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ONLY NIXON COULD GO TO CHINA: THIRD THOUGHTS ON THE UNIFORM MEDIATION ACT

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I. INTRODUCTION

Professor Scott Hughes has performed a great service in his Article To the Spoiled Go the Privileges. Every proposed uniform law needs a solid, detailed history of its evolution. While the Reporters performed exceptionally well with regard to the commentary, Professor Hughes was not subject to the same constraints. Since a uniform act is the product of innumerable hours of joint work by commissioners, committees, members of professional associations, practitioners, and academics, the act and its accompanying report necessarily lose a certain edge. Indeed, these varied, unofficial constituencies carefully scour the Reporters' work to create a document as smooth and as free as possible...
from potential problems. A uniform act and its commentary become more coherent as the drafting process extends, and until the product can be successfully vetted to the full National Conference of Commissioners on Uniform State Laws (NCCUSL), the American Bar Association House of Delegates, and state legislative bodies nationwide. Professor Hughes stepped into this moderating process with an independent eye. He took measure of the proposed Uniform Mediation Act (UMA) free from the necessary restrictions imposed upon the official Reporters who must be held accountable to an assorted professional public. Hughes's record presents a meticulous chronological exposition of each draft from his vantage point on the sidelines as well as on the playing field. Hughes discusses the UMA's impact on who can refuse to testify regarding communications made during a mediation and under what circumstances. Specifically, he analyzes the following question: What can and should be done to rectify a mediated settlement agreement for which one side essentially has "buyer's remorse"?

A party may seek to set aside a mediated agreement because some clear act of fraud, duress, or misrepresentation occurred in the mediation. This behavior may not have been either identified or identifiable at the time of the mediation. Nevertheless, its presence might implicate the doctrine of unconscionability. Was the conduct or communication of such an unfair nature that the agreement should be vitiated? The difficult part arises when the mediator is the only non-interested person that could testify concerning the allegedly improper conduct.

The reader does not know whether Professor Hughes's hypothetical scenarios are fictionalized versions of actual cases with names and certain facts altered to shield identities. Regardless, for many mediators these anecdotes echo their harrying nightmares. This pinpoints Hughes's principal criticism of the UMA as summarized in the title of his article. As he sees it, the UMA exists largely to protect mediators from their own worst fears rather than to protect the public from abuse within the mediation process. One could fairly conceptualize his thesis as arguing that the UMA has evolved through its many drafts into a law designed to give maximum protection or, even insulation to the mediator, with little or no parallel protection for the parties. Hughes presents the UMA as codifying customs and practices that so coddle and

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4. See infra note 31 and accompanying text for explanation of this term.
comfort the mediator, that they could be called "spoiled." 5

Hughes would prefer to remove that insulation. In his Article, he argues, "[w]hen challenges arise to an agreement reached in mediation, the mediator should be treated like all other mediation participants—he or she should be required to testify." 6 He posits that the value placed on protecting the real and perceived integrity of the mediation process should be no more important than protecting the parties' right to self-determination. If a party decides that the mediator should testify concerning a mediation communication or conduct, then the mediator should testify out of respect for the parties' right to waive whatever privilege may have attached. 7

In many ways this position represents significant growth in Professor Hughes's own evolving dialectic on mediation. In 1998, he espoused the provocative position that confidentiality has no general place in mediation. 8 This is a controversial but readily understood argument in the context of mediating with governmental entities. Doctrines of openness in government activities all militate in favor of disclosure and against private deals because public policy, public resources, and public impacts are at issue. Confidentiality and accountability do not make easy companions in the public arena. 9

Professor Hughes's position is noteworthy because he proposes that, even in private sector transactions, there is no sound basis for assuring confidentiality. He offers a radical challenge to the fundamental philosophy and practice of confidentiality by questioning why one

5. Professor Hughes implicates but does not assert the economic analysis of Larry E. Ribstein & Bruce H. Kobayashi, An Economic Analysis of Uniform State Laws, 25 J. LEGAL STUD. 131 (1996). Ribstein and Kobayashi test the hypothesis that "the NCCUSL helps interest groups and other participants in the process secure adoption of inefficient laws by serving such functions as lobbying and coordinating the efforts of interest groups." Id. at 132. After performing an exhaustive series of regression analyses, the authors conclude that "evidence of the NCCUSL's effect on which laws are passed, coupled with our hypothesis that the NCCUSL will tend to propose laws that favor particular groups, suggests that the problems of differing state laws with which the NCCUSL is intended to deal might be better solved in other ways, particularly by enforcing contractual choice of law." Id. at 133.

6. Hughes Article, supra note 2, at 77.

7. See id. at 37-38.


9. This particular issue has been the focus of extraordinary scrutiny over the past two years. This concern was instigated by the controversial action of the U.S. Department of Agriculture (USDA) and the Department of Justice to seize mediation records regarding a foreclosure dispute from the USDA certified agriculture mediation program at Texas A&M University. In re Grand Jury Proceedings, 148 F.3d 487 (5th Cir. 1998).
should assume the need for confidentiality and whether confidentiality, when provided, has made a marginal difference in the outcome of mediations. Hughes states that "there is almost no empirical support for mediation privileges."10

Between 1998 and today, Professor Hughes perhaps recognized that although this rationale is superficially attractive, its foundation is insubstantial. The argument could quickly slide into the fallacy logicians have dubbed "the appeal to ignorance."11 In a basic sense, Hughes's argument would be: "We have no data to show the privilege is needed; therefore, we can safely eliminate it." The fallacy of this proof is that one could just as readily argue that because there are no contrary data, there is just as much reason to preserve the practice of assuring confidentiality.

Arguably, the Alternative Dispute Resolution (ADR) development is still in its infancy. A sufficient body of empirical evidence as a result of longitudinal studies has yet to be compiled that could resolve a rational argument one way or the other. Indeed, one could ask whether empirical data of any sort could truly answer this confidentiality question since the relevant factors may not be susceptible to quantification. Given these currently insuperable barriers, there appears to be even more reason in the interim to preserve confidentiality protections due to the expectations of privacy and trust that have accrued over time.12

These institutionalized expectations of confidentiality are far from ephemeral. They are embodied and embedded in the laws protecting statements made in settlement negotiations, deriving from statutes,

11. IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 116 (9th ed. 1994) (describing this fundamental and pervasive principle of logic). The argument from ignorance or argument ad ignorantiam is defined as "the mistake that is committed when it is argued that a proposition is true simply on the basis that it has not been proved false, or that it is false because it has not been proved true." Id. As the authors point out:

Those who strongly oppose some great change are often tempted to argue against the change on the ground that it has not yet been proved workable or safe. Such proof is often impossible to provide in advance, and the appeal of the objection is commonly to ignorance mixed with fear. Such an appeal often takes the form of rhetorical questions that suggest, but do not flatly assert, that the proposed changes are full of unknown peril. Policy changes may be supported, as well as opposed, by an appeal to ignorance.

Id. at 117.
procedural rules, evidentiary rules, and case law.\textsuperscript{13} Federal Rule of Evidence 408 and its state analogs, through interpretation by courts over several decades, have built a wall of protection around settlement discussions for the purpose of encouraging parties to move away from their aggressively stated legal positions and find a common ground upon which to resolve the dispute. Ostensibly, by assuring that statements made in settlement discussions will not be used in court, parties may take the risk of, for example, apologizing without being terribly apprehensive that the apology will be seen as a legal admission of guilt.\textsuperscript{14} Granted, this wall of protection has recently suffered breaches and become porous.\textsuperscript{15} Nevertheless, the presumption remains that statements made during settlement negotiations will not be used against a party.

Recognizing that the evidentiary rules and other applicable statutes may create an already sufficiently porous barrier, most prudent observers have elected not to suggest any further reductions. One can readily appreciate why after looking at the system. Alternative dispute resolution, as the name implies, exists to offer an alternative to the standard operating procedures of litigation. In litigation, few, if any,
protections exist to create a safe venue for parties to go beyond the publicly stated legal arguments and alleged facts. Negotiated settlement conferences and mediation exist to provide reasonable protections for such risk-taking. Further, it is abundantly clear that parties do take risks by lowering their shields to engage in informal, conciliatory discussions outside of court.  

These concerns meld to form the core considerations that attorneys (both litigators and transactional lawyers), judges, and legislators have wrestled with to determine whether to further encourage ADR. Viewed from a more idealistic perspective, it is desirable to offer parties the opportunity to avoid becoming unnecessarily enmeshed in the quagmire of litigation. Litigation is stressful and expensive, and parties lose the power of self-determination. A pragmatic perspective would view the reduction of court dockets as improving efficiency and lowering costs. When litigants resolve their cases without trial, courts' caseloads diminish, and judges have more time to hear cases that truly require their special intervention. As of today, the expectation of confidentiality constitutes a single feature that distinguishes negotiated settlement and its corollary, mediation, from litigation. If confidentiality is lost or significantly compromised, a serious question would arise as to whether these ADR processes can continue to offer a genuine alternative to the court room.

In fact, mediation without the presumption of confidentiality might produce precisely the type of "second-class justice" that is so vigorously argued against by critics. It would create a setting where parties

16. See, e.g., Goldberg, supra note 12, at 10–11.
17. Risks are taken individually, and by the entire system of justice. See Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984) (presenting the landmark article). Fiss explains that private ordering of the law can lead to injustice against parties and, ultimately, to a warping of the public law, fostering unpredictability and inequities in results. Id. Indeed, the very concept of undertaking conciliatory discussions challenges the prevailing paradigm of adversarial lawyering. Id. See also Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answer from the Adversary Conception of Lawyers' Responsibilities, 38 S. TEX. L. REV. 407 (1997) (presenting additionally influential work in the area).
18. See, e.g., Goldberg, supra note 12, at 172–75.
19. Id. at 8.
undertook the risks of litigation without the protections of the judge's presence and applicable court rules, as well as perhaps without the protections of the substantive law and legal counsel.

II. FROM RESISTANCE TO RAPPROCHEMENT

Professor Hughes seeks to assure party self-determination by allowing mediators and parties to testify about mediation communications. There is another approach to reach the same goal of supporting party self-determination. With this approach, there is a different place of emphasis. Rather than concentrating on how to remedy ill-managed mediations after the fact, it is more important to focus on the mediation process itself. Contemporaneous mechanisms should be installed that assure that the process, as it takes place, protects party self-determination.

It appears to be somewhat of an oxymoron to speak of uniformity and mediation in the same breath.22 Is it not the purpose of mediation to create a true alternative to the court room, by offering all the flexibility and organic variations that must exist in order to meet the different needs of real people? A uniform act designed to "simplify," "clarify," or "make reasonably consistent" the various rules governing mediation throughout the United States, nearly by definition, threatens to chill the innovations in mediation that give the process value.23

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22. Professors Ribstein and Kobayashi argue that uniform laws reduce innovation and experimentation: "A decentralized decision-making process normally can produce more possible solutions to a problem than could a single rulemaker. As a result, innovation and experimentation through a decentralized lawmaking process may produce at least some laws that are better than what a single uniform lawmaker could write." See Ribstein & Kobayashi, supra note 6, at 140-41. Further, they argue that "[e]ven if a decentralized process is unlikely to produce 'better' rules through experimentation and innovation, it may produce rules that are well suited to particular localities or uses." Id. at 141.

23. This criticism is not unique to the UMA. This concern inheres in every uniform act undertaken by NCCUSL. Professors Ribstein and Kobayashi's economic analysis concludes that "in many cases, reliance on . . . centralized lawmaking bodies such as the NCCUSL to produce uniformity may be both unnecessary and perverse." Id. at 131. Professor Fred Miller, Executive Director of NCCUSL, explained the two part process set forth in NCCUSL's 1988 Statement of Policy Relating to Consideration of Acts:

One is there must be an obvious reason for an act on the subject, and, coupled with
This process of mediation has flourished in America during the last couple of decades on the basis of three promises made explicitly and implicitly. First, mediation promises a flexible, user-friendly process capable of responding quickly to the needs of the participants. Second, it promises participants an empowering venue in which they can directly craft a resolution that meets their interests, however they might define those interests. Finally, mediation promises differing levels of privacy that fashion a safe harbor, which allows participants to take risks either not permitted or not prudent in a trial setting.

In those areas where voluntary mediation is growing rapidly, people appear willing to make the following tradeoff: they value privacy and flexibility enough to merit relinquishing the protections of the courtroom. Would the cost-benefit calculus continue to favor mediation if the process became increasingly restricted and resembled a pale imitation of trial? In application, it may become non-binding arbitration in disguise. A further consideration is what interest would remain, if any, in utilizing a mediation process that could not even offer assurances that, there should be a reasonable probability the act can be enacted in a substantial number of jurisdictions, or that it will promote uniformity indirectly, such as by serving as a model for States that are interested in legislation in the area. Second, there also must be a prospect of significant benefit. In other words, the problem should have some significance. It is also important that the proposed act make a contribution that is substantial in relation to other competing projects. And finally, the subject should not be one that is entirely novel, or one on which some experience is lacking, or where it is a local problem; these are not good conditions for uniformity.

Fred Miller, The View from Experience, 52 HASTINGS L.J. 621, 624 (2001). Professor Miller's presentation of NCCUSL's criteria would suggest that mere inconsistency in law from state to state is not in and of itself enough to mandate a uniform act. To merit NCCUSL action, "significant disadvantages" must arise "from diversity of state law." Id. at 622. Importantly, NCCUSL also has authority to propose model acts as templates for states which lack legislative resources or desire a standard reflecting a consensus of widespread expertise. See id. at 621–22.

24. See Goldberg, supra note 12, at 123.


26. See MAY 2001 DRAFT, supra note 2, § 2 Reporter's Notes. Some of the risks of mediating without the protection of confidentiality, however, go beyond mere legal strategy and raise issues of protection from physical and psychological threats and abuse. See e.g., Bryan, Killing Us Softly, supra note 25 (detailing the dynamics of coercion and power imbalance in family mediation, focusing on disadvantages to the woman); Bryan, Reclaiming Professionalism, supra note 25 (explaining what actions the attorney is ethically bound to take when confronting severe power imbalances in mediation; namely, the attorney's duty may be to refuse mediation and to negotiate on her client's behalf).
of privacy? It is arguable that, in time, only mandatory referrals to mediation or those mediations that occur due to little-understood ADR clauses in adhesion contracts would survive in large numbers. Given sufficient publicity concerning the coercive, disempowering nature of such mediations, even these required mediations would eventually fall into disfavor and disuse.

The apprehensions expressed here have not abated. This lends recognition to the fact that despite the validity of these concerns, opposition to the UMA smacks of unintended hypocrisy. Like many lawyers who prefer to consider themselves free from jingoistic tendencies, this author supports the principle of emerging global villages and the increasing harmonization of laws. In other words, the broadening of legal structures transnationally, regionally, or nationally involves important personal interest matters. This selective application of principles suggests an intellectual version of the classic NIMBY ("not in my backyard") that was made infamous in zoning disputes. A proposed uniform act that threatens to undercut a progressive, mature mediation statute and supreme court rules in my "own back yard" should be resisted.

Once distilled, the issue is whether to honor the overarching principle that laws should move at least towards harmonization or compatibility, if not towards one coherent regional structure of laws. In the alternative, the issue is whether that type of macro theory should yield to the micro realities of states like Oklahoma and Florida, whose sophisticated court mediation programs far surpass anything encompassed by the UMA.27 Language in the May 4, 2001 draft of the

27. See OKLA. STAT. ANN. tit. 12, §§ 1801–1813 (West 1993) (citing the Oklahoma Dispute Resolution Act (the "Act") and implemented court rules in Appendices A–C). This 1983 statute created the court-annexed mediation program for the state of Oklahoma. Id. § 1803. The Act established funding and mandated that mediators include a broad cross-section of residents. Id. Additionally, the Act vested authority in the Administrator of the Administrative Office of the Courts to develop and implement necessary rules, as well as select, supervise, train, certify, and monitor the mediators. Id. The Act provides for voluntary participation in a purely facilitative model of mediation. Id. §§ 1803–1805. Mediator and party information are confidential and privileged. Id. § 1805. This protection extends to all "files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator." Id. § 1805(A), app. C. No mediator nor materials subject to the Oklahoma Dispute Resolution Act may be subpoenaed. Id. § 1805(C). The privilege can, however, be waived if a civil action were brought against the mediator. Id. § 1805(E). Additionally, mediators have qualified immunity when operating under the statute. Id. § 1805, app. A. Appendix A contains the Code of Professional Conduct for Mediators which was adopted by court rule in 1986. Id. Appendix B sets forth the Agreement to Mediate which requires the parties to consent to good faith participation. Id. app. B. It also puts in writing the caveat presented at the outset of any mediation under the statute: "We
UMA, coupled with assurances by the NCCUSL drafting committee through its Chair, Honorable Michael Getty, contributed greatly to finding a workable balance.

Uniform laws have often faced informal, anecdotal claims that they simplify practices in order to create an artificial level of conduct around which innumerable constituencies can coalesce. Without pronouncing the UMA as the "lowest common denominator," in a December 2000 joint meeting, the Commissioners and the governing Council of the American Bar Association Section of Dispute Resolution endorsed the characterization of the UMA as establishing a base or a starting block for mediation laws in any given state. States would be encouraged to do more, but not less, if it suited their particularized needs. Moreover, as Judge Getty explained, the UMA was not intended to displace systems for financing and administering court-connected mediation programs. Furthermore, the UMA is not, in itself, a comprehensive statutory scheme. It does not, for example, address funding, mediator training, or certification.

Despite the limited focus of the UMA or, more accurately, the "uniform confidentiality in mediation act," some elements of the surviving draft address deeper, quite critical concerns. Some UMA provisions could affect party empowerment in a pro-active, prescriptive manner, rather than attempting to only cure retroactive problems. Properly applied and interpreted, these provisions could perhaps bring a committed resister to the point of attempting a rapprochement with the UMA.

understand that any information received by a mediator or a person employed to assist a mediator is privileged and confidential. However, a mediator must disclose information brought to his/her attention that an elderly person, or a person with disabilities, or a child under the age of eighteen (18) has been physically abused or neglected. Id. Appendix C elaborates upon the Confidentiality of Proceedings, including Rule 10 governing the conduct of outside parties, and providing for attorney or non-attorney assistance to a party. Id. app. C. See also FLA. STAT. ANN. §§ 44.1011, 44.102-.201 (West 1998) (creating Florida's court-connected mediation program). One of Florida's most valuable contributions to the field is its system of published ethics opinions concerning mediator conduct. See, e.g., In re Amendments to the Florida Rules for Certified and Court-Appointed Mediators, 762 So. 2d 441 (Fla. 2000). In re Amendments discusses not only the court-annexed program's ethics rules 10.300-.380 concerning the mediator's responsibilities to the party, but also analyzes those rules with respect to particular fact situations requiring the court's advice. Id. This allows the ethical structure of the program to grow in a considered manner, open to the public's observation and education.

28. Professor Fred Miller, NCCUSL Executive Director, has described most of NCCUSL's proposed statutes as "not mandatory." See Miller, supra note 23, at 628. He characterized them as essentially "default rules." Id.
III. METHODOLOGY AND ITS IMPACT ON MEANING

One criticism of the UMA is its attempt to make law through hypothetical. In other words, the UMA intensely concentrates on protecting the confidentiality of mediation communications by eliminating conflicts of law issues between differing state jurisdictions. This is, of course, the primary rationale for creating any type of uniform act. Despite that, how many cases can be cited that clearly demonstrate a tangible, present, and pervasive problem with cross-border confidentiality protections in mediations governed by state law? Not the large number of cases that one would expect to find in order to substantiate the need for state uniformity, even at the risk of constricting state innovation. This, of course, concerns cases that offer tangible, reviewable facts and law rather than just apprehensions for the future. 29

A much larger number of cases can be identified within the same jurisdiction in which the mediator's confidentiality status was challenged in a legal action. 30 This author has a strong bias in favor of self-determination by state and local representatives of the people, through their courts and legislatures, just as it is important to preserve individual self-determination. Operating from this articulated bias, it is difficult to see, even with this larger body of cases, a crisis that requires an intervening uniform act. Throughout both the drafting process of the UMA and within Professor Hughes's Article, various hypothetical scenarios were woven and re-woven, and spun on top of each other into a most intriguing design. No one, however, has yet articulated a clear, measurable problem of sufficient magnitude to compel national legislation to override states' own evolving, more subtle standards.

29. I speak here of cases where the system of judicial review and legislative amendment already in place have not adequately resolved the policy issues raised. I speak here of cases where the state processes failed, repeatedly, resulting in bad law and bad policy which impact interstate commerce.

30. Two cases figure prominently and notoriously among this small assortment: Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999), and Foxgate Homeowners' Ass'n v. Bramalea, 25 P.3d 1117 (Cal. 2001). In Olam, the magistrate judge ordered the breach of confidentiality to compel the mediator to testify in a consumer dispute with a financial institution to help resolve a claim that undue influence had been exerted. 68 F. Supp. 2d at 1110. In Foxgate, a retired judge sitting as a mediator filed a report with the court when the court was considering sanctions on one of the parties. 25 P.3d at 1120. In both cases, California law applied. In Foxgate, however, the California Supreme Court held that there were no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports. Id. at 1128. In both Olam and Foxgate, observers may argue vigorously with the judge's application of the law, but the law itself was not confused.
Generally, courts have affirmed the confidentiality of the mediation process despite the "buyer's remorse," a term coined by the author, in which a party seeks to repudiate a purported settlement agreement. Interestingly, from time to time a court has required parties to exercise a certain amount of due diligence and healthy skepticism despite the presence of UMA section 9, which opens the door to counsel. Thus, a party who claims that they were defrauded in a mediation may also be required to show that they acted as a reasonably prudent person under the circumstances. For example, did they request the information necessary to make an informed decision? Further, did they act in a timely manner to verify the information given or to rectify wrong actions based upon the allegedly fraudulent information?

A smaller number of courts have permitted a limited inquiry into the behavior of the mediation participants that requires carefully constructed disclosure by the mediator. Disclosure may be required in

31. Lyons v. Booker, 982 P.2d 1142, 1143 (Utah Ct. App. 1999) (prohibiting disclosure in the settlement agreement enforcement action of testimony or documents related to the court-ordered mediation); Kitchen v. Kitchen, 585 N.W.2d 47, 48 (Mich. Ct. App. 1998) (holding that mediation documents are not admissible even if the information contained in them has already been disclosed in other court documents); Vernon v. Acton, 732 N.E.2d 805, 810 (Ind. 2000) (explaining that oral mediation settlement agreements are not favored because enforceability may require testimony of the mediator, which would breach confidentiality); Anderson v. Anderson, 494 So. 2d 237 (Fla. Dist. Ct. App. 1986) (stating that conduct or statements made during a mediation session are inadmissible in any judicial proceeding); Cohen v. Cohen, 609 So. 2d 785, 786 (Fla. Dist. Ct. App. 1992) (stating that confidentiality of mediation discussions "should remain inviolate until a written agreement is executed by the parties," at which time only the written agreement can be admitted into evidence, not statements resulting in the agreement). Since the initial draft of this paper, I returned to the on-line legal databases to update my previous research. Searching LEXIS, I found nearly 40 cases concerning confidentiality of mediation communications that could have been covered by the UMA, if adopted. In my brief summary here, I shall omit the California cases, which Professor Hughes covered in such detail. In LEXIS, I chose: "States" then "Courts" with a "Date Restriction" of "after 1980." My search terms were: "mediator or mediation w/50 confidentiality or privilege but not labor." The search was conducted on August 15, 2001.

32. In Glover v. Torrence, the mother came to the child support mediation with documentation to prove her income, while the father brought no such verification. 723 N.E.2d 924 (Ind. Ct. App. 2000). The mother did not demand proof, and "took Father at his word and then waited nearly four years after the judgment was entered to challenge" the agreed upon support. Id. at 933. The court concluded, however, that the father's "false verification of his income" was a breach of his duty as a father and, as a result, the court held that the trial court "did not abuse its equitable discretion by affording relief from the 1994 judgment outside the one year limit." Id. at 941. Of course, in hindsight, an observer might inquire whether the mediator had done all that was appropriate to assure the mother had all the information she felt she needed to make an informed decision.

33. In re Paul Daley, 29 S.W.3d 915 (Tex. Ct. App. 2000) (holding that where the trial court had ordered parties to attend mediation, the mediator could be examined on the
order to verify whether there had, in fact, been coercion so extreme as to void the settlement agreement. On rare occasions, a court has upheld the general principle that mediators should not be compelled to testify about confidential communications while at the same time, they have distinguished the role of the mediator to carve out an exception to this general rule.

This can be contrasted with other recent NCCUSL actions such as child and family support enforcement, child custody, trust investing, and computerized information. The Uniform Interstate Family Support Act built upon the two following previous uniform laws: the Uniform Reciprocal Enforcement of Support Act and the Revised Uniform Reciprocal Enforcement of Support Act. The Uniform Interstate Family Support Act seeks to eliminate multiple, conflicting orders that make it difficult to calculate arrearages and enforce child support orders. This was clearly not a solution in search of a problem. Decades of work by NCCUSL and the U.S. Congress substantiated the need for comprehensive legislation. Indeed, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) linked states' adoption of the Uniform Interstate Family Support Act to states' eligibility to receive federal funding of child support enforcement.

34. Randle v. Mid Gulf, Inc., No. 14-95-01292-CV, 1996 WL 447954 (Tex. App. August 8, 1996) (involving a party alleging the mediator would not let him leave the session until an agreement was reached even though he was experiencing chest pains).

35. Anderson v. Anderson, 514 S.E.2d 369 (Va. Ct. App. 1999) (explaining the psychologist-mediator was acting more in the role of a therapist than a mediator). In contrast, the court held in Marchal v. Craig, that despite the mediator's undisputed simultaneous role as therapist in a child custody dispute, he could not provide evidence about the case based upon information learned in mediation. 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997). The court interpreted the state ADR statute as requiring (1) "that which is disclosed during the private caucus sessions will not be revealed to the opponent during the mediation," and (2) "that which transpires during the mediation is not used in any subsequent trial or other proceeding." Id.


There was an unassailable rationale for uniformity. Courts were overwhelmed with the volume of conflicts of law matters affecting enforcement of child support orders across state lines.\textsuperscript{40} Data from state and federal governments attested to the massive impact on interstate commerce and travel.\textsuperscript{41} It is also relevant to consider the centuries of statutory and common law that defined rights and obligations concerning child custody. It was not until 1968, however, that NCCUSL approved the Uniform Child Custody Jurisdiction Act.\textsuperscript{42}

NCCUSL's Uniform Prudent Investor Act sought to do more than merely codify common law, as the Uniform Commercial Code had in earlier generations. Like other uniform law projects, however, the Uniform Prudent Investor Act was built upon the American Law Institute's ("ALI") Restatement of Trusts ("Restatement"), a substantial body of work developed over many years.\textsuperscript{43} The Restatement itself articulated centuries of guidance for prudent investment of trust funds.\textsuperscript{44} Beginning in 1987, the ALI revisited the

\begin{itemize}
\item J.L. \\ & PUB. POL'Y 161 (1998).
\item See Elrod, supra note 39. Professor Elrod summarizes some of the financial information relied upon in developing the reform proposals that resulted in the PRWORA and its linkage to the Uniform Interstate Family Support Act. \textit{Id.}
\item In 1991, 46% of the 11.5 million custodial parents potentially eligible for child support did not have an award. Another 11% had an award, but actually received nothing. Six and a half million families received no payment at all. Only 24% of those potentially eligible both had an award and received the full amount. \textit{Id.} at 697 n.14. According to the U.S. General Accounting Office, "although interstate cases comprised 25.6% of total, only $2.50 in $10 was collected from interstate cases, and 34% of mothers received nothing." \textit{Id.} at 698 n.25 (citing U.S. GENERAL ACCOUNTING OFFICE, INTERSTATE CHILD SUPPORT: MOTHERS REPORT RECEIVING LESS SUPPORT FROM OUT-OF-STATE FATHERS 3, 13 (HRD-92-39FS 1992)).
\item See id.
\end{itemize}
Restatement to consider ways to bring this influential work in line with more contemporary economic theory. In many ways, the Uniform Prudent Investor Act represents a culmination of the effort to incorporate the dominant theory of efficient markets, as enunciated in Modern Portfolio Theory. The profound scholarly research underlying this theory has resulted in four Nobel prizes in economics.

NCCUSL has not limited its contributions solely to reconciling conflicts of long-established law that have grown over many decades. The Commissioners have elected to act, however, when an abundance of real world experience has demonstrated a tangible, verifiable need that is sufficiently widespread to merit intervention. An intriguing dilemma faced NCCUSL when it considered how to address the perceived need to create a uniform platform of state laws concerning electronic commerce in order to promote such a rapidly evolving activity. The drafting committee for the Uniform Electronic Transactions Act ultimately determined that the marketplace for electronic commerce was changing so rapidly and in such varied, unpredictable ways that it would be unwise to draft detailed legal rules at that time.

The best approach to consider the UMA was to follow the typical NCCUSL methodology. The first open question to explore was whether the cases from various jurisdictions around the nation dictated a need for national legislation to create consistent laws about mediation at the state level. Since the UMA does not cover labor-management cases, they were omitted from consideration. In the following section of this paper, there is a detailed examination of the key cases that emerged from the search. For now, the following highlights what types of cases were missing from the search results: a large body of non labor-

45. Id.
46. Id. at 642.
47. Id.
49. MAY 2001 DRAFT, supra note 2, § 4(b)(1)-(2); [UMA § 3(b)(1)-(2)]. Labor law is specifically excluded:

[T]he Act exempts certain classes of mediated disputes out of respect for the unique public policies that override the need for uniformity under the Act in those contexts. Collective bargaining disputes are excluded because of the longstanding, solidified, and substantially uniform mediation systems that already are in place in the collective bargaining context.

Id. § 4 Reporter's Notes § 2.
management cases challenging the mediation process itself, or the mediator's status, or seeking disclosures by the mediator in subsequent litigation; almost any non labor-management cases involving cross-border, multi-jurisdictional issues of mediation procedure, evidence, confidentiality or privileges; and almost any non labor-management cases involving in-state conflicts or confusion concerning issues of mediation procedure, evidence, confidentiality or privileges.

Following the methodology that NCCUSL has successfully employed for many decades, the lesson learned may be that the call for a uniform mediation act was premature. In the alternative, the appropriate step would have been an act of broad, general principles rather than detailed provisions, as the NCCUSL did with the Uniform Electronic Transactions Act. These proposals, however, may have been too restrained and modest to satisfy the constituencies involved in the drafting process. Additionally, the NCCUSL ought to have drafted a model act to assist state legislatures in preparing their own, customized, and comprehensive mediation statute. This goal appears to be the most oft-repeated rationale for pursuing the UMA. The chosen vehicle should match the destination.

Notwithstanding the above, a great deal of energy and effort has gone into creating the UMA as it stands today. Further, the principle of globalization might indeed also carry with it a certain appropriate domestic inertia. If one assumes that a uniform act of some sort will be adopted, then a suggestion would be to take a closer look at the cases. There should also be a closer consideration of some of the UMA provisions that are not a focus of Professor Hughes's article, but rather, that could actually address some of the issues that do emerge from the pertinent body of cases.

IV. CODIFYING PARTY EMPOWERMENT

Three short provisions of the UMA contain language that may appear at first glance to be minor changes. Depending upon where one lives, this language might represent no change at all in current procedures employed by the mediation program(s) of that jurisdiction. Nevertheless, the potential impact of these changes could far exceed their length because they address some of the critical issues that recur most frequently in disputes about dispute resolution.

An analysis of approximately forty court and bar opinions illustrated that the most frequently occurring matters were the following: conflicts of interest, confidentiality, dual roles for attorney-mediator, the binding
nature of mediated agreements, and good faith bargaining. The UMA directly tackles the issues of conflicts of interest and dual roles for the attorney-mediator. The binding nature of mediated agreements and good faith bargaining are handled indirectly, as explained below in section IV.C. These matters shall be examined in terms of the generally accepted principles that shape the appropriate behaviors of mediators and the expectations of participants. The generally accepted principles are the ethical standards for attorneys and for attorney-mediators that have increasingly come to be honored as a workable measure to judge the fairness of a mediation.

A. Section 8(d) Mandatory Disclosure of Conflicts of Interest to Assure Neutrality

Section 8 of the UMA, "Disclosure by Mediator," codifies what should be standard practice for ethical mediators throughout the United States. Unfortunately, it is not necessarily consistently followed as a matter of style. Depending upon language contained in legislation or court rules, a mediator's failure to make mandatory disclosures might pass with no penalty. Unenforceable mandates leave a mediation participant with little or no meaningful, swift recourse. In systems where there is no mandatory, affirmative obligation upon the mediator

50. This was a carefully conducted process. Rather than search the case files for heuristic evidence to support a particular theory, the process was inverted. This began with an extremely broad search request, using the state library of LEXIS on November 14, 2000 to pull all cases within the last 10 years that concerned ethics or misconduct in mediation, but not labor-management mediation. In the Lexis library, I chose "States," "File: Courts," and my date restriction was "after 1990." My search terms were: "mediator or mediation w/50 ethics or misconduct but not labor or union." I chose "ethics" or "misconduct" as reasonably consistent and comprehensive ways to describe the type of behavior that disadvantages a party to mediation. This resulted in nearly 60 court decisions. To identify a body of cases with a common thread of some sort, I selected those where the case: (1) involved an attorney-mediator; and (2) involved one or more family members in a divorce, child custody matter, or a family business dispute.

51. MAY 2001 DRAFT, supra note 2, § 8; [UMA §§ 7, 9].


53. MAY 2001 DRAFT, supra note 2, § 8; [UMA §§ 7, 9].
to ideally know, in advance, whether the case presents personal, ideological, or financial conflicts of interest, an aggrieved party would be required to mount an expensive legal battle to prove the duty to disclose its violation and the damages caused thereby.

Section 8(d)(1) of the UMA would require a mediator, prior to accepting a case, to make a reasonable inquiry to determine "whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation." This establishes an objective standard. Further, it does not permit the mediator to hide behind a shield of ignorance. Thus, if a mediator faces liability for violating section 8(d), the standard will not only be whether the mediator actually knew of the present, past, or foreseeable future conflict, but whether the mediator ought to have known it. The mediator must then, as mandated in the paragraph (2) that follows: "[D]isclose as soon as is practical before accepting a mediation any such fact known." This is explained in the Reporter's Notes as follows:

The goal of such a requirement is to protect the parties against a mediator who, unbeknownst to the parties, is not impartial. No sanctions are provided in the Act, but presumably the Act sets a standard that could be a basis of liability if a party suffers damage as a result of the mediator's failure to disclose conflicts.

1. Conflict of Interest Disqualifying the Attorney or Law Firm or Both

The broad prophylactic measures required under UMA section 8(d) could have a significant impact on those attorneys who occasionally serve as mediators. Section 8(d) fully comports with the American Bar Association (ABA) Model Rules of Professional Conduct (MRPC) and with the ABA Model Standards for Attorney-Mediators. UMA section 8(d) may even be read as extending to non-attorney mediators some of the obligations that attorneys and attorney-mediators have labored under for some time. Since there is no coherent body of case law to use as a yardstick for mediator conduct, it is impossible to predict precisely how section 8(d) of the UMA could restrict a mediator's practice.

54. Id. § 8(d)(1); [UMA § 9(a)(1)].
55. Id. § 8(d)(2); [UMA § 9(a)(2)].
56. Id. § 8 Reporter's Notes § 4.
There is, however, this body of case law for attorneys and some suggestions may be present in the MRPC. The MRPC does not expressly apply to mediators, but the language and concerns about preserving privacy and fostering the trust of the parties are closely analogous.

**a. Concurrent Conflicts of Interest, the General Rule: MRPC 1.7**

Every attorney owes her client a duty of undivided loyalty and complete assurance that all communications requiring protection will remain confidential. Rule 1.7 of the MRPC, pertaining to conflicts of interest, prohibits an attorney from representing a client if it would be "directly adverse" to another client or if the representation would "materially limit[]" the lawyer's responsibilities to another client's interests or to the lawyer's own interests. It is possible to waive this conflict of interest; however, waivers, are not automatic. The lawyer must "reasonably believe," as measured by an objective standard, that the representation will not harm either client. Also, the lawyer must fully disclose to both clients all of the foreseeable risks in this concurrent representation. Finally, both clients, preferably in writing, must agree to waive the conflict.

The next step of the analysis becomes whether UMA section 8(d), interpreted through analogies to the MRPC, would impose a heavy burden upon mediators. In fact, this would be a heavy burden for mediators since it would require them to undertake affirmative steps to ascertain whether the case involves factors that could handicap their impartiality. If section 8(d) is adopted, mediators could not attempt to seek shelter behind passive ignorance. Mediators could not simply say, post facto, that they did not know that their spouse held shares in the company that would benefit from the mediated settlement. Mediators also could not claim that they did not realize that one of the parties to the mediation was the defendant in a suit brought by another attorney in their law firm. If this information were not plain on the face of the initial referral, the mediator would have an obligation under UMA

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57. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001).
58. Id. R. 1.6.
59. Id. R. 1.7.
60. Id. R. 1.7 cmt. 5.
61. Id. R. 1.7.
62. Id.
63. Id.
section 8(d) to find out whether such conflicts exist. This burden would not be unreasonable since it would preserve the public's trust in the private ordering that occurs behind closed doors in a mediation. This trust is an essential element in the mediation field.

b. Self-Dealing in Conflicts of Interest: MRPC Rule 1.8

Since UMA section 8(d) is so brief, it does not take long before one begins to ask the many questions that come to mind with respect to its application in practice. The courts may again look to the MRPC for guidance. The MRPC provisions on conflicts of interest span three different and lengthy rules. Rule 1.8 of the MRPC, entitled "Prohibited Transactions," focuses primarily on the possibility of attorney self-dealing in client representation. Section (b) is especially pertinent to our discussion since it requires that an attorney not "use information relating to representation of a client to the disadvantage of the client unless the client has consented after consultation." Section (g) clarifies that an attorney must not negotiate an aggregate settlement of claims for or against multiple clients, unless the attorney has individually consulted with each client. This consultation must include full disclosure of the participation of each person in the settlement.

Returning to UMA section 8(d), MRPC Rule 1.8 would suggest that a mediator who has developed a fairly large practice in a specialized area would have to be especially cautious to ensure that information gained in one mediation did not 'leak' into another. It is, however, standard, widespread practice for an evaluative mediator to offer parties his assessment of what would likely work, or not work, based upon experience in previous mediations. Furthermore, almost without exception, the mediator has not received permission from the other parties to use their 'story' in another mediation session with other people. Perhaps even more troubling than the 'war stories' is the possibility that a mediator might have indirectly learned important information about a party's true bargaining range due to other mediation work. If UMA section 8(a) is eventually interpreted through the lens of MRPC Rule 1.8, or the proposed amended Rule 1.12, the mediator would not be able to use this information to obtain a

64. Id. R. 1.7–1.9.
65. Id. R. 1.8.
66. Id. R. 1.8(b).
67. Id. R. 1.8(g).
68. Id.
settlement.

This should not necessarily present an especially onerous restriction on a mediator's negotiation style. A mediator must, however, be particularly cautious since standards embodied in a uniform act do not merely provide the basis for disciplinary action before an ethics committee of one's professional trade association as in the case of a MRPC violation. Instead, a violation of a UMA provision would constitute a breach of the statute. Among other things, the mediator might want to seriously consider whether their malpractice and liability insurer would cover them for a statutory violation.

c. Successive Conflicts of Interest: MRPC Rule 1.9

In addition to assessing past relationships, UMA section 8(d) would also require mediators to look forward to assure impartiality regarding the participants. What conflicting associations are foreseeable? If a mediator has not regularly maintained the type of computerized conflicts check software program that law firms use, an astute mediator might very much want to acquire one in a post-UMA environment. To reiterate, the scattered number of mediation cases to date have not elucidated clear doctrines concerning what is reasonable and foreseeable. Nevertheless, the MRPC have revealed analogous issues.

MRPC Rule 1.9 addresses former clients and conflicts of interest and has no counterpart in the earlier Model Code of Professional Responsibility. This rule draws clear and enforceable lines to guide and limit the attorney in successive representations. Once the attorney has established an attorney-client relationship with a person (including, of course, an entity), the attorney is forbidden from representing anyone else in "the same or substantially related matter" if the new person's interests are "materially adverse" to the interests of the former client. It is possible that the former client would consent after consultation. With consent, the client waives their right to challenge the new representation based on conflicts of interest, potential loss of confidential information, or breach of the duty of loyalty owed to the former client. However, such waiver must be based upon full and fair disclosure by the attorney, including an explanation of all the potential

69. Id. R. 1.9.
70. Id. R. 1.9(a).
71. Id. R. 1.9(b).
72. Id.
This prohibition may also extend beyond the attorney to his or her law firm. Additionally, the disqualification can travel with the lawyer to his or her new firm. The reach of this 'contagion' depends upon the type of work done for the previous client, the extent of the attorney's direct involvement with the case, the attorney's access to confidential information of the former client, whether the current matter is substantially related to the former matter, and whether the new law firm itself now intends to represent interests adverse to the migratory lawyer's former client. It is conceivable that the firm can erect a sufficiently high 'screen' to assure the migratory lawyer is effectively quarantined from the case. However, the new law firm carries the burden of proof, and this can be difficult to satisfy.

It is unclear how these same provisions and doctrines apply to the attorney-mediator. It is increasingly commonplace for attorney-mediators to mediate cases as a neutral. At a later time, this same attorney, or this attorney's law firm, may be sought out to represent one of the parties to that former mediation as an advocate, rather than as a neutral. Do the doctrines developed concerning conflict of interest, as embodied in the MRPC, permit this engagement? The Rule 2.4 proposed by the ABA Ethics 2000 Commission leaves little or no room for doubt that the contagion of conflict can extend to an attorney-mediator's law firm.

The majority of cases within the last several years have analyzed the position of the attorney-mediator by the same, or even higher standards established in the MRPC Rules 1.7, 1.8, and 1.9. A higher standard might be applied when the court elects to analyze the mediator's role as more akin to that of a judge, a quasi-judicial capacity, reflecting the neutrality of the mediator's position. If so, then the mediator's conduct must be held to a higher standard imposed upon judges for testing recusal. In this standard, it is asked whether there is the appearance of impropriety, such that continued involvement in the case would undermine the public's trust in the system of justice.

If UMA section 8(d) becomes law in a "Rules" jurisdiction, then the ethical standards concerning disclosure, as required under the MRPC Rules 1.7, 1.8, and 1.9, may acquire the force and effect of law not only in bar association disciplinary hearings, but also in the courts.

73. Id.
74. Id. R. 1.9(c).
75. Id. R. 1.9, cmt. 3–5.
2. Illustrative Actions Interpreting the Conflicts of Interest Doctrine

For anyone who has been keeping track of ethical issues in mediation, it comes as no surprise that standards would "grow teeth." The trend is already underway. A Connecticut case illustrates the softer treatment that attorney-mediators have expected in the past. The Dzen brothers, John and Donald, engaged the services of Attorney John Woodcock "to act as a mediator in order to facilitate the dissolution of their family corporation and real estate partnership." They signed a written agreement setting forth the following ground rules that stated that they would maintain the status quo: "[N]o changes being made in the conduct of their business [and that all] profits will be divided on a 50/50 basis ... and [any] issues that arise with respect to the operation of the business" would be submitted to Woodcock for his input.

Four months later, while Woodcock was still acting as the mediator for the proposed dissolution, brother John asked Woodcock to represent his wife and himself in purchasing valuable property adjacent to the Dzen family farm and business. The family corporation had been leasing this particular property; therefore, use of this land was a valuable corporate asset. John Dzen breached the status quo agreement by acquiring this asset. The court concluded that he did this "to gain a tactical advantage in the mediation process." The next question was attorney Woodcock's reasons for assisting John in breaking the ground rules for the on-going mediation. It appeared that Woodcock's actions constitute a prima facie conflict of interest case in which he pursued the interests of John to the detriment of Donald. Woodcock claimed that the notes in his mediation file indicated that he did not act negligently in undertaking the representation of John and his wife in the purchase of the adjacent property. The court rather complacently accepted this fairly bold exculpatory assertion.

If the case had been argued more closely using the Model Rules of Mediation, the outcome might have been different. The following table provides citations to the relevant case:

<table>
<thead>
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<th>Citation</th>
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<tr>
<td>77. Id. at *6.</td>
<td>Reference to a specific page.</td>
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<td>78. Id. (alteration in original).</td>
<td>Reference to a specific alteration.</td>
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<td>79. Id. at *7.</td>
<td>Reference to a specific page.</td>
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<td>80. Id.</td>
<td>Reference to a specific page.</td>
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<td>81. Id.</td>
<td>Reference to a specific page.</td>
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<td>82. Id. at *38-*39.</td>
<td>Reference to a specific range of pages.</td>
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<td>83. Id. at *11-*12.</td>
<td>Reference to a specific range of pages.</td>
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<td>84. Id. at *18-*19.</td>
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Professional Conduct or the UMA as the measure of reasonable behavior by an attorney, it seems that Woodcock would have been found guilty of malpractice. There is no indication anywhere in the record that he fully disclosed to the defendants, or clearly to the plaintiff, that there was a potential for a conflict of interest. Additionally, the record did not indicate that Woodcock had explained his need to maintain neutrality and confidentiality or, further, that his legal work representing either of them could imperil both his neutrality and their confidences.

In fact, Woodcock's actions were quite the contrary. On March 26, 1996, the same day he was retained by the defendants, Woodcock's notes state that John would prepare his own proposal, within thirty days, for the division of the farms. On April 4, 1996, the transfer of title went through, giving John and his wife ownership of the particular property at issue. On May 7, 1996, the attorney of Donald Dzen, the plaintiff, informed Woodcock by telephone that the corporation had been renting the property that Woodcock helped John purchase. Woodcock's notes indicate "genuine shock and surprise." He allegedly did not believe that there was a conflict of interest between his role as mediator and his representation of John and his wife, the defendants.

There are a number of questions that arise in relation to this case that implicate the standards under the UMA and the MRPC. These include the following: Did this shock and surprise mitigate the ethical violations, malpractice, or possible UMA violation that Woodcock faced? Did Woodcock avoid entering conflict since he was not acting knowingly? Can ignorance be bliss, or at least be an excuse? Under the MRPC or the UMA, the standard would not be whether the attorney knew or did not know, or whether he intended or did not intend to be disloyal to one client in favor of another. This is a subjective standard that is nearly impossible to enforce. Instead, what the Model Rules of Professional Conduct and the UMA require is an objective standard. The question is not merely what the attorney claimed to know but, rather, based on the totality of the circumstances, what should an attorney reasonably have known and done? Under the objective standard of the UMA, it would not be sufficient for Woodcock to claim

85. Id. at *19.
86. Id. at *12.
87. Id. at *19.
88. Id.
89. Id.
that he was genuinely shocked and surprised that John and his wife had radically shifted the status quo. His shock and surprise, if indeed genuine, would simply indicate that he had failed to keep sufficiently informed about his client’s case. Ignorance would be neither blissful nor excusable. If he did not know, then he should have known.

In contrast to Connecticut, California courts have set forth a stringent standard for attorney-mediators. The case of *Cho v. Superior Court* is an illustrative example. In this case, a judge conducted a series of three settlement conferences in which the parties spoke candidly about the strengths and weaknesses of their case. Through these candid discussions, Ms. Cho disclosed vital information, including her "bottom line settlement." After the judge retired, he joined, as counsel, the law firm that was representing the bank against Mrs. Cho. The firm imposed a "cone of silence" around the judge to address this conflict of interest.

The appellate court had to determine whether this "cone of silence" was enough to expect the parties to believe that their confidences would not be betrayed. The judge had used an evaluative model of mediation, the dominant mode for civil-commercial mediation, especially when a judge serves as the neutral. As described by the California Appellate Court, an evaluative mediator will actively participate in the negotiation process and, while not choosing sides, the mediator does weigh in to the debate, shaping the direction and outcome. In this capacity, the appellate court described the mediator's role as follows:

> [T]he mediator is not merely charged with being impartial, but with receiving and preserving confidences in much the same manner as the client's attorney. In fact, the success of mediation depends largely on the willingness of the parties to freely disclose their intentions, desires, and the strengths and weaknesses of their case; and upon the ability of the mediator to maintain a neutral position while carefully preserving the confidences that

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90. 45 Cal. Rptr. 2d 863 (Ct. App. 1995).
91. *Id.* at 864.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 864–65.
96. *Id.* at 870.
97. *Id.*
have been revealed. 98

Given these descriptions of the role of an evaluative mediator, the appellate court found it quite plain that the parties could not be expected to believe that their confidences would not be betrayed either directly or indirectly. 99

No amount of assurances or screening procedures, no "cone of silence" could ever convince the opposing party that the confidences would not be used to its disadvantage. When a litigant has bared its soul in confidential settlement conferences with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm—which is now pressing or defending the lawsuit against that litigant.100

The appellate court did not find that the judge or his law firm lacked integrity; the court's focus was more elevated, looking to the integrity of the ADR system as a whole.101 "No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent."102

The amendments to MRPC Rule 1.12 proposed by the Ethics 2000 Commission reinforce this pervasive and deepening concern that attorney mediators must be scrupulously forthright and have foresight about possible conflicts of interest. Further, in those jurisdictions that adopt the UMA's section 8(d), these matters would no longer be only a matter of the bar's considered opinion. Rather, they would be a matter of statutory law and its application.

B. A Consistent Role for the Mediator—No Switch to Evaluator or Reporter

Section 8(a) of the UMA prohibits a mediator from providing "a report, assessment, evaluation, recommendation, [or] finding" regarding the mediation. Additionally, according to section 8(a), the mediator cannot switch roles from being the neutral facilitator of communication

98. Id. at 868.
99. Id. at 870.
100. Id.
101. Id. at 870 n.4.
102. Id. at 870.
to being the surrogate for a court, agency, "or other authority that may make a ruling" on the subject of the mediation.

This subject frequently arose in publications by the late Professor Trina Grillo. For example, her article, *The Mediation Alternative: Process Dangers for Women*, 1 laid a firm foundation for later critiques of gender-based power imbalances in family mediation. She argued that in some cases the mediator naturally allied himself with the husband, allowing gender (and class) biases to subtly creep into the process. 2 This was viewed as particularly pronounced and devastating in cases involving undisclosed domestic violence. 3 Professor Grillo's analysis focused on cases from Northern California courts where mediation was mandatory for child custody matters. 4 More specifically, if the parents could not reach a settlement, the mediator was empowered to make a recommendation to the judge based on the mediator's own observations of the parents during the session(s). 5 Thus, the mediator had the power to shift from a facilitator to an evaluator and then to an arbitrator, whose decision could become binding. 6 As Professor Grillo describes, this represents the greatest process danger for women.

A valuable correction to this injustice is proposed in section 8(a) of the UMA. 7 Indeed, it may be worthwhile to revisit the feminist and critical legal studies (CLS) critiques of mediation to explore how much of the negative assessment stems from this type of undisclosed, pernicious power being invested within the mediator. It is not, however, a concern that should be limited solely to those courts whose family mediation programs included this type of report-back feature. Much of the same dynamic can infiltrate a proceeding where the parties had agreed by contract to use a therapist as mediator and, in the event of impasse, a decision-maker. The public must rest assured that the neutral in mediation will not subsequently change hats and become nearly the de facto decision-maker. Section 8(a) of the UMA would offer mediation participants this peace of mind.

104. *Id.* at 1590–92.
105. *Id.* at 1586–88.
106. *Id.* at 1552.
107. *Id.* at 1555.
108. See *id*.
109. MAY 2001 DRAFT, supra note 2, § 8(d); [UMA § 9].
C. A Party Representative Must be Permitted in Order to Re-balance Power and Guard Against Coercion

1. Pro-Active Measures of Section 9 May Largely Obviate the Need for Limited Mediator Confidentiality

Under section 9 of the UMA, any party who desires can have an attorney or other representative at their side to attend, to participate, or do both in a mediation.\(^\text{110}\) This representative need not be merely an observer. This designated party representative can "attend and participate in the mediation." Even if a party had previously waived their right to counsel, the party may freely, at their own determination, rescind such waiver. To some, this will seem a small and almost non-noteworthy addition to the UMA. Others, however, will recognize this as a critical mechanism for re-balancing power in mediations and thereby addressing one of the chief areas of criticism.

Mediation has, however, long been attacked by scholars of the CLS movement and others as an inappropriate method to resolve disputes involving minorities in American society.\(^\text{111}\) Professor Richard Delgado, a founder of the CLS movement, is the principal proponent of this position. A fair way to capsulize their argument goes as follows: Minorities in this country will always be the victims of oppression at one level or another.\(^\text{112}\) For any minority person to obtain justice, they must go to court, where the formal procedures and protections of the trial system can re-balance power.\(^\text{113}\) Mediation, on the other hand, will simply provide a forum for re-victimization of the minority person.\(^\text{114}\) Mediation services offer only second-class justice, with no safeguards for the minority victim.\(^\text{115}\)

The CLS movement continues to challenge those committed to developing mediation as a viable, just alternative to litigation. While not all scholars concur in the CLS construct of perpetual victimhood for minorities and perpetual oppression by the majority, UMA section 9 offers protection against this concern. Section 9 also provides needed safeguards against the "strong arm" methods of some mediators, which

\(^{110}\) See, e.g., Goldberg, supra note 12, at 316; MAY 2001 DRAFT, supra note 2, § 9; [UMA § 10].

\(^{111}\) Delgado, Conflict as Pathology, supra note 21.

\(^{112}\) See id. at 1400.

\(^{113}\) See id. at 1403.

\(^{114}\) See id. at 1402-04.

\(^{115}\) See id.
result, on occasion, in agreements that are challenged for coercion, duress, or fraud in the inducement.

2. Recent Case Law on Party Empowerment and Binding Agreements

One might question the desire to categorize the binding or non-binding nature of a mediated settlement agreement as a matter of party empowerment and mediation ethics, partially resolvable through the adoption of UMA section 9. Is this not clearly and simply a matter of procedural and contract law? Is this not proof of the case simply a matter of allowing the mediator to testify as to the conduct and communications during the session? Upon examining the line of cases that explore this issue around the nation, one readily sees that the underlying tests in all of these ostensibly contract cases turn on the ethical conduct of parties, attorneys, and the mediator himself. A number of courts now have considered whether a mediated agreement should be enforced, even if one party attempts to repudiate it. Time and again, the factors that these courts focus upon are factors that the ethics codes for mediators also proscribe: 1) Did the mediator permit an environment that was coercive? Was there direct or indirect duress? 2) Did the mediator allow threats and intimidation to go unchecked? 3) Did the mediator push or manipulate one or more of the parties in ways that overbore the party's will? 4) Did the mediator fail to give each party sufficient time and opportunity to secure all necessary information before proceeding to an agreement? 5) Did the mediator fail to assure that each party fully understood the terms of the agreement before signing? 6) Did the mediator's version of the written settlement agreement re-write or alter the parties' oral agreement?

The leading professional groups in mediation, the American Arbitration Association, the ABA, and the Society of Professionals in Dispute Resolution, have developed a combined "Model Standards of Conduct for Mediators." The first standard states that the mediator must ensure that the principle of self-determination by the parties is honored throughout the process. The agreement reached, if any, must be "voluntary [and] uncoerced."\(^\text{116}\) To assure the exercise of free will, the mediator must also permit any party to "withdraw from mediation at any time."\(^\text{117}\)

This principle will be honored in practice by having a designated party representative present in the room, or at least available by

\(^{116}\) MODEL STANDARDS, supra note 52, § 1.

\(^{117}\) Id.
telephone, with sufficient breaks to facilitate telephone consultation with the attorney/representative. In a growing line of cases from all sections of the United States, it is apparent that this has often been the single most important determinant of whether a reviewing court will permit repudiation by a party. Whether the party would succeed in the suit depended upon whether the mediator could testify about their own and the parties' conduct and communications during the session.

3. Illustrative Cases on Coercive Mediations

There is no absolute right to repudiate. Generally, courts prefer that "voluntary agreements reached through mediation" be binding, rather than non-binding. Otherwise, "many positive efforts to amicably settle differences would be for naught." Thus, when parties have sought to repudiate a mediated agreement, they must prove, usually through the testimony of the mediator, that the agreement was not in fact voluntary.

In a recent Florida case, a lengthy mediation lasted several hours. The husband apparently had a "Woody Allen problem," a penchant for taking Polaroid pictures of females of indeterminate, but clearly, young age. During mediation, the wife sent the husband the following threatening note: "If you can't agree to this, the kids will take what information they have to whomever to have you arrested, etc. Although I would get no money if you were in jail—you wouldn't also be living freely as if you did nothing wrong." Two hours later, the parties "settled" their property matters, with the wife receiving $128,000 in marital assets, while the husband received $10,000. The husband then sought later to repudiate the agreement on the basis that the environment of the mediation had been hostile, threatening, coercive, and that he had signed under duress. The wife convinced the trial judge that the note was merely "a wake up call," and that it did not influence the resulting agreement.

120. Id.
122. Id. at 712 n.4.
123. Id. at 711.
124. Id. at 711–12.
125. Id. at 711.
126. Id.
viewed Mrs. Cooper's behavior as extortion and determined that she should not profit from such conduct, and vacated the agreement.\footnote{127} The threatening note the wife provided to her husband during the mediation may seem unusual. The reader, however, should consider the frequency with which a spouse who has physically or psychologically abused the other similarly threatens their partner during a mediation, and the mediator is not aware of it. The fact that the wife wrote her threat on paper furthers the remarkable nature of the coercion. Under more typical circumstances, one might expect the threat to be a visual, non-verbal cue from the abuser to the victim that would probably be imperceptible, or at least undecipherable to the mediator. Nevertheless, the coercion is just as real.

If Cooper v. Austin had occurred under the proposed UMA, section 9 would have assured the husband an opportunity to have a representative with him to advise and possibly protect him in the session. The coercive atmosphere could have been greatly diminished. Even if the husband's representative did not provide legal advice, this person could have intervened to compel needed breaks from the entire process, or private sessions with the mediator. In those breaks, the husband could have taken the needed time to develop an appropriate negotiating response. In a private session with the mediator, he could have revealed her threat. Either way, power could have been re-balanced in the process.

Oklahoma also offers an illuminating case that is much less titillating than Cooper v. Austin. Indeed, by contrast, the exhausting session at issue in Adams v. Adams\footnote{128} probably does not sound all that unusual. The prosaic nature of this coercion is what makes Adams so troublesome. The mediation lasted for an entire day.\footnote{129} The wife signed the agreement, but shortly afterwards, sought to disavow the agreement on account of coercion and duress.\footnote{130} Further, she believed that she had been defrauded.\footnote{131} The trial court denied the wife's desire for a new trial.\footnote{132} The husband sought to enforce the agreement as an order of the

\footnote{127} Id. at 713.
\footnote{128} 11 P.3d 220 (Okla. Ct. App. 2000). Please note that this case was not mediated under the court-connected mediation program operated under the auspices of the Oklahoma Supreme Court and the Oklahoma Dispute Resolution Act, OKLA. STAT. tit. 12, §§ 1801–1813 (West 1993).
\footnote{129} Adams, 11 P.3d at 220.
\footnote{130} Id. at 221.
\footnote{131} Id.
\footnote{132} Id.
The appellate court reversed and remanded the trial court's decision. The appellate court voiced a number of concerns as reasons for its decision. Like many mediations, whether civil-commercial or family, the mediation was lengthy and heavy. Additionally, there was no counsel to assist the wife, an important factor for examining the usefulness of UMA section 9. Critical information was not shared concerning the financial situation of the husband and wife. There was only a simple recital of properties and debts. This recital alone did not sufficiently explore how much weight should be accorded the fact that the wife "discontinued her employment and presumably dedicated herself to the marriage and its activities..." The court continued as following: "Fairness in negotiation must include disclosure by both parties of all matters relating to age, health, opportunities and contributions of both parties, existence of all assets and their location."

UMA section 9 would have cured some of these problems and assured Mrs. Adams the right to assistance. With the presence of an attorney or other representative, Mrs. Adams would have experienced a much greater opportunity for fairness. An attorney or representative could have given her emotional, mental, and even physical support through the grueling marathon session. There appeared to be a clear imbalance of psychological and financial power between Mr. and Mrs. Adams. A person at her side could have pressed for further information long after she had been worn down by her husband's demands and deceptions.

This case can be compared with a 1996 Florida case where it seemed that the mediator did everything right, especially in using the wife's attorney to help assure the fair operation of the session. Trowbridge seems to illustrate a check-list of all the right things to do as well as several ways that a mediator can work with a party's attorney to assure a fair process. This checklist includes the following:

1) the mediation lasted approximately five hours; 2) there was a break for lunch; 3) the atmosphere was not overbearing; 4) no

133. Id. at 222.
134. Id.
135. Id. at 221.
136. Id.
threats were made; 5) the wife wanted the marital home, the
husband offered it, and the wife accepted; 6) the wife knew that
this was the final settlement of the case; 7) the wife's attorney
instructed her not to settle if she were not happy with the
settlement; 8) the mediator told the wife if she were not happy
with the settlement she could have a trial; 9) the mediator
dictated the settlement agreement for typing; 10) the wife's
attorney reviewed it with her; 11) the written agreement
completely and accurately reflected the oral agreement; 12) the
wife signed freely and voluntarily; 13) all participants signed the
agreement; and 14) the wife knew it would result in an
uncontested divorce.\(^\text{138}\)

Subsequently, only Mr. Trowbridge complied with the mediation
agreement.\(^\text{139}\) Mrs. Trowbridge sought additional payment for attorney's
fees, which was ultimately denied by the appellate
court.\(^\text{140}\) A central
part of the court's reasoning was that the mediation itself had been fully
conducted in accord with ethical principles that ensured party self-
determination.\(^\text{141}\) Further, the presence and active involvement of the
wife's attorney vitiated any later claim of coercion, misinformation, or
other such claim.\(^\text{142}\) This case is indicative of the idea that appropriately
educated attorneys can play a valuable role in assuring fairness and
predictability both in the courtroom and in the mediation room. UMA
section 9, if adopted, would go a long way towards assuring that
mediation serves as a complementary, as compared to a competitive,
attorney service.

V. CONCLUSION

Richard M. Nixon was the first American President to go to China
and initiate our still tentative and delicate relations. As a result of
Nixon's historically stern opposition to all things Communist, no one
could accuse him of being too "soft" on the People's Republic of China.
Despite long-standing apprehensions, this author was able to lend
tentative support to the UMA, a sign of hope for the future. It is
important to stress that if a UMA is to be adopted, there must be
recognition of the fact that the real issues confronting mediation are not

\(^{138}\) Id. at 929-30 (quoting the trial court's December 3, 1993 written order).
\(^{139}\) Id. at 930.
\(^{140}\) Id. at 929.
\(^{141}\) Id. at 931-32.
\(^{142}\) Id. at 931.
necessarily the ones focused upon in the act to the exclusion of everything else. Our primary work need not be to create a detailed listing of all the confidentiality protections and waivers that should apply in any given mediation. The practice of mediation, like computerized electronic transfers, is growing so rapidly and in such unpredictable ways that it may be folly to presently attempt to capture the future in binding legislation.

Different emphases are called for if one looks at the real world of mediation as experienced throughout the country, viewed through cases that have proven sufficiently troublesome and resulted in civil litigation. Rather than focus on ways to protect mediators from the aftermath of mediations that mis-fire, an attempt should be made to focus on ways to improve the fairness of the mediation process itself. An important beginning is to assure the mediator's utter neutrality and impartiality. Further, a party must not be coerced nor tricked into entering into a mediation without legal representation or without the assistance of some other person to help re-balance power. Finally, mediators must ensure an environment that is non-threatening and where parties have sufficient, unpressured opportunities to explore the information they need to make good decisions for themselves. This may sound like an extraordinarily modest request that is too prosaic to be worthy of a uniform act. It may, however, be a truly revolutionary undertaking. Instead of initially placing a heightened power in the hands of the mediator, power would be left in the hands of the parties—where it has always belonged.