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The Process of Drafting the Uniform Mediation Act

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Justice Bilandic, Justice Nickels, Judges, Distinguished Members of the Faculty, Professors and Distinguished Members of the Bar, Mediators and Observers. It is indeed a pleasure for me to be here today and tell you a little bit about a process that has been going on for over four years, but I err in saying that because it has really been going on for more than 110 years. The National Conference of Commissioners on Uniform State Laws (NCCUSL) was founded in the late 1800s. There are commissioners from every state of the United States and the territories who meet at least annually and far more often than that in drafting committees. Each state has the opportunity to appoint anywhere from three to as many as twelve commissioners. Those commissioners meet at the annual meetings and are the members of the drafting committees. Our most well known act is the Uniform Commercial Code. I don't think there is anyone who hasn't run into some application of it. But a lot of people don't realize there are over one hundred other uniform acts.

First, a drafting committee is appointed. It meets for a number of years. The drafting committee has a first presentation before the committee of the whole, which is all of the commissioners, in annual session. Amendments are suggested, and the drafting committee goes back to the drawing board and comes back a year or two later. At the second meeting it is then, hopefully, adopted. Further amendments might have been made during the course of that annual meeting, and it would then go into Phase II.

Phase II is enactment. The Uniform Commercial Code for example started in the late 1940s as a project of the Uniform Law Commission and was not enacted as we all know it until many years later. We are now doing revisions on the Uniform Commercial Code, which are being enacted by the states again to keep up with modern times. So, there is a twofold agenda, the drafting, and then the subsequent requirement of every

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commissioner to support the bills in their state and urge that they be enacted by the legislature of that state.

It is no secret that during the last thirty years we have this phenomenon which has developed called mediation. Back in 1995, 1996 and 1997, I happened to sit on the Scope and Program Committee of the National Conference. That is the committee that decides what we are going to be drafting in the future. There was a request to approve a revision of the Uniform Arbitration Act (UAA). Time was right to revisit the UAA and those people suggested that perhaps we might want to look at this area of mediation. So, there was quite a discussion: "we're not ready to do mediation yet, and besides it shouldn't be part of arbitration, it's a separate freestanding thing." For two years in a row, I moved that we have a study committee to study the drafting of a Uniform Mediation Act. I was voted down. But then something happened that got the attention of the leadership. The President-elect got a letter from a mediator in his state of South Dakota which said, "I have been subpoenaed to appear in one of the neighboring states and testify about what happened in the mediation." The President-elect understood the problem now and he entered into the Scope and Program Committee and supported my motion, and we had the almost unprecedented occurrence of going from an idea to a drafting committee without even bothering with the idea of studying the issue first.

So, in July of 1997, a drafting committee was approved and I was subsequently named as Chair and then a month or two later I found out about this American Bar Association group. Professor Jim Alfini knows about that, because the ADR section of the ABA had, together with a combination of schools led by Nancy Rogers at Ohio State University, secured a Hewlett Foundation Grant with the idea of drafting a model mediation act. Well, they invited me to come to Ohio State and talk about it and it was my concept that what we really needed to do then was to have a core act that would address the area of confidentiality and privilege and other related areas. The ABA at the time was talking about a myriad of specialized things, for example mediation in administrative agencies, in community based programs, etc. So we had a meeting of the minds and decided that we should have a Uniform Mediation Act, and that that Uniform Mediation Act initially ought to be a core act. Then, the ABA/ADR section would have a basis upon which they could build.

So an agreement was reached, a formal agreement between the ABA and the National Conference of Commissioners on Uniform State Laws. By the way, if I say Uniform Law Commission it is the same outfit, the National Conference of Commissioners on Uniform State Laws. If I say that too often we won't get finished today. The timeliness of the Uniform Mediation Act can be seen, I believe, in the historic collaboration that has

led to the promulgation of the Uniform Law Commission and the ABA jointly doing this draft. It's the first time in history. In fact, we have interlocking committees. I am a member of the ABA Committee and there are two members, Frank Sander of Harvard and Jose Feliciano of Cleveland, who are members of the National Conference Mediation Drafting Committee. I am Chair of the National Conference Committee and have acted as de facto Chair of both committees during most of the drafting sessions, but the co-chairs on the ABA side are Roberta Cooper Ramo, a former President of the ABA and Chief Justice Tom Moyer of the Ohio Supreme Court. In addition to that, of course, Professor Nancy Rogers of the Ohio State University College of Law has become our reporter and we have a distinguished panel on both sides.

The process has included input from all areas and interests within the mediation community in the form of appointed official observers. They were granted the privilege of the floor during all drafting sessions, and they included representatives from the Society of Professionals in Dispute Resolution (SPIDR), the Academy of Family Mediators (AFM), several state and local bar associations, including the Chicago Bar Association and the Illinois State Bar Association and various ABA entities. Several people who are present today participated in those drafting committee sessions. In addition to Jim Alfini, Judge Harris Agnew and Susan Yates participated in a number of them. We also received literally thousands of e-mails, faxes, and letters, all of which were collected and all of which were considered. They ranged from a few members of the litigation bar who say "absolutely no privilege and no confidentiality," to some mediators who apparently think that the privilege is superior to constitutional guarantees. Fortunately, most were in the middle, and the committee's draft will reflect that.

I would like to give you some important observations about the Act as it is today. Without the Act, no mediator can tell the parties, with any degree of certainty, what is privileged and what is not. Because of the vast interjurisdictional differences, and the fact that some jurisdictions have no privilege, you just don't know. Adoption of the Act will extend the privilege to many mediation sessions that are currently not privileged, including most of the non-court-sponsored sessions in most of our states. Importantly, the Act will simplify the law within our states. The Act does not regulate the practice of mediation except in two important areas that are key to fairness: first, the right to bring somebody, usually a lawyer, along if participation in the mediation is mandatory, and secondly, the assurance that the mediator will not leak information to a judge who is going to be making the rulings on the case. Because the process of drafting the Act has been broadly participatory, I am pleased to say that it is already receiving

endorsements both officially and unofficially. Public policy strongly supports the development of mediation, but unlike court proceedings and litigation generally, the law has a far more limited but important role to play in encouraging the effective use of mediation and maintaining its integrity, as well as the appropriate relationship with the justice system as a whole. In particular, the law has the unique capacity to assure that the reasonable expectations of participants regarding confidentiality of the mediation process is met rather than frustrated.

The primary focus of the Act is confidentiality. The drafters recognized the central role of confidentiality, and that mediators typically promote a candid and informal exchange regarding events in the past as well as the party's perceptions of and attitudes towards these events. They encourage parties to think constructively and creatively about ways in which the differences might be resolved. This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment in later court proceedings or other adjudicatory processes. This rationale, however, has only sometimes been extended by statute to mediators by allowing them to block the evidence of their notes or other mediation communications. The parties can rely on one another's and the mediator's promise of confidentiality in terms of the mediator making disclosures outside the proceedings, for example to the press or the public, because the mediator would be liable under existing law, both common and contract for breach of such assurances. The drafting committee took the additional step of saying in Section 4 that a mediation communication is confidential.[1] Section 4 provides that a mediation communication is confidential and, if privileged, is not subject to discovery or admissible in evidence in a proceeding.

I want to make a side note here. We've been drafting for four years. During those four years, I presided over every meeting, almost every minute of every meeting, and I voted three times. That was only to make or break a tie; one time at the urging of Jim Alfini, because I tried to bring consensus rather than have a vote where one side beats the other. I never made a motion until the last meeting. Judge Agnew was present and saw that. It was the only time I ever did, and the motion was to say that a mediation communication is confidential. It had been very, very

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1. The Section numbers originally referenced in this speech did not conform to the final version of the Uniform Mediation Act, reprinted *infra* pp. 165-249, because the sections were renumbered during the final drafting process. Consequently, the numbers have been changed to correspond with the final version of the Uniform Mediation Act. Please see the Table of Contents for the Act, *infra* p. 165.

controversial to put that in. It passed, it is in the Act and it is going to stay there.

Because the mediation privilege makes it almost impossible, however, to offer evidence to challenge a mediated agreement, the drafters viewed the issue of confidentiality as tied to self-determination and integrity. Self-determination and fundamental fairness is encouraged by provisions that limit the potential for coercion of the parties to accept settlements as provided in Section 9(d). Section 10 allows the parties to have counsel and other support persons present during the mediation session. Integrity and knowing consent of the mediation process is promoted by Section 9, Provisions d, e and f, that require the mediator to disclose conflicts of interests and to be candid about his or her qualifications. This Act is designed to simplify, not complicate our law. Today there are more than 2,500 state and federal statutes, rules and regulations affecting mediation. There are approximately 250 different state statutes providing for various degrees of privilege. Most of those statutes can be replaced by the Act, which applies a generic approach to topics covered in varying ways by a number of specific statutes currently scattered within substantive provisions. Common differences among these current statutes include the definition of mediation, the subject matter of disputes, the scope of protection and exceptions, the context of the mediation that comes within the statute, such as whether the mediation takes place in a court, community program or private setting. Few of the currently existing statutes even approach being comprehensive. None are uniform, and that is why until the Uniform Mediation Act becomes law, no mediator can tell the parties with certainty what is privileged and what is not.

Why uniformity? Uniformity of the law encourages effective use of mediation in a number of ways. Uniformity is a necessary predicate to predictability. Currently, there is the potential that a statement made in mediation in one state may be sought in litigation or an administrative processes in another state. The law of conflict of laws has failed to provide such predictability. Uniformity also relates to cross-jurisdictional mediation. Mediation sessions are increasingly conducted by conference calls between mediator and parties in different states and even over the Internet. Because it is unclear which state's law applies, the parties cannot be assured of the reach of confidentiality. Absent uniformity, a party trying to decide whether to sign an agreement to mediate, may not know where the mediation will occur, whether confidentiality and privilege apply, or whether the law will ensure against conflict of interest and provide the right to bring counsel or other support person. And, finally, uniformity relates to simplicity. Today, mediators, as well as parties, face a formidable task in understanding multiple confidentiality statutes that vary from nothing to

fairly comprehensive by and within relevant states. With the Uniform Mediation Act we will know that the parties are protected.

Well, what is the scope? Mediation, of course, often involves parties and mediators from a variety of professions and backgrounds, many of whom are not attorneys or represented by counsel. With this in mind, the drafters sought to make the provisions accessible and understandable to all readers and kept the Act shorter, leaving discretion to the courts to apply provisions in accordance with general purposes of the Act and the established common law. The drafters of the Uniform Mediation Act sought to avoid including in the Act those types of provisions that were regulatory, such as mediator certification, and we also deferred consideration of provisions that would and should vary by type of program or legal context. They are left to program-specific statutes or rules. The specification of mediator qualifications is an example. However, as with the Uniform Commercial Code, the Uniform Mediation Act could later have topics and type-specific provisions added. Indeed, as I said before, the protocol between the National Conference and the ABA envisions such further drafting by the ABA with subsequent consideration by the Uniform Law Commission.

So, let's talk about privilege. How does that work? Section 4(b) provides that the following rules of privilege apply.

> 1. A 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.
> 3. A mediator may refuse to disclose and may prevent any other person from disclosing a mediation communication of the mediator. And finally,
> 4. A non-party participant in the mediation may refuse to disclose and may prevent any other person from disclosing a mediation communication of that non-party participant.

So, parties can block their own and the other person's mediation communications, but the drafters also recognized that public confidence in, and the voluntary use of mediation, can be expected to expand if people know that the mediator will not take sides or disclose their statements, particularly in the context of administrative and judicial proceedings. The mediator is therefore granted the privilege to object to testifying so that the mediator will never be viewed as biased in the future. Thus, a statute is required to assure confidentiality that relates to evidence compelled in a judicial or administrative proceeding. In judicial and administrative

proceedings, however, promises, contracts, and court rules or orders are unavailing with respect to discovery, deposition, and subpoenaed evidence, especially as regards third parties. Thus, a major contribution of the Uniform Mediation Act is to provide a mediator privilege in legal proceedings, where it would be otherwise unavailable or would be unavailable in a uniform way across the states.

Now, of course, there must be limits. There are three categories of limits:

1. That the information is otherwise discoverable.
2. That there has been a waiver or a preclusion, and
3. Specific exceptions.

The otherwise discoverable rule provides in Section 4(c) evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.

Section 5 goes on to deal with waiver and preclusion of privilege and provides that a privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all mediation parties and in the case of a privilege of a mediator, it is expressly waived by the mediator, and secondly, in the case of privilege of a non-party participant, it is expressly waived by the non-party participant. It goes on to say that a person who discloses or makes a representation about a mediation communication that prejudices somebody else is precluded from asserting the privilege under Section 4 to the extent necessary for the person prejudiced to respond. As with other privileges, the mediation privilege must have limits and nearly all existing statutes addressing that provide for such limits. Definitions and exceptions primarily are necessary to give appropriate weight to other valid justice system values.

Section 6 provides categories of exceptions to privilege, such as the settlement agreement itself, or proceedings subject to the Open Records or Open Meetings Acts, threats of bodily injury, and use of the mediation to commit a crime. Certain protected parties, such as children, are excepted, under certain circumstances that are very carefully crafted. Professional misconduct is excepted, and after a hearing in camera where a felony case is involved, or it is necessary to urge reaffirmation of a contract, and then only with very strict standards that would find that the need is greater than the public policy of protecting the mediation. In that circumstance the mediator still cannot be called to testify. The point is that once the parties and mediators know the protections and limits, they can adjust their conduct accordingly.

For example, if parties understand that they will not be able to establish in court an oral agreement reached in mediation, they will reduce the agreement to a record or writing before relying on it. If they realize that they will be unable to show that another party lied during the mediation, they will ask for cooperation of the statement made in the mediation prior to relying on the accuracy of it. With respect to limits, once the parties know the recorded agreements are not privileged, they can consider this as they draft the agreement and insert appropriate confidentiality provisions. A uniform and generic privilege makes it easier for the parties and mediators to understand what law will apply and therefore easier to understand the coverage and limits of the Act.

In conclusion, the certainty that flows from the policies established by the Uniform Mediation Act and the uniformity of law and its interpretation can serve to promote local, state, and national interests in the expansive use of mediation as an important means of dispute resolution. These policies include confidentiality and candor, fostering a prompt, economical, and amicable resolution of disputes, integrity of the process, self-determination by the parties, and the balancing of societal needs for information and uniformity of law.

It has indeed been a pleasure to be with you this afternoon. My congratulations to Jim Alfini, his committee, and the Law Review for this fine program, and I look forward to any questions any of you might have.[2]

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2. The final version of the Uniform Mediation Act was approved by the National Conference of Commissioners on Uniform State Laws at its annual meeting in August, 2001, and appears in this volume, *infra* pp. 165-249.