Sound of Dust Settling: A Response to Criticisms of the UMA, The

Richard C. Reuben
University of Missouri School of Law, reubenr@missouri.edu

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The Sound of Dust Settling: A Response to Criticisms of the UMA

Richard C. Reuben

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1. The views and opinions aired in this Article were developed during the course of my service as Reporter to the Uniform Mediation Act Drafting committees for the American Bar Association, working through its Section of Dispute Resolution, and as Associate Reporter for the Drafting Committee of the National Conference of Commissioners on Uniform State Laws. However, they do not express the views or opinions of those organizations, the Drafting Committees, the other Reporters who worked on the Act, the Academic Advisory Faculty that supported the Reporters and Drafting Committees, or the William and Flora Hewlett Foundation, which provided financial support to the Drafting Committees and Academic Advisory Faculty.

I would like to thank Michael Getty, Jack Hanna, and John McCabe for their comments on an earlier draft of this work, Brian Shannon for his excellent criticism of the UMA, and Nancy Rogers for the opportunity to work with her as a Reporter on this project.
I. INTRODUCTION

The Uniform Mediation Act ("UMA") has gone to the states for consideration after about five years of research, drafting, and vetting, and ultimately, overwhelming support by the American Bar Association ("ABA"), the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), most major dispute resolution professional organizations and service providers, and many if not most leading dispute scholars.

Despite this support, concerns about the UMA still continue to echo from its drafting. This is hardly surprising, given the daunting nature of the task. In addition to joining with law a field that has long prided itself as apart from the system, the Drafters seriously, and often courageously, engaged the complex and often competing interests that surround issues of mediation and its cardinal value of confidentiality. The array of viewpoints about mediation, complicated by different professional, practice, and scholarly orientations toward mediation, was reflected in a robust drafting process that was generally collegial but sometimes difficult, as fair-minded people of goodwill with deeply held opinions "worked the issues" with passion and conviction. Moreover, newcomers entering the UMA dialogue generally had to begin from scratch, raising perfectly legitimate questions that already had been discussed at length. As those who participated in the drafting process know well, these debates often looked more contentious from outside the room, as some observers attempted to influence the drafting by

2. The UMA was endorsed by the ABA House of Delegates on Feb. 4, 2002, and was co-sponsored by fourteen ABA sections or other entities: the Section of Dispute Resolution, Section of Business Law, Tort and Insurance Practice Section, Section of Labor and Employment Law, Section of Administrative Law and Regulatory Practice, Family Law Section, ABA Commission on Mental and Physical Disability, Air and Space Law Forum, Real Property Probate and Trust Section, Senior Lawyers Division, Section of Family Law, Judicial Administration Division, State and Local Government Section, and the Government and Public Sector Lawyers Division.

More than a half dozen other ABA entities either supported (but did not co-sponsor) or were neutral on the UMA, including: the Section of Litigation, Section Individual Rights and Responsibilities, Section of International Law and Practice, Criminal Law Section, Antitrust Law Section, Health Law Section, and Young Lawyers Division.

3. The UMA was approved for consideration by the states on Aug. 17, 2001.

4. These principally include: the ABA Section of Dispute Resolution, the Association of Family and Dependency Courts, The Ombudsman Association, the Association for Conflict Resolution (qualified by conditioning endorsement on individual state treatment of certain choices left to states by the Act).

5. These principally include: the American Arbitration Association ("AAA"), Judicial Arbitration and Mediation Service ("JAMS"), and CPR Institute for Dispute Resolution.


swaying public opinion within the mediation community toward certain positions. 8 Yet, at the end of the day, the Act was, for the most part, able to draw the support of even its most ardent critics, precisely because the issues had been engaged deeply, sincerely, respectfully, and with an eye toward a constructive future. 9 While the participants recognized that unanimity would be unlikely, they also understood they could achieve a sensible, sensitive balance that would be enactable as state legislation because it was acceptable to litigators as well as mediators, to academics as well as practitioners, to non-lawyer mediators as well as lawyer mediators, to employers as well as employees, to prosecutors as well as the defense bar, and on and on. In other words, while the final UMA may not have been what most participants might have drafted personally, it was something that nearly all participants could support as a substantial improvement upon the status quo for most states – a net gain for the mediation process, and a monument to the field’s ability to “walk the talk.” 10

Continuing UMA “concerns,” therefore, have a certain vestigial or residual character, often reflecting views taken in battles that were fought within the drafting sessions – sometimes fiercely – but which were incapable of producing a majority among the UMA drafters. Professor Brian Shannon’s criticisms largely echo these discussions, and in this Article I seek to respond to some of them – after first extending my greatest appreciation to Professor Shannon for his willingness to be the “skunk in the parlor” of this symposium edition by generally aggregating those criticisms. 11 In Part I, I give some of the unpublished history of the UMA effort in the hope that it may facilitate greater understanding of the drafting process. In Part II, I categorize Professor Shannon’s criticisms into three distinct (but sometimes overlapping) classes – general criticisms of the Act, criticisms of specific provisions in the Act, and criticisms of what is not in the Act – and I respond to those criticisms. Finally, in Part III, I provide some suggestions to state legislators for integrating the UMA into their laws with minimal disruption.

II. THE CREATION OF THE UNIFORM MEDIATION ACT

A. An Unprecedented Collaboration

The birth of the UMA was the result of a confluence of a number of different forces, not the least of which was the gathering of truly remarkable individuals. Of the many whose work was vital to the drafting and endorsement of the UMA, two

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8. See e.g. Letter from Ron Kelly, Official Observer to the UMA Drafting Committees, to Gene Lebrun, president of NCCUSL, et al. (May 8, 1999) (copy on file with author); Letter from Ron Kelly to Commissioners, NCCUSL, et al. (July 27, 1999) (copy on file with author).
9. See e.g. Letter from Ron Kelly to NCCUSL, Most Vocal Critic Now in Support of the Uniform Mediation Act (Aug. 4, 2001) (on file with author).
11. See Brian D. Shannon, Dancing with the One that “Brung Us” – Why the Texas ADR Community has Declined to Embrace the UMA [hereinafter Shannon, Dancing] (in this volume).
in particular stand out: now-Dean Nancy Rogers of The Ohio State University, Michael E. Moritz College of Law and The Hon. Michael B. Getty, chair of the NCCUSL Drafting Committee.

Dean Rogers, one of the founders of the modern mediation movement, saw the need for a sensible and sensitive interface between law and mediation, believed in the capacity of a collaboratively drafted model or uniform law to provide a vehicle for its creation, and worked tirelessly to achieve it. Judge Getty, a former legislator and highly respected Life member of the esteemed NCCUSL, almost single-handedly introduced NCCUSL to the mediation process, and to the importance of the law’s protection of the confidentiality of the mediation process.

Ironically, they began working their way toward what would become the UMA while fully unaware of the efforts of the other. On the ABA side, Rogers developed a collaborative partnership between the ABA Section of Dispute Resolution and an academic consortium that included three law schools – Ohio State University, University of Missouri-Columbia, and Harvard – that would bring together many of the nation’s leading mediation scholars and practitioners “to study the effects of law on mediation and negotiation, and to reach a consensus on a model mediation statute.” Former ABA President Roberta Cooper Ramo and Ohio Supreme Court Chief Justice Thomas J. Moyer agreed to co-chair the initiative, and The William and Flora Hewlett Foundation agreed to provide funding.

At roughly the same time, however, Getty succeeded in convincing NCCUSL to expand its work on dispute resolution to include mediation confidentiality. Recognizing the need to act quickly, NCCUSL appointed a Drafting Committee on Mediation in the winter of 1997, and set an aggressive schedule for the promulgation of a statute.

The two organizations soon realized that they were working on similar goals, and in 1998 took what for them was the historic step of joining forces. During the

13. Often seen as the public face of the legal profession, the ABA has been responsible for authoring or co-authoring many of the country’s most influential model laws, including the Model Penal Code, the Model Codes of Judicial and Professional Conduct, and the Model Code of Evidence.
14. Two other non-law institutions were part of the consortium: Bowdoin University (represented by Professor Craig McEwen), and The Ohio State University School of Nursing (represented by Professor Jeanne Clement).
18. The work of the NCCUSL Drafting Committee was expected to be completed within two years. In addition to Getty, its members were: Phillip Carroll, Little Rock, Ark.; Joan Zeldon, Washington, D.C. (replacing David Dunbar, Jackson, Miss.); Elizabeth Kent, Honolulu, Haw. (replacing Richard Gregerson, Sioux Falls, S.D.); Byron Sher, Sacramento, Cal.; and Martha Walters, Eugene, Or. Stanley M. Fisher, Arter & Hadden, Cleveland, Ohio, served ex officio as division chair. Dean Rogers served as its Reporter, assisted by myself as Associate Reporter, and in the later stages, by now-Professor Emily Haynes as Reporter Coordinator.
last century, the Conference has been the primary vehicle through which uniformity among the states has been achieved in a number of critical areas, including the Uniform Commercial Code, the Uniform Adoption Act, and the Uniform Arbitration Act (which has been adopted by approximately two-thirds of all states). While the two organizations had worked together toward the common goal of improving the law for nearly a century, they never before had participated jointly in the actual drafting of proposed legislation for state consideration. Yet collaboration on the UMA made particular sense given the interests of both organizations in effective, enactable legislation. Each organization had unique strengths and capacities, and, indeed, the early research for the initiative clearly demonstrated that proposed uniform or model legislation is most likely to be enacted by the states when it is jointly endorsed by the ABA and NCCUSL. This reflects an important lesson of dispute system design: that participation in the drafting is more likely to lead to support for the final product.

The leadership of both organizations agreed to share resources, meet together, and work collaboratively but independently in the drafting of the Act. The final structure included separate ABA and NCCUSL drafting committees, with interlocking members, that would be supported by a shared team of Reporters and an Academic Advisory Faculty. Under the agreement, the Academic Advisory Faculty—chaired by ABA Drafting Committee co-chairs Roberta Cooper Ramo and Justice Thomas Moyer—would propose the first draft of a mediation act, continue to provide substantive research support for the drafting

19. See Getty et al., supra n. 16, at 787.
20. See generally, James J. Brudney, Mediation and Some Lessons from the Uniform State Law Experience, 13 Ohio St. J. on Dis. Res. 795 (1998). Enactment rates of “uniform” legislation tend to be higher than those of “model” legislation. Id. at 805-13. This is in part because commissioners in the Conference are said to have a moral obligation to use their best efforts to get proposals for uniform legislation passed in their states once they have been approved by the full Conference. However, commissioners have no such moral obligation to advance legislation designated as model by the Conference, although they are certainly welcome to put forth such efforts on an individual basis. See National Conference of Commissioners on Uniform State Laws, Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts § 7 (Aug. 2, 1988) (copy on file with author).
22. The ABA Drafting Committee was co-chaired by the Hon. Thomas J. Moyer, Chief Justice of the Ohio Supreme Court, and the Hon. Roberta Cooper Ramo, past president of the ABA. Its members were: James Diggs, Senior Vice President and General Counsel, PPG Industries, Pittsburgh, Pa.; Jose Feliciano, Baker & Hostetler, Cleveland, Ohio; Frank E.A. Sander, Bussey Professor and Associate Dean, Harvard Law School, Cambridge, Mass.; Judith Saul, Executive Director, Community Dispute Resolution, Ithaca, N.Y.; and the Hon. Annice Wagner, Chief Judge, District of Columbia Court of Appeals, Washington, D.C. It was coordinated by Dean Rogers, and I served as the Committee’s Reporter.
23. Harvard Law Professor Frank E. A. Sander, Cleveland attorney Jose Feliciano, and Judge Getty.
24. Dean Rogers and myself.
25. These included Professors Frank E.A. Sander (Harvard Law School); Chris Guthrie, John Lande, James Levin, Leonard L. Riskin, Jean R. Sternlight, and myself (University of Missouri-Columbia School of Law); James Brudney, Sarah R. Cole, L. Camille Hébert, Nancy H. Rogers, Joseph B. Stulberg, Laura Williams, and Charles Wilson (Ohio State University College of Law); Jeanne Clement (Ohio State University College of Nursing); and Craig A. McEwen (Bowdoin College). See Unif. Mediation Act, Prefatory Note, Point 5 (2001).
committees, and meet periodically to review the evolving draft and advise the two drafting committees. Judge Getty of NCCUSL would chair the joint drafting sessions, which would be conducted according to NCCUSL requirements. Finally, the agreement called for the legislation to be submitted for approval by both organizations.

B. Integrated Independence

The independence of the drafting committees was important to both organizations for at least three sometimes interrelated reasons: the differing scopes of their respective mandates, the contrasting expectations and requirements for the composition of their Drafting Committees, and the sometimes conflicting traditions and processes of the two organizations.

First, the mandates of the ABA and NCCUSL Drafting Committees were not entirely consistent. For example, the ABA’s mission was defined broadly to allow for the greatest flexibility of researchers and drafters in terms of the issues to be addressed. The express authorization of the NCCUSL Drafting Committee was much narrower, however, focusing on confidentiality in mediation, although it was also permitted to consider process integrity issues, such as ethics and qualifications.

Second, the expectations of and the requirements for the composition of the Drafting Committees differed substantially between NCCUSL and the ABA Drafting Committees. The ABA envisioned a broad-based drafting committee – one that would, for example, include non-lawyers and community mediators, to reflect the diversity of practices and applications in the mediation field. By virtue of its governing charter, however, the NCCUSL Drafting Committee could only be drawn from the membership of the Conference, all of whom must be lawyers to qualify for appointment as a Commissioner, generally by the state’s governor or legislative leaders. Indeed, as an accommodation to the ABA, and in the spirit of collaboration, NCCUSL agreed to deviate from its standard practices by permitting two members of the ABA Drafting Committee to serve as voting members of the NCCUSL UMA Drafting Committee, rather than serving in the traditional role of ABA advisors to NCCUSL Drafting Committee.

Finally, the organizational traditions and processes of the two groups were appreciably different. The NCCUSL drafting process is highly regulated, with meeting times and places for the Study and Drafting Committees fixed by the organization’s leadership, and various requirements for the conduct of the

26. Much of their initial research was published as a law review symposium issue. See Symposium on Drafting a Uniform/Model Mediation Act, 13 Ohio St. J. Dis. Res. 787 (1998).

27. Further, the NCCUSL Drafting Committee was expressly precluded from considering matters that would determine the structure of court-related mediation programs. NCCUSL does not generally draft purely regulatory acts, such as licensing or certification regulations.

28. This reason alone made it impossible for the groups to merge into a single Drafting Committee, which may have seemed the most intuitive way to consolidate efforts.


Its enactment process is also quite formal, with a clearly prescribed structure that included a “first reading,” and then a “second” (and often final) reading by the full Conference. The ABA Drafting Committee, on the other hand, had the authority to operate much more informally, meeting when, where, and how it chose, and to take a proposal for legislation to the ABA Section of Dispute Resolution, and then to the ABA House of Delegates, for consideration at any regularly scheduled meeting.

By respecting the traditions of both organizations, the joint Drafting Committee structure permitted the initiative to bring together the resources, capacities, and goodwill that neither organization could match on its own. During the drafting phase, this was probably felt most significantly in the broad range of mediation perspectives that both committees were able to generate to inform the drafting process. This included scores of “Official” and unofficial observers that included a vast array of mediation professional and provider organizations, various ABA entities, state and local bar associations, and helpful individuals too numerous to mention. However, all of these observers, contributors, and advisors were every bit as much of a part of the drafting process as the drafters themselves.

These commenters brought to the table understandings drawn from the many different contexts in which mediation is used – court-related, private, community, and corporate – and along many different dimensions (employer and employee, community and commercial, etc.). Similarly, they also enhanced the drafting with a wide spectrum of views about the goals of mediation, and about how

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34. Other Official Observers included: the American Bar Association Section of Administrative Law and Regulatory Practice, American Bar Association Section of Litigation, American Bar Association Senior Lawyers Division, American Bar Association Section of Torts and Insurance Practice, American Trial Lawyers Association, Equal Employment Advisory Council, National Association of District Attorneys, and the Society of Professional Journalists. Id.

35. These several state and local Bar Associations, generally working through their ADR committees, included: the Alameda County Bar Association, the Beverly Hills Bar Association, the State Bar of California, the Chicago Bar Association, the Louisiana State Bar Association, the Minnesota State Bar Association, and the Mississippi Bar. Id.

36. One individual, California mediator Ron Kelly, stands out among others without organizational affiliation because of his important voice in all aspects of the drafting process. See generally Ron Kelly, Are You Looking for an Update on the Uniform Mediation Act, Most Current UMA Text, or Contact Info for Your State’s Uniform Law Commissioners? <http://www.ronkelly.com/RonKellyMedAct.html> (accessed March 11, 2003).

37. The range of goals included efficiency for the parties and the courts, deeper reconciliation of the conflict, and the betterment of society through the use of less adversarial means of resolving disputes.
mediation is to be conducted, reflecting an openness of process that continues to be widely recognized. In the end, it seems fair to say that the drafters' extended deliberations included the views, and in many cases the range of views, of most mediation constituencies on many if not most of the issues presented, most of which was ultimately drafted into the final UMA or official comments.

C. Cultural cross-currents

These diversity strengths are readily appreciable in hindsight. However, they augured a challenging drafting process if success, and at least substantial consensus, was to be achieved. In some respects, the four-year drafting of the UMA was an intense national dialogue on the mediation process – the nature of the process, its goals and values, its practices and experience, and its relationship to law – on a scale that the field of mediation had never before engaged so publicly. Indeed, those who were involved more closely with the process – drafters, reporters, and observers – worked with a sense of history. Over time, this dialogue would sometimes take the form of a massive cross-cultural negotiation (and, on occasion, mediation), with all of the challenges that characterize those processes – including the management of parties, information, and communications in a way that fosters trust among the participants. To complicate matters further, this collaboration cut across at least five major dimensions of potential cultural friction: between mediators and litigators, between lawyer and non-lawyer mediators, between academicians and practitioners, between those seeking to preserve vested state interests and those seeking to promote national interests, and between the instituted cultures of the ABA and NCCUSL.

38. These included, for example, strong proponents of both the evaluative and facilitative models of mediation, as well as supporters and opponents of mandatory mediation.

39. See James J. Alfini, Mediation's Coming of (Legal) Age, 22 N. Ill. U. L. Rev. 153, 154 (2002); Philip J. Harter, The Uniform Mediation Act: An Essential Framework for Self-Determination, 22 N. Ill. U. L. Rev. 252, 252-53 (2002); Letter from Dennis Sharp et al., on behalf of Society of Professionals in Dispute Resolution to Judge Michael B. Getty et al., Uniform Mediation Act Drafting Committee I (Oct. 8, 1999) (copy on file with author) ("[W]e believe that through the collaborative and open process you are conducting we will be able to address these concerns and collectively create effective and responsible protections of mediation communications.").

40. To be sure, there were national level drafting efforts. See e.g. Center for Dispute Settlement and the Institute of Judicial Administration, National Standards for Court-Connected Mediation Programs (1992) <http://www.caadrs.org/studies/nationstd.htm> (accessed Mar. 12, 2003); AAA/ABA/SPIDR Model Standards of Conduct for Mediators (1994) <http://www.ilr.cornell.edu/alliance/model_standards_of_conduct_for_m.htm> (accessed Mar. 12, 2003). However, those drafting efforts were more closed, and were not expected to lead to legislation that would actually be proposed in the fifty states. The salience of possible enactment alone generated substantial national interest in the UMA. See Gregory Firestone, An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act, 22 N. Ill. U. L. Rev. 265, 265-66 (2002).

41. These cross-cultural currents were significant, but cannot be addressed precisely. If we have learned anything about these cultures, it is that the different constituencies affected by mediation do not speak with one voice, are not monolithic in terms of their interests, and can coalesce and disaggregate on an issue-by-issue basis. I therefore proceed in this section to speak in general terms, explicitly acknowledging that the brush sweeps too far to be fully accurate. Still, any attempt to understand the UMA drafting process is distortive at best if it does not account for the cultural factors that were so important in the drafting process.

42. See supra nn. 30-32 and accompanying text.

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Space does not permit a full exploration of all of these dimensions, but it is essential to note at least the general divide between mediators and litigators. Many mediators, of course, view mediation as something apart from the law—a different, if not better, way to resolve conflicts through interest-based discussion and consensus rather than the adversarial litigation of legal claims before a court of law. This belief gives rise to a certain mythology among many in the mediation community: that mediation actually operates apart from, and outside of, the legal system. By contrast many litigators tend to view mediation with suspicion, as at best an inconvenience on the road to court, and at worst a serious impediment to the judicial process. For these litigators, the only right result is an adjudicated result, one that is the product of zealous and competing advocacy. Theirs is the mythology of “litigation romanticism,” and certainly had voice within the NCCUSL Drafting Committee.

The Uniform Mediation Act crystalized the tension between these two competing mythologies by bringing them into confrontation again and again. This was nowhere more true than with the Act’s centerpiece, confidentiality, which directly pit the needs, norms, and expectations of the mediation process against the needs, norms, and expectations of the legal system’s insistence on the availability of “every person’s” evidence in establishing or defending claims at law. In even trying to balance this tension, the UMA’s confrontation of these two mythologies met with a wall of resistance to whatever might be drafted. This dynamic foreshadowed the likelihood of continued resistance long after the participants at the table had achieved mutual understanding.

When combined with other cultural divides, the cross-cultural differences between the mediators and litigators gave rise to an aura of generalized distrust that is common in complex multi-party negotiations. From the outset, for

43. See e.g. W. Reece Bader, ADR is fine, but not always welcome as an alternative to battle in court, 6 Dispute Res. Mag. 21 (Spring 2000).
44. See Carrie Menkel-Meadow, When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals, 44 UCLA L. Rev. 1871, 1874-75 (1997).
45. One member of the NCCUSL Drafting Committee, an influential former president of NCCUSL, Commissioner Phil Carroll, in fact spoke against the Act’s adoption when it was considered by the Conference’s Committee of the Whole. See Philip Carroll, Uniform Mediation Act – a Dissent (Aug. 8, 2001) (copy on file with author).
46. My sense is that one operating assumption of the UMA drafters was that this inter-relationship between law and mediation was inevitable, and that the mediation process was best served if it were undertaken in a thoughtful way by people experienced with mediation as well as law reform.
48. It is noteworthy that the ABA Section of Litigation did not oppose the UMA in the ABA House of Delegates, and, in fact, the Litigation Section of the State Bar of New York carried the UMA to the Board of Governors, where it was unanimously approved in January 2003.
example, there was a skepticism among mediators about the need for a mediation law at all, much less one that would be uniform across the fifty states.\textsuperscript{50} The mediation community after all is one that operates largely on the basis of standards and norms, rather than coercive legal rules. Even proposing that mediation has a relationship with law seemed counter-cultural to some mediators, and threatened to upset the apple cart.

Even assuming need, some mediators were skeptical of NCCUSL's competence to draft the legislation – in part because as of the time that the initiative began, none of the members of the NCCUSL Drafting Committee were full-time mediators; rather, they were all lawyers or judges.\textsuperscript{51} The mediation community was a field that has grown accustomed to controlling the process and establishing its own rules; it did not seem particularly interested in regulation by outsiders.\textsuperscript{52} The presence and composition of the ABA Drafting Committee and its sponsorship by the Section of Dispute Resolution helped somewhat in this regard. However, the fact that these reforms came from the legal profession cut even more deeply for some non-lawyer mediators, as it represented further evidence of cooperation of the field by the lawyers – thus exposing a deep rift within the mediation field about who would lead the profession, and how it would evolve.

Given the complexity of the task as a matter of substantive law and nuanced mediation practice, given the challenges of a commitment by the organizers to an open and inclusive drafting effort, it is hardly surprising that the issues that dominated the discussions by the parties at the table would come to be raised again by newcomers to the UMA dialogue as the Act now moves to the states for individual consideration. As a process in which a statute is drafted centrally, and then enacted diffusely, the uniform law drafting process is one that inherently invites such echoes – as well as the deference that the product of an inclusive national dialogue deserves as it stands on its own merits in the end.

III. CRITICISMS OF THE UNIFORM MEDIATION ACT

Criticisms of the Uniform Mediation Act generally fall into one of three major categories: Criticisms directed generally at either the concept of the Act or to the Act as a whole (generalized grievances), criticisms that take issue with particular provisions in the Act (particular complaints), and those which criticize the act for what it does not include (complaints of exclusion). In this Section, I address the most significant of the criticisms that may continue to occasionally arise as the dust settles on the drafting of the UMA.

\textsuperscript{50} Letter from Norman Brand, mediator-arbitrator, to NCCUSL (July 13, 1999) ("the draft addresses no clear problem") (copy on file with author).

\textsuperscript{51} The chair of the NCCUSL Drafting Committee, Michael Getty, mediated hundreds of cases while serving as a Chancery Court judge in Cook County, Ill., and retired during the drafting process to pursue a full-time mediation practice.

\textsuperscript{52} This perception is consistent with research suggesting that the attributes of group formation include the establishment of group norms within the group, and ethnocentricity with respect to outsiders. See Ronald J. Fisher, Intergroup Conflict, in The Handbook of Conflict Resolution: Theory and Practice 166, 168-73 (Morton Deutsch and Peter Coleman eds., 2000).
A. Generalized Grievances

This class of UMA criticisms includes a variety of arguments that are not tied
to specific provisions, but rather are directed to the Act as a whole or to the
concept of the Act. Not surprisingly, these contentions sometimes have an air of
masking underlying philosophical disagreement with the existence of a Uniform
Mediation Act. I focus in particular on three of these objections: that the Act is
too complex, that the title of the Act is misleading, and that the Act will never
become a uniform law (so why bother).

1. The UMA is too complex

Professor Shannon introduces his Article with several pages of hypothetical
mediator discussions of confidentiality with participants, discussions intended to
underscore the complexity of the UMA’s protections of mediation
confidentiality. While entertaining, it’s a bit of a Trojan Horse. After all, just as
one does not need to know precisely how a clock works in order to tell time,
parties do not need to know every wrinkle of confidentiality law in order to
participate safely and effectively in a mediation.

a. Compared to what?

Professor Shannon’s introduction would imply that holders of other privileges
go into similar detail about the scope of their confidentiality protections, and in
this way holds the mediation privilege to a different, higher standard than those
other privileges.

The attorney-client privilege, with which the UMA is most closely aligned,
provides a good example. By Professor Shannon’s standard for the UMA, he
would require that attorneys spell out in detail all of the exceptions and contours
of the attorney-client privilege – more than 1,000 pages worth of information in
the leading treatise such as what is and is not protected (communications vs.
information), how the privilege may be waived (express and implied), the
crime/fraud exception, and about the need to distinguish legal from non-legal
advice, to name just a few wrinkles. Similarly, they would have to provide
additional detailed information about the confidentiality of settlement discussions
under Federal Rule of Evidence 408 and related state laws – exceptions that
include, for example, the use of settlement discussion communications for
purposes of impeachment at trial, among nearly a dozen others. Finally, since
one never knows in what jurisdiction a privileged communication may be sought,

53. Shannon, Dancing, supra n. 11.
55. Id. at §5.1.
56. Id. at §9.
57. Id. at §8.1-8.16.
58. Id. at §7.1-7.8.
see also Wayne D. Brazil, Protecting the Confidentiality of Settlement Negotiations, 39 Hastings L. J.
955 (detailing narrow reach of Rule 408); Draft Unif. Mediation Act § 5, cmt. 3(a).
attorneys would need to provide this information for all fifty states under Professor Shannon’s standard for the UMA.

One might reasonably doubt whether current attorney-client discussions with respect to the confidentiality of their communications engage this level of detail; I certainly do. Experience tells me that to the extent that the issue comes up during actual attorney-client discussions, attorneys are more likely to just say the communications are confidential and privileged and cannot be used as evidence in later legal proceedings – and to raise more specific cautions when appropriate as client counseling progresses.\(^6\)

Similarly, Professor Shannon’s argument suggests that mediators today provide clients with an accurate and comprehensive assessment of the current state of the law. Again, this seems unlikely. Do mediators who practice today in the twenty-five states that do not have a general law protecting the confidentiality of all mediation communications really tell their clients that their mediation communications are in all probability discoverable and admissible at trial?\(^6\) Do mediators who practice today in the twenty-five states that do have a general mediation confidentiality statute fully inform their clients about the limitations of those protections, such as to the criminal context,\(^6\) to statements related only to the mediation,\(^6\) or to mediations conducted under court programs?\(^6\) Do mediators today really tell their clients that the confidentiality provisions in their contractual agreements to mediate, and their post-mediation settlement agreements, likely will not be enforceable in a court of law if the communication is sought as evidence in a trial, and that the clause will only be enforceable as to disclosures of mediation communications outside of legal proceedings?\(^6\) Do mediators today really tell their clients that even if the mediation communication is protected in their state that it may not be protected in another state in which the evidence might be sought, and that any differences between the laws of the two jurisdictions would be decided according to complex conflicts of law principles?\(^6\)

Again, one would be surprised if current mediator disclosure practices included this level of detail. More likely, one would expect that mediators would

\(^6\) Professor Shannon’s hypothetical assumes that doctors explain in detail the vulnerable parties exception to the physician-patient privilege. See John W. Strong et al., Evidence: Cases and Materials 990 (5th ed. 1995). It also assumes that priests tell their penitent that the privilege may only apply if the disclosure is motivated by spiritual or penitential considerations. See Claudia G. Catalano, Subject Matter and Waiver of Privilege Covering Communications to Clergy Member or Spiritual Adviser, 93 A.L.R. 5th 327 (2001). One may reasonably doubt that a majority of these professionals engage in these types of discussions. Most probably just say the communications are confidential.


\(^6\) See e.g. Fla. Stat. Ann. § 44.102 (West 2002).

\(^6\) Agreements to keep information away from courts are routinely invalidated on public policy grounds. See Rogers & McEwen, supra n. 12, at § 9.23-9.25. See e.g. Lawson v. Brown’s Day Care Center, 172 Vt. 574, 575 fn. 2 (2001) (parties may not create evidentiary privilege by agreement).

be more apt to say something to the effect of "what’s said in this room stays in this room."

This disparity between mediator practices and the state of the law actually underscores one of the major benefits of the Uniform Mediation Act. Mediators who speak to this kind of a general “right” of confidentiality do their clients a great disservice — indeed, arguably mislead their clients — by setting client expectations regarding mediation confidentiality at levels that cannot be legally supported. The UMA, on the other hand, fills this gap by bringing the positive law into alignment with party expectations regarding mediation confidentiality. In states in which the UMA is adopted, when a mediator says “the statements you make in this mediation are confidential and will generally not be admissible in a court of law if this mediation fails,” the UMA provides the parties the tools to back that up: a statutory legal right to tell a court you refuse to provide that information, and to prevent someone else from disclosing it without your permission. 67

b. A complex problem, not a complex act

In many respects, the UMA is a remarkably clear document as finally drafted, having been washed clean on the rocks of more than a dozen drafts and drafting sessions. For example, the operative provision of the Act says: “(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.” 68 This is a fairly straightforward declarative sentence, one that does not even use many big words. 69 It says what the general rule is in a way that is understandable and familiar to both lawyers and non-lawyers, 71 and tells precisely where to find exceptions to this general rule. 72

Even the Act’s most complicated provisions — the blocking rights of mediation participants — are written in plain English, providing:

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

67. It should be noted that the non-party participant’s right to block mediation communications are limited to statements that the non-party participant makes. This preserves party autonomy by permitting parties to waive the privilege with respect to their own statements without needing to secure the permission of the non-party participant, and avoiding the indefensible situation of a non-party participant blocking the use of mediation communications by the parties.

68. Unif. Mediation Act § 4(a) (2001). It may seem odd to begin the sentence with reference to exceptions, but this is consistent with NCCUSL style for all uniform laws. See NCCUSL, Procedural and Drafting Manual, Rule 13(a) (1997).

69. At forty words, it is consistent with a length that general interest newspapers typically consider appropriate for general readers, who are assumed to be able to read at an eighth grade level. See Rudolph F. Flesch, How to Test Readibility 1-6 (1951); Brian S. Brooks et al., News Reporting and Writing 149-51 (6th ed., Bedford/St. Martin’s 1999) (continuing to endorse Flesch standards).

70. The word “privilege” was directed at legal readers of the statute. Unif. Mediation Act § 4(a).

71. The phrase “is not subject to discovery or admissible in evidence in a proceeding” was directed at non-lawyer readers of the statute.

(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. 73

Again, this is hardly the kind of legalese that so often infests our statutes. Still, two facts contribute to the appearance of complexity. First, the environment in which this fairly straightforward rule operates is itself complex – complicated by the different types of mediation applications and styles, complicated by the competing and sometimes trumping demands of the justice system for relevant mediation communications evidence, complicated by the unique needs of the mediation process. On the latter point, for example, the mediation privilege is unique among other privileges in that it does not permit waiver by conduct; rather, waiver of the privilege must be express. 74 This was because of concerns about inadvertent waivers by parties or mediators, especially non-lawyers, vitiating the privilege.

The second reason for the appearance of complexity is that the UMA, is more responsible than other “less complex” statutes because it clearly addresses the difficult questions – just what is a mediation, when does it begin and end, what does confidentiality really mean, when should support for mediation confidentiality give way to larger public concerns – rather than leaving them to the courts. This was a deliberate decision, intended to provide clarity and certainty for mediation participants.

c. Choosing specificity over brevity

In the drafting of any statute, one must make fundamental choices about what matters to address specifically, and what matters, if any, to leave to judicial interpretation. A more specific statute will necessarily be, or will appear to be, more complex, but at the same time it will leave less discretion to the courts and provide parties more certainty. In contrast, a less specific statute will appear to be simpler, but it will be less certain and reliable because it leaves much more room for judicial interpretation.

This is one area in which cultural differences among mediation constituencies made a significant difference. Responding to criticisms of early drafts for complexity, the Drafting Committees adopted the recommendation of the Academic Advisory Faculty 75 for an approach to confidentiality that was very

75. This faculty was composed almost exclusively of law professors. See supra n. 25.
similar to the Texas model: a broad general statement of confidentiality stating that mediations communications would be privileged from admission into evidence unless such exclusion would constitute a “manifest injustice.” This approach tracked the rule for mediations involving the federal government, and has some precedent in the states, including in Texas.

1. Manifest injustice

Lawyers involved in the drafting process were generally willing to trust courts to implement a “manifest injustice” provision narrowly, in accordance with the strong presumption of non-admissibility reflected in the statute’s legislative intent. However, a “manifest injustice” exception was patently unacceptable to the mediation community (including many lawyer-mediators). Indeed, while the mediation community rarely spoke with one voice on any given issue, this was the one issue upon which the overwhelming majority of mediators and provider organizations agreed. Articulations varied, but they boiled down to an unwillingness to trust courts to apply the “manifest injustice” standard narrowly. Instead, they feared the “manifest injustice” provision as “an exception that would swallow the rule,” one “so big that you could drive a truck through it.”

The mediators involved in the process lobbied the drafting committees hard to limit judicial discretion at every instance – even at the acknowledged cost of the additional drafting, or “complexity,” that would be required to achieve that goal. In the end, the drafters relented, deleted the “manifest injustice” provision, and proceeded to draft a more specific – and longer – statute.

Professor Shannon effectively raises this issue again when he holds out the Texas statute, Texas Civ. Prac. & Rem. § 154.073(a), as a better approach to the more complex privilege structure adopted by the UMA. In relevant parts, the Texas law provides:

76. The most significant difference is that the UMA even then distinguished between discovery and admissibility in legal proceedings and disclosures outside of proceedings.
80. See e.g. Letter from Liz O’Brien, president, California Dispute Resolution Council, to Richard C. Reuben, Reporter, ABA UMA Drafting Committee (Aug. 5, 1999) (would create “an impossible environment in which to mediate”).
81. It is ironic, but telling, that some of these mediators may today criticize the UMA as too complex.
83. See Shannon, Dancing, supra n. 11. Texas also has another general mediation confidentiality statute, Tex. Civ. Prac. & Remedies Code Ann. § 154.053(c) (“unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement
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. 84

This statute is somewhat representative of the simple “mediation is confidential” statutes found in some state statutes and court rules. While such statutes are seductive in their simplicity, they are deceptive in that they raise more questions than they answer, promise much more than they deliver, and in the end contribute little to the reliability of mediation confidentiality. At worst, they are downright misleading. In my view, Professor Shannon is correct in contending that the Texas statute provides a good case in point, and therefore is worth a closer look.

2. Ambiguity in the Texas statute

As is typical among these “mediation is confidential” statutes, the Texas law conveniently avoids the harder questions that are likely to lead to litigation. For example, while stating that alternative dispute resolution processes are “confidential,” the statute does not define what an “alternative dispute resolution proceeding” is for purposes of the act, nor does it define “confidential,” nor does it define its express limitation to communications that “relate to the subject matter” of the dispute, nor does it list any exceptions to its general rule of confidentiality. 85

Professor Shannon and the other members of the ADR Section of the State Bar of Texas interpret this broad language to provide both a categorical rule against the discovery or introduction of mediation communications evidence in subsequent judicial and administrative proceedings (with no exceptions 86), as well as a categorical rule against disclosure of mediation communications outside of proceedings (with no exceptions).

Maybe. But we all know that wishing does not necessarily make something so – and there are strong judicial pressures against such an interpretation. Rules of evidentiary exclusion are construed narrowly, in keeping with the law’s demand for every person’s evidence in the pursuit of justice. 87 While it is theoretically possible that a court may view the statute as providing these two

85. The statute does provide that mediation communications are admissible if they are “admissible or discoverable independent of the procedure.” See Tex. Civ. Prac. & Remedies Code Ann. §154.073(c) (West 2003).
86. Id.
87. See supra, n. 47. See e.g. Sharon Motor Lodge v. Tai, 2001 WL 1659516 (2001) (construing state statute as permitting mediator to be required to answer interrogatories on the question of whether there was a mediated settlement agreement, and the terms of that agreement).
bright line rules, it is only a possibility, it is not a rule of law.®8 An equally plausible, and more defensible, judicial reading of the statute’s plain language, would seem to compel a more restrictive interpretation — as a relatively narrow evidentiary exclusion for certain statements made during a mediation. In fact, no Texas court to date has construed the statute as being either without exceptions with regard to admissibility of mediation communications in legal proceedings, or as imposing an affirmative duty not to disclose outside of legal proceedings. To the contrary, the relatively extensive case law in Texas makes abundantly clear that the list of unstated judicial exceptions can be extensive.®9

Texas’ own experience with judicially carved exceptions is consistent with that of other states. Courts have generally refused to categorically exclude mediation communications from admissibility.®0 Rather, courts have viewed such “mediation is confidential” statutes as requiring them to balance the mediation confidentiality interests against the parties’ interest in the evidence in the case before them — frequently deciding in favor of admissibility.®1 California remains the best example, as its statutory scheme lays out a categorical “mediation is confidential” rule to the use of mediation communications in subsequent civil proceedings. Yet both state and federal courts in California have regularly found exceptions that would permit the admission of mediation communications evidence.®2

While it is not emphasized in Professor Shannon’s analysis, Texas law goes one step further in limiting the scope of mediation confidentiality, providing a broad statutory exception to the broad general rule of confidentiality (whatever it is finally construed to mean). It is found in Subsection (e), and provides:

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

88. Unif. Mediation Act § 9, cmt.(a).
90. See Rinaker v. Super. Ct., 62 Cal. App. 4th 155 (Cal. App. 3d Dist. 1998) (juvenile’s constitutional right to confrontation in civil juvenile delinquency trumps mediator’s statutory right not to be called as a witness); Olam v. Cong. Mortg. Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (constituting California statutory scheme as establishing a mediation privilege, and ruling that the mediator’s right to testify gives way when both parties agree to waive the privilege, and the court determines it needs the evidence to decide the parties’ claims); Foxgate Homeowners Assn. v. Bramalea California, Inc., 25 P.3d 1117 (Cal. 2001) (reversing court of appeals decision that portions of a mediator’s report about sanctionable conduct, along with evidence of statements made during the mediation relating to that conduct, may be considered by a court when ruling on the sanctions motion).
92. Supra n. 90.
protective order of the court or whether the communications or materials are subject to disclosure.\(^9\)

On its face, this exception is clearly broader than the proposed "manifest injustice" standard vilified by UMA critics in the early drafting.\(^9^4\) Indeed, it is difficult to imagine how one might draft a broader exception than Subsection (e). A more accurate description of Texas law might be: "Mediation communications are confidential unless a court wants to hear them." And courts in Texas – arguably more than in other states – have repeatedly shown themselves prone to wanting that information.\(^9^5\) For this reason, categorical mediation confidentiality statutes have been frequent targets of scholarly criticism, including the Texas statute in particular.\(^9^6\) For this reason, too, state legislatures have been reluctant to enact such rules, overwhelmingly preferring the privilege structure adopted by the UMA.\(^9^7\)

3. The title of the UMA is misleading

Professor Shannon criticizes the UMA for not getting into other aspects of mediation, such as qualifications.\(^9^8\) This echoes another criticism heard during the latter stages of drafting: that the title of the legislation – the Uniform Mediation Act - is misleading because the Act is essentially an evidentiary privilege and discovery limitation.\(^9^9\) This criticism is just incorrect on its face.

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93. Texas Civ. Prac. & Rem. § 154.073(e)
94. Compare Draft Unif. Mediation Act § 2(c)(5) (June 1999) "... if a court determines, after a hearing, that disclosure is necessary to prevent a manifest injustice of such a magnitude as to outweigh the importance of protecting the confidentiality of mediation communications" with Texas Civ. Prac. & Rem. § 154.073(e), supra n. 93.
95. See supra n. 89 and cases cited therein.
96. See e.g. Eric Galton and Kimberlee Kovach, Texas ADR: A Future So Bright We Gotta Wear Shades, 31 St. Mary’s L.J. 949, 967 (2000) (noting "inconsistency within the statute itself as well the actual and potential conflicts with other legal and ethical requirements," and criticizing the judicial balancing provision for failure to provide standards to guide judicial discretion); Edward F. Sherman, Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience, 38 S. Tex. L. Rev. 541, 573 (1997) (stressing instances in which mediation confidentiality may be at "cross purposes" with other significant state policies, such as requirements for disclosure of child abuse).
97. Indeed, the privilege structure has been used by 21 out of 25 states that have general mediation confidentiality protections. See Unif. Mediation Act, § 4 cmt. 2(a). In some of those states, the courts have interpreted categorical confidentiality statutes as creating a privilege. See e.g., Olam, 68 F. Supp. 2d at 1130 (general rule of mediation confidentiality “has the effect of making the mediator a holder of an independent privilege”).
98. See Shannon, Dancing, supra n. 11. Moreover, as a point of fact, qualifications are addressed in the UMA in a non-intrusive but significant way. Section 9 (c ) requires a mediator to disclose qualifications if asked. Unif. Mediation Act § 9 (c). Citing an ABA Section of Dispute Resolution, the Comments to this section further make clear that no single profession or background qualifies one as a mediator, including that of law. id.
It is clearly true that the centerpiece of the UMA is an evidentiary privilege that permits a party, mediator, or nonparty participant to refuse to provide evidence of, and to block the introduction of evidence of, mediation communications in formal legal proceedings. However, there are several other provisions that are substantially unrelated to the privilege, including provisions that generally provide participants in mediation with some legal assurance of minimal process integrity. For example, the UMA includes a requirement that mediators disclose reasonably known conflicts of interests to parties as soon as the conflict is recognized. Similarly, the Act also assures parties in mediation a right to be accompanied by counsel or support persons. Finally, independent of the privilege, the UMA bars mediators from providing substantive reports about the mediation to judges and other authorities.

As the Comments have long reflected, part of the collaboration agreement between NCCUSL and the ABA was that the drafting committees would draft only a “core” act at first, one that would be initially offered to the states only with those issues upon which uniformity seemed immediately necessary and which could survive the political process of UMA drafting and public vetting. This decision favoring a constrained approach rather than omnibus legislation reflected the need for caution in drafting laws related to mediation, for such laws must account for and respect the differences in mediation styles and practices that would make uniformity inappropriate. This reflects an appreciation for the nuance with which mediation legislation must operate if it is to be well-crafted and constructive rather than clumsy and destructive. As Hippocrates wisely admonished, “First, do no harm.” The collaboration agreement between NCCUSL and the ABA that led to the partnership explicitly anticipated that the various ABA sections might wish to consider developing legislation on specific areas of mediation – such as peer mediation, criminal justice mediation, and international mediation – that could be forwarded to the NCCUSL Drafting Committee as possible amendments to the core Uniform Mediation Act. But such suggestions for mediation-context-specific amendments to the UMA need not come only from or through the ABA. Indeed, at the request of UNCITRAL, NCCUSL reauthorized the UMA Drafting Committee in August 2002 to draft a model provision that would square the UMA with the recently enacted UNCITRAL Model Rule for International Commercial Conciliations. As of this writing, those drafting efforts are ongoing.

100. See Unif. Mediation Act §§ 4-6.
104. See Unif. Mediation Act, Prefatory Note.
106. To be sure, the drafting committees and the Academic Advisory Faculty considered several other issues as possible topics of inclusion within the UMA – including immunity and the summary enforcement of mediated settlement agreements. All of those issues fell out of the Act over time. See Memorandum from Richard C. Reuben, Reporter, ABA UMA Drafting Committee, to Friends of the Mediation Law Project, Changes to the June 1999 Draft (Nov. 16, 1999) (copy on file with author)(deletion of immunity); see Unif. Mediation Act (deleting summary enforcement of mediated settlement agreements).
107. For more on the UNCITRAL Model Rule, see Sekolec and Getty articles in this volume.
One suspects both legislators and mediators over time will appreciate the decision to approach the question of uniformity in the law of mediation on an issue-by-issue basis.

4. The UMA will never be uniform (so why bother)

A third generalized grievance is that the UMA should be rejected because its goal of uniformity will be impossible to achieve. It is probably true that the UMA will not be enacted precisely as written in all fifty states, and by all federal courts through appropriate court rules. But this hardly seems reason to oppose the Act. In fact, no piece of uniform law has ever been adopted uniformly by all fifty states – not even the much heralded Uniform Commercial Code. Rather, the goal is substantial uniformity among the states that wish to adopt the uniform law.

To be sure, the drafters hope that the Act will be broadly adopted, particularly by the many states that have less developed confidentiality laws. However, most uniform laws require some tinkering to fit within the fabric of existing state law, and the Uniform Mediation Act is no different in this regard. Indeed, as discussed further below, the drafters conceived of the act as a law to complement rather than displace existing state laws, to the extent such laws exist at all, and occasionally use Legislative Notes to underscore this drafting assumption. Again, the goal is substantial uniformity among the states that wish to adopt the UMA. Professor Shannon’s analysis criticizes the UMA for allowing states this flexibility on certain issues, such as the regulation of mediation communications outside of proceedings. More commonly, though, this is viewed as a strength of the UMA, not a weakness, as it permits states to integrate the UMA into their current law with minimal disruption, while at the same time providing a broad framework of uniformity in mediation upon which the public at large can reasonably rely.

B. Criticisms of what is in the UMA

It is a testament to the drafting process that there are relatively few criticisms about what is actually in the UMA. Again, I will focus on three of these relatively minor criticisms: the Act’s requirement that mediators disclose their reasonably known conflicts of interest, the fact that some exceptions are subject to an in camera evidentiary hearing before the evidence may be admitted, and the Act's distinction between felony and misdemeanors for purposes of the admissibility of mediation communications evidence in subsequent criminal proceedings. Again, all three issues were the subject of intense discussions among drafters over an extended period of time.

108. For example, as of Sept. 30, 2000, New York had refused to enact Articles 3 and 4 of the UCC, and South Carolina had yet to enact Articles 2A and 3. See NCCUSL, 2000-2001 Reference Book 116.


110. See e.g. Unif. Mediation Act § 3, Legislative Note (urging state judiciaries to consider adopting conforming court rules); Unif. Mediation Act § 4, Legislative Note (making clear that UMA does not preempt state statutes that make mediators incompetent to testify, or that provide for costs and attorney fees to mediators who are wrongfully subpoenaed).

111. See Shannon, Dancing, supra n. 11.
1. The mediator's obligation to disclose conflicts of interest

Section 9 of the UMA requires mediators to disclose reasonably known conflicts of interest, and makes clear that this obligation of the mediator is a continuing one that lasts throughout the mediation.\(^{112}\) Even though this requirement is consistent with the ethical obligations already incumbent upon mediators under all professional standards,\(^ {113}\) a few mediators—led by the International Academy of Mediators—vigorously opposed this provision during the drafting, and continue to articulate this as the basis for their opposition.\(^ {114}\)

The thrust of this criticism is two-fold: disclosure should be an ethical obligation, and not a legal requirement created by statute; second, that the remedy suggested by the statute—that the mediator who fails to disclose reasonably known conflicts of interest be precluded from being able to assert the privilege—is inappropriate. Neither criticism has been persuasive.

Unlike lawyers, doctors, accountants, plumbers, barbers, indeed most other professionals, most mediators are subject to no oversight by the state.\(^ {115}\) They are not subject to licensure before being permitted to practice, nor are they accountable to professional standards as they practice apart from the possibility of malpractice.\(^ {116}\) While this lack of accountability is not necessarily an argument in favor of taking these steps, it does heighten consumer protection concerns—especially when the practices of some mediators seem particularly questionable.\(^ {117}\) Such special treatment would seem to be justifiable only if there was at least some minimal assurance for process integrity for mediations afforded such protections.

In this regard, the drafters again took a minimalist approach and recognized that the most fundamental of consumer protection assurances is that the person entrusted to mediate disputes will not have an incentive to favor either side in the

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113. See e.g Model Standards of Conduct for Mediators, Stand. III (AAA/ABA/Socy. of Prof. in Dispute Res. 1995); Model Standards of Practice for Family and Divorce Mediation, Stand. IV (AAA/ABA/Socy. of Prof. in Dispute Res. 2001); National Standards for Court-Connected Mediation Programs, Stand. 8.1(b) (AAA/ABA/Socy. of Prof. in Dispute Res. 1992); see also Revised Uniform Arbitration Act § 12 (2000); Code of Professional Responsibility for Arbitrators of Labor-Management Disputes § 2(B) (Natl. Acad. Of Arb./AAA/Fed. Mediation and Conciliation Serv. 1985) (required disclosures).
114. See Resolution of the International Academy of Mediators Opposing Adoption of the Uniform Mediation Act (Oct. 31, 2001) (copy on file with author) <www.texasadr.org/umaresolutionopposed.pdf> (for PDF download) (accessed Mar. 12, 2003). Professor Shannon correctly notes that the Pennsylvania Bar Association adopted a resolution that was similar to the IAM resolution in this regard. The two may seem like odd bedfellows—until one realizes that the same person, Pittsburgh attorney mediator Robert Creo, played a pivotal role in the development of the positions of both organizations. This was clearly a minority position among mediators, as the endorsements of all of the major dispute resolution providers and professional organizations well demonstrates. See supra n. 2.
116. It is worth noting that mediators lobbied strenuously for the UMA to include an immunity provision as well. There was no support on the drafting committees for that proposition. To the contrary, the Drafting Committees at one point included a bracketed model provision that would have restated current law by making it clear that mediators could not include waivers of liability in their contracts. Draft Unif. Mediation Act §4(b) (June 1999).
resolution of that dispute. However, they also recognized that complete impartiality may be an unattainable goal in light of the various cognitive biases that social scientists, and dispute resolution scholars and professionals, have come to recognize are experienced by all humans. Further, there may be reasons why parties may prefer, even need, to have as a mediator someone with whom they know they have a pre-existing or on-going relationship. Therefore, consistent with the principle of informed consent that undergirds the act as a whole, the drafters concluded that this process integrity value was best implemented through a disclosure requirement that puts the burden on the mediator to identify and disclose the potential conflict of interest, and then permits the parties to waive the conflict if they so desire.

The International Academy of Mediators and a few other mediators have complained of the administrative burden that a disclosure requirement would make. Even so, the requirement, and its articulation, were not difficult issues for the drafters. The more difficult issue was what the sanction would be for a breach of this duty to disclose reasonably known conflicts of interest. The drafters considered many different options, including civil and criminal penalties, before deciding on a bracketed provision recommending to the states a narrowly tailored remedy of precluding the mediator from asserting the privilege if he or she failed to disclose a reasonably known conflict of interest. This remedy draws largely on the longstanding principle of “unclean hands” embedded in the UMA’s waiver and preclusion provisions, leaves intact the privilege protections of other mediation participants, and recognizes that the preclusion is most likely to come into play in a proceeding against the mediator, which is excepted under Section 6(a)(5) anyway. As the UMA comments make clear, states are free to impose more severe sanctions than the loss of mediator privilege if they are dissatisfied with the drafters’ recommendation.

118. See e.g. Tumey v. Ohio, 273 U.S. 510 (1927); Gibson v. Berryhill, 411 U.S. 564 (1973) (holding that state agency regulating optometry that is composed of independent optometrists is biased in proceedings against optometrists who work for corporations because they have a pecuniary interest in limiting entry into the field and excluding chain stores). For a discussion of due process requirements that may inure to mediations conducted under color of state authority, such as a court-related mediation program, see Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. Rev. 949, 1091-99 (2000).


120. Surely attorneys have been able to get along with similar obligations, to the benefit of the profession.

121. In yet another effort to work with the mediation community, the drafters initially approved this section as a bracketed provision, meaning that it would be offered to the states as an optional model provision. However, the Uniform Law Commission ordered the brackets deleted, and the provision to be made uniform, as a condition of its final approval. See Letter of Robert Mussehl, Chair, ABA Sec. of Dispute Res., to ABA Sec. Chairs, (Oct. 4, 2001) (copy on file with author).

122. See Unif. Mediation Act, § 5.

123. See Unif. Mediation Act, § 9 cmt. 3(a).

https://scholarship.law.missouri.edu/jdr/vol2003/iss1/7
2. Criticisms relating to the exceptions to the general rule of inadmissibility

As a matter of general legislative drafting, exceptions to general rules often provide the greatest capacity for disagreement. In this regard, the UMA is again fairly remarkable in that the list of UMA privilege exceptions have been substantially uncontroversial.

While noteworthy, this is not surprising. The UMA exceptions are narrowly tailored to address specific issues and are generally consistent with exceptions that are commonly found in state mediation confidentiality statutes. Therefore they may be seen as reflecting some degree of consensus about public policy norms with respect to the admissibility of mediation communications evidence for the purposes covered in each exception.124 Still, Professor Shannon raises at least two questions about the exceptions that are worth a response. One question relates to the disparity in treatment between the exceptions listed in Section 6(a), the application of which does not require an evidentiary hearing, and those listed in Section 6(b), which must be established during an in camera evidentiary proceeding before the evidence sought can be admitted into evidence. The second question concerns Section 6(b)(1)'s distinction between the admission of mediation communications evidence in subsequent felony and criminal cases.

a. Sections 6(a) and 6(b): “Above the line” and “below the line” exceptions

Section 6 of the UMA distinguishes between two categories of exceptions, with Section 6(a) coming to be known during the drafting as the “above the line” exceptions and Section 6(b) exceptions coming to be known as the “below the line” exceptions.

The exceptions to the general rule of privilege in Section 6 reflect the drafters’ recognition that society’s interests in the confidentiality of mediation communications are sometimes outweighed by broader societal interests in the availability of evidence when necessary to achieve justice in a particular case. The “above the line” exceptions represent those situations in which the justice system’s need for the evidence may be said to categorically outweigh its interest in the confidentiality of mediation communications such that it would be either unnecessary or impractical for the parties, and administratively inefficient for the court system to hold a full evidentiary hearing on the applicability of the exception. These “above the line” exceptions include the ability to use the mediated settlement agreement as evidence in a subsequent action for its breach,125 as well as mediation communications that are made during a mediation

124. In all fairness, the UMA has received criticism from some for having “too many” exceptions. See e.g. Shannon, Dancing, supra n. 11. However, those who make this criticism give no hint as to which of the current exceptions they would delete as inappropriate. One suspects that the answer may often lead to a preference for a categorical rule of inadmissibility with no exceptions, which is simply unrealistic.

that is already made public by state open meetings and open records laws, that provide evidence of credible threats of violence during a mediation, that are used to further a crime, that are used to establish a misconduct or malpractice complaint against a mediator, or that are offered to prove the abuse of a vulnerable party. As many states already have recognized, in these narrow circumstances, society’s interest in the information clearly outweighs its interest in barring the admissibility of mediation communications evidence, and if applicable, should not require an additional judicial determination before the mediation communication may be received into evidence.

In contrast, the two “below the line” exceptions of Section 6(b) make it more difficult to introduce mediation communications evidence in situations in which the evidence may be desirable, but does not necessarily outweigh the state’s policy favoring the confidentiality of mediation communications. In these situations, the UMA requires courts to determine whether the mediation communications evidence should be admitted. Crucially, Section 6(b) specifies precisely how judges are to strike this balance, and places a thumb on the confidentiality side of the scale by limiting the admissibility to situations in which the evidence is otherwise unavailable and the need for it in the case at bar “substantially outweighs” the state’s interest in preserving the confidentiality of mediation.

The two “below the line” exceptions are limited to mediation communications that are used to establish guilt or innocence in a felony matter, or that are used to establish the contractual validity of the mediated settlement agreement itself. In both situations, the state’s interest in the information and the parties’ interest in confidentiality are equally strong. In the felony context, the exception permits evidence affecting someone’s physical liberty, and possibly their life, as well as the public’s interest in safety and the enforcement of society’s most serious criminal laws – if that evidence is really necessary in the case and is otherwise unavailable. Similarly, the contractual validity exception permits a party to a mediation to establish that his or her assent to the mediated settlement agreement did not meet traditional standards for contractual assent – for example, that it was induced by fraud or duress. Judicial gatekeeping and a high standard of proof are still appropriate for both exceptions because of the potential for abuse that would undermine the larger goal of mediation confidentiality, and to promote the reasonable expectations of the parties.

126. Unif. Mediation Act § 6(a)(2). This exception essentially defers to, and therefore leaves in place, state and local open records and open meetings laws.
129. Unif. Mediation Act §§ 6(a)(5) and (6).
131. This is in contrast with the standardless conferrals of judicial discretion in Texas and other states that have simple confidentiality statutes.
132. Unif. Mediation Act § 6(b)(1). For further discussion, see infra n. 135-137.
133. Unif. Mediation Act § 6(b)(2).
b. The felony-misdemeanor distinction

Professor Shannon criticizes the "below the line" criminal law exception for felonies because it distinguishes between felonies and misdemeanors. This criticism reflects a basic confusion with regard to this exception.

First, it must be remembered that the exception is to a general rule of inadmissibility—meaning that mediation communications remain confidential and inadmissible for misdemeanors under the exception (which means many if not most criminal cases in which a party may seek to introduce mediation communications evidence). They are only subject to admissibility under the strict balancing test to establish guilt or innocence in felonies—those crimes that society deems to be its most serious, where the consequences are greatest for both the individual and the state. Thus this exception shades toward confidentiality generally, while at the same time recognizing the unique needs of the criminal context.

Second, the Act gives states the option of including misdemeanors within this exception if they so desire as a matter of policy. The drafters declined to take this step because adding misdemeanors to the exception would have the effect of diminishing, not increasing, mediation confidentiality. Moreover, they were particularly concerned about potentially undermining the many successful victim-offender mediation programs by making victim-offender mediations more vulnerable to invasion for evidence in subsequent prosecutions. Out of respect for these programs, and an Act-wide drafting philosophy of keeping encroachments on mediation confidentiality to a minimum, the drafters elected to leave the question of misdemeanors to states to decide under the policies, practices, and traditions of their own criminal laws.

C. Criticisms of what is not in the UMA

The final set of criticisms are those that address issues or positions not included within the UMA. The three biggest issues are the drafters' decision not to place an affirmative duty of confidentiality outside the context of legal proceedings, not to expand the definition of mediation communications to include mediator observations and mental impressions, and not to draft a notice

135. See Shannon, Dancing, supra n. 11.
137. It is worth stressing that the exception does not apply to statements made during mediations conducted under victim-offender programs. Rather, it only applies to subsequent felony prosecutions in which statements made during victim-offender mediations may be sought to be introduced into evidence (by either the prosecution or the defense). The exception does not permit the introduction of victim-offender mediation communications in a subsequent misdemeanor prosecution unless the state decides to include misdemeanors within the exception. For a seminal compilation of research and practice guides on victim offender mediation, see Mark S. Umbreit, The Handbook of Victim Offender Mediation: An Essential Guide to Practice & Research (Jossey-Bass 2001).
138. Professor Joseph B. Stulberg also raises questions about the exclusion of mediations conducted under federal collective bargaining agreements in § 3(b)(1), and of peer mediations in § 3(b)(4)(A). Stulberg, supra n. 6. Because these issues have not been raised by others, I will limit my response to the official comments to those provisions.
requirement for invoking the privilege. The drafters considered these issues at length over an extended period of time, and rejected them as too novel for a uniform law. The affirmative duty and expanded definition of mediation communications would have cut new law, raising an untold number of questions about their applicability and exceptions. This in turn would probably, and justifiably, affect enactability in some states. Similarly, a notice requirement would have inappropriately intruded upon state and local rules and customs. That said, individual states are free to draft in these areas without affecting the fundamental thrust of UMA uniformity.

1. No duty of confidentiality outside of proceedings beyond contract

The Uniform Mediation Act does not include an affirmative duty – or gag rule – on mediators and parties that would prevent them from disclosing what was said in the mediation outside of the context of proceedings. Rather, it follows current law and mediation’s fundamental premise of self-determination in leaving non-proceeding disclosures to contract – which is to say, to the good judgment of the parties to determine in light of the unique facts and circumstances surrounding the matter under dispute.

This was a very difficult issue for the Drafting Committees throughout the four-year drafting effort, essentially because they agreed with the many commentators on this issue that confidentiality outside the context of formal court proceedings is an important value to mediation. Yet, in the end, they concluded that confidentiality outside of proceedings was not an issue upon which uniform law was necessary, appropriate, or practicable.

Particularly persuasive were the concerns that courts would likely impose civil liability when individuals disclosed mediation communications (even inadvertently) as a consequence of the violation of such a duty, and that the duty was unworkable given basic human nature and the often felt need that people have to talk about their disputes (and the resolution of those disputes). For example, mediation parties with no idea that state law imposed such a duty might innocently discuss the mediation with a neighbor, only to learn when they were

139. See NYSB Report, supra note 99, at 14-17.
140. For further discussion, see infra nn. 146-155, and accompanying text.
141. Research for the UMA uncovered no statutes that specifically impose such a duty of confidentiality, although did find a few court rules that appear to impose this obligation. See e.g. Okla. Stat. Title 12, Ch. 37, App. A(5)(a)(1) (1993) (code of conduct for mediators establishing that mediator “shall not reveal, outside the negotiations, information gathered during mediation”). Section 8 of the UMA makes clear that the UMA does not preempt such rules. Unif. Mediation Act § 8 (2001).
143. The drafters also believed a confidentiality agreement between the parties and even a local rule would be more likely than a statute to put the parties on notice of the confidentiality requirement.
sued by a suddenly angered mediation counterpart that they had violated a statutory duty not to disclose these communications. The drafters felt that enacting such a duty would create a trap for the unwary, and one with potentially significant damages, including for emotional distress.

Rather than trying to establish new law on this issue, the Act takes an approach of restraint. In providing an evidentiary privilege, it establishes statutory law where statutory law is necessary and uniformity is appropriate and practicable: the discoverability and admissibility of mediation communications. A statute is necessary in this context because parties by private contract cannot agree to keep evidence from the courts. Uniformity is appropriate because it promotes certainty about the treatment of mediation communications in the courts and other formal proceedings, thus allowing the parties to guide their conduct as appropriate.

By contrast, uniformity is not necessary or even appropriate, and much less practicable, with regard to the disclosure of mediation communications outside of proceedings. These are the kinds of issues that are traditionally discussed when confidentiality is discussed during the “contracting” stage of mediation. In some situations, parties may prefer absolute non-disclosure to any third party; in other situations, parties may wish to permit, even encourage, disclosures to at least some other parties to the conflict, family members, business associates, even the media. These decisions are best left to the good judgment of the parties, to decide what is appropriate under the unique facts and circumstances of their disputes, a policy that furthers the Act’s fundamental principle of party self-determination. Such confidentiality agreements are common in law, and are enforceable in courts.

2. No protection for mediator’s observations and mental impressions

Some concerns were raised during the drafting about the scope of the UMA’s definition of “mediation communication.” These concerns appear to have been driven by the controversial opinion in Olam v. Congress Mortgage Co., which permitted the compulsion of mediator testimony about the mediator’s mental impressions of a party’s mental capacity to enter into a mediated settlement agreement. Some mediators wanted the UMA to take a position that would

144. Unif. Mediation Act, §8 cmt. (b).
145. See Unif. Mediation Act, §§8 cmts. (a) and (b).
146. See e.g. Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 200 (2d ed. 1996). Because discussions about the contours of confidentiality are already standard practice in mediation, it is difficult to respond to Professor Shannon’s suggestion that such discussions will have a chilling effect on mediation because the parties’ positions at that point are so entrenched.
149. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).
effectively codify a reversal of this opinion by specifically including a mediator's observations and mental impressions within the definition of communication.\textsuperscript{150}

The drafters declined to take this step because it would have been fundamentally inconsistent with the rest of the law of privilege, would not have been justified by any separate policy rationale, and therefore would be unlikely to be respected by courts. As the comments to this section of the UMA make clear, the mediation privilege is like other communications privileges in that it covers communications but does not cover conduct that is not intended as an assertion.\textsuperscript{151} The reason is that the underlying rationale for privilege is that society is better served by encouraging this type of communication than by its availability for introduction into evidence in later proceedings. Therefore, it is the communication itself that is privileged – the words expressed or conduct that is intended to have a communicative effect – not the information behind the words.\textsuperscript{152}

Apart from the physician-patient privilege, which protects information learned during diagnosis,\textsuperscript{153} no other communications privilege extends beyond communications to include observations and mental impression, except to the extent that they are based on privileged communications. The comments, however, do make clear that mental impressions that are based on mediation communications would be covered under the UMA.\textsuperscript{154} In this regard, mediation communications are privileged to the same extent as attorney-client communications – the most sacrosanct protection for communications known to law – but no farther. Beyond that, the drafters simply did not believe it appropriate for a new uniform act to establish a rule of law that would be plainly inconsistent with other bodies of similar and well-established law. States of course are free to fashion such rules if they so desire, as Texas most notably has.\textsuperscript{155}

3. No notice requirement when invoking the privilege

Some have expressed occasional concern that the UMA does not require someone who seeks to introduce mediation communications to notify other possible holders of the privilege of that intent. The thrust of the argument here is that without such notice the non-testifying holders would never know of the need to assert the privilege, thereby making the privilege effectively worthless.

This is not a trivial concern. However, the fact of the matter is that notice requirements vary widely by jurisdiction, and even then are commonly promulgated and implemented by courts rather than legislatures to take into account other local court rules, practices, and standards. For this reason, presumably, none of the states that have used the privilege structure for protecting the confidentiality of mediation communications have adopted notice provisions,
and the drafters were unaware of any reports that the lack of a notice requirement has been problematic. Similarly, the drafters were unaware of any reason to believe notice requirements need to be uniform. To the contrary, they were concerned about the capacity of a uniform notice requirement to be disruptive of local court rules, customs, and practices, and to unnecessarily constrain local discretion to adapt notice requirements to local needs and circumstances that are sometimes changing. Finally, drafters were concerned that a notice provision would have violated NCCUSL’s standard prohibitions against drafting regulatory legislation. 156 Again, however, states and local court rules are free to legislate in this area if they deem it wise and appropriate.

IV. MOVING FORWARD ON THE UMA

NCCUSL’s history of general success would suggest that state legislatures would consider giving some deference to the national four-year drafting process that led to the UMA. 157 However, the drafters did leave some specific choices to states to resolve according to their own policies, practices, and traditions. I have already discussed a few of them, most notably whether to place an affirmative duty of confidentiality on non-proceeding disclosures, 158 and whether to expand the definition of mediation communications to include a mediation participant’s observations and mental impressions. 159 In this last section, I want to focus on three other specific and significant choices that the UMA leaves to the states: which current statutory provisions to repeal or retain (Section 15), whether to require mediator impartiality (Section 9(g)), and the scope of the section of the privilege exception for mediation communications evidencing abuse of vulnerable parties (Section 6(a)(7)).

A. Section 15: Repeals

For some states, Section 15 may be one of the most important in the UMA because it most directly addresses how the UMA will fit into the state’s own law. For most states, this should be relatively painless because the UMA employs the same approach to mediation communications that is used in most states (both general and subject specific states), because the exceptions are substantially similar to the law of most states, and because the Act’s other substantive provisions generally track most state laws. 160 Still, this is an issue upon which state legislators and their mediation communities should approach with care because there may be elements of the state’s mediation law that are desireable, which may be perfectly consistent with

156. See supra n. 27.
157. See Brudney, supra n. 20, at 809-13; Schwartz & Scott, supra n. 30, at 610-16.
160. One exception is the rule permitting parties the accommodation of support persons, which is inconsistent with the law in a relatively small handful of states that expressly prohibits counsel from attending mediations. See Unif. Mediation Act § 10, Comments (2001). A second exception is § 7’s prohibition on mediator reports to judges who may make rulings on the dispute, which may run afoul of some formal and informal mediator reporting practices. See Unif. Mediation Act § 7 (2001).
the UMA, and which therefore need not be repealed in order to make room for the UMA. The UMA is drafted as a floor, rather than a ceiling, providing what the drafters hope will be the minimum level of protection for the mediation process and its participants in states that enact the UMA. States are of course free to provide for other regulations, and may for example want to be sure to keep in place a rule of statutory law, a court rule, or a judicial doctrine that is particularly meaningful to that jurisdiction. Common examples include authorization of mandatory mediation, standards for mediators, and funding for mediation programs.161 In such situations, an abundance of caution may counsel in favor of noting specifically in Section 15 which provisions of current state laws are not being repealed, as well as which ones are being repealed. By the same token, states specifically wishing to repeal a statute, court rule, or court decision, should specify those laws in this section with particularity as well.

Minnesota provides a good example. Depending upon how you count them, Minnesota has about twenty-five different statutes, court rules, and rules of evidence affecting mediation confidentiality,162 as well as significant Supreme Court authority.163 Because of the resulting confusion over the state of the law, it would make sense for Minnesota to give the Uniform Mediation Act serious consideration, and it in fact has been doing so for some time.164 The UMA’s privilege should comfortably replace the Minnesota privilege for parties and for what the UMA refers to as “non-party participants.”165 However, Minnesota law most clearly protects against potential mediator disclosure of mediation communications in proceedings by making the mediator incompetent to testify in such proceedings.166 This is a relatively uncommon approach in state legislation,167 and after giving it due consideration, the UMA drafters decided to use a single form of protection – privilege – for all participants in mediation to avoid the potential for confusion.

Still, the Minnesota mediation and legal communities may really like the testamentary incapacity approach and if so, should take care to note in Section 16 that the mediator incapacity provision is not preempted by the Minnesota UMA. However, such a decision raises other drafting complications – such as, in this context, what to do with the UMA privilege for mediators.

One option would be to keep the testimonial incapacity provision in place, and delete the mediator privilege. This would also require Minnesota to take a hard look at Section 6(a)(5), which permits mediators to testify in their self-defense when sued by a party for malpractice, or brought into some kind of

163. See Haghighi v. Russian-American Broadcasting Co., 577 N.W.2d 927 (Minn. 1998) (handwritten document prepared by the parties’ attorneys at the conclusion of mediation session was unenforceable as a mediated settlement agreement under the Minnesota Civil Mediation Act because it failed to use certain language to denote the applicability of the Act).
164. See Letter from Jennelle Soderquist, CMDR Section Chair, and Rebecca M. Picard, CMDR Ethics Committee Chair, to the Hon. Michael B. Getty, Chair, NCCUSL UMA Drafting Committee, Uniform Mediation Act (Oct. 7 1999) (copy on file with Author).
166. Id.
misconduct proceeding. Unless Minnesota anticipates a regime of immunity and non-discipline for mediators – that is, no formal accountability at all – a responsive exception to testimonial incapacity seems only fair to the accused mediator. Minnesota would also have to consider deleting Section 6(c), which bars mediator testimony in disputes over the validity of a mediated settlement agreement and in professional malpractice or misconduct proceedings in which the mediator is not named or charged (such as in a client’s malpractice or misconduct complaint against his or her lawyer). The drafters felt it was inappropriate for mediators to be used as tie-breakers in these situations, but Minnesota may have a different view based on its experience with the general mediator incompetency provision, just as it may have with respect to the other listed exceptions that would otherwise apply to the mediator privilege.

While such an approach would have the advantage of preserving existing Minnesota law, it would provide the mediator with a lesser degree of protection than the UMA provides in at least two respects that Minnesota may want to consider. First, already discussed, is the capacity of the mediator to defend himself or herself against malpractice or misconduct situations. Second, the testimonial incapacity approach does not permit mediators to block testimony other than their own. The legal authority of a mediator to block parties and non-party participants from testifying about statements made by the mediator in a mediation seemed to be important to mediator representatives at the UMA drafting session, but Minnesota again may have a different view based on its experience with its current legal regime.

A second option would be to leave both the mediator privilege and the mediator testimonial incapacity in place as is. This would undermine the goal of simplification, because the two provisions overlap substantially, although not exclusively. In particular, courts would likely have to resolve the question of whether the mediator testimonial exceptions to the UMA privilege provided in Sections 6(a)(5), 6(a)(6), and 6(c) are also exceptions to the pre-existing rule of mediator testimonial incapacity. That is certainly a possible outcome considering the interpretive canon that a legislature’s most recent pronouncement on an issue prevails over an older pronouncement, to the extent they are inconsistent. If this is deemed an undesirable result, Minnesota may wish to provide courts with

168. To date, mediator discipline is generally not regulated by states. One notable exception is Florida, which has a sophisticated system of court-ordered education, training, ethical requirements, and mediator discipline procedures in its Florida Rules for Certified and Court-Appointed Mediators. See Fla. Stat. Ann. § 44.106 (1999) (authorizing the rules); Fla. R. Med. 10.100 et seq. (Florida Rules for Certified and Court-Appointed Mediators). Still, an attorney-mediator may be brought before a lawyer disciplinary body for misconduct arising from his or her service as a mediator.


170. While the question is uncommon, given judicial pressures favoring the receipt of relevant evidence, one might reasonably question whether a court that determines it needs mediator testimony – as in Olam, 68 F. Supp. 2d 1110 (mediator testimony necessary for court to decide whether a party had capacity to enter into mediated settlement agreement) – might be tempted to find Minnesota’s mediator testimonial incapacity provision to have the effect of making the mediator “unavailable” for purposes of relevant exceptions to the hearsay rule. See Christopher B. Mueller & Laird C. Kirkpatrick, Evidence 898-951 (3d ed. 2003).

black letter guidance with appropriate cross-referencing language in one or both of the provisions in Section 15.

A third option would be to keep the mediator privilege in place, and to consider exceptions to the mediator testimonial incapacity provisions that would at least include those exceptions covered by Section 6 of the UMA, perhaps among others. This approach would have the benefits of retaining the current rule of testimonial incapacity, providing the mediator with the ability to block, and eliminating the conflict between the statutes. However, it also carries the capacity to generate more confusion, and with questionable gain over the current UMA given that the new list of exceptions may ultimately be quite similar in the end to what the UMA already provides.

A fourth option is, of course, to leave the UMA mediator privilege intact, delete the mediator incapacity provision, and incorporate the body of law and community norms into the state’s own legislative history of Section 6(c). This would have the benefit of clarity and the literal retention of current legal and normative regimes, but might leave disquieted those who are comfortable with, and comforted by, the current rule of testimonial incapacity.

While the foregoing discussion focuses on Minnesota, it is offered only as an example of how other states may want to take a hard look at what their current law provides, so that informed legislative choices can be made as the UMA is used to modernize and clean up their mediation legal regimes.

B. Section 9(g): The optional requirement of mediator impartiality

The UMA’s disclosure section includes a requirement of mediator impartiality that is offered to states as a bracketed, or optional, provision, Section 9(g).

The neutrality of the mediator is an important value in mediation, a point made consistently throughout the drafting process by the Association for Conflict Resolution (“ACR”), a mediator professional organization.172 The drafting committees did not disagree with this principle as a matter of practice, but received comments from other mediators, judges, provider organizations, program directors, and other UMA constituencies who were deeply concerned about enshrining this value in a black letter law. Several sources of potential mischief surfaced during the drafters’ consideration of this issue.

The most common concern was that such a requirement could easily be abused by disgruntled parties – ones who on reflection did not like the deal they had struck in mediation, and who might use a challenge to the “impartiality” of the mediator as a basis for vacating the mediated settlement agreement. This concern was particularly salient to mediators with a more evaluative style, who feared their common practice of so-called “reality checking” would be used as a basis for such actions against them as mediators. Moreover, scholarly research in cognitive psychology has confirmed many hidden but common biases that affect judgment, such as attributional distortions of judgment and inclinations that are

the product of social learning and professional culturation.\textsuperscript{173} Taken out of context, these too could be argued as a basis for a finding of bias.

A related concern was over the workability of a statutory impartiality requirement across mediation contexts. In some contexts, mediators sometimes have an ethical or felt duty to advocate on behalf of a party, such as long-term care ombuds in the health care context.\textsuperscript{174} Sometimes, too, parties seek to use a mediator who has a duty to be partial in some respects — such as a domestic-relations mediator who is charged by law to protect the interests of the children.\textsuperscript{175} Such obligations seemed inconsistent with the notion of a statutory requirement of impartiality. Finally, there were autonomy concerns, as the drafters recognized that there are times when the best mediator for a dispute may be one whose personal qualities or gravitas commands similar respect from parties, even though that mediator may have a prior, ongoing, or future relationship with one or more of the parties.

A compromise between the drafters and ACR sent the UMA to its final vote before NCCUSL with the concept of impartiality addressed as an interpretive principle in a section entitled “Application and Interpretation.”\textsuperscript{176} However, after much debate on the floor, the NCCUSL Conference of the Whole deleted that Section as a violation of NCCUSL’s general rule against so-called “purpose” clauses.\textsuperscript{177}

Back at the drawing board, the drafters concluded that as a matter of law — as distinguished from a matter of mediation practice — the concept of impartiality created the least potential for mischief when implemented through a requirement that compelled arbitrators to disclose reasonably known conflicts of interest. After the deletion of Section 2 at the final reading, the Drafters added a model provision on impartiality for states that may wish to assume the aforementioned risks and capture this mediation value with specificity as part of the general disclosure obligations of Section 9.

\textbf{C. The “exception to the exception” for mediation communications evidencing abuse of vulnerable parties}

A third significant choice that the UMA leaves to the states is the scope of the exception to the general rule of mediation confidentiality for statements that evidence the abuse of a vulnerable party.

\textsuperscript{173} Supra n. 110.


\textsuperscript{175} See e.g. Kenneth S. Gallant, \textit{Promoting the Best Interests of Children Whose Parents Are Divorcing: The Next Steps for Arkansas} 607 (discussing, \textit{inter alia}, Arkansas legislation allowing court-ordered mediation).

\textsuperscript{176} See Interim Draft Unif. Mediation Act § 2 (Aug. 13, 2001). To the surprise of the UMA Drafting Committee, however, ACR continued to lobby the full Conference for a separate provision on mediator impartiality. See Letter from Arnold T. Schienvold, president, Association for Conflict Resolution, to the Hon. Michael B. Getty, Chair, NCCUSL UMA Drafting Committee (Aug. 13, 2001) (copy on file with author) (endorsing UMA, but offering “proposed modification (on mediator impartiality) to the Uniform Mediation Act”).

A little background helps to set the stage. Because the UMA does not limit disclosures outside of proceedings, mediators with ethical or felt obligations to report abuse may meet these duties without any interference by the UMA. Since the UMA does generally bar admission of mediation communications evidence in subsequent proceedings, however, the question becomes whether mediators or parties may provide testimony in such proceedings – which may well be a proceeding at least in part intended to terminate the abusive relationship. Many mediators wanted the capacity to participate in these kinds of proceedings if their testimony would help bring an end to the abuse, and thus favored an exception to the general rule of confidentiality, as is common in many states.\(^{178}\)

However, the Association of Conflict Resolution raised concerns about the implications of such an exception on the family mediation programs found in many courts – concerns, it should be noted, not shared by the Association of Family and Conciliation Courts\(^{179}\) or a task force of the ABA Commission on Mental and Physical Disability.\(^{180}\) In particular, ACR’s position was that many family mediations included claims of domestic violence, child abuse, or similar claims, and that parties simply would not participate in such mediations in a meaningful way if they knew that statements related to the abuse would be admissible in a subsequent proceeding.\(^{181}\) The problem thus pit two important values against each other: physical safety versus process integrity.

The drafters came down on the side of physical safety, granting an exception for the abuse of vulnerable parties in Section 6(a)(7). However, ACR continued to lobby hard on this issue after that fundamental decision was made, responding to safety concerns by stressing the capacity of skillful mediators to be able to identify and manage situations involving abuse or violence. Others opposing the ACR initiative responded with their own concerns about the levels of skill and commitment of mediators in these programs to deal with these problems in fact – concerns expressed both within and beyond those sectors of the community that work with vulnerable party mediations. The drafters ultimately agreed to let the states decide for themselves the scope of the “exception to the exception,” depending upon the comfort level that state legislators have with the training, practices, and procedures of their court-related programs with respect to domestic violence and other issues relating to the abuse of vulnerable parties.

Two alternative “exceptions to the exception” are explicitly offered. Alternative A is the more limited of the two, and would create an “exception to
the exception” that would preclude the introduction of mediation communications that evidence abuse of vulnerable parties in subsequent proceedings under two conditions: the parties are routed to the mediation pursuant to some court-related mediation program, and that one of the state’s own agencies (such as a Department of Children’s Services) is a party to the conflict. In those situations – presumably a large class of cases – the main exception for vulnerable party abuse simply would not apply at all and mediation communications evidencing such abuse would not be admissible into evidence in a hearing in which that abuse was relevant under any circumstance. Alternative B, on the other hand, is a broader exception to the exception, and would apply if a state agency was involved in the mediation, regardless of whether the mediation was ordered or offered through a court-connected program. States would choose Alternative B primarily if they do not have court-related programs, and want to provide an “exception to the exception” for the reasons heretofore stated.

The official Comments direct states to choose one of those two options. However, the closeness of the votes of the Drafting Committees suggests states in fact may take at least two other options. One is to simply delete the Section 6(a)(7) exception entirely, rather than having a confusing legal regime that included an exception, and then an exception to the exception that substantially eviscerates the exception. This would reflect a policy choice favoring the mediation process value over the physical safety value, an uncompromised endorsement of ACR’s position at the UMA drafting. On the other hand, it is also plausible to imagine a state preferring to go in the other direction, rejecting both alternatives and simply having no exception to the exception at all. This would reflect a policy decision favoring the safety value over the process value.

V. CONCLUSION

The Uniform Mediation Act presents a unique opportunity for states to modernize their mediation laws, and to bring them into alignment with the expectations of participants in mediation, as well as the public’s expectation with regard to the integrity of the mediation process.

It was the product of an unprecedented drafting process. It was unprecedented in terms of the alliance between NCCUSL and the ABA, unprecedented in terms of the breadth and depth of the discussions regarding mediation during the drafting of the UMA, and unprecedented as finally drafted in terms of the breadth of its support across constituencies potentially affected by mediation. As Dean James Alfini and David Hoffman have suggested, the promulgation of the UMA represents “the coming of (legal age)” of the mediation process.

As Professor Harter has also suggested, the UMA also stands as a monument to the best the field has to offer in terms of process – an example of the field

183. One would expect that states preferring this approach would simply put a period after the word “party” at the end of § 6(a)(7), and delete the “unless the” language and both of the two alternatives following thereafter.
“walking the talk.” Issues were engaged forcefully, and the Act and supporting comments are much stronger because of the drafters’ insistence upon seeking out, listening to, understanding, and when possible, accommodating the many competing views at the table. The end product is a result that none can personally claim, but all can support as a significant improvement for the law of mediation. Truly collaborative rulemaking can hope for little more.

This fact was appreciated by the many active participants in the UMA drafting process – drafters, reporters, observers, unofficial commenters, academic advisors, etc. It is only natural that newcomers to the Act as it goes to the states will raise questions with regard to the many difficult and important issues that were discussed at length during the five-year research and drafting effort. The strength of the UMA as a consensual drafting process is its capacity to provide thoughtful answers to those perfectly understandable questions. Apart from the nuances posed by particular state consideration of the UMA, the relatively few concerns sounded today as the UMA goes to the states are not new. Rather, to the extent that the UMA kicked up a storm during the drafting, they are the sounds of the dust settling on a successful collaborative effort.