

# Current Issues in Mediation Ethics

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## **Current Issues in Mediation Ethics** **--by Professor James Holbrook**

1. **THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS ARE GENERALLY REGARDED AS NON-BINDING STATEMENTS OF BEST PRACTICE.** The revised Model Standards were proposed by the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution, dated April 10, 2005, and approved by the ABA in August 2005. The Model Standards can be found at: <http://www.adr.org/sp.asp?id=22118>
  - a. Standard I. Self-Determination
    - i. Self-determination applies both to process and outcome.
    - ii. Mediator should make parties aware of importance of consulting with other professionals
  - b. Standard II. Impartiality.
    - i. Mediator should neither give nor accept a gift that raises issue of impartiality.
    - ii. Mediator may accept de minimis gift that is culturally required.
    - iii. (Do pre-mediation ex parte conferences between the mediator and a party raise questions about impartiality? Can the mediator keep confidential information disclosed in these conferences?)
  - c. Standard III. Conflicts of Interest
    - i. A conflict of interest can arise from any relationship between a mediator and a participant that raises issue of impartiality (e.g., the “repeat player” problem).
    - ii. A mediator shall disclose actual and potential conflicts of interest (this may include disclosing prior mediations involving lawyers representing parties in this mediation, and perhaps other lawyers in their law firms).
    - iii. After a mediation, the mediator shall not establish another relationship with any of the participants in any other matter that raises issue of impartiality.

- d. Standard IV. Competence
  - i. Mediator must have the necessary competence to satisfy the reasonable expectations of the parties.
- e. Standard V. Confidentiality
  - i. Mediator shall maintain confidentiality, unless agreed to by parties or required by applicable law.
  - ii. Mediator should not directly or indirectly disclose caucus information without consent of the disclosing party.
  - iii. Mediator shall promote understanding among the parties about whether they will maintain confidentiality of mediation information.
- f. Standard VI. Quality of the Process
  - i. Presence or absence of persons in mediation depends upon agreement of parties and mediator.
  - ii. Mediator should promote honest and candor among participants and not knowingly misrepresent any material fact or circumstance.
  - iii. Mediator may provide information that mediator is qualified by training or experience to provide {i.e., this permits evaluative mediation).
  - iv. Mediator can undertake another role (e.g., arbitrator) only with party consent and explanation of the implications of the changed role.
  - v. Mediator shall take appropriate steps when made aware of domestic abuse or violence among the parties.
- g. Standard VII. Advertising and Solicitation
  - i. Mediator should not communicate any promises as to outcome.
  - ii. “Certification” does not mean “certificate of completion.”
- h. Standard VIII. Fees and Other Charges
  - i. Mediator’s fee arrangement should be in writing.

1. The mediator should use a written Agreement to Mediate.
  2. An example of an Agreement to Mediate is attached hereto.
- ii. Outcome-based fee is not prohibited.
  - iii. Mediator may accept unequal fee payments from the parties.

**2. AN OVERVIEW OF MEDIATION CONFIDENTIALITY:**

- a. Mediation confidentiality includes both “process” confidentiality (i.e., protecting the confidentiality of the mediation process from disclosure to outsiders) and “ex parte” confidentiality (i.e., protecting confidential communications between a party and the mediator from disclosure to other mediation parties or to outsiders).
  - i. Protecting process confidentiality can include: limiting who can attend mediation sessions; prohibiting recording of mediation sessions; destroying the mediator’s notes at the conclusion of the mediation process; prohibiting disclosure of mediation communications to outsiders; and restricting use of mediation communications by parties.
  - ii. Protecting ex parte confidentiality includes preventing disclosure of a party’s confidential caucus communications and confidential party-supplied materials to other mediation parties or to outsiders.
- b. The mediator’s responsibilities to protect confidential mediation information can arise from:
  - i. The parties’ reasonable expectations about mediator confidentiality
  - ii. The mediator’s self-assumed responsibilities, either orally or by contract
  - iii. Mediator confidentiality required by state mediation statute and rules
  - iv. Mediator confidentiality required by federal court mediation program rules
  - v. Mediator confidentiality required by Utah Court of Appeals’ mediation order

- vi. Mediator confidentiality required by evidentiary privilege statute or rules
- c. In Utah at the moment, parties in private (i.e., non-court-annexed mediation) generally have no responsibilities to protect confidential mediation information. However, the parties' responsibilities to protect confidential mediation information can arise from:
  - i. Parties' self-assumed responsibilities, either orally or by contract
  - ii. Party confidentiality required by state mediation statute and rules
  - iii. Party confidentiality required by federal court mediation program rules
  - iv. Party confidentiality required by Utah Court of Appeals' mediation order
  - v. Party confidentiality required by evidentiary privilege statute or rules
- d. Confidential mediation information may be permissibly disclosed through:
  - i. Statutory responsibilities in Utah to report child abuse or neglect, disabled or elder adult abuse or neglect, and computer crimes
  - ii. Contractual responsibilities to report imminent threats of serious bodily harm, etc.
  - iii. Lawyer's responsibilities to report certain violations of the Rules of Professional Conduct
  - iv. Professional licensing responsibilities to report fraud, threats of serious bodily harm, etc.
  - v. Third-party subpoena compelling disclosure by the mediator of specific mediation information
  - vi. Court order compelling the mediator to disclose specific mediation information
- e. Confidential mediation information is commonly used through:
  - i. Mediator's use in asking questions about issues, interests, options, legitimacy, risk analysis, etc.

- ii. Mediator's or program's use in reports, supervision, research, or training
  - iii. Party's use as leads for formal discovery
- f. Prudent mediator practice concerning confidential mediation information includes:
  - i. Mediator's explanation of and parties' agreement to provisions protecting process confidentiality and ex parte confidentiality (this includes any use of pre-mediation conferences by the mediator with each party)
  - ii. Mediator's explanation and parties' understanding of statutory and contractual provisions requiring disclosure of confidential information
  - iii. Mediator's explanation of mediator's note taking and note destruction
  - iv. A written agreement to mediate, signed by the parties, which specifies:
    - 1. the scope of confidentiality and the persons bound thereby;
    - 2. all relevant mandatory disclosure requirements; and
    - 3. (perhaps) the parties' commitment that mediation communications will not be used by the parties in any subsequent proceeding
  - v. Mediator's standard "confidentiality question" at the end of each caucus (i.e., "Is there anything you've told me that you do not want me to disclose?")
  - vi. Party's express confidentiality instructions at the end of each caucus
  - vii. Mediator's explanation to a party of the benefit of disclosing certain confidential information to the other party
  - viii. Protection of mediator's notes during the mediation process:
    - 1. do not leave the notes unattended with a party;
    - 2. do not permit a party to read the notes, e.g., upside down;

3. keep caucus notes on separate pages for each party; and
  4. mark information in the notes that a party instructs should be kept confidential
- ix. Destruction of mediator's notes at conclusion of the mediation process
  - x. Return of party-supplied materials at conclusion of the mediation process
  - xi. Keep copy of written agreement to mediate signed by the parties, plus billing information, written mediator disclosures, and any mediation settlement agreement

**3. THE UNIFORM MEDIATION ACT ("UMA") MAY BE ADOPTED IN UTAH IN 2006.**

- a. The UMA is promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). The UMA was last revised and amended in 2003. An unannotated text of the UMA is attached hereto. The annotated text of the UMA is found at:  
<http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm>
- b. Utah's NCCUSL commissioners are: Greg J. Curtis, Lyle W. Hillyard, Reed L. Martineau, and M. Gay Taylor. Utah State Senator Hillyard is going to introduce a bill in the 2006 Utah Legislature to enact the UMA in Utah.
- c. The NCCUSL's legislative fact sheet for the Uniform Mediation Act is found at:  
[http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uma2001.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp)
- d. The UMA has been adopted in Illinois, Iowa, Nebraska, New Jersey, Ohio and Washington, and was introduced in 2005 in Connecticut, the District of Columbia, Indiana, Massachusetts, Minnesota, and Vermont.
- e. The NCCUSL believes the UMA is necessary to promote uniformity, especially across state lines. Uniformity enhances predictability regardless where a mediation may occur. Uniformity also promotes simplicity because mediators and parties do not have face multiple confidentiality statutes that vary by state.
- f. A central purpose of the UMA is to provide a privilege of confidentiality for mediators and participants. The UMA provides exceptions to the

confidentiality privilege which include threats made to inflict bodily harm or other violent crime, when parties attempt to use mediation to plan or commit a crime, when the information is needed to prove or disprove allegations of child abuse or neglect, or when the information is needed to prove or disprove a claim or complaint of professional misconduct by a mediator.

- g. The UMA provides rules on the issues of confidentiality and privileges in mediation. The UMA establishes an evidentiary privilege for mediators and participants in mediation that applies in later legal proceedings. It also provides a confidentiality obligation for mediators. Specifically, in proceedings following a mediation, a party may refuse to disclose, and prevent any other person from disclosing, a mediation communication. Mediators and non-party participants may refuse to disclose their own statements made during mediation, and may prevent others from disclosing them, as well. Thus, for a person's own mediation communication to be disclosed in a subsequent hearing, that person must agree and so must the parties to the mediation.
  - i. In Utah, however, evidentiary privileges have been adopted by the Utah Supreme Court in the Utah Rules of Evidence, rather than by the Legislature in statutes. If this practice continues, this may require a parallel amendment of the UMA.
  - ii. The Legislature and the Judiciary must decide whether and the extent to which the UMA applies to state court-annexed mediations in Utah. If so, the Legislature may wish to amend the UMA to conform to existing court rules.
- h. In addition, mediation communications are confidential to the extent agreed to by the parties or provided by other law or rule of this state. Therefore, the UMA does not preempt current court rules and statutes that impose a duty of confidentiality outside of proceedings.
- i. The primary guarantees of fairness within mediation are the integrity of the process and informed self-determination. For example, parties can agree with the mediator on the general approach to mediation, including whether the mediator will be evaluative or facilitative.
- j. The UMA promotes the integrity of the mediation process by providing legislative support for the professional standards requiring the mediator to disclose conflicts of interest, to be candid about qualifications and to be impartial.
- k. Specifically, the UMA requires a mediator to determine whether there are any known facts that a reasonable individual would consider likely to

affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation. If so, the mediator must disclose such facts to the mediation parties as soon as is practical before accepting a mediation.

- i. These disclosures, for example, address the so-called “repeat player” problem where a mediator has served on multiple cases for the same party or party representative.
  - ii. The UMA does not require these disclosures to be in writing; however, best practice may be to put them in writing so there can be no question that a mediator made and provided relevant disclosures to mediation parties or their representatives.
- l. At the request of a mediation party, a mediator also shall disclose the mediator’s qualifications to mediate a dispute. However, the UMA does not require that a mediator have any special qualification by background or profession.
  - m. The UMA also requires that a mediator must be impartial, unless the parties agree otherwise.
  - n. An attorney or other individual designated by a party may accompany the party to and participate in a mediation.
  - o. The UMA also provides that international commercial mediation shall be governed by the law of International Commercial Conciliation adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) which is found at [www.uncitral.org/en-index.htm](http://www.uncitral.org/en-index.htm).

**4. EXAMPLES OF WRITTEN MEDIATOR DISCLOSURES INCLUDE:**

- a. I do not represent any person in a proceeding involving any Party to this mediation.
- b. I have not represented any person against any Party to this mediation.
- c. I have no professional or social relationships with any of the Parties in this proceeding.
- d. I am aware of no professional or social relationships with any relative of any of the Parties.

- e. Neither I nor any member of my family nor any close social or business associate has served as an arbitrator or mediator in any proceeding in which any of the Parties appeared or gave testimony.
- f. Neither I nor any member of my family nor any close social or business associate has been involved in the last five years as a party in any dispute involving the subject matter of this mediation.
- g. I have not served as an expert witness or consultant to any Party or Party representative identified in this mediation.
- h. None of the Parties in this mediation have appeared before me in past mediations.
- i. Counsel for the Parties and I are members of the Utah State Bar. I am acquainted with them and many of the lawyers in their law firms in a variety of professional contexts.
- j. I have served as the mediator in prior mediations involving counsel for the Parties and other lawyers in their respective law firms.
- k. I am not a member of any organization that I believe is relevant to this mediation.
- l. I have neither sued nor been sued by any Party or representative involved in this mediation.
- m. I was a shareholder of the Salt Lake City law firm of Callister Nebeker & McCullough (“the Callister law firm”) from 1983 to 2002, when I resigned to become a full time law professor. I did not use the Callister law firm’s conflict checking system in making the disclosures herein. It is possible that lawyers at the Callister law firm have had some professional or social contact or relationship with an issue, law firm, Party, representative, lawyer, or relative of one of the Parties involved in this mediation, which I do not know and therefore have not disclosed.
- n. I have no computerized data base which tracks the names of lawyers, law firms, party representatives, witnesses, or issues involved in prior arbitration or mediation proceedings in which I have served as an arbitrator or mediator. I have relied on my memory in making the disclosures herein. To the best of my knowledge I have nothing further to disclose.
- o. I have been practicing law for more than 30 years in Salt Lake City, Utah, and I have served as an arbitrator in over 100 arbitration proceedings since 1996 and as a mediator in over 500 mediations since 1987. As a result, I

am acquainted with many of the lawyers and law firms practicing in Utah in a variety of professional contexts, and hundreds of party representatives, law firms, and parties in those arbitrations and mediations have appeared before me. It is possible that I have had some professional or social contact or relationship with an issue, law firm, Party, representative, lawyer, witness, or relative of one them involved in this mediation, which I do not recall and therefore have not disclosed herein. Accordingly, if any Party, representative, or attorney participating in this mediation has information concerning any undisclosed prior professional or social relationship which should be disclosed, please bring such relationship to my attention for my consideration for disclosure.

- p. In my opinion, no information provided to me so far in this mediation adversely affects my ability to serve as an impartial and neutral mediator. If any Party, representative, or attorney participating in this mediation has questions or concerns about my disclosures, please bring such to my attention for my consideration.

**5. UTAH HAS ENACTED A MANDATORY DIVORCE MEDIATION STATUTE.** Utah Code Ann. § 30-3-39. [http://www.le.state.ut.us/~code/TITLE30/htm/30\\_03049.htm](http://www.le.state.ut.us/~code/TITLE30/htm/30_03049.htm)

- a. Utah Code Ann. § 30-3-39(2) provides in part: “(2) If, after the filing of an answer to a complaint of divorce, there are any remaining contested issues, the parties shall participate in good faith in at least one session of mediation. . . .”
- b. Utah Code Ann. § 30-3-39(3) provides: “(3) The parties shall use a mediator qualified to mediate domestic disputes under criteria established by the Judicial Council in accordance with Section 78-31b-5.”
- c. Utah Code Ann. § 30-3-39(6) provides: “(6) Mediation shall be conducted in accordance with the Utah Rules of Court-Annexed Alternative Dispute Resolution.”

**6. LAWYER-MEDIATORS CANNOT REPRESENT BOTH PARTIES IN DRAFTING COURT PLEADINGS IN MEDIATED DIVORCE SETTLEMENTS.**

- a. Serving as a mediator is not the practice of law:
  - i. Utah Supreme Court Rules. Rule 1.0. Authorization to Practice Law. <http://www.utcourts.gov/resources/rules/ucja/ch13a/1.htm>
    - 1. Rule 1.0(c)(9) provides: “Whether or not it constitutes the practice of law, the following activity of by a non-lawyer,

who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted: . . . (c)(9) Serving in a neutral capacity as a mediator, arbitrator or conciliator.”

- b. Drafting documents applying legal principles to facts is the practice of law:
  - i. Utah Supreme Court Rules. Rule 1.0. Authorization to Practice Law. <http://www.utcourts.gov/resources/rules/ucja/ch13a/1.htm>
    - 1. Rule 1.0(b)(1) provides: “For purposes of this Rule: (b)(1) The ‘practice of law’ is the representation of the interests of another person by . . . drafting documents for that person through application of the law and associated legal principles to that person’s facts and circumstances.”
- c. Utah Rules of Court-Annexed Alternative Dispute Resolution. Rule 101. Conduct of mediation proceedings. <http://www.utcourts.gov/resources/rules/adr/101.htm>
  - i. Rule 101 (e) provides: “(e) Settlement. In the event that a settlement to all issues is reached during the mediation conference, the participating parties or the mediator shall prepare . . . a written settlement agreement and promptly file with the clerk of the court any documents appropriate for resolution of the action. . . .”
- d. Utah Rules of Professional Conduct Rule 1.7. Conflict of interest: general rule. [http://www.utcourts.gov/resources/rules/ucja/13\\_proco/1\\_7.htm](http://www.utcourts.gov/resources/rules/ucja/13_proco/1_7.htm)
  - i. Rule 1.7(a) provides: “A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) Each client consents after consultation.
  - ii. The Comment to Rule 1.7 provides: “Conflicts in Litigation. Paragraph (a) prohibits representation of opposing parties in litigation.”
- e. Utah Rules of Professional Conduct Rule 2.4. Lawyer Serving as Third-Party Neutral <http://www.utcourts.gov/resources/rules/comments/2005/06/RPC02.04.pdf>
  - i. Rule 2.4(a) provides: “(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that

has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.”

- ii. Rule 2.4(b) provides in part: “(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. . . .”
  - iii. The Comment to proposed Rule 2.4 provides in part: “. . . In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as . . . the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.”
- f. Utah State Bar Ethics Advisory Opinion Committee Opinion No. 05-03, 5/6/05  
[http://www.utahbar.org/rules\\_ops\\_pols/ethics\\_opinions/op\\_05\\_03.html](http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_05_03.html)
- i. The opinion concludes that “When a lawyer-mediator, after a successful mediation, drafts the settlement agreement, complaint and other pleadings to implement the settlement and obtain a divorce for the parties, the lawyer-mediator is engaged in the practice of law and attempting to represent opposing parties in litigation. A lawyer may not represent both parties following a mediation to obtain a divorce for the parties.”
  - ii. The initial draft of the opinion contained a dissenting opinion that provides that “Under a careful and reasonable interpretation of the Rules, we conclude that they permit an attorney-mediator, in limited circumstances, to undertake the subsequent joint representation of the mediating parties in obtaining final judicial approval of a fully successful settlement.”
  - iii. The initial draft of what was the majority opinion also concluded that “It may be possible after the mediation has terminated, in limited circumstances, for the lawyer-mediator to act as the lawyer for one party in drafting a settlement agreement and in obtaining a divorce decree after disclosure and consent of both parties consistent with Rule 1.7.” That sentence was deleted from the final opinion.

- iv. The Utah Supreme Court’s Rules Committee is considering an amendment to the Utah Rules of Professional Conduct Rule 1.7 which would expressly permit a lawyer-mediator to draft and file court pleadings to implement the mediation parties’ successful mediation agreement. The lawyer-mediator, however, could not represent both parties as their counsel, nor could the lawyer-mediator later represent one party against the other, if the divorce action proceeded to trial on the merits. The Committee is likely to conclude that non-lawyer-mediators should not be permitted to prepare divorce documents implementing the parties’ mediated settlement. If so, what qualifications and training should non-lawyer-mediators have?
- v. Otherwise, the parties may represent themselves pro se.
  - 1. In this regard, Judge Royal Hanson recently told the author that about 90% of the divorce cases that come before him on the Third District Court in Sandy, Utah, are pro se cases.
  - 2. The Utah Online Court Assistance Program (“OCAP”) is the official State of Utah website for assistance in preparing court documents if parties are not able to have an attorney draft them. Divorce documents can be prepared for marriage dissolution, custody, parent time, support, and asset distribution. The OCAP website address is: <http://www.utcourts.gov/ocap/> The author recently was told that OCAP has been revised to be more user-friendly.
- g. Related analytical or research issues include:
  - i. The number and growth of pro se divorces in Utah, with socioeconomic data about the litigants
  - ii. The number and growth of mediator-facilitated divorces in Utah, with forecasts about the effect of mandatory divorce mediation legislation
  - iii. The growth and extent of collaborative family law practice in Utah
  - iv. The restrictions that should apply to lawyer-mediators drafting divorce documents (e.g., must the lawyer-mediator be an experienced divorce attorney as well as a member of the Utah State Court divorce mediator panel?).

**7. BREACH OF FIDUCIARY DUTY ARGUABLY IS A BASIS OF MEDIATOR LIABILITY.**

- a. “Fiduciary duty” is defined in BLACK’S LAW DICTIONARY (7<sup>th</sup> ed. 1999) at 523 as: “A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary . . . to the beneficiary . . . ; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person . . .”
- b. “Fiduciary” is defined in BLACK’S LAW DICTIONARY (7<sup>th</sup> ed. 1999) at 640 as: “One who owes to another the duties of good faith, trust, confidence, and candor . . .”
- c. “Fiduciary relationship” is defined in BLACK’S LAW DICTIONARY (7<sup>th</sup> ed. 1999) at 640 as: “A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. . . . Fiduciary relations usu. Arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first . . .”
- d. Parties should agree in Agreement to Mediate that mediator is not serving as a fiduciary (however, fiduciary duty is not waivable). For example, an Agreement to Mediate may state: “The Parties understand and agree that the Mediator is not representing any of them as legal counsel, nor giving them legal advice, nor serving as a fiduciary.”

**8. OTHER ISSUES AFFECTING REPRESENTATION BY OR EMPLOYMENT OF LAWYER-MEDIATORS.**

- a. Utah Rules of Professional Conduct Rule 1.12. Former Judge, Arbitrator, Mediator or Third-Party Neutral  
<http://www.utcourts.gov/resources/rules/comments/2005/06/RPC01.12.pdf>
  - i. Rule 1.12(a) prohibits a lawyer from representing anyone in a matter in which the lawyer participated personally and substantially as a judge, adjudicative officer, law clerk, arbitrator, mediator, or other third-party neutral, unless all parties give informed consent in writing.
  - ii. Rule 1.12(b) prohibits a lawyer from negotiating for employment with anyone involved as a party in a matter in which the lawyer participated personally and substantially as a judge, adjudicative officer, law clerk, arbitrator, mediator, or other third-party neutral.
  - iii. Rule 1.12(c) provides that, if a lawyer is disqualified by Rule 1.12(a), the other lawyers in the firm cannot undertake or continue representation in the matter unless: (1) the disqualified lawyer is

screened and receives no fee from the matter; and (2) written notice is given to the parties and any appropriate tribunal.

- iv. Requirements for screening procedures are stated in Utah Rules of Professional Conduct Rule [proposed] Rule 1.0(1)  
<http://www.utcourts.gov/resources/rules/comments/2005/06/RPC01.00.pdf>

# AGREEMENT TO MEDIATE

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(hereinafter “the Parties”) agree to mediate in accordance with the following terms:

**Voluntary Procedure:** The Parties agree that mediation is a voluntary, facilitated settlement negotiation process and that the Mediator has no authority to resolve their dispute. The Mediator may, if requested, provide one or more of the Parties with the Mediator's opinions about the dispute, including possible outcomes if their dispute is not resolved by the Parties.

**Mediator:** The Parties agree that \_\_\_\_\_ will be the Mediator.

**Costs:** Fees for the Mediator's services (including preparation, travel, and mediation time) are charged at the rate of \$\_\_\_\_\_ per hour plus expenses (“Costs”). The Parties agree to pay these Costs as follows:

\_\_\_\_\_.

**Representation by Counsel:** The Parties understand and agree that the Mediator is not representing any of them as legal counsel, nor giving them legal advice, nor serving as a fiduciary. The Parties understand that they are, or can be, represented by their own legal counsel at any time during the mediation.

**Private Caucuses:** The Mediator can hold private sessions (“caucuses”) with one Party at a time in order to improve the Mediator's understanding of the Parties’ positions. The Parties may share confidential information with the Mediator during caucuses. The Parties agree the Mediator may disclose to other Parties any information which the sharing Party does not expressly instruct the Mediator to keep confidential.

**Confidentiality:** The Mediator, Parties and attendees agree that mediation sessions are settlement negotiations and confidential to the extent required by applicable law. The Parties and attendees agree not to subpoena or otherwise require the Mediator to testify or produce documents or other information in any future proceedings. Any Party or attendee who signs this Agreement to Mediate--who later subpoenas or otherwise attempts to require the Mediator to testify or produce documents or information about this mediation (collectively “Subpoena”)--agrees to pay the Mediator for expenses, time spent (at the hourly rate set forth above), and all reasonable attorneys’ fees incurred in responding to the Subpoena.

**DATED:** \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**UNIFORM MEDIATION ACT**  
(Last Revised or Amended in 2003)

Drafted by the  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

**Section 1. Title.** This [Act] may be cited as the Uniform Mediation Act.

**Section 2. Definitions.** In this [Act]:

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

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

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

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

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

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

(7) “Proceeding” means:

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

(B) a legislative hearing or similar process.

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

(9) “Sign” means:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

**Section 3. Scope.**

(a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

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

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

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

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

(4) conducted under the auspices of:

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

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

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

#### **Section 4. Privilege against disclosure; admissibility; discovery.**

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

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

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

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

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

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

## **Section 5. Waiver and preclusion of privilege.**

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

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

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

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

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

## **Section 6. Exceptions to privilege.**

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

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

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

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

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

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

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

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

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

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

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that

there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

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

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

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

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

### **Section 7. Prohibited mediator reports.**

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

(b) A mediator may disclose:

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

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

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

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

### **Section 8. Confidentiality.**

Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

### **Section 9. Mediator's disclosure of conflicts of interest; background.**

(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest

in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

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

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

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

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

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

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

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

## **Section 10. Participation in mediation.**

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

## **Section 11. International Commercial Mediation**

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

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

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

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

## **Section 12. Relation to electronic signatures in global and national commerce act.**

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

**Section 13. Uniformity of application and construction.**

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

**Section 14. Severability clause.**

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

**Section 15. Effective date.**

This [Act] takes effect .....

**Section 16. Repeals.**

The following acts and parts of acts are hereby repealed:

**Section 17. Application to existing agreements or referrals.**

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

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