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Be Careful What You Say in Mediation - Indiana Supreme Court Rules That Oral Settlement Agreements Reached in Mediation Must Be in Writing to Be Enforceable

*Kirk E. and Martha Vernon v. Adam J. Acton*¹

I. INTRODUCTION

When parties use mediation as an alternative to litigation, they generally expect the agreement will be binding upon the parties and confidential. However, the parties must ensure that the agreement they reach is reduced to writing or the agreement may not be enforceable. Furthermore, certain things said during the mediation session may be admissible in future litigation proceedings. The Indiana Supreme Court, in *Vernon v. Acton*, held that until mediation agreements are reduced to writing and signed by the parties, they must be considered *compromise settlement negotiations* under the applicable evidence rules and are not admissible as evidence of an oral mediation agreement.²

II. FACTS AND HOLDING

Kirk and Martha Vernon were involved in an automobile collision with Adam Acton.³ Before the Vernons filed a complaint against Acton for damages, the parties agreed to participate in a voluntary pre-suit mediation.⁴ The mediation was to take place according to a mutual written agreement establishing the terms and conditions of the mediation process.⁵ After the mediation session took place, Acton believed

1. 732 N.E.2d 805 (Ind. 2000).

2. *Id.* at 809-10.

3. *Id.* at 806.

4. *Id.*

5. *Id.* The agreement included the following provisions regarding confidentiality:

2.1. The mediation process is confidential. All parties expressly understand and agree that any statements made during the mediation process by either party about any matter shall be considered confidential, in conformity with State law and Supreme Court Rules.

Further, all parties understand and agree that insofar as the mediation process is directed towards the settlement of issues which might otherwise be the subject of litigation, statements made by either party during the process are intended to be taken as being in furtherance of settlement and, therefore, not admissible as evidence in court.

Further, in signing this Agreement, all parties understand and agree to be

the session produced an oral agreement to settle the Vernons' claims for \$29,500.⁶ Acton's insurance company then issued a check and a release form to the Vernons to be signed and returned.⁷ The Vernons "returned both [documents] unsigned and promptly filed a complaint against [Acton] alleging negligence and seeking damages for physical injuries and loss of consortium."⁸ Acton asserted various defenses and counterclaimed seeking damages for breach of the settlement agreement and attorney's fees.⁹ Two months later, Acton filed two pre-trial motions, a "Motion to Enforce Settlement Agreement" and a "Motion for Attorney's Fees."¹⁰

The trial court granted both of Acton's pre-trial motions, enforcing the oral pre-trial mediation settlement agreement and awarding attorney's fees.¹¹ The trial court heard testimony from David Young, a representative for Acton's insurance company, regarding the settlement that took place at the mediation session.¹² The trial court also allowed the mediator to testify that "the parties reached [an] agreement in separate rooms, after which [the mediator] brought them together for the purpose of summarizing the terms of the agreement."¹³ "The trial court ruled that it could hear evidence that an agreement was reached, but that [Indiana] ADR Rule 2.12 prevented it from receiving evidence of 'what went on during the mediation process.'"¹⁴ The court of appeals upheld the trial court's judgment.¹⁵ It based its

foreclosed and barred from: telling any statement made by the other party; requesting the production of any notes, documents, or tapes made in mediation; or, requesting the testimony of the mediator with regard to any part of the mediation process in Court or any other legal process.
Id. at 808 n.3.

6. *Id.* at 806.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* "The trial court heard evidence on [Acton's] pretrial motions and made the following determinations that the [Vernons] had accepted [Acton's] settlement offer; that there was an oral agreement that the [Vernons] would execute a release of all claims in exchange for \$29,500; that [Acton] did not breach the confidentiality provisions of the Agreement to Mediate or the A.D.R. Rules by disclosing statements made during the mediation process; and that [Acton] was entitled to \$8,000.00 in attorney fees from the [Vernons] because the lawsuit was a frivolous, unreasonable, and groundless action in light of the settlement agreement." *Id.*

12. *Id.*

13. *Id.*

14. *Vernon*, 732 N.E.2d at 807. Indiana A.D.R. Rule 2.12 states that at the time of mediation:

Mediation shall be regarded as settlement negotiations. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in the course of mediation is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of the mediation process. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negating a contention of undue delay. Mediation meeting shall be closed to all persons other than the parties of record, their legal representatives, and other invited persons.

decision on Indiana Evidence Rules 402 and 408 and “its view that the confidentiality provisions in the parties’ written agreement to mediate could not supersede the Rules of Evidence.”¹⁶

The Supreme Court of Indiana reversed the trial court’s decision.¹⁷ The Court stated that “until reduced to writing and signed by the parties, mediation settlement agreements must be considered as *compromise settlement negotiations* under the applicable ADR Rules and Evidence Rule 408.”¹⁸ The Court held that the “mediation confidentiality provisions of [Indiana’s] ADR Rules extend to and include oral settlement agreements undertaken or reached in mediation.”¹⁹

III. LEGAL HISTORY

Indiana ADR Rule 1.3 provides:

Mediation. This is a process in which a neutral third person, called a mediator, acts to encourage and to assist in the resolution of a dispute between two (2) or more parties. This is an informal and nonadversarial process. The objective is to help the disputing parties reach a mutually acceptable agreement between or among themselves on all or any part of the issues in dispute. Decision-making authority rests with the parties, and not the mediator. The mediator assists the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives, and in other ways consistent with these activities. The mediator assists the parties in negotiating a settlement that is specifically tailored to their needs and interests.²⁰

During the last thirty years, the use of mediation has expanded to become an “integral and growing part of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.”²¹ “The parties’ participation in the process and control over the result contributes to greater

Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by mediators.

Ind. A.D.R. R. 2.12 (1996) (The rule has since been revised and renumbered as A.D.R. Rule 2.11 and it now reads: “Mediation shall be regarded as settlement negotiations as governed by Indiana Evidence Rule 408. For purposes of reference, Evid. R. 408 provides as follows”) Ind. A.D.R. R. 2.11 (1996).

15. *Id.*

16. *Id.*

17. *Id.* at 810.

18. *Id.* at 810 (emphasis added). See Ind. Ediv. R. 408 (1996).

19. *Id.*

20. Ind. A.D.R. R. 1.3 (1996).

21. U.M.A Prefatory Notes (prop. off. draft February 2001).

satisfaction on their part.”²² In order for the parties to reach an acceptable agreement, the parties to the mediation must have confidence that the mediator “will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes.”²³

Confidentiality in the mediation process makes it an appealing alternative to the judicial process. Many state legislatures have enacted statutes to guarantee confidentiality during the mediation process.²⁴ Indiana passed ADR rule 2.11 to deal with confidentiality in mediation sessions.²⁵ The rule states that mediation will be regarded as settlement negotiation (as defined by Indiana Evidence Rule 408).²⁶ Rule 2.11 further states that all mediations are considered confidential and privileged and that “the confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the mediators.”²⁷ Traditionally, the laws of evidence have excluded settlement negotiations from evidence, “but the protection was limited to the specific terms of the offer or compromise.”²⁸ However, Federal Rule of Evidence 408 (“FRE 408”) expanded the protection to exclude “evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself.”²⁹ However, FRE 408 does not require the exclusion of statements made during compromise negotiations if used for other purposes such as for proving bias or prejudice of a witness.³⁰ These “other purposes” for allowing mediation communications as evidence in judicial proceedings prevents parties from having complete confidence that their statements made during the mediation process are indeed confidential.³¹ Another reason parties lack complete confidence that their

22. *Id.*

23. See U.M.A. at Reporter’s Notes for § 2.

24. *Id.* (“State legislatures have enacted more than 250 mediation confidentiality statutes”).

25. Ind. A.D.R. R. 2.11.

26. *Id.* See Ind. Evid. R. 408.

27. Ind. A.D.R. R. 211.

28. Mindy D. Rufenacht, *The Concern Over Confidentiality in Mediation—An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act*, 2000 J. of Dis. Res. 113, 115 (2000) (citing Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public Interest*, 1995 J. of Dis. Res. 1, 10-11 (1995)).

29. *Id.* (citing Kirtley, *supra* n. 28, at 13). See also Fed. R. Evid. 408 (2001).

30. See Fed. R. Evid. 408.

31. Indiana Evidence Rule 408 contains a similar provision that states “this rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” Ind. Evid. R. 408.

This too was a concern for the drafters of the U.M.A. They stated in the Reporter’s Working Notes:

“The Drafters considered whether the settlement discussions exclusion in Uniform Rule of Evidence 408 and comparable state provisions provide sufficient protection for the confidentiality of mediation communications. [T]his approach has . . . been generally discredited as a vehicle for protecting the confidentiality of mediation communications, primarily because the scope of the protection is severely constrained. Its application to mediation would mean that mediation communications could be introduced at trial for many purposes, including impeachment or to show the bias of a witness, as well as knowledge and intent, motive, conspiracy, mitigation of

comments will remain confidential is the states' differing views on confidentiality and oral settlements.³²

Written agreements are commonly excepted from mediation confidentiality protections.³³ The Indiana ADR Rules state that "[i]f an agreement is reached, in whole or in part, it shall be reduced to writing and signed by the parties and their counsel. . . ."³⁴ However, the Indiana Supreme Court recently had to rule on a case concerning mediation confidentiality and oral agreements reached during mediation.³⁵ The court overturned the trial court and court of appeals' decisions and refused to find that "the enforcement of oral mediation agreements is a sufficient ground to satisfy the 'offered for another purpose' exception to the confidentiality rule and Indiana Evidence Rule 408."³⁶ The court held that the mediation confidentiality provisions of Indiana's ADR Rules extend to and include oral settlement agreements undertaken or reached in mediation.³⁷ The court followed the reasoning set out by the drafters of the Uniform Mediation Act ("UMA") and other jurisdictions.³⁸ The drafters and these courts believed that the public policy of confidentiality in mediation is an integral part of the process and then took the position of disfavoring oral agreements about which the parties are more likely to have misunderstandings and disagreements.

IV. INSTANT DECISION

In *Vernon*, the Supreme Court of Indiana held an alleged oral agreement reached during a mediation process was not admissible as evidence in a judicial proceeding.³⁹ The court rejected the trial court's decision that it could hear evidence that an oral agreement was reached.⁴⁰ In doing so, it held that "mediation settlement agreements, until reduced to writing and signed by the parties, must be considered as compromise settlement negotiations under the applicable ADR Rules and Indiana Evidence Rule 408."⁴¹

In holding that the alleged oral agreement was not admissible as evidence, the court looked to Indiana ADR Rule 2.7, which states that when a settlement agreement is reached in mediation, it "shall be reduced to writing and signed."⁴² The court concluded that the mediator's testimony regarding the alleged oral settlement

damages, to name just a few examples."

U.M.A. at Reporter's Notes for § 5.

32. Compare *Hudson v. Hudson*, 600 So.2d 7 (Fla. App. 1992) (abrogated on other grounds) (privilege statute precluded evidence of oral settlement) with *Kaiser Foundation Health Plan of the Northwest v. Doe*, 903 P.2d 375 (Or. App. 1995) (the court of appeals disagreed with the trial court that oral settlement agreements must be reduced to writing to be enforced).

33. U.M.A. at Reporter's Notes for § 5.

34. Ind. A.D.R. R. 2.7(E)(2) (1996).

35. *Vernon*, 732 N.E.2d at 805.

36. *Id.* at 810.

37. *Id.*

38. See U.M.A. at Reporter's Notes for § 8. See also *Ryan v. Garcia*, 27 Cal. App. 4th 1006 (1994); *Hudson*, 600 S.2d at 7; *Cohen v. Cohen*, 609 S.2d 785 (Fla. App. 1992).

39. *Vernon*, 732 N.E.2d at 807.

40. *Id.* at 807.

41. *Id.* at 810.

42. *Id.* at 809. See Ind. A.D.R. R. 2.7.

agreement was confidential and privileged and that it was not admissible pursuant to the ADR Rules incorporated in the parties' written mediation agreement.⁴³

The court turned to the Reporter's Notes of the proposed UMA for guidance as to whether claims of oral mediation settlement agreements should be enforceable. The UMA provides that "a record of an agreement between two or more disputants shall not be protected by privilege or prohibition against disclosure."⁴⁴ The Reporter's Notes provide the following explanation:

This exception is noteworthy only of what is not included: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a mediation session could bear on either whether the disputants came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule. As a result, mediation participants might be less candid, not knowing whether a controversy later would erupt over an oral agreement. Unfortunately, excluding evidence of oral settlements reached during a mediation session would operate to the disadvantage of a less legally-sophisticated disputant who is accustomed to the enforcement of oral settlements reached in negotiations. Such a person might also mistakenly assume the admissibility of evidence of oral settlements reached in mediation as well. However, because the majority of courts and statutes limit the confidentiality exception to signed written agreements, one would expect that mediators and others will soon incorporate knowledge of a writing requirement into their practices.⁴⁵

The court agreed with this approach and stated that "requiring written agreements, signed by the parties, is more likely to maintain mediation as a viable avenue for clear and enduring dispute resolution rather than one leading to further uncertainty and conflict."⁴⁶ The court further declined to find that the enforcement of oral mediation agreements is a sufficient ground to satisfy the "offered for another purpose" exception to the confidentiality rule and Indiana Evidence Rule 408.⁴⁷

V. COMMENT

It is universally recognized that in order for non-judicial settlement discussions and other ADR mechanisms to work, they must be conducted in a spirit of candor and in such a fashion that anything said or done during the discussions will not have a detrimental effect on any of the parties if there is subsequent litigation.⁴⁸ It is this confidentiality in mediation that was the subject of the *Vernon* case. Confidentiality

43. *Id.* at 806.

44. *See* U.M.A. at Reporter's Notes for § 8.

45. *Id.*

46. *Vernon*, 732 N.E.2d at 810.

47. *Id.*

48. James J. Restivo, Jr. & Debra A. Mangus, *Alternative Dispute Resolution: Confidential Problem-Solving or Every Man's Evidence?*, in Lawrence Freedman, Christopher Haule & Howard Bookstaff, *Confidentiality in Mediation: A Practitioner's Guide* 143, 143 (ABA 1985).

in mediation is also a main theme in the proposed UMA.⁴⁹ However, the approaches to confidentiality used in the *Vernon* case and proposed in the UMA differ. In the *Vernon* case, the Indiana Supreme Court used the Indiana statute that is modeled after Federal Rule of Evidence 408.⁵⁰ The drafters of the proposed UMA looked to all the existing federal and state laws and tried to create a more uniform approach to mediation among the states, especially with regards to confidentiality.⁵¹ This comment will first look into the effects that the Indiana Supreme Court's ruling in *Vernon* might have on future mediation sessions in Indiana. Next, the proposed UMA approach to confidentiality will be discussed and how it might have affected the *Vernon* decision.

A. Possible Effects of Vernon

There is an underlying public policy rationale that mediation needs to be confidential in order for parties to feel like they can disclose information that might help in reaching a settlement. Confidentiality needs to be protected not only with regard to settlement offers that may prove liability, but also with regard to statements made during the mediation session, which might have an impact in future litigation. Indiana Rule 2.11 protects this rationale by stating "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible."⁵² However, this rule has the potential for future problems when one of the parties believes that an oral settlement was indeed reached during the mediation process. According to the Indiana statute, no evidence will be allowed in a judicial proceeding to prove that an oral settlement was in fact reached during the mediation session. This seems to make it easier now for parties in mediation sessions to subsequently rescind any oral settlement made during the session. The rule may create a trap for the unwary and possibly operate to the disadvantage of a less sophisticated party who is accustomed to the enforcement of oral settlements reached in negotiations.

This brings up another point as to why there should be a special rule for mediation settlement agreements to only be enforceable if they are in writing. In general, settlement agreements need not be in writing to be enforceable.⁵³ However, when a settlement agreement is reached in mediation, the mediation rules require that "it shall be reduced to writing and signed."⁵⁴ The Indiana rule has the potential for creating a problem in which two parties sit through a mediation session for many hours and discuss possible settlement agreements. Next, the parties orally agree to

49. See U.M.A. § 2 (1) which reads: "In applying and construing this Act, consideration must be given to: (1) the confidentiality of the mediation process because of the need to promote candor of parties and mediators through confidentiality, subject only to the need for disclosure to accommodate specific and compelling societal purposes."

Id.

50. *Vernon*, 732 N.E.2d at 806.

51. See U.M.A. at Prefatory Notes entitled Importance of Uniformity.

52. See Indiana A.D.R. R. 2.11.

53. See *Indiana Farmers Mutual Ins. Co. v. Walters*, 50 N.E.2d 868 (1943); See also *Klebes v. Forest Lake Corp.*, 607 N.E.2d 978, 982 (Ind. App. 1993).

54. Indiana A.D.R. R. 2.7(E)(2).

a settlement at the end of the day. However, before the parties sign the settlement or can get it in writing, one of the parties decides to rescind the oral agreement. The other party now has no way of proving or showing that any settlement was indeed reached and the once preferable alternative to litigation has now become just an extra step to litigation. This potential problem was the issue in an Oregon case in which the court of appeals reversed the trial court's decision that agreements reached in mediation in order to be enforced must be reduced to writing.⁵⁵ The court of appeals said that it could not find any authority that required "special treatment" for agreements reached in mediation.⁵⁶ Instead, the court chose to look at the "objective manifestations of the parties as evidenced by their communications and acts" in trying to reach a settlement and found the oral agreement enforceable.⁵⁷ A Virginia case also presents a good example of a judicially created exception where one can pierce the confidentiality of mediation where there is a demonstrable need for parol evidence when one of the parties to a mediation agreement sues to enforce or rescind that agreement.⁵⁸ These courts weighed the competing factors of confidentiality in mediation with the admissibility of evidence to prove a settlement was in fact reached.

B. A Possible Solution

The potential problems of Indiana ADR Rule 2.11 show the battles that courts face when trying to balance the need for confidentiality in mediation sessions with the need for parol evidence to prove an agreement may have in fact been reached during the mediation session. Like the federal rule, the Indiana rule contains a provision that allows for evidence to be admissible if it is "offered for another purpose,"⁵⁹ but the Indiana Supreme Court refused to allow evidence of an oral agreement as a sufficient ground to satisfy this exception to the confidentiality rule.⁶⁰ The Indiana Rules of ADR now require that a settlement agreement be reduced to writing,⁶¹ but this still does not correct the problem of oral settlements. The rule would correct this problem if it contained an exception which allows for an *in camera* hearing performed by the judge in order to determine if an oral settlement was reached during the mediation session when one of the parties sues to enforce or rescind that settlement. Alternatively, Indiana could create a judicial exception similar to the one in *Kaiser*, when there is a demonstrable need for parol evidence when one of the parties to a mediation agreement sues to enforce it.⁶²

55. *Kaiser*, 903 P.2d at 375.

56. *Id.* at 378.

57. *Id.* at 382.

58. *See Snyder-Falkingham v. Stockburger*, 457 S.E.2d 36 (Va. 1995) (where Virginia Supreme Court reviewed the mediation session evidence introduced at trial—witness testimony and exhibits—to reach its holding to bind Snyder-Falkingham to the terms of the oral settlement reached during the mediation session).

59. Indiana A.D.R. R. 2.11.

60. *Vernon*, 732 N.E.2d at 809.

61. Indiana A.D.R. R. 2.7(E)(2).

62. *See supra* n. 55.

The need for confidentiality in mediation sessions is vital. However, there needs to be exceptions to the rule to ensure agreements are enforced. The *in camera* hearing is such an exception. This exception may provide for less confidentiality, but it may also provide for the greater reassurance that any settlement agreement reached during mediation will be enforced. This will also give the parties a greater sense that the time spent during a mediation session will not be wasted if one party decides at the end of the session, after already orally agreeing but before putting it into writing, to rescind their agreement. The *in camera* hearing will still protect the confidentiality aspect of the mediation, while also allowing the judge to determine if a settlement was indeed reached.

C. *The Proposed Uniform Mediation Act*

In making its ruling, the Indiana Supreme Court turned to the Reporter's Notes of the proposed UMA to determine whether claims of oral mediation settlement agreements should be enforceable.⁶³ The UMA says "there is no privilege against disclosure under Section 5 for: (1) an agreement evidenced by a record authenticated by two or more parties . . ." ⁶⁴ However, nowhere in the draft is there a privilege for oral agreements. The Reporter's Notes explain that "[u]nfortunately, excluding evidence of oral settlements reached during a mediation session would operate to the disadvantage of a less legally-sophisticated party who is accustomed to the enforcement of oral settlements reached in negotiations. Such a person might also mistakenly assume the admissibility of evidence of oral settlements reached in mediation as well."⁶⁵ The Reporter's Notes go on to say that they hope mediators will incorporate a writing requirement into their practices,⁶⁶ but as of today many of the states' rules on written requirements by mediators differ. So until the UMA is adopted by each state, there will be no predictability as to whether a statement made in mediation in one state may be allowed in litigation or administrative processes in another state.

The proposed UMA creates a much broader coverage for the communication privilege than does Indiana ADR rule 2.11. The UMA privilege is beneficial to the parties because they "begin mediation knowing all their mediation communications will be confidential, except for specific types of information that can be identified in advance."⁶⁷ In comparison, Indiana ADR rule 2.11 does not require exclusion when "the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . ." ⁶⁸ This 'other purposes' exception leaves parties in mediation wondering if their statements will be used in subsequent litigation and harms the expectations of the parties that their statements will remain confidential. The broad approach of the UMA allows the parties to be more forthcoming during mediation

63. *Vernon*, 732 N.E.2d at 810.

64. See U.M.A. § 8(a)(1).

65. See U.M.A. at Reporter's Notes for § 8.

66. *Id.*

67. See Rufenacht, *supra* n. 28, at 38-39.

68. Indiana A.D.R. R. 2.11.

and encourages them to open communication, which may ultimately lead to quicker resolution of the dispute.

The UMA contains a section dealing with exceptions to the communication privilege.⁶⁹ The UMA states that “there is no privilege under Section 5 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, and; . . . (2) the mediation communication is offered in a judicial, administrative, or arbitration proceeding to prove a claim or defense under other law sufficient to set aside, rescind, or reform a contract.”⁷⁰ By allowing for an *in camera* hearing, the UMA maintains the confidentiality aspect of the mediation process while considering whether factors in the case allow for the court to “set aside, rescind, or reform a contract.” Had the Indiana Supreme Court followed the UMA approach to *in camera* hearings, the court could have determined whether a settlement was in fact agreed on by the parties, even if oral, by seeking the testimony from the mediator and the parties. This would have allowed the parties’ mediation communications to remain confidential and would have enforced the integrity of the mediation process. If Indiana had used the exceptions to the privilege set out by the UMA, then the court would have had the opportunity to view, *in camera*, the testimony of the mediator and the parties to determine if a settlement had been reached in *Vernon*. This would have produced a more just result while also keeping the mediation session confidential.

VI. CONCLUSION

The Indiana Supreme Court stated that “notwithstanding the importance of ensuring the enforceability of agreements that result from mediation, other goals are also important, [such as] producing clear understandings that the parties are less likely to dispute or challenge.”⁷¹ The court held that the best way to protect the “viable avenue for clear and enduring dispute resolution” was to require a written agreement as the only means of an enforceable mediation settlement.⁷² The confidentiality of mediation is indeed the main concern for many parties, but the enforceability of possible agreements reached during the mediation session should not be overlooked. The broad coverage of the proposed UMA protects both aspects. It protects the expectations of the parties by letting them know that all their mediation communications will be confidential, except for specific types of information that can be identified in advance. It also protects the enforceability of possible mediation settlements by allowing for *in camera* hearings if there is a need for the evidence that substantially outweighs the interest in protecting confidentiality. Whether the need for the evidence substantially outweighed the confidentiality protection in *Vernon* is unknown. But knowing that there is the possibility that we can find out should be a warm welcome to all parties to mediation.

GARRETT S. TAYLOR

69. U.M.A. § 8.

70. *Id.*

71. *Vernon*, 732 N.E.2d at 810.

72. *Id.*