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An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act

Gregory Firestone

An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act

GREGORY FIRESTONE, PH.D.*

It has been a unique opportunity to serve, on behalf of two conflict resolution organizations, as an Official Observer to the drafting of the Uniform Mediation Act (UMA) by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Certainly, it is not often that one has the chance to sit at the table with such an influential group and debate the manner in which mediation law should be codified and to what extent, if any, such mediation law should be uniform across the United States. It is even more challenging when asked to represent professionally diverse national organizations of conflict resolution professionals in this process.

This paper will discuss the role of professional mediation association advocacy involved in the drafting of the UMA, outline the eleven guiding principles of advocacy for the UMA adopted by certain national mediation and conflict resolution organizations, and briefly review the UMA according to these eleven guiding principles. Except where indicated otherwise, the comments in this article represent the opinions of the author and are not necessarily the official position of any professional organizations mentioned in this article. The comments will be based upon the latest draft of the UMA which was available at the time this article was written. The principled review of the UMA will discuss some aspects of the UMA and is not intended to be a complete analysis of the UMA.

In 1999, this author became the sole Official Observer to the NCCUSL UMA Drafting Committee on behalf of the Academy of Family

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* Gregory Firestone received his Ph.D. in Clinical and Community Psychology from the University of South Florida (USF) and is a practicing mediator, mediation trainer and clinical psychologist. Professor Firestone is Director of the USF Mediation Institute and a Clinical Associate Professor in the USF Department of Psychiatry and Behavioral Medicine. He currently serves as the Co-Chair of the Legislative and Public Policy Committee of the Association for Conflict Resolution (ACR), and sits on the ACR Family Section Advisory Council. Previously, Dr. Firestone has served on the Board of Directors of the Academy of Family Mediators and the Association of Family and Conciliation Courts (AFCC) and currently is President of the Florida Chapter of AFCC. The author wishes to acknowledge the thoughtful review and constructive comments from Professors James Alfini, Charles Ehrhardt, Sharon Press and Nancy Rogers and the dedication of the UMA Drafting Committee members, UMA Official Observers, and Legislative Committees from AFM, SPIDR, and ACR.

Mediators (AFM). Later, after the merger of AFM, the Society of Professionals in Dispute Resolution (SPIDR) and the Conflict Resolution Network (CRENET) into the Association for Conflict Resolution (ACR), the author continued in this role and served as one of two Official Observers on behalf of ACR. The other ACR Official Observer was Dennis Sharp, who had previously served as the Official Observer on behalf of SPIDR.

The drafting of uniform laws is a well-established part of the legislative process in the United States. Since 1892, NCCUSL has promoted the development of uniform state laws. NCCUSL consists of more than 300 commissioners from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. NCCUSL Commissioners are attorneys and many serve as state legislators, judges, practicing attorneys, and law professors. NCCUSL works to develop uniform and model state laws and, after adoption by NCCUSL, the membership encourages state enactment of these Acts in order to establish uniformity of law between the above-mentioned U.S. states and jurisdictions. The Uniform Commercial Code is probably one of the best known NCCUSL Acts, but NCCUSL has developed numerous Acts including the Uniform Arbitration Act and the 2000 Revised Uniform Arbitration Act.

In the case of the UMA, a parallel drafting committee consisting of members of the American Bar Association Section on Dispute Resolution (ABA) also met at the same time as the NCCUSL UMA Drafting Committee. This arrangement represented a very substantial collaboration in the development of a UMA between these two very important and influential organizations. Unfortunately, however, these committees were not very professionally diverse. The NCCUSL Committee consisted entirely of lawyers and the ABA UMA Committee consisted of virtually all lawyers. Thus, while many well-respected and extremely talented jurists, law professors, legislators, and practicing lawyers were included in this process, some with extensive mediation experience, there was a substantial paucity of experienced mediators with training and experience other than law.

Representing a diverse organization of mediators in a meaningful manner proved to be a huge task for this author. As the Official Observer for AFM and later ACR, this author needed to bridge the gap between a very diverse professional mediation organization that was ambivalent on the drafting of a UMA, and a more homogenous group of UMA Drafters who were actively engaged in drafting a UMA. There were clear differences in the constituencies of each organization. While the NCCUSL and ABA UMA Drafters were virtually all lawyers, the Academy of Family

Mediators, the Society of Professionals in Dispute Resolutions, and the Association for Conflict Resolution are organizations that represent a rich and diverse group of professional backgrounds including, but not limited to, law.

I. DEVELOPMENT OF PRINCIPLED ADVOCACY

One of the first tasks that an advocate must face is developing a strategic plan for advocacy. In the case of the UMA, it was clear from the previous drafts of the UMA that the UMA was a constantly changing document. Drafters would attempt to craft the Act in one manner and then on a number of occasions move from one approach to another in their exploration to develop a viable UMA that could be enacted. For example, the provisions concerning confidentiality and impartiality seemed to substantially change over time. As such, it became clear that reading each early UMA draft and meticulously reviewing and critiquing specific wording would become a very time consuming process which would likely contribute little at that stage to the drafting process. Often, proposing specific revisions to the language in these early drafts would later prove to be a fruitless effort, as entire sections in the UMA were deleted or completely reformulated. It became apparent that one needed to start with a broad approach to the major aspects of the UMA.

As a professional mediation organization, it seemed that we needed to develop a broad approach to these negotiations that would:

> 1) seek to unite diverse organizational membership viewpoints,
> 2) enumerate the principles on which an organization stood,
> 3) provide the basis for on the spot advocacy by organizational Official Observers,
> 4) serve as a role model for the implementation of the best integrative advocacy strategies,
> 5) educate others about the important underlying issues inherent in a UMA, and,
> 6) enable adoption of these principles by other professional mediation organizations.

This author concluded early in the process that the only way that an advocate could accomplish these tasks was to develop an interest-based approach to the drafting of the UMA. Given the time constraints, it necessitated creating a set of principles for one conflict resolution

organization and then seeking to create a consensus among other conflict resolution organizations as well.

As a result, eleven interests or principles were developed and are summarized in Table 1.1.[1] The principles were first adopted by the AFM Board of Directors in January, 2000. SPIDR adopted virtually the same objectives in June, 2000, and the minor changes made by SPIDR were subsequently accepted by the Board of Directors of AFM in July, 2000. After the merger of AFM, SPIDR, and the CRENET in 2001, the newly formed Association for Conflict Resolution (ACR) also adopted these eleven concerns. For each organization, the format for the adoption of these objectives involved both legislative committee input within each organization followed by Board adoption of these Committee recommendations.

While many mediators were not enamored with the idea of a Uniform Mediation Act, it appeared that the drafting of a UMA, which had already begun, would likely result in a NCCUSL adopted UMA. It also seemed to this author that there was some justification to support the drafting of uniform statutory provisions which would address the admissibility of mediation communications in a court or similar proceeding. The significant differences between state mediation statutes did raise legitimate questions regarding how courts would determine the admissibility of mediation communications across jurisdictions. Even within some states there are numerous and sometimes conflicting provisions concerning the admissibility of mediation communications in proceedings depending upon a number of potential factors. For example the admissibility of mediation communications in Florida can be a function of 1) whether the case was court ordered to mediation,[2] 2) whether the mediator works in a court-established Citizen Dispute Settlement Center,[3] 3) the nature of the dispute,[4] 4) possibly the nature of the mediation communication,[5] and 5) factors specific to a case such as one party seeking to void a contract due to claims of duress by the mediator.[6]

To this author, there is some appeal to intrastate uniformity as well as interstate uniformity. However, there are also good reasons to support the status quo, which would allow continuing innovation within the states and permit states to craft mediation statutes to suit the particular needs of a

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1. *Infra* p. 286.
2. *See* FLA. STAT. ch. 44.102(3) (2001).
3. *See* FLA. STAT. ch. 44.201(5) (2001).
4. *See, e.g.*, FLA. STAT. ch. 400.29(4)(b) (2001).
5. *See, e.g.*, FLA. STAT. ch. 39.204 (2001).
6. *See, e.g.*, McKinlay v. McKinlay, 648 So.2d 806 (Fla. Dist. Ct. App. 1995).

state. Compared to other professions, the development of the field of mediation is still in its infancy, and care should be taken not to stifle its further evolution and innovation.

The primary purpose of developing these eleven principles was to encourage a conservative approach to the development of a Uniform Mediation Act which would:

> 1) limit the development of a UMA to only those areas where uniformity was required,
> 2) preserve many fundamental principles of mediation,
> 3) attempt to reflect a broad consensus of the mediation community wherever possible, and
> 4) respect the diversity of mediators, mediation styles, and the range of issues mediated.

II. PRINCIPLED REVIEW OF THE UMA

The following discussion of the eleven principles and the subsequent review represents the opinion of the author and is not an official response of any professional organization mentioned above. The author, however, is very grateful to the many UMA Drafters and Observers and fellow mediators who have participated in the UMA drafting process. The comments below will at times reflect ideas and reactions which have been raised not only by this author but by others as well.

A. PRINCIPLE #1: ADDRESS ONLY THOSE AREAS (SUCH AS CONFIDENTIALITY) WHERE UNIFORMITY IS REQUIRED

The first principle was designed to set a conservative tone to the development of the UMA. While AFM, SPIDR and ACR were willing to support the drafting of an Act that addressed the eleven concerns, none of the organizations were strong advocates at the time for the uniformity of mediation law. Rather, it appeared that the Act was going to be drafted with or without Association involvement, and therefore it was necessary to participate in the drafting process.

There are many reasons for limiting the drafting of a Uniform Mediation Act. First, while it did appear to many that there was a need for uniformity with regard to the confidentiality of mediation, there was little support for a uniform mediation law governing other aspects of mediation. Rather, it appeared that creating uniformity where little need existed might

inhibit the innovation and experimentation of state legislatures, state courts, private mediators and others. In addition, it was recognized that many different models of mediation appear to work well in different settings, and it might be counterproductive to attempt to create a "one size fits all" model for the practice of mediation.

The issue of confidentiality was also a monumental task in and of itself. State laws governing mediation vary considerably around the country. Some states provide little, if any, protection for the confidentiality of mediation communications. Other states provide for the confidentiality of mediation and give the parties a privilege, and some go so far as to also give the mediator a privilege or make the mediator incompetent to testify. It seemed that the writing of an adequate mediation confidentiality or evidentiary act would by itself be a substantial task that would consume most of the drafters' time.

Provisions in earlier drafts of the Act that addressed issues such as summary enforcement, mediation procedures, etc., appeared to be best left out. States wishing to adopt summary enforcement provisions for mediation agreements should be free to adopt such provisions. However, it did not seem apparent that there was presently a need for uniformity of law in this regard. In addition, in some states, mediation procedures were already being governed by court rule or independent professional standards, and it was apparent that in some jurisdictions the courts, and not the legislatures, wanted to address mediator standards and procedures. Perhaps in a later revision of the UMA some of these other provisions could be revisited, but at this time the above professional mediation organizations clearly wanted to proceed slowly with the development of a uniform mediation law.

Principle #1 Analysis

The UMA primarily provides for the privileged nature of mediation communications. While the Act does address other issues, such as party representation and mediator disclosure, the vast majority of the UMA addresses the issue of privilege and confidentiality.

The Act does not provide for broader confidentiality "to the world" as many mediators had hoped. Such an absolute confidentiality provision would have prohibited disclosures outside of a judicial or similar proceeding as well as during such a proceeding. While it does not prevent the parties from agreeing in writing to make mediation more confidential, if not in conflict with other state law, the Act primarily addresses the extent to which mediation communications are admissible in a court or similar proceeding. States wishing to insert confidentiality "to the world"

provisions certainly could add such provisions without necessarily compromising the uniformity of the Act. States adopting the UMA thus would be wise to consider to what extent they wish mediation to be confidential outside a court proceeding and to consider possibly drafting language to broaden the scope of confidentiality.

B. PRINCIPLE # 2: PRESERVE PARTY EMPOWERMENT AND SELF-DETERMINATION

One distinctive feature of mediation is the ability of the parties to determine their own outcome. This typically is referred to as self-determination.[7] Party empowerment perhaps goes beyond self-determination to include providing parties the opportunity to become actively involved in the mediation process. As mediation becomes more institutionalized within court procedure, the law, and general business practice, it is important that parties do not lose their right to self-determination and to actively participate in the mediation process.

Principle #2 Analysis

The Prefatory Note to the UMA does provide that the Act should be "applied and construed in such a way as to promote uniformity and ... active party involvement, and informed self-determination by the parties" along with a list of other important considerations.[8] Unfortunately, however, such language is not part of the black letter act as it had been when initially submitted to NCCUSL for approval in August 2001. In earlier drafts there was an Application and Construction Section which included language detailing purpose provisions.

While the UMA definition of mediation in Section 2(1) refers to the parties reaching a "voluntary agreement," more substantive reference to notions such as self-determination or empowerment would have been preferred.[9] It is noteworthy that the prohibition against mediators making substantive reports to the court and the inadmissibility of such reports in a court proceeding outlined in Section 7 does go a long way toward preventing mediators from using the threat of an unfavorable report to

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7. For an interesting look at self-determination within the context of the Uniform Mediation Act, see Philp Harter, *The Uniform Mediation Act: An Essential Framework for Self-Determination*, *supra* p. 251.

8. Prefatory Note to Uniform Mediation Act, *supra* p. 167.

9. UNIF. MEDIATION ACT § 2(1), *supra* p. 179.

compromise the self-determination of any party.[10] Given the absence of specific reference to empowerment and self-determination, states considering the adoption of the UMA may wish to create a purpose (or application and construction) section and insert such concepts in this new section.

C. PRINCIPLE # 3: PROVIDE ADEQUATE, CLEAR AND SPECIFIC CONFIDENTIALITY PROTECTIONS AND, WHERE NECESSARY, LIMITED AND CLEARLY DEFINED EXCEPTIONS THAT WOULD MAINTAIN MEDIATION AS AN EFFECTIVE CONFIDENTIAL PROCESS IN WHICH PEOPLE ARE FREE TO DISCUSS ISSUES WITHOUT FEAR OF DISCLOSURE IN LEGAL OR INVESTIGATORY PROCEDURES

The goal of this principle was to ensure that mediation participants would be able to speak freely in mediation. There was a recognition that exceptions to the confidentiality of mediation were likely necessary. However, it was important to insure that the exceptions did not inhibit the willingness of the parties to speak openly in mediation. It appeared that this could be accomplished if exceptions only existed where absolutely necessary, if they were understandable, and if mediation participants could predict with a reasonable degree of certainty whether or not mediation communications would later be confidential.

There are many ways to construct a mediation confidentiality provision. Some of the factors which can be considered include whether confidentiality provisions:

1. apply to all mediation participants, some mediation participants or just to the mediator,
2. prevent disclosure in judicial proceedings or to disclosures outside of a proceeding as well,
3. allow exceptions to the confidentiality protections,
4. provide a privilege to any or all of the mediation participants,
5. make the mediator incompetent to testify, and
6. apply to only mediation communications or to other activity such as party conduct.

Principle #3 does not cover the specific nature of the confidentiality but does assert that one goal of creating a confidentiality provision should

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10. UNIF. MEDIATION ACT § 7, *supra* p. 224.

be to preserve mediation as a process where parties may speak freely with one another.

Principle #3 Analysis

It is difficult to provide exceptions to confidentiality without risking the likelihood that parties may come to feel less willing to speak openly in mediation. The drafters therefore faced a difficult balancing act. Most exceptions to confidentiality, in this author's opinion, are necessary, both to protect the parties and to protect the process. However the exceptions must be crafted in clear language that would at least give the parties the ability to predict which mediation communications would have confidentiality protections and which communications, if any, would not be protected.

Unfortunately, the Act is not that clear and, in some cases, is confusing. For example, the distinction between Section 5(c) where an individual can lose his or her entire privilege (for all mediation communications) for intentionally using "a *mediation* to plan . . . a crime"[11] and Section 6(a)(4)[12] where an individual can lose his or her privilege for a specific mediation communication for intentionally using "a *mediation communication*...to plan a crime" to this author seems vague. Will parties feel free to brainstorm if they fear they could lose their privilege for the entire mediation or even just for a specific mediation communication? How does one draw a distinction between using a mediation to plan a crime and using a mediation *communication* to plan a crime? Similarly, how will one determine a party's intent in the context of brainstorming? The drafters understandably wanted to prevent criminals from using the UMA to conceal their criminal activities. However, the lack of clarity may have other unintended effects. For example, this author wonders if parties will be advised to consult with their attorney each time before speaking out for fear of losing their privilege. As the language in the Act, "commit a crime" also sets a rather low threshold for the exceptions to apply, the net result may be to unnecessarily inhibit party involvement in mediation.

11. UNIF. MEDIATION ACT § 5(c), *supra* p. 206 (emphasis added).
12. UNIF. MEDIATION ACT § 6(a)(4), *supra* p. 210 (emphasis added).

D. PRINCIPLE # 4: REFLECT AN UNDERSTANDING OF THE DIVERSITY OF MEDIATION STYLES AND RANGE OF DISPUTES MEDIATED

This was an important issue, as the Act was attempting to create a one size fits all approach to all mediators and mediation styles and to most types of disputes mediated. The definition of mediation would need to be broad enough to capture the wide range of mediation techniques without becoming so broad as to include other unintended conflict resolution strategies. Styles of mediation including facilitative, evaluative, transformative, and therapeutic, are just a few examples of the many ways in which some mediators practice. At the same time, drafters needed to be careful that any definition would not be so broad that all discussions involving three or more persons could inadvertently fall under the Act. Also, it was clear that any definition of mediation in this Act, if adopted throughout the country, might come to be the standard definition of mediation and impact the future practice of mediation. Thus, while the definition needed to be broad to assure the protections of the Act would apply to different styles of mediation, it must also have been sufficiently narrow to appropriately delineate what mediation was.

A second concern was that the Act should accommodate the many different types of disputes which are mediated. This proved to be a challenging task as it is impossible for the drafters to be very knowledgeable about the full range of disputes mediated. While many experts are knowledgeable about traditional court mediation programs and traditional private mediation practices, there exists a wide range of other disputes that are "mediated" in other contexts and the extent to which these practices exist are difficult to ascertain.

Principle #4 Analysis

Section 3(b) does provide some exclusion for some peer mediation programs, correctional institution for youth mediation programs, and for some circumstances involving collective bargaining issues.[13] For the initial UMA, it is probably wise to limit the scope of the Act to exclude areas where the UMA may not appropriately address the specific concerns in a given area. It is not clear if the scope of the Act should have been further limited. For example, it is unclear to this author how this Act will impact the conduct of mediation like conferences on Native American Reservations and to what extent these proceedings will be deemed

13. UNIF. MEDIATION ACT § 3(b), *supra* p. 188.

confidential. Unfortunately, conflict resolvers representing different important cultural groups did not actively participate in the drafting process, and it is not clear to what the extent this Act will impact or possibly intrude into the norms and practices of diverse cultural groups.

In one case, the drafters failed to best address the unique nature of child protection mediation in a uniform manner, but instead left to the states the option to address child protection mediation independently. Child protection mediation (typically involving the non-criminal issues in cases of child abuse and neglect which are often court ordered to mediation) frequently includes discussions of allegations of child abuse and neglect in the petition before the court, along with case planning issues such as placement of the child, visitation, treatment for the child and parents, and services to the family, etc. Unless there is an explicit protection for these admissions (which is currently a bracketed state option), Section 6(a)(7) provides that mediation communications "sought or offered to prove or disprove abuse, neglect or abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party" are not privileged.[14] If states do not adopt the optional language to protect these mediation communications, parents will not be likely to discuss these allegations in mediation. This will likely serve to inhibit what has been shown to be a very helpful form of ADR in an area that benefits children, parents and the state. It is for this reason that in 1995 the National Council of Juvenile and Family Court Judges (NCJFCJ)[15] endorsed the notion that the confidentiality of such mediation communications in a child protection mediation should be maintained in a court proceeding.[16] In addition, giving states the opportunity to choose to adopt or not adopt this confidentiality protection for child protection mediation, erodes the uniformity of this Act as it applies to child protection mediation. One can only hope that states will recognize the importance of this optional language and choose to protect mediation communications in cases where the court refers the case and the child protective services agency participates in the mediation.

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14. UNIF. MEDIATION ACT § 6(a)(7), *supra* p. 210.

15. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES (1995).

16. The NCJFCJ also recommended confidentiality exceptions for mandatory reporting of new allegations of child abuse and neglect and threatened harm as is permitted elsewhere under the UMA.

E. PRINCIPLE # 5: BE EASILY UNDERSTANDABLE TO MEDIATION PARTICIPANTS

Parties entering mediation will be most empowered if they can easily understand the extent to which mediation communications are confidential. A complex Act written in complicated legal language will only serve to confuse parties and will make them feel they need to be represented in mediation. Further, parties may be less inclined to speak up without representation fearing that their statements might later be deemed admissible in court. Given the wide range of disputes where parties are typically not represented, such as community mediation, a UMA that is difficult to understand would only serve to hinder participation in mediation.

Principle #5 Analysis

Unfortunately, this Act is complicated and hard to understand. If parties and experts cannot understand the provisions and cannot predict with some degree of certainty which mediation communications are confidential, then parties will be less likely to openly participate in mediation. To this extent, the Act could have the unintended effect of inhibiting open discussion and disempowering participants.

For example, it is unclear whether an attorney or other representative is a "nonparty participant" under the Act and therefore is entitled to the privilege afforded to a nonparty participant. In the UMA, a "nonparty participant" is defined in Section 2(4) as " . . . a person, other than a party or mediator, that participates in a mediation."[17] From this definition, it would appear that an attorney or other representative is a nonparty participant. However, later in the Act, Section 6(a)(6) refers to "conduct occurring during a mediation" by "a mediation party, nonparty participant, or representative of a party."[18] This section would appear to suggest that an attorney or other representative possibly may not be a nonparty participant.

Perhaps any new Act will be somewhat unclear, and it will be left to the courts ultimately to make practical sense of the Act. However, this author expects that some states and jurisdictions will be tempted to better clarify the provisions in the Act.

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17. UNIF. MEDIATION ACT § 2(4), *supra* p. 179.
18. UNIF. MEDIATION ACT § 6(a)(6), *supra* p. 210.

F. PRINCIPLE # 6: PRESERVE MEDIATION AS A PROCESS THAT IS SEPARATE AND DISTINCT FROM THE PRACTICE OF LAW, ARBITRATION, AND JUDICIAL PROCEEDINGS

Mediation is a distinct process from the practice of law, arbitration and litigation. As such, the Act should not blur the distinction with these other processes. First, mediation must clearly be distinguished from the practice of law, as mediation is a more free flowing process where parties with adversary interests may seek the help of a impartial individual to facilitate negotiation between the parties. Clearly distinguishing mediation from the practice of law will also help to avoid creating the "turf" issues between the various professionals when the argument is raised that mediation is the unlicensed practice of law. Further, if mediation is the practice of law, then lawyers may find that practicing law simultaneously with parties in dispute may raise issues of the unethical practice of law. More importantly, we will better serve the field by focusing our energies upon what constitutes the appropriate practice of mediation.

Mediation can be distinguished from binding arbitration in that the parties are the decision-makers and the mediator has no decision-making authority. However, given the broad range of mediation styles, it is clear that some forms of evaluative mediation may be similar to non-binding arbitration.

It is also clear that settlement conferences conducted by a judge who continues to hold a decision-making role in the case are different from mediation. These settlement conferences are not confidential. Party participation in these conferences will likely be less active, as the judge is a potential decision-maker, and parties may be intimidated by the presence of the judge. These judges are also governed by other rules that generally prohibit ex parte communications, limit the procedural flexibility that mediators have, and otherwise restrict their conduct. Judges certainly can accomplish a great deal in settlement conferences using effective conflict resolution strategies, however, the rules governing these conferences should not be addressed in the UMA.

Principle #6 Analysis

In this regard the UMA seems to provide that mediation is not the practice of law, as it clearly states that mediators may come from a variety of professions and backgrounds. Similarly, the scope of the Act does provide that the UMA does not apply to "mediation" conducted by judges with decision-making authority. Lastly, the Act provides that the parties,

not the mediator, are the decision-makers, and as such distinguishes mediation from binding arbitration.

G. PRINCIPLE # 7: PROVIDE THAT MEDIATORS MAY COME FROM A VARIETY OF PROFESSIONAL AND NONPROFESSIONAL BACKGROUNDS

This seemingly simple provision was very important to the larger mediation community. First, as mentioned previously in this article, the UMA assured that mediation would not be labeled as solely the jurisdiction of one discipline.

Secondly, it was important that the provisions of the Act would apply uniformly to mediations conducted by all mediators, regardless of profession or background (and not just to mediations conducted by mediators who have certain professional qualifications). Having application of the Act apply to only one subset of mediators such as attorney mediators or mental health mediators would mean that the Act would not uniformly provide for the confidentiality of all mediation communication. Further, if states were to develop different definitions of mediators according to professional background, the Act might no longer be uniform, as mediation communications might be inadmissible in one state and admissible in another.

In addition, an act that just covered some types of mediators would be divisive within the mediation community. Rather than serve to unite mediators in their quest to build the profession of mediation, it might lead to greater tension between mediators and create different classes of mediators.

Principle #7 Analysis

In this regard, the UMA is relatively clear. It applies to all mediators regardless of background or profession. The drafters seemed to well understand this issue and were largely in agreement with the Official Observers advocating for Principle 7.

H. PRINCIPLE # 8: PROVIDE PROCEDURAL PROTECTIONS FOR THE DISPUTANTS, THE MEDIATOR, AND THE PROCESS WHEN EXCEPTIONS TO CONFIDENTIALITY ARE RAISED

Another important issue was protecting the parties from information being brought into a proceeding without a preliminary process for determining whether the information would be admissible, and providing

that information admissible for one purpose would not therefore automatically become admissible in other subsequent proceedings.

Principle #8 Analysis

The Act does provide in Section 6(b) that for issues concerning a court proceeding involving a felony (and misdemeanor is a state's option as well) or "a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation" a hearing in camera would be required to demonstrate that the "evidence is not otherwise available [and the] . . . need for the evidence . . . substantially outweighs the interest in protecting confidentiality."[19] However, these procedural protections are not explicitly in place for all exceptions. Importantly, Section 6(d) does provide that information which is admissible for one purpose is only admissible to the extent necessary to accomplish the purpose of that exception.[20]

One item missing in the UMA is a requirement to notice mediation participants when anyone seeks to introduce mediation communications into a proceeding. In the present proceeding, for example, the mediator may not know that their mediation communications are being introduced in a proceeding and therefore, while the mediator has a privilege (to prevent anyone from disclosing a mediation communication of a mediator), the mediator would not know that he or she might need to exercise that privilege. Similarly, in a subsequent or unrelated proceeding involving some, but not all of the parties, a party not involved in the subsequent hearing likely would not receive notice that their mediation communications were being introduced. Therefore, the party might not have the opportunity to exercise a privilege that, in theory they have, but perhaps, given the absence of required notice of intent to introduce privileged communications, they actually lose by default.

19. UNIF. MEDIATION ACT § 6(b), *supra* pp. 210-11.
20. UNIF. MEDIATION ACT § 6(d), *supra* p. 211.

PRINCIPLE # 9: ADEQUATELY ADDRESS HOW MEDIATORS, PARTIES AND REPRESENTATIVES ARE TO COMPLY, IF AT ALL, WITH MANDATORY REPORTING REQUIREMENTS THAT MAY BE REQUIRED BY LAW OR PROFESSIONAL ETHICAL STANDARDS

Within the mediation community there is not a clear agreement as to whether mediators should be required to comply with mandatory reporting rules such as child abuse. However, it is evident that there is a need for clarity on this issue so that parties entering mediation can know what to expect in this regard.

Principle #9 Analysis

This Act provides for no confidentiality outside of a court or similar proceeding. Therefore, unless a state were to have a statute to the contrary, it would appear that state laws governing mandatory reporting of abuse and neglect would apply to parties in mediation and to the mediator as well. For mediators, Section 7(b)(3) specifically states that "[a] mediator may disclose a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment."[21] Similarly, obligations of a professional to report professional misconduct would likely not be hampered by this Act as it applies to mediation parties and nonparty participants.

J. PRINCIPLE # 10: PRESERVE THE IMPARTIALITY OF THE MEDIATOR

When this principle was first put forth by the professional national mediation associations mentioned above, the concept of impartiality was included in the then existing definition of mediator in the UMA. Later the drafters removed impartiality from the definition due in part to concerns that:

1. an operative term such as impartial should not be a part of the definition and, if included, should be addressed later in the Act,
2. some mediators preferred to be partial,

21. UNIF. MEDIATION ACT § 7(b)(3), *supra* p. 224.

3. including impartiality in the definition of mediator might cause the parties to lose the confidentiality of the Act if it was later determined that the mediator was partial and the court concluded therefore that a mediation did not occur,
4. impartiality is difficult to define and to achieve, and
5. mediators might be liable if they failed to be impartial.

Conflict resolution profession associations mentioned above took the position that, despite the above mentioned concerns, a fundamental principle of mediation is that mediators are impartial. Descriptions of mediators as being impartial (or neutral) are common in many state statutes and rules governing mediators or mediation and the concept of impartiality is also included in the Proposed Model Rule of Professional Conduct for The Lawyer as Third Party Neutral sponsored by Georgetown University and the CPR Institute for Dispute Resolution.[22] This basic issue addresses the relationship of the mediator to the parties and their agreement and the conduct of the mediator in relationship to the parties and their agreement.

A key aspect of mediation is that the parties can trust that the mediator will be fair in dealing with all mediation participants. When parties are ordered or referred to mediation by courts, administrative agencies and other entities, it is particularly important that the mediator be impartial, unless the parties choose to make an informed consent otherwise. The impartiality of the mediator at least provides some assurance that parties who may be denied easy access to the courts are not pressured into settlement in a process that is inherently unfair.

Lastly, providing that mediators be impartial not only protects the parties, it protects the mediation process. If mediators are seen as partial to one side or the other, then one can assume that public mistrust will follow resulting in harm, not only to parties, but to the field of mediation as well. Clearly, the above named conflict resolution organizations advocated a principle that was more focused upon protecting the parties and the process than protecting the mediator. One would hope that any UMA adopted by a state legislature would reflect a similar position.

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22. Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral: Draft for Comment (April 1999) Reported by Carrie Menkel-Meadow and Elizabeth Plapinger, CPR-Georgetown Commission on Ethics and Standards in ADR.

Principle #10 Analysis

While the concept of impartiality is not included in the definition of mediator, the new Act does include a bracketed (optional) provision concerning impartiality that seems to address this issue. Section 9(g) states that:

> A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.[23]

It further allows states the option to provide that a mediator may lose his or her privilege if he or she fails to be impartial as provided above. Should this happen, the parties would still keep their privilege, and it would appear that only the mediator would be affected.

In addition, by allowing parties to waive mediator impartiality after informed consent, the Act's optional provision would permit those mediators who feel that they can constructively assist the parties, even if they are partial, to continue to mediate after appropriate disclosure and party consent. Similarly, it allows parties the choice to have such a mediator and still provide the mediator with a privilege. Such conduct might still be considered unethical under certain mediation standards,[24] however, the mediator would not automatically lose his or her privilege under the UMA.

States would be well advised to adopt the optional provision concerning impartiality contained in Section 9(g). Since there is no definition of impartiality, states might also consider including such a definition so as to provide the parties, the mediator, and the court with some guidelines for determining when a mediator has failed to be impartial. For example, some seem to consider impartiality to be a function of the mediator's relationship to the parties outside of mediation, while others would say that impartiality is a concept that applies to the mediator's conduct in the mediation. While the latter would seem to be important, if we are to protect the integrity of the process, the former is also an important component as well. Either way, states will be well advised to adopt this optional provision, if the concept of impartiality is not already included elsewhere in state law.

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23. UNIF. MEDIATION ACT § 9(g), *supra* p. 230.
24. *See, e.g.*, Fla. Rules For Cert. and Ct. Appointed Mediators 10.330(b) (2001).

K. PRINCIPLE # 11: TAKE INTO CONSIDERATION THE SPECIAL CONCERNS RAISED WHEN THE THREAT OF VIOLENCE IS PRESENT

The purpose of this principle was to be sensitive to the very real concerns that arise when the threat of violence is present. This type of threat can raise very important issues regarding safety concerns and a substantial imbalance of power. It would seem, that at a minimum, confidentiality provisions should not limit the ability of those involved in mediation to protect the safety of other mediation participants as well as possibly others at risk who are not present during mediation. In the case of divorce mediation where domestic violence might become apparent, for example, parties and the mediator perhaps should be permitted to notify a potential victim of impending danger or alert appropriate authorities when the threat appears to be highly credible. At the same time, it is important not to impose a Tarasoff-type standard upon the mediation participants where none may otherwise exist. Thus, mediation participants should be free to take appropriate action to protect potential victims when credible threats of violence are perceived, but there need not be an additional duty placed upon mediation participants to take such an action.

Principle #11 Analysis

As the Act does not prevent communications "to the world" it would appear that under most circumstances the mediation participants could notify the victim or the police where credible threats of violence exist. While there are some prohibitions regarding mediator reports in Section 7, it would appear that the mediator is not prohibited by the UMA from also taking such action in most circumstances. Of course, mediator disclosure may also be governed by other state law, court rule, professional standards, or an executed mediation confidentiality agreement.

CONCLUSION

The construction of an interest-based approach to advocacy well served the professional mediation community. Professional mediation associations were able to organize and unify their efforts to implement a comprehensive and organized program of advocacy which could constructively assist the drafting of a Uniform Mediation Act based upon a coherent set of guiding principles. This strategy was especially helpful at a time when major mediation organizations were merging.

Professional mediation advocacy in the development of a Uniform Mediation Act is critically important to assure that any such Act reflects a broad understanding of mediation including the wide variety of mediation styles and mediation disputes. Mediation draws upon a variety of disciplines and mediation practitioners come from many different professional and experiential backgrounds. Given the fact that practically all Committee drafters were lawyers and given the narrow range of experience with mediation among the drafters, it was very important for professional mediation organizations to participate in this legislative process. Hopefully, when a revised UMA is contemplated in the future, the composition of the drafting committees will better reflect the diversity of the mediation community.

Each state must evaluate for itself whether or not the Act will serve to enhance the laudable goals of the UMA Drafters and benefit the consumers of mediation. While the appeal of uniformity is very compelling, each state must determine whether the Act in whole or part will enhance existing state statutes. At the same time that the UMA is introduced, there may also be attempts to modify and/or supplement the Act. Given the failure of the Act to provide broad confidentiality protections outside of a court or similar proceeding, state legislatures would be well advised to consider whether legislation governing the confidentiality of mediation communications outside a proceeding (with reasonable exceptions to this broader confidentiality provision) would further improve the Act. Such confidentiality protections might mirror some of the existing exceptions that govern exceptions to confidentiality within a proceeding. It would appear that complementary provisions addressing confidentiality outside a proceeding would not necessarily conflict with the integrity or uniformity of the Act.

States may consider whether to modify the Act to make it more consistent with existing state statutes or to improve it. The UMA is clearly not a perfect document and could be improved. However, one must weigh whether making substantive changes to the Act is worth the loss of uniformity across states. Perhaps non-substantive changes that make the Act more understandable, provide greater clarity, or otherwise improve the Act while not compromising the uniformity of the Act may be undertaken with less hesitation.

The Act will be significant not only for what is contained in the UMA, but also for what existing statutory provisions are simultaneously repealed upon adoption of a UMA. State legislatures and professional advocacy groups will need to monitor the legislative process to be sure that other important provisions that are embedded within these existing statutes remain intact. For example, concepts such as impartiality and neutrality

may be lost if states replace statutory definitions of mediator or mediation that had included such concepts and fail to adopt the optional language governing impartiality. Similarly, states with provisions that make the mediator incompetent to testify will need to consider whether to maintain such language when considering adoption of the UMA. Toward this end, there is a Legislative Note that states the following:

> The Act does not supersede existing state statutes that make mediators incompetent to testify, or that provide for costs and attorney fees to mediators who are wrongfully subpoenaed.[25]

According to the UMA Reporters, half the states have a general application mediation statute and the other half have a host of statutes that govern the confidentiality of mediation communications. In many cases, these various provisions are narrowly written and sometimes conflicting. One possible benefit resulting from the adoption of a UMA for a state with inconsistent mediation confidentiality provisions is that this Act will provide for greater uniformity of application within a state. It would seem that intrastate uniformity would make it easier for parties and mediators to better understand the mediation confidentiality provisions in their state. Hopefully, these uniform standards will adequately reflect the unique issues governing different mediation circumstances.

Another issue worthy of consideration is whether this Act should become a uniform Act or whether it should be welcomed as a model Act which could be of immeasurable help as a template for states struggling to develop comprehensive mediation confidentiality statutes. Viewing it as a model Act would enable states to have greater latitude to determine what works best in their state and to continue to innovate and experiment. Ultimately, it will be up to each state to determine what best serves their citizens. Certainly for states with little or virtually no statutory protection for the confidentiality of mediation communications, the UMA represents a viable option for legislative adoption.

Now that this Act has been adopted by NCCUSL, it is critically important for state professional mediation associations, acting sometimes in concert with national professional mediation associations, to monitor the introduction of this legislation in their jurisdictions and follow closely the state legislative process.

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25. UNIF. MEDIATION ACT § 4, *supra* p. 197.

TABLE 1.1

ASSOCIATION FOR CONFLICT RESOLUTION
UNIFORM MEDIATION ACT PRINCIPLES

A Uniform Mediation Act, if adopted, should be one that would:

1. address only those areas (such as confidentiality) where uniformity is required;
2. preserve party empowerment and self-determination;
3. provide adequate, clear and specific confidentiality protections and, where necessary, limited and clearly defined exceptions that would maintain mediation as an effective confidential process in which people are free to discuss issues without fear of disclosure in legal or investigatory procedures;
4. reflect an understanding of the diversity of mediation styles and range of disputes mediated;
5. be easily understandable to mediation participants;
6. preserve mediation as a process that is separate and distinct from the practice of law, arbitration, and judicial proceedings;
7. provide that mediators may come from a variety of professional and nonprofessional backgrounds;
8. provide procedural protections for the disputants, the mediator, and the process when exceptions to confidentiality are raised;
9. adequately address how mediators, parties and representatives are to comply, if at all, with mandatory reporting requirements that may be required by law or professional ethical standards;
10. preserve the impartiality of the mediator; and
11. take into consideration the special concerns raised when the threat of violence is present.