

CONFIDENTIALITY IN MEDIATION:  
WHAT CAN FLORIDA GLEAN FROM THE UNIFORM  
MEDIATION ACT?

PAUL DAYTON JOHNSON, JR.\*

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I. INTRODUCTION

Society is forced to deal with the inevitable side effects of expansion as it continues to grow. The continual increase in litigation is one of these side effects, and it has strained the resources of our judicial system. Litigation is slow and expensive as court dockets become more crowded. This rise in litigation has led society to explore alternative means of dispute resolution. Today, Alternative Dispute Resolution<sup>1</sup> is a burgeoning field of study that encompasses many aspects of society.

Mediation is a popular form of ADR that has been used to settle disputes in courts, public agencies, and between private parties.<sup>2</sup> Mediation is “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”<sup>3</sup> The introduction of the mediator as a neutral third party is an integral part of the mediation process.<sup>4</sup> In order for the mediation to have a chance at reaching a settlement, there are generally two prerequisites: first, the parties must have faith in the mediator’s neutrality and, second, they

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\* J.D. Candidate May 2003, Florida State University College of Law; B.S., Political Science, Florida State University. I would like to dedicate this Comment to my wife, Erin, whose love and support has made all of this possible. I would like to acknowledge Chasity O’Steen and the rest of the *Law Review* staff for all of their help throughout the editing process.

1. Hereinafter “ADR.”

2. UNIF. MEDIATION ACT, Prefatory Note (2001); *see also* Mindy D. Rufenacht, Comment, *The Concern Over Confidentiality in Mediation—An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act*, 2000 J. DISP. RESOL. 113, 113 (“Support for mediation has increased dramatically over the last twenty years, and now there are more than 2000 federal and state statutes regulating the field.”) (footnote omitted).

3. UNIF. MEDIATION ACT § 2(1) (2001).

4. Greg Dillard, *The Future of Mediation Confidentiality in Texas: Shedding Light on a Murky Situation*, 21 REV. LITIG. 137, 139 (2002).

must trust in the confidentiality of the process.<sup>5</sup> As a fundamental element of the mediation process, confidentiality has been a hotly debated topic in the courts and among academia. This debate has centered more on the individual's expectation of confidentiality and its importance to the mediation process than on the court's interest in adjudicating all relevant evidence.<sup>6</sup>

States have differed in the scope and breadth of their use of mediation. Some states require mandatory mediation, while other states leave the decision to the parties.<sup>7</sup> In addition, some states provide specific statutory enforcement to mediation agreements, but other states leave enforcement to the law of contracts.<sup>8</sup> While most states have rules relating to mediation in their codes of civil procedure, others choose to expand mediation rules statutorily.<sup>9</sup> Confidentiality is another area in which states have varied greatly.

Part I of this Comment begins with a general review of confidentiality in mediation. The prevailing norms in mediation today are discussed to show the importance of confidentiality in the process. Part II focuses on the recently approved Uniform Mediation Act (UMA)<sup>10</sup> and its approach to confidentiality. The UMA is a collaboration of the National Conference of Commissioners on Uniform State Laws, which promotes uniformity in mediation by applying a generic approach to topics that are covered in different ways by many states.<sup>11</sup> This Section discusses the UMA's approach to confidentiality and examines several portions of the Act that will have an effect on confidentiality. Part III briefly analyzes Florida's current approach to confidentiality in mediation. Part IV presents the question of what benefit, if any, Florida can glean from the UMA. This Section focuses in particular on Florida Senate Bill 1226,<sup>12</sup> which was approved unanimously by the Senate Judiciary and Finance Committees during the 2002 legislative session. Senate Bill 1226, if enacted, will adopt some changes to mediation confidentiality that conform to the UMA.<sup>13</sup>

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5. *Id.*

6. See generally Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 102 (1999) (explaining that even the drafters of the Federal Rules of Evidence were concerned about an individual's expectation of privacy).

7. See 1 SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 7.1, app. A, B (2d ed. 2001).

8. *Id.* § 8.1, app. A, B.

9. *Id.* § 8.1, app. A.

10. UNIF. MEDIATION ACT (2001).

11. See *infra* Part II.

12. Fla. CS for SB 1226 (2002).

13. See *infra* Part IV.

After arguing that Senate Bill 1226 should ultimately be enacted, this discussion examines whether Florida should adopt the UMA approach, which grants a specific mediator privilege. This privilege protects the confidentiality of the process by giving the mediator the right to refuse to testify, and to prevent others from testifying, about mediation communications.<sup>14</sup> This is an area of mediation law in which the states have varied greatly, and it is a major focus of the UMA. Ultimately, this Note argues that Florida should adopt the UMA approach of granting a limited mediator privilege.

## II. CONFIDENTIALITY IN MEDIATION

Confidentiality in mediation refers to the ability of a party to keep the contents of the mediation from being used as evidence at a subsequent legal proceeding.<sup>15</sup> This is important, not just from a legal standpoint, but from a practical perspective. Candor by the parties can be crucial to a successful mediation.<sup>16</sup> As neutral third parties, mediators use the ability to speak privately to the parties as a tool in facilitating settlement.<sup>17</sup> Mediators attempt to identify the issues and uncover any underlying causes of conflict with the hope that they can use this information to encourage the parties to work out their differences.<sup>18</sup> Mediators will often use information obtained from their discussions to craft alternative grounds for settlement.<sup>19</sup> During these discussions, it is inevitable that the participants will be called upon to discuss facts that they would not normally be willing to concede. Confidentiality is essential to the mediation process; without it, parties would not be willing to make the kind of concessions and admissions that lead to settlement.<sup>20</sup> Therefore, confidentiality allows the parties to participate effectively and successfully.<sup>21</sup>

Confidentiality is also important to mediation as a measure to ensure that the proceeding is fair to the parties.<sup>22</sup> Parties often communicate in mediations with the expectation that discussions are confidential.<sup>23</sup> After informing the parties that the mediation is confidential, mediators typically have all participants sign a confiden-

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14. UNIF. MEDIATION ACT § 4(b)(2) (2001).

15. Lawrence Freedman, *Confidentiality: A Closer Look*, in CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 47, 49 (Anne Clare ed., 1985).

16. Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 38 (1986).

17. Dillard, *supra* note 4, at 139-40.

18. Freedman & Prigoff, *supra* note 16, at 38.

19. *Id.*

20. Christopher DeMayo, *The Mediation Privilege and Its Limits*, 5 HARV. NEGOT. L. REV. 383, 394 (2000).

21. Freedman & Prigoff, *supra* note 16, at 38.

22. *Id.*

23. *Id.*

ality agreement.<sup>24</sup> Telling the parties that the mediation will be confidential, however, does not necessarily create a judicially-recognized protection.<sup>25</sup>

Courts have often held that confidentiality agreements are unenforceable as a matter of public policy because “[a]greements between individuals are not permitted to restrict the court’s access to testimony in its pursuit of justice.”<sup>26</sup> Most participants in mediation, including the mediator, are unaware of their duty to testify despite the fact that they have signed confidentiality agreements.<sup>27</sup> This false sense of security leads to unintended disclosures that have drastic consequences.<sup>28</sup> In the interest of fairness, parties should know beforehand what will be disclosed and what will remain confidential; notice allows parties to plan accordingly.

Confidentiality has significant effects on a mediator’s neutrality.<sup>29</sup> Ideally, a mediator should seek to create an atmosphere that encourages an uninhibited flow of information from the participants to the mediator.<sup>30</sup> Knowledge that the mediator might one day be an adversary in court could prevent the participants from confiding during the mediation.<sup>31</sup> This knowledge also hinders the mediator from building a rapport that is crucial to a successful mediation.<sup>32</sup>

Despite the importance of confidentiality to the mediation process, it is at odds with a judicial system that favors consideration of all relevant evidence.<sup>33</sup> Most people recognize the need for some degree of confidentiality protection, but whether the scope should be broad or narrow has been the subject of much debate. Some people favor a narrow privilege, arguing that a broad privilege is unnecessary because of adequate confidentiality protection in existing statutes, contractual agreements, and rules of evidence.<sup>34</sup> It is further proposed that a broad privilege could severely hamper the rights of third parties by preventing the use of relevant evidence.<sup>35</sup>

24. Rufenacht, *supra* note 2, at 115.

25. Ehrhardt, *supra* note 6, at 92.

26. See Rufenacht, *supra* note 2, at 115 (citing Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public Interest*, 1995 J. DISP. RESOL. 1, 10-11).

27. Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 635 (2001).

28. *Id.*

29. Freedman & Prigoff, *supra* note 16, at 38.

30. Dillard, *supra* note 4, at 139.

31. Freedman & Prigoff, *supra* note 16, at 38.

32. Dillard, *supra* note 4, at 140.

33. Freedman & Prigoff, *supra* note 16, at 39.

34. See *id.*

35. *Id.* at 40.

Those that favor a broad privilege find flaws in the argument that current law provides enough protection when considering that, in many cases, there is a false perception of confidentiality.<sup>36</sup> A false perception of confidentiality can eventually cause the candor of participants to be mitigated if expectation is not matched with reality; or, it can hurt the credibility of the mediation process in the eyes of the general public.<sup>37</sup> Proponents also argue that confidentiality does not necessarily hamper litigation because it is likely that the information being withheld would never have arisen absent the mediation and the perception of confidentiality.<sup>38</sup> The UMA was drafted in the midst of this debate on the scope of confidentiality.<sup>39</sup>

### III. THE UNIFORM MEDIATION ACT AND ITS APPROACH TO CONFIDENTIALITY

An ultimate goal of the UMA is to promote uniformity in an area of law that has varied greatly from state to state.<sup>40</sup> To accomplish this, the drafters have sought to make the rules as predictable and simple as possible in the hope that it will encourage adoption of the Act.<sup>41</sup> Confidentiality has become a major focus due to the many variations among the states. An important policy of the UMA is to ensure that the confidentiality protections of the Act are in line with the reasonable expectations of the parties.<sup>42</sup> A focused set of rules has been drafted that participants can refer to when making decisions regarding what they want to disclose.<sup>43</sup>

The UMA has chosen to significantly expand confidentiality protections beyond what the majority of states currently allow.<sup>44</sup> The drafters were fully aware that these rules make it more difficult to admit evidence in a subsequent judicial proceeding. However, they felt it was justified because the drafters viewed the “issue of confidentiality” as an essential element “that will help increase the likelihood that the mediation process will be fair.”<sup>45</sup> “Fairness is enhanced if it will be conducted with integrity and the parties’ knowing consent

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36. *Id.* at 42.

37. *Id.* at 42-43.

38. *Id.* at 44.

39. Undoubtedly, this debate was also a central issue during the many revisions of the UMA that were necessary before a final version could be ratified.

40. *See* UNIF. MEDIATION ACT, Prefatory Note pt. 3 (2001).

41. *See id.*

42. *Id.*

43. Dillard, *supra* note 4, at 151.

44. 1 COLE ET AL., *supra* note 7, at § 8.1 app. A, B.

45. UNIF. MEDIATION ACT, Prefatory Note (2001).

will be preserved.”<sup>46</sup> Many provisions in the UMA illustrate the drafters’ resolve to protect the confidentiality of the proceedings.<sup>47</sup>

The UMA has given a broad definition of communication for purposes of the Act.<sup>48</sup> It includes “statements that are made orally, through conduct, or in writing or other recorded activity.”<sup>49</sup> The protection provided is also similar to the attorney-client privilege protection in that a mediator’s mental impressions and observations and work product are considered communications for purposes of the privilege.<sup>50</sup>

The UMA has created a broad confidentiality privilege that applies to the participants and the mediator. “A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.”<sup>51</sup> The mediator holds a limited privilege in that he or she can only prevent his or her own communications from being disclosed.<sup>52</sup> The privilege is also extended to any other parties present at the mediation.<sup>53</sup> This extended privilege has been the subject of widespread debate.<sup>54</sup>

The UMA has listed a number of specific statutory exceptions for which the privilege does not apply because of public policy reasons.<sup>55</sup> These exceptions include threats to commit bodily injuries or crimes of violence, communications used to plan or commit a crime, evidence of professional misconduct or malpractice, and evidence of abuse or neglect.<sup>56</sup> Evidence of this type is automatically outside of the privilege.<sup>57</sup> The Act also lists some other exceptions that would be admissible if deemed appropriate at an in-camera hearing.<sup>58</sup>

Section three, one of the most significant portions of the UMA, deals with scope of the Act.<sup>59</sup> This section states that the Act applies to mediations that are ordered by the court,<sup>60</sup> which is common. In addition, the Act applies to mediations in which the participants

46. *Id.*

47. *See id.*

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

49. *Id.* § 2(2), Reporter’s Notes.

50. *Id.*

51. *Id.* § 4(b)(1).

52. *Id.* § 4(b)(2).

53. *Id.* § 4(b)(3).

54. *See* detailed discussion *infra* Part IV.

55. UNIF. MEDIATION ACT § 6 (2001).

56. *Id.* § 6(a).

57. *Id.* § 6, Reporter’s Notes.

58. *Id.* § 6(b).

59. *Id.* § 3.

60. *Id.* § 3(a)(1).

agree to mediate, and in any mediation conducted by a person who holds himself or herself out as a mediator.<sup>61</sup> This effectively extends the confidentiality protection under the UMA to all presuit and voluntary mediations. This broad coverage is a departure from traditional state statutes that provide for enforceability of court-ordered mediation or mediation for particular types of disputes.<sup>62</sup> Not only does section three extend the confidentiality privilege to all types of mediation, it also applies to administrative proceedings and other areas in which the Rules of Evidence do not apply.<sup>63</sup>

These provisions of the UMA reflect the drafters' intent to promote candor through confidentiality.<sup>64</sup> In addition to uniformity and confidentiality, the purpose of the UMA is to "encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties."<sup>65</sup> The drafters of the Act, along with the National Conference of Commissioners on Uniform State Laws, argue that the time is ripe to adopt a uniform law of mediation.<sup>66</sup> States have now had the time to engage in experimentation with different approaches to mediation, and clear trends have emerged.<sup>67</sup> Florida and every other state should at least evaluate the UMA to see if there are aspects of their current approach that can be improved.

#### IV. MEDIATION IN FLORIDA AND ITS APPROACH TO CONFIDENTIALITY

Florida has been at the forefront of the mediation movement as one of the first states to officially recognize the value of ADR in the legal system.<sup>68</sup> Privileges in Florida are statutorily created, not developed by judicial decision.<sup>69</sup> Florida utilizes the statutory system and the rules of civil procedure to both encourage and require mandatory mediation.

Chapter 44, *Florida Statutes*, titled "Mediation Alternatives To Judicial Action," is the most significant legislation pertaining to mediation. Florida defines mediation as "a process whereby a . . .

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61. *Id.* § 3(a)(2)-(3).

62. *Id.* § 3, Reporter's Notes.

63. *Id.*

64. *Id.*, Prefatory Note.

65. *Id.*

66. *Id.*, Prefatory Note pt. 4.

67. *Id.*

68. SHARON PRESS, A SKILL-BUILDING FOR FAMILY LAW MEDIATORS/THE FLORIDA BAR CONTINUING LEGAL EDUCATION COMMITTEE AND THE FAMILY LAW SECTION 1-1 (Florida Bar 2000) [hereinafter FAMILY LAW MEDIATORS].

69. Perry S. Itkin, *IN RE: Amendments to the Fl Rules for Certified and Court-appointed Mediators—Revisions to the Fl Rules*, in FAMILY LAW MEDIATORS, *supra* note 68, at 2-1.

mediator acts to encourage and facilitate the resolution of a dispute between two or more parties.”<sup>70</sup>

It further describes mediation as an informal and nonadversarial process, the goal of which is to help the parties reach a mutually acceptable and voluntary agreement.<sup>71</sup> Unfortunately, the rules that stress a voluntary and nonadversarial process only pertain to court-ordered mediation. Opposing sides have already been involved in litigation by the time the court orders mediation. Resolution of a dispute is harder to achieve after litigation has begun and emotional feelings about a case have been influenced. Upon the request of one party to a civil action in Florida, the court is required to order both parties to attend mediation.<sup>72</sup> There are a few stated exceptions to this rule such as medical malpractice, a landlord-tenant dispute, and a claim for a debt.<sup>73</sup>

The statute also provides a specific privilege of confidentiality to the participants in the mediation. This privilege states that “[e]ach party . . . has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding.”<sup>74</sup> However, confidential communications may be disclosed during disciplinary proceedings filed against mediators, although references to the privileged communications are deleted from the record prior to the release of any disciplinary files to the public.<sup>75</sup> Ultimately, the statute grants wide discretion to the courts, providing that court-ordered mediation is conducted according to the rules of practice and procedure adopted by the Florida Supreme Court.<sup>76</sup>

The Florida Rules of Civil Procedure also provide a statutory basis for mediation.<sup>77</sup> The presiding judge in any civil matter has the authority to mandate mediation before trial.<sup>78</sup> Judges may liberally use this discretion to settle disputes before trial in order to ease the burden of overcrowded courts.<sup>79</sup> In addition, the rules also permit any party to move to disqualify a mediator for good cause, and provide guidelines for scheduling and completing the mediation.<sup>80</sup>

70. FLA. STAT. § 44.1011(2) (2002).

71. *Id.*

72. *Id.* § 44.102(2)(a).

73. *Id.* §§ 44.102(2)(a)(1)-(8).

74. *Id.* § 44.102(3).

75. *Id.* § 44.102(4); *see infra* Part IV.

76. FLA. STAT. § 44.103(1) (2002).

77. FLA. R. CIV. P. 1.700(a).

78. *Id.*

79. UNIF. MEDIATION ACT, Prefatory Note (2001).

80. FLA. R. CIV. P. 1.700(a)-(d).

The Florida Supreme Court has promulgated the Florida Rules for Certified and Court-Appointed Mediators.<sup>81</sup> These rules govern mediator qualifications, standards of professional conduct, and discipline. The rules state that the mediation proceedings are confidential and declare that a violation of confidentiality by a mediator could result in removal by the Chief Justice of the Florida Supreme Court.<sup>82</sup> However, this confidentiality only extends until sanctions are imposed, which suggests that the duty to remain confidential is inferior to a court order to testify at trial.<sup>83</sup> Because Florida has adopted a specific set of rules that apply only to court-ordered mediation, the policies need to be re-examined in light of the growth of voluntary mediation in this country.

#### V. WHAT BENEFIT CAN FLORIDA GLEAN FROM THE UNIFORM MEDIATION ACT?

##### A. *Comparison of the UMA to Florida's Proposed Mediation Bill*

The UMA is purported to be a culmination of the best mediation trends that have developed in the last thirty years.<sup>84</sup> This has not gone unnoticed by lawmakers in Florida. The Florida Senate Judiciary Committee recently approved a "bill that would establish new confidentiality protections in pre-suit and voluntary . . . mediation."<sup>85</sup> The bill, Senate Bill 1226, has also received the unanimous approval of the Senate Taxation and Finance Committee.<sup>86</sup> "Sharon Press, director of the Florida Dispute Resolution Center, said the bill would 'create both a privilege and confidentiality protections' that will be 'tried out in family mediations with the intent of extending [the protections] to all civil cases.'"<sup>87</sup> The bill represents a response to the Uniform Mediation Act and has adopted some of the Act's measures in regard to confidentiality.<sup>88</sup>

A major provision of the bill, relating to confidentiality in mediation, is the extension of coverage to voluntary and presuit mediation. Presuit mediation will entail any matters "which are in dispute and for which the persons disputing the matters agree to submit to mediation before the initiation of any legal proceeding."<sup>89</sup> This new ap-

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81. FLA. R. MED. 10.020.

82. *Id.* 10.260.

83. *See id.*

84. UNIF. MEDIATION ACT, Prefatory Note pt. 4, 5 (2001).

85. Justin Kelly, *Florida Senate Committee Passes Mediation Confidentiality Bill*, ADRWorld.com (Mar. 1, 2002), at <http://www.adrworld.com/opendocument.asp?Doc=WR19SCJ19U&code=b8ne1tSm> (last visited Mar. 30, 2003) (on file with author).

86. *Id.*

87. *Id.*

88. *Id.*

89. Fla. CS for SB 1226, § 10(g) (2002) (proposed FLA. STAT. § 44.1011(2)).

proach is effectively the same as the coverage adopted by the UMA and is a significant extension of Florida's current law.

*B. Why Florida's Current Mediation Statutes are not Sufficient*

Presently, all statutory coverage of mediation is limited to court-ordered mediation.<sup>90</sup> The statute does not cover presuit and voluntary mediation disputes, and they do not fall under the protection of the confidentiality privilege.<sup>91</sup> Parties of a non-court-ordered mediation who desire to preserve the confidentiality of the process must rely on a signed confidentiality agreement.<sup>92</sup> A contractual agreement does provide some measure of protection, but it pales in comparison to Florida's statutory privilege, which approaches an absolute immunity for participants.<sup>93</sup>

Extending protection to voluntary and presuit mediation will increase the public's faith in these areas of mediation. As discussed earlier, this faith in the process will make mediations more effective by promoting candor. Further, as public faith in the confidentiality of voluntary and presuit mediation increases, so should participation. An increase in participation coincides with Florida's goal of expanding mediation by encouraging its use on a voluntary basis.<sup>94</sup>

One of the principal goals of mediation, and ADR in general, is to promote resolution of disputes without having to resort to the judicial process. This goal will be stifled if statutory protection is not provided for voluntary and presuit mediation. In today's society, it is theoretically safer to file suit, thereby gaining the protection of the confidentiality privilege, before attempting to mediate. Adopting Senate Bill 1226 will allow parties to enter mediation and obtain the protection of the statute without ever entering the judicial system. In order to encourage parties to utilize mediation as an alternative to litigation, it makes sense to give people every incentive to avoid the judicial system.

Making confidential mediation more accessible to the public creates an attractive alternative to litigation. The proposed bill adopts another provision that appears to be taken directly from the UMA. Senate Bill 1226 creates specific exceptions to the confidentiality privilege for communications concerning abuse or neglect, evidence of acts or threats of violence, and professional misconduct committed

90. FLA. STAT. § 44.102 (2002).

91. *See id.*

92. Itkin, *supra* note 69.

93. *See* Aaron J. Lodge, *Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells?*, 41 SANTA CLARA L. REV. 1093, 1107-08 (2001).

94. *See* Fla. CS for SB 1226, § 11 (2002) (proposed FLA. STAT. § 44.1012) (codifying the intent of the legislature to promote a range of alternative methods to resolve disputes in order to reduce the level of costly court intervention).

during the mediation.<sup>95</sup> These exceptions are the same as the UMA's automatic exceptions.<sup>96</sup>

Interestingly, there is one proposed addition to Florida's mediation law that is not in the UMA and, in fact, was purposely left out of the Act.<sup>97</sup> This section requests that the Florida Supreme Court establish a formal process by which settlement agreements may be filed and approved through a court order without requiring the parties to appear in court.<sup>98</sup> The purpose of this provision is to help ease the burden of overcrowded courts by eliminating the necessity of a court appearance. The process would "provide notice to the parties regarding their right to a hearing, include safeguards to prevent the filing or acceptance of agreements reached under duress or coercion, and provide for a hearing if the court determines that such a hearing is necessary."<sup>99</sup>

The drafters of the UMA recommended against the judicial enforcement of mediation settlement agreements because of the possibility that more sophisticated parties could use it to take advantage of others.<sup>100</sup> However, the proposed provision offers some advantages. If parties attend presuit mediation, they can achieve judicial enforcement of a settlement agreement without ever having to go to court. In terms of time and money, the savings to the parties and the court can be substantial. Another section of the bill provides for the creation of a pilot program to test the proposed changes to the mediation law.<sup>101</sup> These provisions offer enough potential advantages that the changes should at least be thoroughly tested.

Senate Bill 1226, also called the Family Court Reform Bill, represents Florida's first attempt to incorporate portions of the UMA into Florida's existing mediation law. Note that the portion of the bill relating to mediation is but a small part of comprehensive legislation aimed at family court reform in general. Ultimately, even though the bill has not been successfully passed into law, the bill is noteworthy because it represents the current mindset of today's Legislature and its view regarding mediation and the UMA.

Extension of the protection to cover voluntary and presuit mediation is a necessary step in light of the growth of mediation and the benefits mediation brings to our judicial system. A list of statutory exceptions is necessary for public policy reasons and to ensure a cer-

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95. *Id.* § 12(3) (proposed FLA. STAT. § 44.1025).

96. UNIF. MEDIATION ACT § 6 (2001).

97. Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 903 n.419.

98. Fla. CS for SB 1226, § 14 (2002) (proposed FLA. STAT. § 44.1025).

99. *Id.*

100. Stipanowich, *supra* note 97.

101. Fla. CS for SB 1226, § 16 (2002) (proposed FLA. STAT. § 44.202).

tain amount of predictability. The bill provides some very important changes to Florida law based on the UMA. But it fails to address the UMA's approach to the confidentiality privilege in general.

### C. Differing Approaches to Privileges in Mediation

Two general variations exist in states that designate a statutory confidentiality privilege.<sup>102</sup> Some states give a privilege to both the mediator and the participants, while others only extend the privilege to mediation participants.<sup>103</sup> Florida follows the more narrow approach and limits the confidentiality privilege to the participants.<sup>104</sup> This grants a party to the mediation the right to refuse disclosure and prevent any other person present at the mediation from disclosing communications made at the proceeding.<sup>105</sup> If, however, the participants waive the privilege or the court demands that the mediator testify, the individual will be forced to disclose everything that was discussed at the mediation, including his personal thoughts and work product.<sup>106</sup>

States that adopt a broad privilege extend its coverage to the participants and the mediator.<sup>107</sup> Similarly, under the UMA, the mediator has the authority to refuse to disclose the contents of the mediation, regardless of the parties' or the court's request, with some exceptions.<sup>108</sup> The privilege also empowers the mediator with the right to block other parties from divulging the contents of the mediation unless all parties agree that a party should testify about a party's mediation communications.<sup>109</sup> Drafters could look to these prevailing models for guidance.

The underlying goals and principles of the UMA greatly influenced the drafters' decision when forming the UMA's confidentiality privilege. As mentioned earlier, a primary goal of the UMA is to promote candor during mediation by sustaining the expectations of the parties and the mediator regarding the confidentiality of the mediation process.<sup>110</sup> Parties are less likely to be sincere if there is a possibility, however remote, that what is said could later be used to their detriment in a judicial proceeding.<sup>111</sup> Attorneys will point this out to clients and often advise against disclosing facts that may be

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102. Rufenacht, *supra* note 2, at 118.

103. *Id.* at 118-19.

104. FLA. STAT. § 44.102(3) (2002).

105. *Id.*

106. See Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 69-70 & n.138 (2001).

107. See Rufenacht, *supra* note 2, at 118-19.

108. UNIF. MEDIATION ACT § 4, Reporter's Notes (2001).

109. *Id.* § 4, Reporter's Notes pt. 4.

110. *Id.*, Prefatory Note pt. 1.

111. See Dillard, *supra* note 4, at 140.

crucial to settlement.<sup>112</sup> Further, the drafters felt that forcing a mediator to testify would erode public confidence in the mediation process.<sup>113</sup> In an attempt to accomplish both goals, the drafters combined the two approaches.

Under the UMA, the participants hold an absolute privilege that can be raised in regard to any communication made during the mediation.<sup>114</sup> By contrast, the mediator holds a limited privilege. The limited privilege allows the mediator to decline to disclose a mediation communication; however, he or she can only prevent others from disclosing one of the mediator's own communications.<sup>115</sup> This privilege is much closer to a broad privilege than a narrow one, however, because mediators can withhold confidential communications and work product.<sup>116</sup>

Those who oppose a broad privilege believe it is unnecessary and argue that adequate protection for the parties already exists in the form of statutes and the Rules of Evidence.<sup>117</sup> Critics argue that the UMA provides mediators "with more protections against testifying than are necessary."<sup>118</sup> In other confidential relationships, such as the attorney-client privilege, on which the UMA provision is based, "the privilege against testifying belongs to the part[ies] and can be waived."<sup>119</sup> Under the UMA, mediators have a separate privilege and can refuse any request to testify.<sup>120</sup> However, "[i]f a mediator is accused of malpractice, he [or she can] waive [the] confidentiality [privilege] and testify in order to defend himself or herself."<sup>121</sup>

In addition to being able to defend themselves, mediators can also force the mediation parties to testify.<sup>122</sup> However, a party may not compel the mediator to testify when the party is seeking to overturn the settlement agreement.<sup>123</sup> Further, there are certain situations in which mediation testimony should expressly be allowed.<sup>124</sup> Testimony should be allowed in challenges to the mediation process.<sup>125</sup> While

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112. See generally Freedman & Prigoff, *supra* note 16 (explaining that expectations of confidentiality, regarding both the mediation process and the mediator, could lead to disclosure of information that would be unfairly prejudicial at a subsequent legal proceeding).

113. UNIF. MEDIATION ACT, Prefatory Note pt. 1 (2001).

114. *Id.* § 4(b)(1).

115. *Id.* § 4(b)(2).

116. *Id.* § 4, Reporter's Notes pt. 4(a)(3).

117. Freedman & Prigoff, *supra* note 16, at 39.

118. Andrea K. Schneider, *Which Means to an End Under the Uniform Mediation Act?*, 85 MARQ. L. REV. 1, 3 (2001).

119. *Id.*

120. UNIF. MEDIATION ACT § 4(2).

121. Schneider, *supra* note 118, at 3; UNIF. MEDIATION ACT § 6(a)(6).

122. Schneider, *supra* note 118, at 3-4.

123. UNIF. MEDIATION ACT § 4(b)(2).

124. *Id.* § 6(a).

125. See DeMayo, *supra* note 20, at 394-95.

mediators strive to be completely impartial, there may be times when a mediator favors one side; a party should be allowed to challenge the process with the use of all relevant evidence if such a situation arises. Testimony should be allowed in claims that are not connected to the underlying mediation.<sup>126</sup> By entering mediation, the parties should not be deemed to have waived their legal rights in another proceeding that they did “not contemplate[], [or] which may not have even existed, at the time of the mediation.”<sup>127</sup> Testimony in other proceedings cannot be used against the parties, so allowing mediation communications should not affect the candor of the parties.

Adopting a narrow approach is more in line with the direction taken by the courts, which have favored a narrowing of existing privileges and have refused to recognize new ones.<sup>128</sup> Leaving the privilege in the hands of the parties provides options to the participants in the actual dispute. If a compelling need for disclosure arises, the parties can waive their privilege or turn to the courts. The rights of participants will not be blocked by giving a privilege to a neutral third party.

Despite these arguments, the protection currently provided in Florida’s statutes and the Rules of Evidence is not enough. Florida has an absolute privilege for the participants, but it does not provide adequate protection for the confidentiality of the mediation process and should be expanded. In Florida, the mediator does not have a privilege, and a party is permitted to testify and subpoena the mediator’s testimony if the other party waives the privilege by alleging duress or intimidation.<sup>129</sup> Further, courts have sometimes skirted narrowly construed privileges and required a mediator to testify against the parties’ wishes.<sup>130</sup> This is problematic because confidentiality and the appearance of impartiality are essential to the mediation process and these characteristics influence the public’s confidence in mediation.<sup>131</sup>

#### *D. Expectations of the Parties in Mediation*

Public confidence in mediation will grow if people trust “that the mediator will not take sides or disclose their statements.”<sup>132</sup> “The public confidence rationale has been extended to permit the mediator to object to testifying,” thereby allowing the mediator to remain neu-

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126. *Id.* at 396.

127. *Id.*

128. See Ehrhardt, *supra* note 6, at 114.

129. Deason, *supra* note 106, at 69-70.

130. See *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1139 (N.D. Cal. 1999).

131. Weston, *supra* note 27, 640.

132. UNIF. MEDIATION ACT, Prefatory Note pt. 1 (2001).

tral in future mediation sessions involving comparable parties.<sup>133</sup> This neutrality will dissipate if litigation forces a mediator into the position of a tie-breaking witness.<sup>134</sup> Mediator testimony should be limited to circumstances in which there is a strong public policy in favor of disclosure,<sup>135</sup> such as the specific exceptions in the UMA.

A broad privilege, such as the one adopted by the UMA, offers advantages that can enhance the overall success of the mediation process in Florida. One of the UMA's principal benefits is that it favors enforceable standards among the participants, the mediator, and third parties present at the mediation.<sup>136</sup> Having a focused privilege such as this keeps the privilege in line with the reasonable expectations of the parties.<sup>137</sup> Predictability is an important component of these expectations because it "is necessary for [the] parties to feel confident in using the mediation process."<sup>138</sup>

Finally, Florida should adopt the mediator privilege to achieve the goal of state law uniformity. As previously mentioned, the myriad of different state laws regarding mediation has caused problems, particularly in today's market of interstate commerce such as the Internet. The law of the state in which the litigation is located usually determines privileges,<sup>139</sup> so it is possible for confidentiality to be determined by the law of a state other than the state in which a mediation takes place.<sup>140</sup> This situation may potentially confuse mediation participants and is not in line with the reasonable expectations of the parties.

## VI. CONCLUSION

Florida's approach to mediation has been remarkably successful since its inception in the early 1980s, particularly considering the few statutes available to provide guidance when the proposal was drafted. However, the recent adoption of the UMA should cause Florida to reconsider its current approach to mediation. Critics argue the old adage, "if it ain't broke, don't fix it,"<sup>141</sup> but Florida did not become a leader in the ADR movement by remaining content with the status

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133. *Id.*; see, e.g., *NLRB v. Macaluso*, 618 F.2d 51, 54 (9th Cir. 1980) ("Public interest in maintaining the perceived and actual impartiality of . . . mediators does outweigh the benefits derivable from [a given mediator's testimony].").

134. Alan Kirtley, *Best of Both Worlds: Uniform Mediation Privilege Should Draw from Both Absolute and Qualified Approaches*, DISP. RESOL. MAG., Winter 1998, at 5, 5.

135. Weston, *supra* note 27, at 642.

136. Dillard, *supra* note 4, at 147.

137. UNIF. MEDIATION ACT § 4, Reporter's Notes pt. 2(a).

138. Schneider, *supra* note 118, at 4.

139. Kirtley, *supra* note 134, at 5.

140. *Id.*

141. See, e.g., Thomas F. Christian, *Running Statewide Dispute Resolution Programs—The New York Experience*, 81 KY. L.J. 1093, 1100-01 (1993).

quo. Developments over the past thirty years have given states the chance to experiment with many different approaches to ADR, and clear trends have emerged.<sup>142</sup> The UMA is a culmination of the best of these trends, and there are several provisions that Florida should adopt.

Whether through the Family Court Reform Bill or some future legislation, Florida should extend the confidentiality protection to cover voluntary and presuit mediation. This will encourage parties to use the mediation process without having to resort to the judicial system, and further Florida's goal of expanding the use of ADR. Florida should also follow the UMA's lead and adopt a limited mediator privilege. Adopting this privilege will increase the public's confidence in the mediation process and foster its growth. This confidence will also make mediations more effective by encouraging candor among the participants. The UMA statutory exceptions are an indispensable companion to this heightened privilege that Florida should also adopt. In all, these measures coincide with Florida's goal of increasing the use and effectiveness of ADR. Florida has been a leader in mediation from the beginning of the movement. Implementing these portions of the UMA provide an opportunity for Florida to once again take a leadership role in crafting mediation in the future.

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142. UNIF. MEDIATION ACT, Prefatory Note pt. 4.