolution procedure statute some fifteen years ago, the lawmakers intended to encourage the peaceable resolution of disputes outside of court, and to provide a broad cloak of confidentiality for proceedings like the one you are participating in today. The purpose of requiring confidentiality was to encourage everyone to be candid, and to have the opportunity to be very forthcoming about the strengths and weaknesses of pending cases without the fear that such candor with regard to offers and other information might be subject to later attempts at disclosure either in court or elsewhere. There was a strongly held belief that a broad confidentiality law would better facilitate frank and open discussions and thereby bring about greater opportunities for understanding and settlement. Accordingly, the matters discussed today should be kept confidential. Unless somehow ordered by a court, you are not going to have to, nor will you be allowed to, give evidence about the matters discussed in this session. Indeed, you have a duty to keep today's proceedings confidential.

Our laws relating to confidentiality also apply to any writings or documents created at today's session. Unlike those depositions that you told me about that were taken earlier in this pending case, you have no doubt noticed that there is no court reporter present with us today. That is because a record is not normally kept as part of a mediation. In fact, at the end of the mediation session, I am going to require you to give me all of your notes. I will then take your notes, along with mine, and destroy them after the mediation's conclusion. The only documents that will originate in this session that might ultimately be subject to later disclosure are either a final signed agreement, or a form that we will complete if no settlement is reached. Obviously, I will use my best efforts to facilitate your reaching a voluntary settlement here today, but if we are unable to reach agreement, I will need to send to the court [if the mediation has been conducted pursuant to a court order or local rule] a statement

that the mediation was conducted today as ordered, that you showed up as required, and that no settlement was reached.

Do any of you have any questions about the requirements of confidentiality that govern our proceedings today?

**Alternative II.** Let me now turn to the topics of privilege and confidentiality. Our state law includes provisions that are intended to protect the confidentiality of mediation communications against attempts at disclosure in later legal proceedings. If there is some later legal proceeding in which a person attempts to discover or introduce evidence about what we have addressed today, state law has created certain mediation privileges. These privileges apply broadly to all types of mediation communications, including verbal, non-verbal, and written communications. As a general matter, a privilege operates to allow a person either to refuse to disclose information or to stop somebody else from disclosing information; it allows for a type of blocking function. That is, if you have a privilege, it gives you certain powers to block later disclosure. You should be aware, however, that different people involved in this process have differing levels of privilege. For example, as a general matter, you two parties have the ability to refuse to disclose any of our mediation communications here today and block any of the rest of us from so disclosing. I must caution you, however, that our law considers your attorneys as nonparty participants, and they can only refuse to disclose and prevent others from disclosing any communications made today by the nonparty participants. For our purposes today, that would apply to the two attorneys who are present. As the mediator, I can refuse to disclose any mediation communications, but I can only block others from disclosing my communications. On the other hand, if you don't like these various rules, you can agree right now in writing, or at any point during the mediation, that all or part of the mediation is not privileged. In that case, the state's laws on privileges will not be applicable.

I should also caution you that our state law sets forth a lengthy number of waivers and exceptions to these blocking privileges that I have just described. Let me first address waivers of the privilege. If both of you parties agree in writing or orally at some later legal proceeding to waive any of the privileges, you can do so for certain privileges. But, as for my privilege as a mediator, I would have to agree, too. Similarly, given that your respective lawyers who are present here today are considered as nonparty participants, they will have to agree to any waiver of their mediation privileges. In addition, you will waive your privilege if you make disclosures in some later proceeding that prejudices another person in that proceeding. In such a case, the other person can talk about what happened in the mediation as a response to the prior disclosure. And, obviously, if you are attempting to use these proceedings to plan, attempt to commit or commit a crime, or to conceal criminal activity, you will not be able to assert any sort of mediation privilege. Of course, I hope that will not be the case with today's mediation! In addition, on this

topic of criminal law, you should also be aware that our state law privileges statute might not be applicable in the event of some type of federal criminal investigation.

Let me now turn to the principal exceptions to the various mediation privileges. Our legislature has created a number of these exceptions. For example, similar to the waiver I just discussed, statements threatening bodily harm, violence, or other criminality are not covered. Also, if you ever bring a claim of malpractice against me, you can try to prove your claim or I can try to disprove your claim with testimony about what we have to say today. Obviously, I do not believe that you will need to consider any such action because I plan to act professionally throughout our proceedings. On the topic of malpractice, however, I should also point out that the statute has certain exceptions related to disclosures of mediation communications if some type of malpractice claim is pursued against one of the attorneys or parties here today; however, I could not be compelled to disclose anything in such a case. There is also no privilege that attaches to allegations of child or adult abuse, neglect, abandonment, or exploitation. The law also has exceptions relating to contract defenses to any settlement agreement we might reach and criminal proceedings, but before such an exception is invoked, the court will first hear argument relating to the need for such evidence in camera – not in public.

Do you have any questions so far with regard to mediation privileges, waivers, and exceptions to the privileges? As you can readily appreciate, our state legislature believes that these matters are very important. I suspect that is why they set out such a detailed array of rules, waivers, and exceptions. Before we proceed with the mediation, however, I need to discuss one further matter relating to this general topic. I would be remiss if I did not address the difference between confidentiality and privilege. Under our state law, the discussions we have today are not generally confidential. That is, there is no law that precludes you from talking about what we say today with *any* other person *outside* of a later legal proceeding. Thus, you are free to talk about the things learned at mediation with anybody, including the media. The mediation privilege statute that I just explained to you relates only to disclosures in later legal proceedings. If you would like to have a broader degree of confidentiality, you will have to agree to it. Is this something that you would like to consider? Is it an issue that you would like to discuss with your attorneys? If so, we can take a little break at this point before proceeding further. Otherwise, do you have any questions about confidentiality and later disclosures?

Although the two alternative statements set forth above may well be subject to charges of exaggeration, they are intended to highlight the stark comparisons between the parameters and scope of the confidentiality provisions of the Texas

Alternative Dispute Resolution Procedures Act (Texas ADR Act)<sup>1</sup> with the disclosure privileges, waivers, and exceptions contained in the Uniform Mediation Act (UMA).<sup>2</sup> I am very pleased that the *Journal of Dispute Resolution* has invited me to participate in this important symposium on the UMA. I must confess, however, that because my views are inconsistent with those of the other participants, I feel somewhat like the proverbial skunk in the parlor. Nonetheless, I am glad to have the opportunity to discuss some of the dissenting viewpoints regarding the UMA.

I readily acknowledge that the UMA is a bold and noble project, and it is certainly the result of substantial effort and compromise. Indeed, I largely concur with the sentiment of Philip Harter that “[t]he UMA is the product of heroic effort that brought together many interests and perspectives to thrash out a workable framework for mediation.”<sup>3</sup> That being said, however, much of the Texas mediation community, of which I am a part, has largely opposed enactment of the UMA’s framework for our state. As I have written previously, the Alternative Dispute Resolution Section of the State Bar of Texas (Texas ADR Section) has publicly stated its opposition.<sup>4</sup> Similarly, the Association of Attorney-Mediators (AAM) and the Texas Association of Mediators have registered their strong opposition.<sup>5</sup> The primary concerns of these organizations relate to two principal areas: (1) the UMA drafters’ approach to confidentiality in comparison to the long-established legislative approach set forth in the Texas ADR Act, and (2) the relative complexity of the UMA’s provisions. In this essay I will first address these two major areas of opposition. Then, I will turn to several ancillary concerns, followed by a brief discussion of certain other entities’ objections. I then encourage the reader to consider the other contributors’ responses to my viewpoints.

## II. DIFFERING APPROACHES TO CONFIDENTIALITY

The Texas Legislature enacted the Texas ADR Act in 1987. Thus, Texas mediators and courts have over fifteen years of experience in conducting or ordering mediations and other non-binding processes under this statutory scheme. One of the cornerstones of the enactment was the statute’s broad confidentiality protection.<sup>6</sup> These confidentiality protections are set forth in two sections of the act.

1. Tex. Civ. Prac. & Rem. Code Ann. §§ 154.001 - .073 (West 2003) [hereinafter “Texas ADR Act”].

2. National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act (2001) [hereinafter “UMA”].

3. Philip J. Harter, *The Uniform Mediation Act: An Essential Framework for Self-Determination*, 22 N. Ill. U. L. Rev. 251, 252 (Spring 2002).

4. Wayne I. Fagan & Brian D. Shannon, *A Potential Threat to Texas ADR*, 65 Tex. B. J. 27 (2002). Mr. Fagan is the immediate past chair of the Section.

5. Letter from the President, AAM Newsletter (Assoc. of Attorney-Mediators, Dallas, TX) 1, 2 (Sept. 2002). <<http://www.attorney-mediators.org/news200209.pdf>> (accessed March 13, 2003) (AAM is a national association with its headquarters in Dallas); see also Minutes of Texas Association of Mediators Board of Directors Meeting 2 (May 18, 2002) (on file with the *Journal of Dispute Resolution*) (reflecting unanimous board vote to oppose the adoption of the UMA in Texas).

6. Dean Ed Sherman has described the Texas ADR Act’s confidentiality section as “perhaps the broadest ADR confidentiality provision in the country.” Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience*, 38 S. Tex. L. Rev. 541, 542 (1997).

Section 154.073 delineates the primary confidentiality provisions of the law.<sup>7</sup> Apart from certain narrow exceptions set forth in the act, the statute provides that:

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.<sup>8</sup>

In addition,

[a]ny record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.<sup>9</sup>

Accordingly, the Texas ADR Act sets out a broad confidentiality rule applicable to Texas mediations and other non-binding procedures, and includes a form of evidentiary privilege that applies to both participants and neutrals.

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7. Section 154.073 provides the following:

(a) Except as provided by Subsections (c), (d), (e), and (f), 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.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

(e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or material are subject to disclosure.

(f) This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.

(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.

Texas ADR Act, *supra* n. 1, § 154.073.

8. *Id.* § 154.073(a).

9. *Id.* § 154.073(b).

Moreover, supplemental to these main confidentiality provisions, Section 154.053 of the Texas ADR Act explicitly places a duty on the mediator to "at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute."<sup>10</sup> Additionally, even if these other provisions are not sufficiently clear, Section 154.053 of the Texas ADR Act provides further that "[u]nless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court."<sup>11</sup> Hence, taken together these various provisions place limits on future testimony in later adjudications and require confidentiality outside of other legal proceedings.

In contrast to the Texas ADR Act, the UMA approaches confidentiality much differently. As stated by the immediate past chair of the ADR Section Council of the State Bar of Texas, "Whereas the Texas ADR ... Act's confidentiality provisions start with the general proposition that all ADR communications are confidential, save for several exceptions, the UMA focuses instead on privileges from discovery and admissibility in later proceedings."<sup>12</sup> Indeed, the UMA's drafters declined to include a general requirement of confidentiality. Apparently in response to criticism for this omission, however, the drafters included some coverage of general confidentiality in the final version of the UMA. Section 8 of the UMA provides, "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."<sup>13</sup>

The UMA's drafters apparently "were unable to agree on a confidentiality requirement for mediation that would reach beyond the protection of a privilege to

10. *Id.* § 154.053(b).

11. *Id.* § 154.053(c). Section 154.053 primarily relates to the mediator's duties, but there is some degree of overlap with § 154.073. The full text of § 154.053 is as follows:

(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.

*Id.* § 154.053. It is also interesting to note that the Texas Legislature re-embraced the Texas ADR Act as recently as 1997 when it enacted the Governmental Dispute Resolution Act, Tex. Govt. Code Ann. §§ 2009.001 - .055 (West 2003). Except for minor distinctions, section 2009.054 incorporates by reference both section 154.053 and 154.073 of the Texas ADR Act. *Id.* § 2009.054(a)-(d).

12. Letter from Wayne Fagan, Chair, State Bar of Texas ADR Section Council, to Texas members of the ABA House of Delegates, *ABA House of Delegates Vote on the Uniform Mediation Act (UMA)* 1 (Nov. 14, 2001) <<http://www.texasadr.org/umaletter.pdf>> (accessed March 13, 2003). Mr. Fagan also stated, "The UMA proposal has headed in the wrong direction by not beginning with a wide umbrella of confidentiality protection followed by appropriate exceptions." *Id.* I assisted Mr. Fagan in the preparation of this letter.

13. UMA, *supra* n. 2, § 8.



govern disclosures in settings other than legal proceedings.”<sup>14</sup> Accordingly, the drafters punted on the issue and left the decision-making up to possible agreement by the parties or other state enactments. The drafters observed that they wanted to leave “the disclosure of mediation communications outside of proceedings to the good judgment of the parties to determine in light of the unique characteristics and circumstances of their dispute.”<sup>15</sup> Also, and perhaps as a nod to states such as Texas that had raised concerns about the lack of general confidentiality, the drafters structured Section 8 to allow states to retain or adopt general confidentiality provisions. Indeed, in the Official Comments to Section 8, the drafters cited to one of the Texas ADR Act’s confidentiality provisions in expressing the intent of not wanting to “interfere with local customs, practices, interpretations, or understandings regarding the disclosure of mediation communications outside of proceedings.”<sup>16</sup>

One irony of the UMA’s approach to general confidentiality of mediation communications in Section 8 is that the drafters have intentionally included a provision that is directly inconsistent with their overall push for uniformity. The goal of uniformity is worthwhile. On the other hand, why should a state such as Texas with its well-developed ADR statute shelve that statute for the UMA when there is apparently going to be no uniformity on a central issue of consideration? The drafters have opined that “uniformity is not necessary or even appropriate with regard to the disclosure of mediation communications outside of proceedings.”<sup>17</sup> This statement appears incongruous when contrasted with one of the drafters’ essential premises – that “[c]andor during mediation is encouraged by maintaining the parties’ and mediators’ expectations regarding confidentiality of mediation communications.”<sup>18</sup> How is such candor enhanced if the parties are advised, as discussed in *Alternative II* above, that the matters to be discussed at the mediation might not be subject to later use as evidence in future adjudicatory proceedings, but may otherwise be freely disclosed? How is uniformity to be achieved if this important issue is left up to the parties or individual states?

Separate from the issue of non-uniformity, the drafters’ approach in Section 8 that leaves confidentiality up to the agreement of the parties has dubious merit. Of course, in some situations parties may be willing to engage in a general confiden-

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14. Ellen E. Deason, *Uniform Mediation Act – Law Ensures Confidentiality, Neutrality of Process*, Dis. Res. Mag. 7, 9 (Summer 2002).

15. UMA, *supra* n. 2, § 8, cmt. c.

16. *See id.* § 8, cmt. b (suggesting that the UMA is not intended to preempt “current court rules or statutes that may be understood or interpreted to impose a duty of confidentiality outside of proceedings”).

17. *Id.* § 8, cmt. a.

18. UMA, *supra* n. 2, at Prefatory Note § 1. One of the reasons the drafters have offered for not including a broad confidentiality provision is centered on “the risk of civil liability that might accompany an affirmative statutory duty prohibiting such disclosures.” UMA, *supra* n. 2, § 8, cmt. a. In certain situations, however, the prospect of civil liability may well be appropriate. Consider, for example, a situation in which a party to a mediation discloses something controversial or negative about herself. The other party then discloses the information to the disclosing party’s employer, spouse, or the media. The information is then used in a damaging manner. If the disclosure was in violation of a statutory duty, there might, and perhaps should, be the consideration of civil liability. Under the UMA approach, however, such disclosures are freely permitted. For a further discussion of problems and concerns regarding disclosures outside of later legal proceedings, *see* Brian D. Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 Tex. Tech. L. Rev. 77, 79-86 (2000).

tiality agreement prior to the commencement of a mediation. In addition, certain dispute resolution organizations might require that the parties agree to abide by rules of that organization that call for broad confidentiality. However, the opportunity to secure a pre-mediation agreement will not always be readily achievable. While a dispute is pending and prior to the outset of a mediation, the parties may be well-entrenched in their positions and unwilling to agree to much of anything – particularly with respect to a subject as important as confidentiality that might have far-reaching implications. Similarly, in the case of a court-ordered mediation, the parties may well be entering into the mediation process in a reluctant fashion and not have any strong interest in reaching an agreement at the outset on the issue of confidentiality or anything else. Moreover, as illustrated in *Alternative II* above, once a mediator has attempted to explain the broad array of privileges, waivers, and exceptions that are included in the UMA, it may prove difficult to then explain the distinctions between privileges and confidentiality and whether the parties – particularly unrepresented parties – would also want to enter into a confidentiality agreement.

Of course, no statute is perfect, and the Texas ADR Act's confidentiality provisions are far from perfect. As I have detailed in another forum, there are some gaps in the Texas ADR Act's coverage with regard to confidentiality.<sup>19</sup> For example, the Texas ADR Act does not include any exception to confidentiality to allow parties to use mediation communications as part of proving a traditional contract defense.<sup>20</sup> In the event of the potential for a miscarriage of justice, however, a court may not be deterred by the lack of a statutory exception. For example, in an unreported case, *Randle v. Mid Gulf, Inc.*,<sup>21</sup> a party who participated in a mediation asserted that a settlement agreement reached at the mediation was void because he had signed it under duress.<sup>22</sup> The party asserted that despite fatigue and chest pains, the mediator had announced that he could not leave the session "until a settlement was reached"; thus, he signed the agreement.<sup>23</sup> Although the opposing party asserted that the confidentiality provisions of the Texas ADR Act precluded introduction of such statements at the subsequent court challenge, the court conclusorily determined that a party could not "sue for specific performance of the mediation agreement" and simultaneously "argue that the mediation communications are confidential as to ... [the other party's] duress defense."<sup>24</sup> Thus, despite the lack of an exception to the state's confidentiality statutes, the court's sense of justice apparently led it to create an ad hoc exception.<sup>25</sup> As I have argued else-

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19. *Id.*

20. For a detailed discussion of this gap under the Texas ADR Act, see *id.* at 86-89 (discussing the need for a legislative exception to confidentiality for traditional contract defenses).

21. 1996 WL 447954 (Tex. App. – Houston [14th Dist.] Aug. 8, 1996, writ denied).

22. *Id.* at \*1.

23. *Id.*

24. *Id.*

25. For a similar judicially created exception to a broad confidentiality statute, consider *Olam v. Congress Mortg. Co.*, 68 F. Supp. 2d 1110, 1118-19 (N.D. Cal. 1999) (requiring the testimony of the mediator in a subsequent challenge to an agreement reached at mediation based on the traditional contract defenses of alleged undue influence and lack of capacity).

where, "Because of the uncertainty associated with judge-made decision-making in this regard, ... a legislative solution would be far superior."<sup>26</sup>

In this regard, the Texas Legislature should consider adopting an exception to confidentiality for traditional contract defenses. One possibility is to consider an approach that is comparable to UMA section 6(b)(2), which allows testimony, after an in camera hearing process, "to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation."<sup>27</sup> Ironically, however, the UMA disallows the mediator from being compelled to give testimony relating to such a contract defense.<sup>28</sup> A court's sense of justice may cause it to chafe under such a limitation. The UMA drafters wanted to avoid parties' "frequent attempts to use the mediator as a tie-breaking witness."<sup>29</sup> An alternative would be to advocate for the aggressive use of sanctions for frivolous assertions of defenses. Of course, the Texas Legislature need not adopt the UMA to cherry-pick worthwhile exceptions. By way of comparison, Louisiana's ADR statute includes a broad confidentiality statute with limited exceptions and contains a specific exception to determine the "meaning or enforceability" of a mediated agreement if "necessary to prevent fraud or manifest injustice."<sup>30</sup> Like the UMA, however, the Louisiana provision excludes the mediator from being compelled to testify in such situations.<sup>31</sup>

In addition to the *Randle* court's allowance of mediation communications to support a duress defense, other Texas courts have allowed the later introduction of mediation communications despite the broad confidentiality provisions set forth in the law. For example, in *Hur v. City of Mesquite*,<sup>32</sup> an injured party in an automobile-pedestrian accident sued the city for negligence. At a later mediation, although the representative of the city declared at the outset of the session that he had authority to settle, once an oral agreement was reached to resolve the dispute, the city representative "announced that the verbal agreement would have to be approved by the Mesquite City Council or there [would be] no agreement."<sup>33</sup> After the city did not pay the agreed sum, the opposing side pursued actions for breach of the oral settlement agreement and breach of the implied warranty of authority of the agent to settle the case.<sup>34</sup> The Texas Court of Appeals questionably allowed testimony on both theories even though the supporting contentions were largely

26. See Shannon, *supra* n. 18, at 89 (also suggesting that a court should be "ready and willing to sanction frivolous assertions of contract defenses" to avoid abuse of such an exception). Not all courts have been as willing as the *Randle* court to ignore the confidentiality provisions of the Texas ADR Act. See e.g. *Vick v. Waits*, 2002 WL 1163842 at \*3 (Tex. App. – Dallas June 4, 2002, pet. denied) (disallowing introduction of mediation communications that were intended to demonstrate fraud in the inducement of a mediation agreement); *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 452-53 (Tex. App. – Fort Worth 2000, no pet.) (reversing trial court's allowance of inquiries about mediation communications relating to the negotiations and settlement authority).

27. UMA, *supra* n. 2, § 6(b)(2).

28. *Id.* § 6(c) (stating that a "mediator may not be compelled to provide evidence of a mediation communication referred to in subsection . . . (b)(2)"). Of course, this approach is contrary to the ad hoc confidentiality exception reached by the court in *Olam*, in which the court required the mediator's testimony after an in camera hearing. 68 F. Supp. 2d at 1139.

29. *Id.* § 6, cmt. 12.

30. La. Stat. Ann. § 9:4112(B)(1)(c) (West Supp. 2002).

31. *Id.* § (B)(2).

32. 893 S.W.2d 227, 229-30 (Tex. App. – Amarillo 1995, writ denied).

33. *Id.* at 232.

34. *Id.* at 232-33.

based on mediation communications.<sup>35</sup> Nonetheless, it is not surprising that a court's sense of justice would cause it not "to allow a representative of a public entity to make false representations about her authority at the mediation, only to then wrap herself in the mantle of confidentiality when her approach is [later] challenged."<sup>36</sup> Other courts have also discarded confidentiality when faced with situations involving departures from a sense of fairness. In *Avery v. Bank of America, N.A.*,<sup>37</sup> the court allowed a foray into mediation communications as part of a party's proof of an independent tort claim relating to a bank's alleged failure to disclose – at the mediation – material facts relating to the rights of an estate's beneficiaries. Consider also the unreported decision in *Guevara v. Sahoo*,<sup>38</sup> in which the court failed to find an abuse of discretion in a case in which the trial court had sanctioned a lawyer for certain communications made at a court-ordered mediation.<sup>39</sup>

Given such decisions, it appears that some courts have effectively engrafted an ad hoc "manifest injustice" exception to broad confidentiality provisions when one is lacking. It is worthy of note that the drafters of the UMA considered the adoption of an exception for "manifest injustice," but discarded the idea during the evolution of the proposal.<sup>40</sup> By way of contrast, the federal Administrative Dispute Resolution Act includes a narrowly tailored exception for situations in which a court determines that the disclosure is necessary to prevent a "manifest injustice."<sup>41</sup> If the Texas Legislature is troubled by some of these recent court decisions, an approach of adopting a few narrow amendments to the existing law would be superior to eliminating the current Texas ADR Act and its fifteen years of application and experience.

Although it is my firm conviction that the Texas Legislature should reject any entreaties to replace the Texas ADR Act with the UMA, there are certain aspects of the UMA that merit consideration as potentially valuable amendments to the existing Texas statute. Indeed, like the exception for contract defenses, a few of the UMA's numerous exceptions to its complex privileges structure should merit serious contemplation as possible additional exceptions to the Texas confidentiality provisions. For example, the UMA drafters have added exceptions by which mediation communications can be used to prove or disprove malpractice claims

35. *Id.* at 232-34. For a full discussion and critique of *Hur*, see Shannon, *supra* n. 18, at 90-94.

36. Shannon, *supra* n. 18, at 93.

37. 72 S.W.3d 779, 803 (Tex. App. – Dallas 2002, pet. denied).

38. 2001 WL 700517 at \*1 (Tex. App. – Dallas June 22, 2001, no pet.).

39. Other jurisdictions have seen similar decisions. For example, the court in *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 470-71 (Cal. App. 1998), determined that a juvenile's constitutional right to confrontation in a delinquency proceeding required a mediator to testify despite statutory confidentiality protections. In *F.D.I.C. v. White*, 76 F. Supp. 2d 736, 737-38 (N.D. Tex. 1999), the court ignored a local rule on mediation confidentiality to allow testimony that federal agency officials who participated in a mediation had made threats of criminal prosecution if a pending civil case was not settled. Similarly, in *Allen v. Leal*, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998), a federal judge tossed aside a local rule on mediation confidentiality when a party to a mediation later alleged "that the mediator had 'forced' her and her husband into settling the case and had also misled them." For additional discussion of *Allen*, see Shannon, *supra* n. 18, at 89.

40. For a detailed and thoughtful discussion of the UMA drafters' shifting positions on the inclusion of an exception for "manifest injustice," see Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marq. L. Rev. 9, 54-63 (Fall 2001).

41. 5 U.S.C. §§ 574(a)(4)(A), (b)(5)(A) (1996).

against the mediator, party, or party's attorney.<sup>42</sup> As for the exception for malpractice suits against mediators, the drafters included the exception "to promote accountability of mediators by allowing for grievances to be brought against mediators, and as a matter of fundamental fairness, to permit the mediator to defend against such a claim."<sup>43</sup> The Texas Legislature might give consideration to adding such an exception to the Texas ADR Act for the same reasons stated by the UMA's drafters. Given, however, the potential dangers of such an exception in opening the door to potential frivolous actions, checks and balances such as in camera hearings and the possibility of imposing sanctions should also be included.

A few other UMA sections are worthy of positive mention as well. For example, the UMA broadly defines "mediation communication" to include oral, written, or nonverbal statements that occur either during the course of a mediation session, or which have been "made for purposes of considering, conducting, participating in, initiating, continuing, reconvening a mediation, or retaining a mediator."<sup>44</sup> Accordingly, the UMA extends its privileges provisions to a party's first contact with a prospective mediator and to other communications that are not directly a part of the mediation session(s). Indeed, the Official Comments reflect that the provision is intended to make "clear that conversations to initiate mediation and other non-session communications that are related to a mediation are considered 'mediation communications.'"<sup>45</sup> The Texas ADR Act is silent on whether the statute's confidentiality provisions have application to discussions relating to the initiation of mediation. Section 154.073 of the Texas ADR Act makes confidential any "communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure,"<sup>46</sup> but does not define the beginning point of the ADR procedure. In addition, although Section 154.053 of the Texas ADR Act places duties of non-disclosure on the impartial third party, those would appear logically to apply only once there has been a selection or appointment of the impartial third party.<sup>47</sup> Thus, unless covered by a court's local rule or order,<sup>48</sup> it is uncertain whether the broad confidentiality provisions of the Texas ADR Act extend to pre-session communications. On this point I concur with the UMA's drafters who observed that "candor during these initial conversations is critical to insuring a thoughtful agreement

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42. UMA *supra* n. 2, §§ 6(a)(5)-(6). Another section of the proposal, however, provides that "a mediator may not be compelled to provide evidence of a mediation communication" that relates to malpractice claims against persons other than the mediator. *Id.* § 6(c). The Official Comments reveal that this latter exception relating to the mediator's not having to provide evidence in such an action was motivated by concern for "the potential adverse impact on a mediator's appearance of impartiality." *Id.* § 6, cmt. 7.

43. *Id.* § 6, cmt. 6.

44. UMA, *supra* n. 2, § 2(2).

45. *Id.* § 2, cmt. 2.

46. Texas ADR Act, *supra* n. 1, § 154.073(a).

47. See *id.* § 154.053(b) (requiring the impartial third party to maintain confidentiality "at all times"). Apparently, Texas is not alone in not covering pre-session communications. As observed in the Official Comments to the UMA, "[m]ost statutes are silent on the question of whether they cover conversations to initiate mediation." UMA, *supra* n. 2, § 2, cmt. 2.

48. Consider, for example, a local rule in Lubbock County, Texas, by which the courts have interpreted the state's confidentiality statute as applying from "a party's first contact" with the local dispute resolution center. Policy Statement by Presiding Judge Cecil Puryear, Lubbock County, Texas 1 (April 12, 1991) (copy on file with *Journal of Dispute Resolution*).

to mediate."<sup>49</sup> For example, consider communications with a mediator or a mediation organization prior to the actual mediation session(s) in which matters are discussed such as the parties' prior relationship or their ability to be in a room together. Those matters should remain confidential.

In addition, this lack of coverage or lack of clarity in the Texas ADR Act became further apparent in *In re Learjet, Inc.*<sup>50</sup> with regard to another form of pre-mediation communication. In that case Learjet videotaped witness statements of three employees that were edited, then played for the parties in a mediation.<sup>51</sup> After the mediation failed, the opposing side sought production through the discovery process of both the edited videotapes that had been shown at the mediation and the "unedited core videotapes."<sup>52</sup> The trial court ordered production, and the appellate court refused to issue a writ of mandamus.<sup>53</sup> Although the court acknowledged that it was "clear the videotapes were prepared for mediation," the court determined that the Texas ADR Act did not bar discovery.<sup>54</sup> The court recognized that Section 154.073(a) of that act makes communications "made by a participant in an alternative dispute resolution procedure" confidential.<sup>55</sup> Nonetheless, the court relied on Section 154.073(c)'s proviso that "[a]n oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure."<sup>56</sup> Given the court's view that the videotapes had been created prior to the mediation session and were not covered by the attorney-client privilege, the court held that the tapes were not covered by the Texas ADR Act's confidentiality provisions.<sup>57</sup>

The *Learjet* decision points out the problem with the lack of a statutory provision to assure that an ADR statute's confidentiality provisions will protect relevant communications made prior to the actual mediation sessions. The practical effect of *Learjet* will be to deter parties from preparing videotaped, or even written, submissions or other communications intended to be delivered to the mediator in advance of a mediation session or to be used at the mediation. The irony of *Learjet* is that had the three individuals actually provided "testimony" at the mediation session, rather than having appeared by means of videotape, there would have been no question regarding the lack of admissibility of anything to do with their communications. Accordingly, the UMA's approach of defining "mediation communications" to cover relevant statements made from the party's first contact is a better approach. The *Learjet* videotapes were clearly "made for purposes of ... participating in ... a mediation..."<sup>58</sup> Indeed, the UMA's drafters, although not addressing this precise situation, intended that this definition include such things as mediation "briefs," reports, and memoranda explaining a party's position that

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49. UMA, *supra* n. 2, § 2, cmt. 2.

50. 59 S.W.3d 842 (Tex. App. – Texarkana 2001, no pet.).

51. *Id.* at 844.

52. *Id.*

53. *Id.* at 844, 847.

54. *Id.* at 845.

55. *Id.* (citing Texas ADR Act, *supra* n. 1, § 154.073(a)).

56. 59 S.W.3d at 845 (quoting Texas ADR Act, *supra* n. 1, § 154.073(c)).

57. *Id.* at 845-47.

58. UMA, *supra* n. 2, § 2(2).

are prepared in advance of mediation and provided to the mediator.<sup>59</sup> Accordingly, I support amending the Texas ADR Act to incorporate the UMA's approach to defining when mediation communications commence, at least as to matters prepared solely for use in a later mediation.

I also favor a portion of Section 7 of the UMA relating to limitations on a mediator's report to court or agency. Subsections 7(a) and (b)(1) place a strict limitation on the information that a mediator may disclose to the governing tribunal, which will often be the referring court or agency.<sup>60</sup> Subsection (b)(1) limits disclosure in such a report to "whether the mediation occurred or has terminated, whether a settlement was reached, and attendance."<sup>61</sup> This aspect of the UMA would be worth considering as a possible amendment to the Texas ADR Act. If a court has ordered parties to participate in a mediation, the "court is certainly entitled to know whether the parties and their attorneys appeared as ordered for the ADR proceeding."<sup>62</sup> Having a provision that limits reports to such basic factual information also removes the temptation for the court to probe into what occurred during the mediation or to explore the nature of the parties' participation. For example, the drafters have declared that these "provisions would not permit a mediator to communicate, for example, on whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement."<sup>63</sup> Thus, a clear delineation of the limitations on mediators' reports as contained in portions of UMA Section 7 would be worthy of possible amendment to the Texas ADR Act.

However, one aspect of Section 7 of the UMA is quite disturbing. In subsection 7(b)(2), the UMA allows the mediator to make a report to the appointing court with regard to any of the many mediation privilege exceptions that are included in Section 6 of the UMA.<sup>64</sup> This aspect of the UMA is unclear with regard to whether such a report would be ordered by a court only after a party's invocation of one of the exceptions to privilege in some later adjudicatory proceeding. Instead, given the structure of Section 7(b), it appears that a court could generally require a mediator to detail all possible Section 6 exceptions to privilege as a matter of course. For example, the court's order could require the appointed mediator to provide the court with a report following the conclusion of the mediation that (1) states "whether the mediation occurred or ... terminated, whether a settlement

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59. *Id.* § 2, cmt. 2.

60. *Id.* §§ 7(a), (b)(1).

61. *Id.* § 7(b)(1). Section 7 also allows a mediator to report to the tribunal mediation communications "evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment." *Id.* § 7(b)(3). This subsection is generally consistent with the requirements under the Texas ADR Act to report child abuse and neglect, and the abuse, neglect, or exploitation of the elderly or persons with disabilities. Texas ADR Act, *supra* n. 1, §§ 154.053(d), 154.073(f).

62. Alan S. Rau et al., *Rau, Sherman & Shannon's Texas ADR & Arbitration Statutes and Commentary* (2000) (although I was a co-author of this publication, Dean Ed Sherman was the principal author of the quoted section). See also Sherman, *supra* n. 6, at 552 (discussing how such matters can be best communicated to the appointing court).

63. UMA, *supra* n. 2, § 7, cmt. 1. The Texas courts have generally proscribed any duty to mediate in "good faith." See Shannon, *supra* n. 18, at 105-09 (discussing Texas cases limiting the disclosure of mediation communications regarding whether a party participated in good faith).

64. UMA, *supra* n. 2, § 6, 7(b)(2).

was reached, and [identifies the] attendance;"<sup>65</sup> and (2) delineates all mediation communications that in the judgment of the mediator would be excepted from privilege "under Section 6."<sup>66</sup> Although the structure of Section 7 would allow for this possibility, such an approach would likely chill frank and candid mediation communications. Although the drafters may have contemplated that this subsection would allow a mediator to create a report only after an exception to privilege was invoked in a later adjudication, this aspect of the provision is unclear.

### III. A PROBLEM OF COMPLEXITY

As the contemplated opening statement identified as *Alternative 2* is intended to reflect, the structure of the proposed UMA is very complex. Instead of providing a broad statement of confidentiality followed by narrow exceptions, the UMA attempts to safeguard confidentiality through a complex, numerous, and dizzying array of privileges, waivers, and exceptions. These provisions are set out in UMA Sections 4-6,<sup>67</sup> and represent the "meat" of the proposed statute. UMA Section

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65. *Id.* § 7(b)(1).

66. *See id.* § 7(b)(2) (allowing a mediator, if required, to disclose "a mediation communication as permitted under Section 6").

67. UMA, *supra* n. 2, §§ 4-6. These sections provide the following:

**SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.**

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

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

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

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

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

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

**SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.**

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

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

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

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

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

**SECTION 6. EXCEPTIONS TO PRIVILEGE.**

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

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

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

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



4(a) begins these linked provisions by stating, “[e]xcept as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.”<sup>68</sup> Thus, Section 4 commences with the premise that mediation communications will be privileged from disclosure in later legal proceedings unless there is an exception to privilege under UMA Section 6 or a waiver or a preclusion of privilege under Section 5. However, the language and structure are extremely convoluted and confusing. One short subsection refers the reader to a privilege structure set out in another subsection and lengthy lists of exceptions, waivers, and preclusions in two additional major sections of the proposal. Then, to add to the potential for confusion, Section 4 thereafter provides three differing levels of privilege to a mediation participant depending on whether the person is a party, a mediator, or a nonparty participant.<sup>69</sup> Although the drafters assert that the differentiated tiers of privilege are intended to bring “clarity” to the law,<sup>70</sup> I predict that the distinctions will prove to be difficult for (1) mediators to understand and explain to participants, (2) participants to comprehend and appreciate, and (3) courts to readily comprehend and apply. In *Alternative 2* I have endeavored to delineate a mediator’s possible attempt at explaining these various tiers, privileges, exceptions, waivers, and preclusions to the participants at a mediation. Although the approach is exaggerated, I contend that it is not far off the mark in terms of the level of complexity that must be learned and explained. The complex and highly legalistic nature of the statute

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

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

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

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

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

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

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

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

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

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

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

68. *Id.* § 4(a).

69. *Id.* § 4(b)(1)-(3).

70. *Id.* § 4, cmt. 4(a)(1).

may result in effectively eliminating non-attorney mediators and limit the likelihood of parties' participation in mediation absent legal representation by well-trained mediation advocate attorneys.

The three tiers of privilege also will generate confusion with respect to the differing levels of privilege afforded to a party versus that party's attorney. The UMA defines a "mediation party" as a "person that participates in a mediation and whose agreement is necessary to resolve the dispute."<sup>71</sup> Although one would normally expect a party's counsel to be an agent of the party at a mediation session as in other forms of legal representation, this definition appears to be too narrow to include the party's lawyer. Although Section 10 of the UMA specifically allows an attorney to "accompany the party to and participate in a mediation,"<sup>72</sup> the drafters' Official Comments state that "counsel for a mediation party would not be a mediation party."<sup>73</sup> Accordingly, the UMA treats the party's attorney as a "non-party participant" at the mediation. This is both significant and potentially confusing in that Section 4 affords a party a much broader privilege that it confers on a "nonparty participant." The nonparty participant may only refuse to disclose, and prevent others from disclosing, that person's mediation communications, while the party may generally refuse to disclose and block others from disclosing all mediation communications.<sup>74</sup> Thus, the attorney for the party enjoys a far narrower privilege than does the person the attorney has represented. This dichotomy is potentially troublesome both because of the quizzical concerns it may raise when disclosed either by the attorney or the mediator (as I endeavored to demonstrate in *Alternative 2* above), and its susceptibility to mischief in later legal proceedings.<sup>75</sup>

Other provisions of the UMA also have the potential to cause confusion. Section 3(c) of the UMA provides that the statute's large array of privileges do not apply "[i]f the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged."<sup>76</sup> The drafters included this opt-out provision to further the proposal's "policy of party self-determination."<sup>77</sup> Although the ability to opt out might be valuable in certain classes of public policy disputes, it could well cause more con-

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71. *Id.* § 2(5).

72. *Id.* § 10.

73. *Id.* § 2, cmt. 5.

74. *Id.* § 4(b)(1), (3).

75. Although the drafters appear to have recognized that their proposal creates differing privileges between parties and their attorneys, the drafters do not appear to have discussed a rationale for the dichotomy. In the Official Comments, the drafters opine that "[i]n the event that an attorney is deemed to be a nonparty participant, that attorney would be constricted in exercising that right by ethical provisions requiring the attorney to act in ways that are consistent with the interests of the client." *Id.* § 2, cmt. 4. This suggests that although the drafters quite properly are of the view that an attorney may be restricted in asserting a privilege that counters the interest of a client, the drafters have not commented on the gap that could be exploited in that the attorney's privilege is narrower than that enjoyed by the client. Moreover, it is intriguing to note that the drafters in this comment used the phrase, "[i]n the event that an attorney is deemed to be a nonparty participant," while in the very next comment the drafters flatly state that "counsel for a mediation party would not be a mediation party." Compare *id.* § 2, cmt. 4, with *id.* § 2, cmt. 5. Why have the drafters hedged here? If the attorney is not a party to the mediation, and given that the UMA allows the attorney to attend, then that attorney must be a "non-party participant."

76. *Id.* § 3(c).

77. *Id.* § 3, cmt. 7.

fusion than is worthwhile in other forms of mediation. First, the provision does not require the parties to the dispute to include, or even to inform, the mediator about the opt-out agreement. The failure to so inform the mediator will result in the mediator's privileges to still be applicable given that the statute's privileges provisions "apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made."<sup>78</sup> Thus, the parties might think that discussions are not going to be privileged, and thereby be surprised to learn that the mediator's communications will remain privileged. A likely result of this provision will be to require the careful mediator to explore with the parties prior to the outset of the mediation whether they have reached any such pre-mediation opt-out agreement. Similarly, less sophisticated parties may have limited understanding of the distinctions between confidentiality and privilege, as well as the various tiers of privilege. In the absence of learned representation, such parties might possess limited understanding of the impact of an opt-out agreement as to part or all of a mediation's communications. Does the burden then fall upon the mediator to educate a party or all the parties to the relative wisdom of an opt-out agreement? Does the statute effectively require the careful mediator to advise parties that they can enter into an opt-out agreement as to the UMA's privileges at the outset of every mediation? Answers to these questions are not clear from the text or comments.

Another bothersome aspect of the UMA's approach to confidentiality relates to the drafters' decision to require in camera hearings by a subsequent tribunal for only two of the proposal's many exceptions and waivers to the various privileges. Section 6(b) sets forth exceptions to the act's privileges for mediation communications that are sought or offered in either (1) a later felony court proceeding, or (2) a proceeding in which a contract defense has been asserted to an agreement reached at mediation.<sup>79</sup> If a party seeks discovery or wants to introduce mediation communications for either purpose, the proponent must, in an in camera hearing, demonstrate "that the evidence is not otherwise available" and "that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality."<sup>80</sup> The drafters' formulation of a balancing process for these two exceptions is well-crafted; however, that the drafters opted to require this in camera process prior to disclosure only for these two exceptions speaks volumes about the lack of seriousness with which mediation confidentiality was viewed in general. Why was the in camera process not made applicable across the spectrum of exceptions and waivers? For certain of the exceptions, such as Section 6(a)(1) relating to signed mediation agreements or Section 6(a)(2) regarding open public records,<sup>81</sup> the use of an in camera hearing process would likely be unnecessary. Yet on the other hand, one would suppose that if there were truly a commitment to safeguarding the confidentiality of mediation communications, there would have

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78. *Id.* § 3(c). The Official Comments suggest that the parties "should inform the mediators or nonparty participants" of any such opt-out agreement to avoid this patchwork of non-privileged and privileged communications, but the statute includes no direction or requirement to do so. *Id.* § 3, cmt. 7.

79. *Id.* §§ 6(b)(1)-(2). The drafters apparently could not agree on whether the exception should relate to later misdemeanor proceedings given that the provision leaves that option up to adopting states.

80. *Id.* § 6(b).

81. *Id.* § 6(a)(1)-(2).

been a greater employment of the in camera hearing process for most of the remaining exceptions and waivers to the assorted UMA privileges.<sup>82</sup>

The UMA's vast array of exceptions, waivers, and preclusions to privilege, in addition to the differing levels of privilege, will lead inexorably to numerous judicial challenges. Rather than the occasional fight to evade a broad confidentiality statute such as we have experienced in Texas, parties in later legal proceedings in states adopting the UMA will have numerous opportunities to persuade the courts to open the door to mediation communications given the wide-open and labyrinthine structure of the proposal's approach to privilege. Prudent attorneys who represent parties at mediation will either have to provide substantial caution to their clients about the questionable prospects for later success in keeping mediation communications privileged in the event of non-settlement, or advise the client of a strong need to engage in drafting and negotiating a true confidentiality agreement with the opposing counsel prior to the outset of a mediation.

#### IV. ADDITIONAL CONCERNS

Although the main focus of this essay is to address problems and concerns with the UMA's approach to confidentiality and its unnecessary complexity as contrasted with the Texas ADR Act, the UMA includes several other troubling aspects. In this section of my essay I will address a few areas of concern that I perceive, as well as several problem areas that other organizations have raised.

##### *A. Ancillary Provisions*

In addition to major concerns centering on the UMA's approach to confidentiality and its complexity, several other aspects of the UMA are problematic. For example, the UMA has been drafted to apply only to mediation, not other forms of nonbinding ADR procedures. In contrast, the Texas ADR Act is applicable to nonbinding processes such as mini-trials, moderated settlement conferences, summary jury trials, and nonbinding arbitrations.<sup>83</sup> The confidentiality provisions apply to all such nonbinding processes.<sup>84</sup> Also, the UMA defines "mediation" as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary settlement agreement."<sup>85</sup> The focus is exclusively on the goal of reaching agreement. In contrast, the Texas ADR Act more broadly defines "mediation" as being intended "to promote reconciliation, settlement, or understanding" between parties.<sup>86</sup> Although not as substantive a distinction as some of the others that I have delineated, the Texas ADR Act does recognize that mediation can be productive through the encouragement of understanding or reconciliation, even when the process does not result in a settlement.

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82. Cf. Texas ADR Act, *supra* n. 1, at § 154.073(e) (requiring in camera hearings in the event of conflicts between the Texas ADR Act's confidentiality provisions and other legal requirements for disclosure).

83. Texas ADR Act, *supra* n. 1, §§ 154.024-027.

84. See *id.* §§ 154.053, 154.073 (making such provisions applicable to "alternative dispute resolution procedures").

85. UMA, *supra* n. 2, § 2(1).

86. Texas ADR Act, *supra* n. 1, § 154.023(a).

Another distinction between the UMA and the Texas ADR Act is that the Texas statute includes provisions relating to the qualifications of impartial third parties.<sup>87</sup> The statute requires generally that a person have completed "40 classroom hours of training in dispute resolution techniques" for most appointments as a neutral, and "an additional 24 hours of training in the fields of family dynamics, child development, and family law" for disputes relating to the parent-child relationship.<sup>88</sup> The UMA includes no such provisions. Instead, the UMA "does not require that a mediator have a special qualification by background or profession."<sup>89</sup> The drafters left the question of qualifications up to the states, and were of the view that although "[q]ualifications may be important, ... they need not be uniform."<sup>90</sup> Thus, if the UMA were to be enacted, other provisions relating to the qualifications of neutrals would need to be enacted, retained, or revisited.

Although the UMA's drafters declined to set forth any qualifications for mediators, the UMA does include a requirement that any person who has been requested to serve as a mediator make certain disclosures that have a bearing on the impartiality of the prospective mediator.<sup>91</sup> The types of matters that the proposal requires to be disclosed, such as financial or personal interest in the outcome, or existing or past relationships with a party or a foreseeable participant,<sup>92</sup> are largely unobjectionable. Indeed, as the drafters have observed, they are "consistent with the ethical obligations imposed on other ADR neutrals."<sup>93</sup> On the other hand, these provisions are arguably misplaced in this statute. These forms of ethical disclosures seem far better suited for inclusion in codes of ethics for mediators.<sup>94</sup> In addition, there is a certain degree of inconsistency in the drafters' having included these ethical disclosure obligations, yet having left out any coverage of mediator qualifications. Moreover, if there is a desire to codify certain ethical provisions, why limit the codification only to the disclosure requirements? The provisions are misplaced.<sup>95</sup>

Another troubling aspect of the UMA relates to two of the proposal's approaches to criminal matters. Although Section 6(b)(1) does a good job of limiting the potential use of mediation communications in later criminal proceedings through an in camera balancing process,<sup>96</sup> Sections 5(c) and 6(a)(4) leave the door open to significant potential mischief.<sup>97</sup> Section 5(c) bars a person who "intention-

87. *Id.* § 154.052.

88. *Id.* § 154.052(a)-(b). A Texas court can make an appointment of an impartial third party who does not meet the ordinary training requirements in "appropriate circumstances" and based on "legal or other professional training or experience." *Id.* § 154.052(c).

89. UMA, *supra* n. 2, § 9(f). The UMA also imposes no duty on a prospective mediator to disclose that person's qualifications unless requested to do so by a mediation party. *Id.* § 9(c).

90. *Id.* § 9, cmt. 2.

91. *Id.* § 9(a).

92. *Id.* § 9(a)(1).

93. *Id.* § 9, cmt. 1(a).

94. Consider, for example, the State Bar of Texas ADR Section's Ethical Guidelines for Mediators, which include comparable disclosure requirements as part of many other ethical principles. State Bar of Texas ADR Section, *Ethical Guidelines for Mediators* <<http://texasadr.org/ethicalguidelines.cfm>> (accessed March 1, 2003).

95. As will be discussed below, other organizations have been sharply critical of another aspect of § 9 – the forfeiture of privilege protections for a violation the disclosure requirements. See *infra* nn. 109-21 and accompanying text (discussing criticism of § 9(d)).

96. UMA, *supra* n. 1, § 6(b)(1).

97. *Id.* §§ 5(c), 6(a)(4).

ally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity" from asserting a UMA privilege.<sup>98</sup> Similarly, Section 6(4) excepts from the privileges provisions any mediation communication that is "intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity."<sup>99</sup> At one level, these appear unobjectionable. For example, suppose that one party at a mediation assaults the other party with physical blows. Most would likely agree that this type of "communication" should not be privileged – even if it were viewed as a "statement" covered by the UMA's definition of "mediation communication."<sup>100</sup> On the other hand, why are these exceptions even necessary given that Section 6(b)(1) is already designed to cover the introduction of mediation communications in later criminal proceedings? Moreover, under Sections 5(c) and 6(a)(4), unlike Section 6(b)(1), there is no in camera balancing process prior to the discovery or introduction of the proffered communications. In addition, the very open-endedness of the exceptions in Sections 5(c) and 6(a)(4) will serve as invitations to aggressive and clever (or not-so clever) prosecutors to engage in fishing expeditions to try to obtain mediation records or communications through the grand jury process or otherwise. Even the drafters have "recognize[d] that it is possible that the exception itself could be abused."<sup>101</sup> On the other hand, Texas mediators are very well aware of the prospect of an aggressive prosecution effort to obtain mediation files as was the situation in *In re Grand Jury Subpoena Dated December 17, 1996*.<sup>102</sup> In *In re Grand Jury Subpoena*, the United States Court of Appeals for the Fifth Circuit refused to quash a subpoena issued to the Texas Agricultural Mediation Program that required disclosure to a grand jury of numerous files relating to the program's mediations.<sup>103</sup> Although the program was federally funded, the court disregarded approved contract language calling for application of the Texas ADR Act's confidentiality provisions and refused to apply the confidentiality sections of the federal Administrative Dispute Resolution Act.<sup>104</sup> Ironically, the Texas ADR Act clearly reaches and makes confidential "communication[s] relating to the subject matter of any civil or criminal dispute ... whether before or after the institution of formal judicial proceedings."<sup>105</sup> By way of contrast, the UMA

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98. *Id.* § 5(c).

99. *Id.* § 6(a)(4).

100. *Id.* § 2(2).

101. *Id.* § 6, cmt. 5. The drafters opined further that "[s]uch unethical or bad faith conduct would continue to be subject to traditional sanction standards." *Id.* This statement arguably overshoots the mark. A zealous prosecutor might simply urge the court that an investigation into a prior mediation was necessary to explore whether there were any attempts by a target defendant who was a mediation participant "to conceal an ongoing crime or ongoing criminal activity." *Id.* § 6(a)(4).

102. 148 F.3d 487 (5th Cir. 1998), *cert. denied sub nom. Moczygemba v. U.S.*, 526 U.S. 1040 (1999).

103. *Id.* at 489.

104. *Id.* at 491-93. For a discussion and criticism of *In re Grand Jury Subpoena*, see Shannon, *supra* n. 18, at 94-96.

105. Texas ADR Act, *supra* n. 1, § 154.073(a) (emphasis added). See also *Williams v. State*, 770 S.W.2d 948, 949 (Tex. App. – Houston [1st Dist.] 1989, no pet.) (rejecting the state's attempt to introduce prior mediation communications in a later prosecution); Shannon, *supra* n. 18, at 99-101 (discussing *Williams* and the application of this Texas provision to criminal matters).

leaves the door open to potentially broad forays into mediation communications in later criminal investigations or proceedings.<sup>106</sup>

### B. Objections by Others

Other organizations and individuals within the ADR community have voiced additional objections to the UMA. In this subsection, I will highlight objections by two such groups, the International Academy of Mediators (IAM) and the Pennsylvania Bar Association's Dispute Resolution Committee.<sup>107</sup> The IAM adopted a resolution on October 31, 2001, opposing the adoption of the UMA.<sup>108</sup> The IAM primarily opposed UMA Section 9's "linking" of the violation of that section's ethical disclosure requirements with a "voiding [of] the evidentiary privilege in underlying civil litigation between the parties."<sup>109</sup> In this regard, the IAM expressed concern that a "mediator's failure to disclose ... should not have the effect of vitiating the privilege protecting the confidentiality of mediation communications," and that under the proposal, "communications (offers of compromise; hearsay; mediator to impeach witnesses, etc.) expected to be confidential now become discoverable or admissible as evidence."<sup>110</sup> In addition, the IAM also opposed having exceptions to privilege in later criminal proceedings, and questioned whether the UMA's definition of "mediation communication is broad enough to encompass conduct not intended as a 'statement' or involves the demeanor, reactions or other nonverbal actions of participants."<sup>111</sup>

In response to the IAM position, leadership from the UMA drafting committees submitted an open memorandum to followers of the UMA's deliberations and process.<sup>112</sup> In particular, the memorandum emphasized that although the mediator would lose privileges under Section 9(d), the parties and non-party participants would not and could "still block testimony in such situations, a point ignored in IAM's Resolution."<sup>113</sup> The Official Comments retain this position and observe

106. Moreover, in light of *In re Grand Jury Subpoena*, the UMA would likely have no application to any effort by a federal prosecutor to subpoena mediation records or to probe participants as to their mediation communications.

107. I also direct the reader's attention to an extensive critique and careful analysis by Professor Scott Hughes, in which he has contended that the UMA provides greater protections to mediators than to the parties and more than may be needed or appropriate. Hughes, *supra* n. 40.

108. *Res. of Intl. Acad. of Mediators Opposing Adoption of the UMA* [hereinafter "IAM Resolution"] <<http://www.texasadr.org/umaresolutionopposed.pdf>> (accessed March 1, 2003).

109. *Id.* at 1. Section 9(d) provides that if a prospective mediator does not make proper disclosures about the covered conflicts of interest, that person "is precluded by the violation from asserting a privilege under Section 4 [of the UMA]." UMA, *supra* n. 2, § 9(d).

110. IAM Resolution, *supra* n. 108, at 1. The IAM also expressed concern that this aspect of the UMA is "impractical in its application" and that it is unclear as to "[h]ow and by whom" violations of the disclosure requirements are to be determined. *Id.*

111. *Id.* The resolution opined that "[s]cars, limping, blinking, blushing, coughing or other physical attributes or reactions of participants are not within the definition" and presumably would not be privileged. *Id.*

112. Memo. from Michael B. Getty et al. to "Those Following the UMA," *IAM Should Take Another Look at UMA, Reconsider Opposition* (Nov. 8, 2001) <<http://www.texasadr.org/umaimaresp.pdf>> (accessed March 4, 2003).

113. *Id.* at 2 (emphasis in original omitted). The memorandum also addresses the IAM concern about criminal cases by focusing on the in camera review process contained in § 6(b)(1), and assessing that

that "in a situation in which the mediator has lost the privilege, for example, the parties may still come forward and assert their privilege, thus blocking the mediator who has lost the privilege from providing testimony about the affected mediation."<sup>114</sup>

Subsequent to the memorandum by the leadership of the UMA drafting committees, the Pennsylvania Bar Association Dispute Resolution Committee issued its report opposing adoption of the UMA.<sup>115</sup> Although this report included numerous criticisms of the UMA, the report commented that "Section 9(d) is at the root of the UMA problem. It creates the opportunity for tremendous mischief while adding nothing substantively to the UMA nor to the promotion of mediation as an annex to the court system or as a true alternative to litigation."<sup>116</sup> Similar to the IAM position on the same issue, the Pennsylvania Report asserted that "[t]he effect of this provision is to create uncertainty during and after the mediation process about what communications, if any, may be subsequently challenged."<sup>117</sup> The report characterized Section 9(d)'s preclusion of privilege for disclosure violations as creating a "chilling effect" on communications, and as "weakening" the "protection for a candid exchange of information."<sup>118</sup> The report also suggested that it "makes no practical sense to tie violation of an ethical rule" to the "voiding [of] an evidentiary privilege" in later civil litigation.<sup>119</sup> In reaching its position, the Pennsylvania Report also responded to the UMA drafters' contention that even under Section 9(d), a party can still block a person from testifying at a later proceeding.<sup>120</sup> In this regard, the Pennsylvania Report declared the following:

If a party can preclude the mediator from testifying in an underlying action under [UMA] Section 4, even though the mediator has no privilege, then Section 9(d) becomes effectively meaningless. If inability to assert the privilege is intended only for actions where the mediator is a party, then the UMA should expressly state that in Section 9(d) since ... the UMA already has an express Section 6(a)(5) exception dealing with actions against professional mediators arising from the mediation.<sup>121</sup>

The Pennsylvania Report appears to raise a valid concern. Given that disclosure requirements are generally included in codes of ethics for ADR professionals, it does not appear necessary to codify the requirement – particularly if the codes of ethics are viewed as satisfactorily protecting the integrity of the process. More-

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section as striking "a middle ground, providing what is in effect a rebuttable presumption that mediation communications are confidential in criminal proceedings." *Id.* at 3.

114. UMA, *supra* n. 2, § 9, cmt. (3)(b).

115. Report Adopted by the Penn. Bar Assoc. Dispute Res. Comm. on the Uniform Mediation Act by NCCULS [sic] [hereinafter "Pennsylvania Report"] (Nov. 29, 2001) <<http://texasadr.org/umapareport.pdf>> (accessed March 4, 2003).

116. *Id.* at 8. Among the many other criticisms included in the Pennsylvania Report, the report, like the IAM position statement, raised concerns about whether the definition of "mediation communication" is broad enough to encompass conduct not intended as a 'statement' or involves the demeanor, reactions or other nonverbal actions of participants." *Id.* at 7.

117. *Id.* at 8.

118. *Id.*

119. *Id.*

120. *Id.* at 10.

121. *Id.*



over, the linkage of a violation of the ethical rule with a later partial bar on confidentiality protection is odd given that the other participants can still assert privilege. Given that the failure of adequate disclosures by the mediator would most likely lead to a possible mediator malpractice action, the mediator malpractice exception in Section 6(a)(5)<sup>122</sup> should be adequate. Alternatively, in a scenario in which the parties did not reach a settlement agreement at the mediation and it is somehow learned that the mediator failed to make a full disclosure of a possible conflict, the parties should not have an open door to a fishing expedition with the mediator about communications from the mediation. And, given that either party could still block such inquiries, what is the point of Section 9(d) as drafted? Of course, in my view a better approach – at least for Texas – would be for the legislature to reject not just Section 9(d), but also the UMA as a whole, and possibly consider an exception to our broad confidentiality statute for mediator malpractice actions.<sup>123</sup>

## V. CONCLUSION

There is no question that the UMA's drafters have engaged in substantial efforts to create a workable statute to bring about greater uniformity in mediation practice around the country. For the reasons described above, however, when compared to an established and long-utilized statute such as the Texas ADR Act, the UMA falls short. The UMA's backwards approach to confidentiality as well as its maze of privileges, waivers, and exceptions are not an adequate substitute for the current Texas approach. Other than the hope of greater uniformity, the drafters and supporters have simply not made the case that Texas should shelve its statute that is now enjoying its fifteenth year of successful application. Although the Texas ADR Act is not perfect and could benefit from some legislative fine-tuning, its broad and comparatively simple approach to confidentiality with narrowly crafted exceptions has well-served disputants and the courts of this state, and is far superior to the direction taken by the UMA. The UMA train has now left the station, but there is no compelling reason for Texas to jump on board.

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122. UMA, *supra* n. 2, § 6(a)(5).

123. See *supra* nn. 42-43 and accompanying text (discussing the role of confidentiality in mediator malpractice claims).