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The Uniform Mediation Act: An Essential Framework For Self-Determination

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The law governing the confidentiality of mediation is currently a mess. Parties regularly expect that what they tell the mediator in confidence will remain just between them, and mediators regularly promise virtually complete confidentiality to the participants.[1] Perhaps in response to the recognition that mediation can and does play an important role in resolving society's disputes by encouraging self-determination by the parties and that confidentiality is an essential ingredient for making mediation work, Congress and the state legislatures have enacted statutes to provide it. Unfortunately, however, they have passed literally hundreds of them.[2] As a result, the law governing confidentiality varies by subject matter within a state and by jurisdiction within a substantive area. Moreover, the differences can be quite significant. And, the parties to a mediation can never know just where a challenge to confidentiality might be brought or even whether it will be directly related to the subject on the table. As a result, the parties cannot know whether what they think is confidential will be in another jurisdiction when an action might take place or as to parts of a mediation that might fall outside a narrowly drawn statute. Further, mediators often promise more confidentiality than they can actually deliver as a matter of law and since many parties are unrepresented by counsel, they may rely on this assurance to their detriment.

While, given the potential for confusion, remarkably few cases have actually arisen that test and define the law, the process of mediation would

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1. The Model Standards of Conduct for Mediators adopted by the Sections of Dispute Resolution and Litigation of the American Bar Association, the Society of Professionals in Dispute Resolution, and the American Arbitration Association provide that "A Mediator shall maintain the reasonable expectations of the parties with regard to confidentiality," *available at* http://www.ilr.cornell.edu/alliance/model_standards_of_conduct_for_m.htm (last visited Mar. 26, 2002).

2. Prefatory Note to Uniform Mediation Act, *supra* p. 166-78.

benefit greatly by having a defined minimal set of rules[3] by which it operates so the parties and the mediator can have some assurance as to the consequences of their actions. They could then tailor their actions accordingly, such as by entering into contracts that further clarifies and defines their relationship.[4] The Uniform Mediation Act was developed to meet that need.

The UMA is the product of heroic effort that brought together many interests and perspectives to thrash out a workable framework for mediation. Virtually anyone could quibble with — of flat out stridently oppose — provisions of the act. But, on the whole it is a functional piece of work. The critically important part — whatever one's views as to just how confidentiality should work — is that the UMA would establish a consistent and predictable structure for mediation. Everyone would then know what to expect and can tailor their actions accordingly.

Since I was the official observer of the Section of Administrative Law and Regulatory Practice, it is not surprising that I see in the UMA some analogy to the seminal Administrative Procedure Act which forms the basis for how government agencies make decisions. The APA, like the UMA, defines the basic "rules of the road" for their respective areas. Given that, Justice Jackson's observations in the first case that reviewed the APA are apt here as well:

> The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formulation upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far

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3. Mediation is used in an extraordinarily broad range of settings from settling nettlesome disputes between neighbors, to divorces, to the resolution of complex business deals, to the enforcement of laws, and to the development of the legal requirements themselves. As a result, the process of mediation itself must be flexible and responsive to the ability of the parties to devise a procedure that meets the needs of the particular matter. Thus, the law governing mediation needs to provide for that adaptation and growth.

4. For example, a statute might provide for some but not total confidentiality of information exchanged during a mediation. The parties could then agree among themselves — and the mediator — that they would not seek to use any of that information for any other purpose. Thus, while not binding on non-parties, the agreement would supplement the statutory protections.

> as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.[5]

This essay reviews several salient points — substantive and procedural — of the UMA to the end that some might be clarified in practice and that we might learn from the experience for application to new endeavors.

I. THE PRIVILEGE

The heart of the UMA is its privilege against disclosure of mediation communications. Section 4(a) provides that "A mediation communication is privileged and is not subject to discovery or admissible in evidence in a proceeding."[6] Thus, a party "may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.[7] While it sounds simple, there is actually a lot going on in that sentence. First note that it applies only **in a proceeding** — that is, the confidentiality provided by this section extends only to formal proceedings, largely adjudicatory actions before courts, agencies and arbitrators, but also including legislative proceedings. Importantly, it does not impose a duty to maintain confidentiality on anyone. Thus under the act someone could leave the mediation and hold a press conference with a "he said and she said" narrative of what just went on, but could nonetheless refuse to "tell it to the judge."[8] Next, it allows the holder of the privilege to refuse to reveal a mediation communication. A mediation communication is defined broadly to include oral, written and nonverbal statements during a mediation, and those made while convening a mediation or while selecting a mediator. The refusal to reveal is pretty straight forward: the holder is asked and simply says no. But the next part gets dicey: the holder of a privilege may also block the others from tattling. Again it is easy if someone offers the mediation communication in a proceeding in which the person holding the privilege is also party, but what if the holder does not know anything about it? How is the person to suppress the revelation unless s/he is aware that it is happening? The proposal does not address the issue squarely since this section does not impose a duty on anyone to maintain confidentiality. The

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5. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40-41 (1950).
6. UNIF. MEDIATION ACT § 4(a), *supra* p. 197.
7. UNIF. MEDIATION ACT § 4(b), *supra* p. 197.
8. And that was the theory of the drafting of the UMA until the last few hours when some potentially significant changes were made. *See* Part II *infra* at p. 255.

Reporters' Notes suggest that the parties enter into a contract that will commit everyone either to maintain confidentiality or to provide notice to all parties of a demand for or an intent to disclose a mediation communication.

The privilege will likely work well for business disputes and for others that use an experienced mediator who will bring to the process some boilerplate language to address these issues. But, the need for addressing confidentiality outside of the courtroom and notice to the other parties when demands are made are a very large traps for the unwary. And, even if someone is aware of them and enters into a contract for confidentiality and notice, what is the measure of damages for a breach? To be sure the same issue would arise if the statute imposed a duty of confidentiality and of notice, but at least the requirement could be clear and it could also provide that any information that is revealed in violation of the duty is not admissible in a proceeding.[9] Perhaps one way around this dilemma is to interpret Section 4(a) as meaning that no mediation communication may be admitted into evidence unless all relevant people have waived the resulting privileges; thus, there would be a ban unless authorized instead of forcing someone to come forward to assert the privilege and, in the words used in the commentary, to "block" admission.

In a decision that took a lot of discussion and debate and generated much consternation, the privilege also extends to allowing the mediator to refuse to reveal a mediation communication, even if the parties urge the mediator to sing, and to prevent anyone else from disclosing a mediation communication *of the mediator.*[10] Thus, the mediator can refuse a discovery request for or refuse to testify about a mediation communication, but the mediator cannot block others from doing so. The reason for this privilege is that experience has shown far too many times (and I personally bear a prominent scar) that when a mediator testifies, some party or another will likely be hurt by the testimony and will repudiate the entire agreement on the ground that the mediator was biased or some such thing; moreover, the mediator has no information that is not shared by at least one party other than his or her own impressions and they should be kept to the

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9. For example, the Administrative Dispute Resolution Act provides: "Any dispute resolution communication that is disclosed in violation of [the duties provided in the Act] shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made." 5 U.S.C. §574(c) (2001).

10. "A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator." UNIF. MEDIATION ACT § 4(b)(2), *supra* p. 197.

mediator.[11] Thus, if the parties ask the mediator to testify as to something or another, the mediator can determine whether the testimony would be such as would jeopardize or enhance the process.[12]

Finally, in another controversial call, a non-party participant in the mediation — such as an expert witness or someone who accompanies a party — may refuse to disclose and may prevent others from disclosing communications made by that participant; that person may not, however, block anything said or done by others.[13]

II. THE ELUSIVE CONFIDENTIALITY

Until the very last meeting of the drafting committee, the entire thrust of the proposed UMA was the evidentiary privilege. The thought was that many people who would mediate under the Act would not be terribly sophisticated legally and would logically and normally talk about what went on with their friends and colleagues, and that it would be unfair to subject them to sanctions or duties when they simply were not aware of the requirements. So, the thought was that if parties wanted a broader requirement of confidentiality, they could impose a duty on themselves to remain silent beyond that of the privilege by entering into a contract to do so; and, indeed, that is a common practice. But that caused an awful disquiet: confidentiality is commonly thought to mean more than simply keeping the communications away from adjudicatory bodies and if one is worried about the unsophisticated, this is a snare in waiting.

It was decided in the final meeting of the drafting committee that something had to be done to extend the protection and make the Act more in keeping with common understandings. The committee therefore changed the lead in sentence to Section 5 to read "A mediation communication is confidential and, if privileged, is not subject to discovery or admissible in evidence in a proceeding."[14] The word "confidential" was

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11. Nevertheless, some hold strongly to the view that the mediation process belongs to the parties, and consequently if they waive all privileges then the mediator should testify. Thus, under this view, the parties and not the mediator hold the privilege. That is, of course, akin to the attorney client privilege.

12. Testifying may be perfectly appropriate, for example, if a party had died and the mediator would authenticate his signature on the agreement and participation in the mediation.

13. "A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant." UNIF. MEDIATION ACT § 4(b)(3), *supra* p. 197.

14. Section 5, as it is quoted here, no longer exists. For the Uniform Mediation Act's coverage of confidentiality, see UNIF. MEDIATION ACT § 8, *supra* p. 227; *Eds.*

not defined nor further explained; rather, it stood there starkly. The undercurrent was that its inclusion would impose some sort of duty on those who participate in a mediation, but its contours were not defined. Rather, it would be up to the courts to pour specific meaning into the term: whatever duty there is and whatever restrictions on use there may be. In short, it was an invitation to develop a common law of confidentiality.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) was bothered by the inclusion of some sort of duty of confidentiality in the section on privilege, and significant changes were made. The confidentiality was excised from Section 5 and put in a separate section that says:

> Unless subject to the [open meetings act/open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.[15]

The change has two important consequences as compared to the draft going to the floor of NCCUSL. First, it does not in itself impose a duty of confidentiality nor invite the courts to define its contours. Second, unlike the draft, the provision explicitly authorizes the parties to define their own confidentiality by saying that a contract to that end is enforceable.[16] While that may sound redundant with normal contract law it is significant for three reasons. The first is symbolic since the statute would specifically mention it and hence legitimize that which mediators have been promising since they existed. Second, it alone can serve as an important notice to potential parties that they need to address what happens outside the courtroom. Third, without such a provision the argument could be made that the privilege provided by the statute is as far as the legislature wanted to go with respect to confidentiality in which case any agreement that purported to require confidentiality beyond that specified in the UMA would be void as against public policy.

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15. UNIF. MEDIATION ACT § 8, *supra* p. 227.

16. Thus, for example, the parties can agree that they will maintain confidentiality at all times and not just in proceedings and that they will provide notice to the other parties if anyone makes a demand for a mediation communication.

III. EXCEPTIONS TO THE PRIVILEGE

Like all privileges, there are exceptions and qualifications. Importantly, the exception to privilege does not extend to the agreement that results from the mediation so that a resulting agreement is not privileged,[17] although it could still be confidential under Section 8. In a matter that was important to the Section of Administrative Law, the privilege does not apply to mediation communications that are available under a state's open records act — for example, a state agency may negotiate a compliance agreement with a company in a closed negotiation but the agency may still be required to supply the mediation communications under its open records act.[18] Nor does the privilege extend to a mediation communication that is made during a session of a mediation that is open to the public — it would surely be anomalous if someone made a statement in front of many non-participants but later claimed a privilege and refused to furnish the statement to a court — or even if the meeting was closed but required to be open (alas, there are many such animals) under a state's open meetings law.[19] Threats to inflict bodily injury are not protected[20] nor are communications that are intentionally used to plan, commit or conceal an ongoing crime.[21] There are other exceptions concerning the welfare of vulnerable populations[22] and professional misconduct.[23]

An important provision, Section 6(b), allows the tribunal to override the privilege in narrowly drawn circumstances. First, the tribunal must hold a hearing in camera and make three findings: (1) the party seeking the material has demonstrated that it is not otherwise obtainable; (2) "there is a need for the evidence that substantially outweighs the interest in protecting confidentiality;" and (3) the mediation communication is sought or offered in a court proceeding involving a felony or a proceeding to prove a claim or defense sufficient to reform or avoid liability on a contract arising from the mediation.[24]

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17. UNIF. MEDIATION ACT § 6(a)(1), *supra* p. 210.
18. UNIF. MEDIATION ACT § 6(a)(2), *supra* p. 210.
19. *Id.*
20. UNIF. MEDIATION ACT § 6(a)(3), *supra* p. 210.
21. UNIF. MEDIATION ACT § 6(a)(4), *supra* p. 210.
22. UNIF. MEDIATION ACT § 6(a)(7), *supra* p. 210.
23. UNIF. MEDIATION ACT § 6(a)(5-6), *supra* p. 210.
24. UNIF. MEDIATION ACT § 6(b)-6(b)(2), *supra* p. 210.

IV. CONCERN THAT MATTERS OF PUBLIC HEALTH, SAFETY AND WELFARE WILL BE SUPPRESSED

The very first submission of the Section of Administrative Law and Regulatory Practice addressed an issue it believed was of importance to the public health and welfare:

> It seems clear that there will be instances when it is simply more important to reveal what was learned in a mediation than to maintain confidentiality as an aid to reaching agreements in that or future cases. The public health and safety may be directly implicated, or some other serious matter of the public welfare. For example, the mediator may learn that a barrel of a highly toxic chemical lies just beneath the local playground or that some product poses a very real danger to potential users.[25] Or, it may be that one of the participants is so upset with what happened that s/he plans to seriously harm someone. In these instances the strong presumption of confidentiality — which is essential for mediation to work successfully — should be overridden and the facts revealed, but only to the extent necessary to address the concern. The question is: who decides and by what standards.
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> We appreciate this provision is controversial within the mediation community, and that there are those, perhaps many, who advocate that courts should not play a role in deciding whether and when to breach confidentiality. We respectfully disagree. As stated above, there are situations in which it is important to reveal what was said; many lives may turn on it; an individual's immediate health or welfare

25. After these comments were submitted, the grave safety issues surrounding the Ford Explorer and Firestone Wilderness tires became well known. That case can serve as a vital example: Suppose a mediator undertook a product liability mediation on the reasonable assumption that the issue involved a specific manufacturing defect, but during the process it became clear that many people were at severe risk of death.

> may be at stake. Thus, someone needs to make that determination. If it is the mediator — or one of the parties — that person has a horrible conflict of interest: whether to maintain the confidentiality that surrounds the process or decide whether what was just heard is of sufficient magnitude to merit public disclosure; both needs will be tugging at the participant. How are the other participants to regard each other and the mediator if any one of them can suddenly decide unilaterally and without notice to tell all? Surely concern and distrust will develop that will, in itself, inhibit the very free flow of information that confidentiality is designed to encourage. In addition, the decision will be standardless — what the individual believes should be revealed. Thus, we think it is better to remove that conflict of interest and have some outside person strike the difficult balance (except, of course, in cases of imminent harm in which there simply is not enough time to ask anyone else to decide in which case the mediator must make the hard choice).[26]

Courts are the institution we use for making judgments that require the balancing of competing societal needs, and they are the logical place to make the determination here. In fact, when confronted with such a choice, courts are likely to make these decisions anyhow. Finally, if a court strikes the balance and orders a party or a mediator to reveal what was said, that would likely clothe the actual disclosure in immunity, so that mediators would not be liable for complying with judicial orders whereas they may well incur liability for striking the wrong balance if they make the decision. Thus, the Section concurs in placing this responsibility in the courts.[27]

The Federal Administrative Dispute Resolution Act, which the Section had a major role in drafting, has such a provision.[28] And, throughout most of the drafting process, the draft UMA did likewise by including a health and safety provision in what became Section 7(b) that is

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26. Comments of the Section of Administrative Law and Regulatory Practice on the June, 1999, Draft of the Uniform Mediation Act (on file with author).

27. *Id.*

28. Confidentiality can be overridden when "a court determines that such testimony or disclosure is necessary to . . . prevent harm to the public health and safety of sufficient magnitude in the particular case t outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential." 5 U.S.C. §574(a)(4) and (b)5).

discussed above. At the last meeting of the drafting committee, however, a number of people thought such a provision would hurt the chances of mediating product liability cases. It was deleted ***but only because*** under the draft then on the table there would be no duty on the part of the mediator — or anyone else for that matter — not to tell the authorities, and they could go ahead and do so. Thus, the provision was, at the time, supererogatory. Moreover, to the extent the courts would define the nature of confidentiality in an evolving and responsive "common law," at least the AdLaw Section would trust them to recognize the need to protect the public and carve out an exception for the public health and safety under suitable safeguards that balance competing needs. Although we would have preferred that the "override" stay in to make it clear that a mediator who learned something nasty might happen could apply to a court for a determination as to whether confidentiality should be breached, we "could live with" — good mediation term there — the provision as it emerged from the drafting committee.

The incarnation of confidentiality in the final version of the UMA raises concern. It no longer provides for a common law evolution of confidentiality but instead authorizes the parties themselves to define its parameters beyond the testimonial privilege. To be sure, a mediator could say to the parties that s/he would not mediate a case without some ability to reveal information that has important societal consequences. But, it is likely that competitive pressures will mean that parties will insist that mediators agree up front not to reveal anything, anytime, for any reason, period. If that fear materializes and the courts sustain it, as indeed the UMA seems to contemplate since it permits of no explicit exceptions, then the concerns of the AdLaw Section are not met since important information that may save lives will in fact be suppressed.

We believe that somewhere the UMA should indicate there are limits on the ability to contract for complete confidentiality. For example the commentary to the Model Standards of Conduct for Mediators provides that "[t]he mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy."[29] Thus, the standards recognize in the confidentiality provision that there are limits to the confidentiality based on public policy. Although not directly relevant to the question in issue, this summer the American Bar Association revised the standards of conduct to authorize a lawyer to "reveal information relating to the representation of a

29. The Model Standards of Conduct for Mediators, *available at* http://www.ilr.cornell.edu/alliance/model_standards_of_conduct_for_m.htm (last visited Mar. 26, 2002).

client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm."[30] The reporter's Commentary explains the provision thusly:

> Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.[31]

This provision only authorizes the lawyer to disclose information in these situations, not that s/he has to. And, indeed, perhaps the lawyer could agree at the outset of representation not to do so. But, the modification indicates at minimum that the ABA recognizes there are important limits on confidentiality.

Given the current configuration of the UMA, we would prefer if the health and safety exception were included in the "override" provision of Section 6(b) to make it very clear that there are limits. But, barring something quite unexpected, that is not likely to happen. Given that, it would be helpful — indeed essential — to include a discussion in the Reporter's notes that there are public policy limits on contracts for confidentiality and that anyone learning of a risk to the public that meets the criteria described in the ABA's Rule 1.6 would nevertheless be able to apply to a court for a declaratory judgment, after a hearing in camera, that the contract does not restrict similar disclosures.

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30. The Model Standards of Conduct for Mediators, Rule 1.6(b)(1), *supra* note 29.

31. The Model Standards of Conduct for Mediators, Commentary to Rule 1.6, par. 6, *supra* note 29.

V. PROCESS

As has been discussed elsewhere in this book,[32] the process used to craft the UMA was novel and complex. Like a giraffe, it looked a bit ungainly, but its form largely fit its function. In the past, NCCUSL would draft and adopt a uniform act and then submit it to the ABA for its approval. The issue would come before the ABA's House of Delegates on a "closed rule" — the decision was either up or down, but no amendments were allowed. In this case, the ABA had at least as much, and probably considerably more, expertise in the subject matter than NCCUSL and was moving towards a similar goal. Thus, the usual procedure would not be particularly productive since the ABA would want to have its own views incorporated into the draft and not simply endorse the work of others. The drafting process, therefore, had to accommodate the needs of both organizations. Perhaps, given the rules and requirements of each, the structure was about as good as it could be. But, in the interests of learning from experience in case there is some wiggle room for modifications, it is worth stepping back briefly for at least one participant's observations.

As one who represented an ABA entity as official observer, I felt throughout the process that the ABA was clearly a stepchild. To be sure, some of the problems were self-inflicted since half of the ABA members rarely showed up. During the deliberations, the ABA Reporter was clearly not accorded equal status. Thus, if there is to be a future collaboration, this ABA'er would clearly prefer a parity of participation. Indeed, the dual committees that strove to make sure there were no differences - and very rarely if ever were there any - seem unnecessarily ungainly. A jointly appointed committee or a single committee with tailored decision processes that would protect the needs of each sponsoring organization would seem to be far preferable and efficient.

Further, the participation of the official observers — known throughout as "the observer corps" — was extremely helpful since it was largely they who had the practical insights into the issues, and I need to emphasize my appreciation for both my own participation and that of other mediators. My own view — colored, of course, by where I sat and my day-to-day experience with negotiated rulemaking and its convening processes — would be that future actions like this would benefit from having a single committee consisting of representatives of NCCUSL, the ABA, and whatever subject matter was under development, in this case, the

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32. Judge Michael Getty, *The Process of Drafting the Uniform Mediation Act*, *supra* pp. 157-64.

mediation community. That joint committee would have one reporter who would be responsible for developing the drafts and scholarly input. My view is that such a committee would engage in more productive and engaging discussions than the necessarily awkward differentiation between committee members — we — and observers — they.

VI. PARTICIPATION OF THE MEDIATOR COMMUNITY

As one final note which probably reflects a lawyerly concern, it seemed to me that in many of the discussions a number of representatives of the mediation community seemed focused, and adamantly so, on mediation as an end in itself and not as part of a broader societal activity. Thus, there tended to be an absolutism, and a view that only the mediator could make various decisions, that fails to recognize that while mediation in an important means to self-determination and an important means to making hard decisions, there are other, competing considerations that must at times be balanced. That view was also at times propounded with a stridency that was inimical to a group deliberation and consideration that can only hurt in the long run.

It is my fervent hope that as mediation matures into a broadly accepted practice, the mediation community will recognize and accept that other actors may at times need to make decisions that will affect the practice and that government agencies will allow mediation to function fully without trying to manipulate its processes.[33]

CONCLUSION

The development of the Uniform Mediation Act took a heroic effort of a lot of people. In the end, it is no one's ideal approach; no one will see it as perfect. Indeed, when drafting a proposed statute on confidentiality, I took a very different approach. But, it reflects the results of robust discussions and careful deliberations over a broad range of issues developed by widely divergent interests. It provides a very workable framework for mediation consistent across the incredible breadth of issues and across the complex of jurisdictions. Its broad adoption will further the

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33. *See, e.g.*, Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389 (1997). For example, as this essay is being written, a government agency is proposing that it can unilaterally, and in derogation of the Administrative Dispute Resolution Act, define the contours of confidentiality for the mediation of issues that arise under its administration.

establishment and use of mediation to the end of broader self determination and better decisions.

With all the concerns expressed here and a few more to boot, I am proud to have been a participant in its development and proudly proposed that the Section of Administrative Law and Regulatory Practice be a co-sponsor of the Uniform Mediation Act when it is taken up by the ABA's House of Delegates, which the section readily agreed to do.