

defences, such activities raise questions about the liability of a conciliator for erroneous conclusions.

By making the process more accommodating for lawyer-conciliators, commercial conciliation loses its characterisation as an alternative dispute process. Evaluative conciliation only confuses the proper role of conciliators within the dispute resolution regime. Mixing the functions traditionally associated with arbitrators, case evaluators and judges with those of conciliators makes conciliation significantly overlap with these other processes.

Ultimately, evaluation promotes positioning and polarisation which is antithetical to the goals of

conciliation. In the evaluative context, where the parties go to the conciliation anticipating an evaluation of their case, they are more likely to take a positional rather than a collaborative approach to the conciliation process. They are more likely to not fully disclose their positions, despite the fact that the information provided in the conciliation is clearly confidential and not to be used in subsequent proceedings.

They also tend to perceive the lawyers' versus the parties' roles in a classic light, namely the lawyer as decision-maker controlling the process and the client as a passive party who does not participate in the decision-making process.

UNITED STATES

Mediation under National Law: United States of America

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Why mediation legislation was enacted in the United States

Prefatory note

While most other countries deal with only one or a limited number of jurisdictions, it should be remembered that the United States consists of 51 different jurisdictions, namely the federal jurisdiction and the 50 states.

And while in the area of arbitration most state arbitration statutes apply only to strictly local cases because in other cases those statutes are pre-empted¹ by the Federal Arbitration Act, no equivalent federal statute exists for mediation. Besides, insofar as state law *does* apply, whether independently or as a supplement to the Federal Arbitration Act, virtually all states have adopted the Uniform Arbitration Act of 1955² or the revised Uniform Arbitration Act of 2000 (RUAA).³ In contrast, the states' legislation in the area of mediation has primary applicability.

This article gives a brief overview of the current status of mediation legislation in the United States, and focuses in more detail on the status of mediation at the local level, ie in Los Angeles County.

The concept of mediation as a form of dispute resolution goes back thousands of years, notably in certain Asian countries.⁴ In the United States, mediation is also traced back to the country's earliest history as

many Native American tribes have employed a form of mediation for many centuries.⁵

The earliest attempts at legislation relating to mediation did not occur until the late 1970s and early 1980s, as mediation had started to become more popular. Early statutes were scattered because they tended to accommodate special situations in which the legislature wanted to encourage mediation.⁶ For example, Colorado wanted to encourage resolution of disputes in mobile home parks⁷; and Iowa set up a mediation programme in which lenders were mandated to mediate before they could foreclose on agricultural land that secured a debt.⁸

By 1989, the legislatures of the 50 states and the Federal Government had adopted close to 1,000 statutes.⁹ As of 1994, those several governments had enacted 2,000 statutes,¹⁰ and in 2001, the Prefatory Note to the Uniform Mediation Act reported that this number had increased to more than 2,500 statutes.¹¹

In addition to the countless statutory provisions at state level, labour relations boards, working men's compensation boards, school districts and public commissions (such as for public utilities, parks and wildlife departments, social services, etc) may adopt, and in many instances have adopted, their own rules regarding mediation.¹² Also, the local courts frequently have their own individual rules about mandatory and voluntary mediation.

Before 1998, the mediation rules of California were spread over seven different Codes until that state adopted a comprehensive mediation statute as part of the Evidence Code, restating and adding to the existing legislation.¹³ Presumably, more states will seek to consolidate their legislation, either by adopting the Uniform Mediation Act¹⁴ or by following California's example of adopting the relevant state's own comprehensive mediation statute. If that assumption is correct, the enormous proliferation of statutes may well diminish in the coming years, – although a wider acceptance of the UMA will perhaps not have as much impact as one might expect, as it only really covers confidentiality.

The main reason for the adoption of statutory law that deals with mediation is to encourage the use of the process.¹⁵ The key subject (but by no means the only one) that is covered in such statutes is confidentiality of the mediation process and the protection of mediation communications in the evidentiary rules that apply to pre-trial discovery and evidence taken at trial.¹⁶

Almost as important a reason for the adoption of mediation legislation is the public policy of reducing the case load of the courts and the substantial costs associated with the expansion of the court system that would be required without encouragement of alternative dispute resolution. For example, California Code of Civil Procedure (CCP) s 1775(c) explicitly provides that '[m]ediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.'

CCP Section 1775(f) adds:

'The purpose of this title is to encourage the use of court-annexed alternative dispute resolution methods in general, and mediation in particular. It is estimated that the average cost to the court for processing a civil case of the kind described in Section 1775.3 through judgment is three thousand nine hundred forty-three dollars (US\$3,943) for each judge day, and that a substantial portion of this cost can be saved if these cases are resolved before trial.'

Content of the legislation in Los Angeles County

Given the overwhelming number of different rules pertaining to mediation in the United States, I will focus on those that apply to mediation of a litigated case that comes within the jurisdiction of the California Superior Court for Los Angeles County.

The California court system is the largest in the country.¹⁷ The LA Superior Court system, within which all trial courts are now unified in one administrative system, is the largest in the United States.¹⁸ It consists of 12 districts with a total of 48 courthouses.¹⁹ It is therefore not surprising that in the Code of Civil Procedure, the California Legislature designated the LA Superior Court as the primary place to conduct an ADR pilot programme.²⁰

The LA Superior Court's Mediation Programme is governed mainly by:

- (i) Code of Civil Procedure (CCP) ss 1775–1775.15²¹;
- (ii) Evidence Code (EC) ss 703.5 and 1115–28²²;
- (iii) California Rules of Court (CRC) ss 1630–9²³; and
- (iv) Chapter 12 of the Los Angeles Superior Court (LASC) Rules.²⁴

CCP ss 1775 to 1775.15 apply specifically to the courts situated in Los Angeles County.²⁵ However, at the option of the presiding judge, any other county may adopt the programme set forth in CCP ss 1775–1775.15. Many of California's 58 counties have in fact elected to conduct similar ADR programmes. But each of these Superior Court systems has its own set of local rules, which may differ in material respects from the LASC Rules.

Compulsory mediation

Pursuant to s 1775.3 (*juncto* s 1141.11), all 'non-exempt unlimited civil cases' are to be submitted to mediation if the amount in controversy, in the opinion of the court, will not exceed US\$50,000 for each plaintiff. With a few exceptions, therefore, all civil cases with an amount in controversy of less than US\$50,000 per plaintiff go to 'compulsory' or 'court-mandated' mediation.

In addition, the court determines on a case-by-case basis the suitability of a particular case for mediation or arbitration. The court then confers with counsel as to whether mediation or arbitration offers the better likelihood of final disposition of the case without further proceedings. The court may then order arbitration or mediation, at its discretion, and sets the dates for completion of such arbitration or mediation and a further status conference following such completion dates.²⁶

Suggested by judges

Even in cases in which the court does not order mediation or arbitration, it will discuss the possibility of mediation and other ADR options with counsel and strongly encourage the parties to explore it on a voluntary basis.

No suspension of procedure

According to s 1775.7(a), compulsory mediation does not generally suspend the running of time periods²⁷ within which the plaintiff must serve his summons and complaint upon the defendant,²⁸ within which the case must be brought to trial,²⁹ or after which the court may, at its discretion, dismiss the case for failure to prosecute it.³⁰

The only exception to this rule is when an action is, or remains, submitted to mediation for more than four-and-a-half years and the mediation ends in non-agreement, in which event the time period within which the case must be brought to trial will be computed without inclusion of such a four-and-a-half-year period.³¹

For (voluntary) international mediation, the California International Arbitration and Conciliation Act does provide for a stay of judicial or arbitral proceedings from the start until the end of mediation proceedings. In addition it provides that all applicable limitation periods 'including periods of prescription' shall be tolled until the tenth day following termination of the mediation proceedings.³²

Time frame

Once the court has determined the suitability of a litigated case for ADR, the parties go to the court's ADR office where they complete an ADR Intake Form. This often happens on the same day that the judge sends the case to mediation. At the ADR office, the parties select a mediator, or ask the ADR office to select one for them. The ADR office then issues a Notice of Assignment and sends this to the mediator and all parties. The parties have five days to request a disqualification of the mediator pursuant to CCP s 170.1 *et seq.*³³ The mediator is requested to contact the parties within ten days of the receipt of the Notice.³⁴

Upon contacting the parties, the mediator schedules a suitable date on which all parties are available. This date needs to be before the mediation completion date set by the court, supposedly within 60 days of the date on which the judge referred the case to an ADR process,³⁵ but in practice often set much later than that. The mediator may grant an adjournment of the mediation date for up to 20 days, but generally grants such adjournment only upon good cause shown. A party may file a motion with the court for an extension of the mediation completion date, which the court will grant only upon good cause shown.³⁶

The parties must appear in person with their counsel,³⁷ and they are obliged to remain at the mediation for three hours, unless all parties and the mediator agree to end the mediation before that time because further mediation would be futile.³⁸ When the party is other than a natural person, it shall appear by a representative with full authority to resolve the dispute.³⁹

Within ten days following the conclusion of the mediation, the parties need to file an ADR Information Form with the ADR office.⁴⁰

In the event the parties settle, they need to give oral notice within ten days to the court and to the other parties. If the parties settle prior to the mediation, the parties must notify the mediator at least two days prior to the scheduled hearing date. If the mediator is notified later than that, the court may impose on the parties to pay the neutral a fee in an amount up to that which he would have earned.⁴¹

Generally, when the parties have settled, the plaintiff must file a request for dismissal within 45 days of settlement. Otherwise the court must dismiss the case after 45 days.⁴²

Training of mediators

Generally, a mediator must comply with the experience, training, educational and other requirements established by the court for appointment and retention of mediators.⁴³ For the LA Superior Court system, these requirements have been established by Rule 12.36.

Pursuant to this Rule, mediators are required to have had at least 30 hours of mediator training and have completed at least eight mediations, each lasting at least two hours, within the past three years. To keep their status on the court's roster, mediators must complete four hours of continuing education in an ADR course approved by a continuing education provider.

Mediator fees

Mediators in Los Angeles County who participate in the mandatory mediation programme agree to conduct the first three hours *pro bono publico*.⁴⁴ If the mediation continues beyond these three hours, upon prior agreement with the parties, the mediator may charge his/her regular hourly fee.

Since the summer of 2004, the court has instituted an additional panel of 'party pay mediators', pursuant to which the mediator may charge US\$150 per hour for the first three hours.⁴⁵ In order to qualify for this panel, mediators must show additional experience beyond the experience required by Rule 12.36, and they must also agree to accept a minimum number of *pro bono* cases from the original panel. The result so far has been that parties choose a mediator who is listed on the 'party pay panel', but they select him/her as an unpaid mediator from the other (*pro bono*) list.

There is growing discontent with the current system, as mediators find themselves in the awkward position that during the mediation process they may be surrounded by say five or six attorneys who all charge their usual rates to their clients, while the mediators who (in their estimation) do most of the work do so for free.

Mediators' regular hourly fees range from US\$200 to US\$1,000 per hour.⁴⁶

Mediation incentives

Beyond the *pro bono*/reduced-fee system described in the previous section, I am not aware that California law uses incentives to encourage mediation. The benefits of mediation are so well established that it may not require any further incentives.

On the other hand, it is not unusual for a judge to exert considerable pressure to persuade the parties and their counsel to agree to voluntary mediation of the case before him/her.

The judge may urge the parties to estimate the costs associated with taking a matter all the way to trial. Since the legislature encourages mediation at the earliest possible stage, ie before most pre-trial discovery has

taken place,⁴⁷ the cost-savings can be substantial. At that stage, in addition to the pre-trial discovery that still needs to be done, experts may have to be consulted, procedural issues may arise which may be the subject of motions, and legal issues will have to be researched and briefed. Both parties will reap considerable benefits if mediation can settle the litigated case before the parties incur all these expenses.

Effectiveness of court-mandated mediation

The LA Superior Court system reports that as many as 97 per cent of all civil cases filed do not go to trial. They are either withdrawn, settle through negotiation, or settle as a result of mediation.⁴⁸

The success rate of court-mandated mediation is almost as impressive. According to the ADR office of the Los Angeles Superior Court, the ADR programme handled 36,579 cases in the 12-month period from July 2003 to June 2004.⁴⁹ Of these, 21,494 cases were completed, out of which 13,083 (or 61 per cent) were resolved, either by settlement conference, non-binding arbitration in which the parties both accepted the award, or successful mediation.

Most of these cases were resolved by mediation: 31,628 cases out of the 36,579 handled by the ADR programme were referred to mediation.⁵⁰ Out of these, 17,421 cases were completed, of which 11,001 (or 63 per cent) were resolved.⁵¹

Many of the cases that end in non-agreement at mediation get settled later on, mainly because parties tend to continue the bargaining process that started at the court-mandated mediation session. This explains at least in part the discrepancy between the percentage ending in non-agreement (39 per cent) (in addition to the substantial number of cases that are withdrawn), and the low percentage (three per cent) that eventually does proceed to trial.

California's ethical rules

Effective 1 January 2003, California has ethical rules for mediations that take place within the context of court-connected mediation programmes.⁵² The rules apply to any mediator who has agreed to be on a superior court's panel of mediators for civil cases, or have otherwise agreed to participate in a court-connected mediation, – for the duration of the mediation proceedings.

Curiously, California has not, or at least not yet,⁵³ adopted rules of conduct for mediators who mediate outside the court-connected mediation programmes, even though similar rules of ethics exist for arbitrators.⁵⁴

If the mediation is administered by an institutional agency or provider, the mediator may be subject to a particular code of conduct developed by such agency or provider. For example, the federal government developed a Mediator Code of Professional Conduct⁵⁵ for mediation by neutrals employed by the Federal

Mediation and Conciliation Service (FMCS), a federal agency that provides mediation services principally in the area of collective bargaining between companies and organised labour. Similarly, mediators who mediate under the auspices of the American Arbitration Association have undertaken to comply with the (soon to be revised) 1994 'Model Standards of Conduct For Mediators' (sometimes known as the 'Joint Standards')⁵⁶ that were developed as a joint project with the Dispute Resolution Section of the American Bar Association and the Society of Professionals in Dispute Resolution (SPIDR).⁵⁷

The Joint Standards are the most widely adopted national standards of conduct for mediators in the United States. Besides being used by members of the AAA, ABA and ACR, the Joint Standards are used for mediations with the Air Force⁵⁸ and the US Navy, and many of the state and national organisations use standards that are largely based on the Joint Standards.⁵⁹

Private organisations of mediators have often developed their own standards. For example, the California Dispute Resolution Council (CDRC), a statewide organisation of mediators, arbitrators, and other neutral dispute resolvers, has developed its own 'Standards of Practice for California Mediators'.⁶⁰ On the other hand, the Southern California Mediation Association⁶¹ requires every applicant for professional membership status to affirm his/her commitment to abide by the code of mediator conduct promulgated by one of four organisations, including the ABA,⁶² the CDRC⁶³ and the Association for Conflict Resolution (ACR).⁶⁴

The California Rules of Conduct in court-mandated cases are set out in CRC Rules 1620–40.8.⁶⁵ The Rules are intended as minimum standards to promote confidence in the integrity and fairness of the mediation process. The Rules are not intended to create a basis for challenging a settlement agreement or for a civil cause of action against a mediator.⁶⁶

The Rules emphasise the voluntary participation and self-determination that apply even to court-mandated mediation. The Rules also require that at the outset of the mediation process, the mediator inform the parties of the confidentiality of the process pursuant to Evidence Code ss 1115–28 and case law that has interpreted those sections, and that the mediator explain his/her practice regarding confidentiality of discussions held with one of the parties in caucus.⁶⁷ Under CRC Rule 1620.4 (c), the mediator must not disclose information revealed in confidence during caucus unless authorised by the person revealing the information.

There has been criticism of the rule that requires the mediator to inform the participants of the confidentiality rules at the outset of the mediation. Specifically, the CDRC⁶⁸ has suggested that instead, at the time that the case is assigned to mediation, the court should distribute a pamphlet that summarises California

law on mediation confidentiality. This would avoid mistakes that might be made by the mediator, especially if he/she is not a lawyer, and it would get this information to the participants earlier.

Rule 1620.5 deals with the issue of conflicts of interest. The basic rules are that (i) the mediator 'must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially', and (ii) he/she has a continuing duty to disclose these matters to the parties.

The matters that reasonably could raise a question include without limitation: (a) 'past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature'; and (b) the existence of any grounds for disqualification of a judge as specified in CCP s 170.1.⁶⁹ The Advisory Committee Comment to Rule 1620.5 gives examples of what could fall within these categories, and also points out that when an attorney-mediator is part of a law firm, these potential conflicts extend to any other attorney in his/her firm. In a large firm setting, with multiple offices, this could lead to a situation in which the mediator has a conflict because of some type of involvement of an attorney he/she does not know but who works in some distant office of the same law firm.

Generally, if no party makes any objections after the mediator makes the disclosures, he/she is allowed to proceed. But if one party objects, the mediator must withdraw (unless more than two parties are involved, in which case he/she may continue to mediate the dispute among the non-objecting parties).

The mediator must decline to serve or withdraw if (1) the mediator cannot maintain impartiality towards all participants, or (2) proceeding with the mediation would jeopardise the integrity of the court or the mediation process.⁷⁰ If there is a conflict between a mediator's obligation to maintain confidentiality and the mediator's obligation to make a disclosure, he/she must determine whether a general disclosure of the circumstance without revealing any confidential information will satisfy his/her duty to disclose. If it does not, he/she must decline to serve or withdraw.

The Rules do not require any particular advanced degree or technical or professional experience as a prerequisite for competence as a mediator.⁷¹ The LASC Rules, however, do require a minimum number of hours of training and experience.⁷²

The Rules of Conduct further deal with the quality of the mediation process, requiring that the mediator conducts the mediation in a procedurally fair manner; his/her marketing of mediation services; compliance with applicable requirements concerning compensation and complaint procedures (which are left to the local courts).

Confidentiality in California and pursuant to the Uniform Mediation Act

It may be recalled that confidentiality as it relates to mediation comes in three forms⁷³:

- (1) when a party gives information to the mediator in caucus;
- (2) as a general obligation on the parties, the mediator and other participants, to keep confidential all information obtained during the mediation process and not to disclose such information to any third party; and
- (3) a right and/or duty not to disclose such information in discovery or evidence in a later arbitral, judicial or administrative proceeding.

ad 1

In California, the first form of confidentiality is handled in CRC Rule 1620.4 (c),⁷⁴ which, similar to many modern institutional rules,⁷⁵ provides that the mediator keeps information that was revealed in caucus confidential unless the person revealing the information expressly consents to the mediator sharing that information with the other participants in the mediation. There is no corresponding provision in the UMA.⁷⁶

ad 2

Under California law, the two other forms of confidentiality are dealt with in ss 1115–28 of the Evidence Code (EC). The second form of confidentiality is covered by EC s 1119 (c), which provides that '[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential'.

The equivalent provision in the Uniform Mediation Act, s 8 UMA, was added after some lengthy debates as to the usefulness of such a provision, and the reluctance of the Drafting Committee to insert the provision is evident from the text:

'Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.'

Section 8 UMA thus effectively bars confidentiality of mediation communications unless and to the extent that either (i) the parties agreed thereto or (ii) another law or rule of the State provides otherwise. Consent of the mediator is not required.

On the other hand, EC s 1119 (c) finds itself at the other end of the spectrum as it provides for a broad duty of confidentiality, from which deviation can be only pursuant to EC s 1122 (a), which effectively requires the express written agreement of all parties *and the mediator*.⁷⁷

ad 3

The third, and most important form of confidentiality in mediation is the right and/or duty not to disclose mediation information in pre-trial discovery or in evidence in a concurrent or later arbitral, judicial or administrative proceeding.

There are three different ways of attempting to resolve this type of confidentiality: by contract, by rule of evidence and by creating a privilege.

(A) The first, and oldest form of trying to protect mediation information is that the parties and the mediator (and any other participants) enter into a confidentiality agreement, in which each party undertakes to keep such information confidential and not to testify in later arbitral or judicial proceedings. Often the provision comes with an appropriately worded exception covering the eventuality that a party is obliged by law or by a court to reveal such information in a proceeding. Of course, in such an event the contractual undertaking has no teeth at all. But even without this exception, a contractual duty to keep mediation information confidential will run into problems, at least in the United States, and probably also in other common law jurisdictions.

The problem with relying on a contractual provision such as the one just described is that it often turns out to be unenforceable as against public policy that courts are entitled to every person's evidence. Even if such a contractual provision may succeed in a subsequent proceeding between the parties, it is unlikely to be respected in a proceeding involving third parties.⁷⁸

(B) California, in EC ss 1119 (a) [for oral communications] and (b) [for writings], has sought its solution in a rule of evidence, providing in principle that evidence of mediation information is inadmissible, both in pre-trial discovery and in arbitral and non-criminal judicial proceedings.⁷⁹ EC s 1120 (a) provides, as a *general* exception, that '[e]vidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation'.

The problem created by this system is that the scope of each of these two provisions is uncertain, and it is easy to see that it may be difficult to distinguish between documents, photographs, etc that have been 'prepared for the purpose of, in the course of, or pursuant to, a mediation', and evidence otherwise admissible that 'shall not become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation'. This problem was basically at the core of the recent case, *Rojas v Superior Court*,⁸⁰ on which I reported in the first issue of this Newsletter in April 2005,⁸¹ and which is briefly mentioned in the next section of this article.⁸²

In addition to the general exception of EC s 1120(a), EC ss 1119(a) and 1119(b), by limiting the protection

of mediation communications to non-criminal proceedings, implicitly except criminal proceedings from the inadmissibility rule. Furthermore, s 1120(b)⁸³ provides specific exceptions to the exclusionary rule of s 1119 relative to (1) an agreement to mediate, (2) any agreement not to take a default or to extend time to act in a pending action, and (3) the fact that a particular mediator served or was otherwise involved in the mediation process. As a result, these three subject matters are admissible in any subsequent proceeding.

The provisions of ss 1119 and 1120 are not mandatory, and can be waived by agreement among all participants (including the mediator) to the mediation process by EC s 1122(a).⁸⁴

(C) The third method in which the law may attempt to protect mediation information is by creating a privilege. This is the solution decided upon by a large number of states⁸⁵ as well as the drafters of the Uniform Mediation Act. Privileges are common in the United States with respect to confidential relationships that arise in a professional relationship, such as clergy-penitent, attorney-client, accountant-client, psychiatrist- and/or psychologist-patient, physician-patient, nurse-patient, and even in certain instances, realtor-client and architect-client.⁸⁶ These privileges may be established by codes of ethics of a professional organisation or by statute. Typically, these privileges include both (a) a duty to keep secrets and (b) freedom from involuntary testimony.⁸⁷

The mediator-disputant privilege differs from these other privileges in that the duty of confidentiality in the other professional relationships is imposed upon the professional but not on the person being served by the professional, - whereas in principle the mediator-disputant privilege created by the UMA is imposed on both the mediator and all other participants to the mediation. In addition, these other privileges do not necessarily prevent a third party from trying to compel testimony on these issues, - whereas the mediation-disputant privilege is absolute unless covered by an express waiver or exception. Thirdly, these other privileges do not prevent the person being served from making voluntary disclosures outside arbitral or judicial proceedings, - whereas the mediator-disputant privilege created by the UMA is intended to prohibit those as well.⁸⁸

To approach the confidentiality issue as an evidentiary privilege has the advantage that it can clearly define: (a) the scope of the privilege in terms of what mediation information and activities are covered; (b) which persons are burdened by the privilege; (c) in which later proceedings the privilege will apply; (d) who are the holders of the privilege, with the right to invoke or waive the privilege (and to what extent); and (e) what information will be excepted from the privilege.⁸⁹ This also means that such a provision can account for the separate and perhaps conflicting interests of

mediation parties and the mediator in maintaining confidentiality.⁹⁰

This approach has been adopted in Articles 4, 5 and 6 of the UMA. Section 4 creates the privileges of the various participants in the mediation proceeding, s 6 provides who can waive what privilege, and s 5 provides for exceptions to the privileges. Section 4 UMA reads as follows:

SECTION 4

PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY

- (a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.
- (b) In a proceeding,⁹¹ the following privileges apply:
- (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
 - (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
 - (3) A non-party participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
- (c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Thus, s 4 sets up the evidentiary privilege, which provides that disclosure of mediation communications⁹² generally cannot be compelled in certain proceedings (or discovery) and results in the exclusion of these communications from evidence (and from discovery) if requested by any party or, for certain communications, by a mediator or non-party participant as well, unless within an exception set forth in s 6, or validly waived pursuant to s 5.⁹³

Section 4(c) UMA is almost identical to EC s 1120(a), and excludes from the privilege evidence or information otherwise admissible or subject to discovery.

Section 5 provides who can waive what privilege, and sets forth situations in which the holder of a privilege is precluded from asserting the privilege.

SECTION 5

WAIVER AND PRECLUSION OF PRIVILEGE

- (a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:
- (1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and
 - (2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant

- (b) A person that discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.
- (c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

Unlike the attorney–client privilege, the mediation privilege does not permit waiver to be implied by conduct. The drafters of the UMA were concerned that mediators and parties unfamiliar with the statutory environment might waive the privilege inadvertently.⁹⁴

Section 6 sets out specific and exclusive exceptions to the privilege granted under s 4. The drafters of the UMA contemplated that a court will hold an *in camera* proceeding at which the claim of exemption from the privilege can be confidentially asserted and defended. Section 6(a) sets out exceptions to the privilege as to which it can be said categorically that society’s interest in the information outweighs its interest in the confidentiality of the information contained in the mediation communication. These include agreements signed by all parties (including agreements to mediate, and settlement agreements), mediations open to the public, threats of bodily injury or to commit a violent crime, communications used to plan or commit a crime, and evidence of professional misconduct or malpractice by the mediator, a party or representative of a party.⁹⁵

In contrast, s 6(b) UMA⁹⁶ refers to exceptions that apply in situations where the relative strengths of society’s interest in the information and in the confidentiality thereof can be measured only under the facts and circumstances of the particular case.⁹⁷ Thus, s 6(b) is intended to place the burden on the proponent of persuading the court that this exception to the privilege applies by demonstrating that the evidence is otherwise unavailable and the need for the evidence outweighs the policies underlying the privilege. Absent a finding to that effect after an *in camera* hearing, the evidence will not be disclosed, and it will be admitted only for that limited purpose.⁹⁸ Importantly, however, s 6(b) limits such exceptions to two special circumstances: first, the mediation communication is sought to be admitted as evidence in a criminal proceeding, or second, a proceeding involving contract defences to the enforcement of a mediation settlement agreement, such as duress by a party or the mediator or a mis-statement by a party about a material fact that induced the other party to agree to the settlement.⁹⁹

Section 6(c) provides that the mediator cannot be compelled to testify regarding claims of professional misconduct against a party or party representative (s 6(a)(6)), or regarding the validity or enforceability of a settlement agreement (s 6(b)(2)).¹⁰⁰

Finally, s 6(d) makes clear the limited use that may be made of the exceptions set out in ss 6(a) and 6(b). A statement will be admitted only for the specific purpose for which the exception is made, and will remain privileged and therefore inadmissible in other proceedings.¹⁰¹

(D) Clearly, the California statute on admissibility of mediation communications in subsequent proceedings is among the most restrictive, as it provides only extremely limited exceptions to mediation confidentiality. The Uniform Mediation Act provides much broader exceptions, but these too have been criticised for being too narrow in certain instances. Specifically, it has been argued that the case-by-case exception of s 6(b) could be expanded to include situations beyond the circumstances described in subsections (1) and (2).¹⁰²

Case law in California and elsewhere in the United States

Since the late 1980s or early 1990s, not only has California had mediation legislation, but so also have others, for example Texas and Florida. The result has been a modest, yet significant body of case law dealing with the issues that emanate from mediation legislation. There are three primary areas of issues that have arisen before the courts. They are: (1) the requirement of good faith negotiation in mediation; (2) confidentiality of communications in mediation; and (3) the enforceability of mediation settlement agreements.¹⁰³

Requirement of good faith

The prominent case in California on this issue is *Foxgate Homeowners' Ass'n, Inc v Bramalea California, Inc*, 26 Cal 4th 1 (2001). This case involved a construction defect action by a Homeowners' Association against the developer of a 65-unit Culver City condominium complex. After the attorney for the developer failed to show up without expert consultants, the mediator filed a report with the court in which he reported in a fair amount of detail that the attorney had acted in bad faith, and the mediator recommended the imposition of sanctions on the defendant and its attorney. Relying on EC S 1121,¹⁰⁴ the defendant argued that the mediator was not permitted to file any such report with the court and that the sanctions ought to be lifted.

After the Superior Court had granted the plaintiff's motion for sanctions, the Court of Appeal acknowledged that the purpose of the confidentiality mandated by s 1119 is to promote mediation as an alternative to judicial proceedings and that confidentiality is essential to mediation. It reasoned, however, that it should balance against that policy the recognition that, unless the parties and their lawyers participate in good faith in mediation, there is little to

protect. Therefore, the Court of Appeal concluded that the Legislature did not intend statutory mandated confidentiality to create an immunity from sanctions that would shield parties who disobey valid orders governing the parties' participation. The Court of Appeal also expressed doubt that s 1121 was intended to preclude a report to the trial court if the parties engaged in improper conduct by attacking or threatening to attack an opposing party. In sum, s 1121 was not intended to shield sanctionable conduct.

The Supreme Court of California reversed, holding that the language of ss 1119 and 1121 is clear and unambiguous, and that the confidentiality of s 1119 is absolute. In addition, s 1121 also prohibits the mediator, *but not a party*, from advising the court about *conduct* during mediation that might warrant sanctions.

The only California case upholding admission, over objection, of statements made during mediation in which no statutory exception to confidentiality applied, was *Rinaker v Superior Court*, 62 Cal App 4th 155 (1998), which the Supreme Court distinguished in *Foxgate*.¹⁰⁵ In *Rinaker*, the Court of Appeal held that, although a delinquency proceeding is a civil action within the meaning of s 1119 and the confidentiality provisions were applicable, that statutory right must yield to a minor's constitutional due process rights to put forward a defence and confront, cross-examine and impeach the victim witness with his prior inconsistent statements. To maintain confidentiality to the extent possible, however, the Court of Appeal stated that the juvenile court judge should first have held an *in camera* hearing, to weigh the minors' claim of need to question the mediator against the statutory privilege to determine if the mediator's testimony was sufficiently probative to be necessary.¹⁰⁶ The *Foxgate* court stated that *Rinaker* was consistent with its past recognition and that of the United States Supreme Court that due process entitles juveniles to some of the basic constitutional rights accorded adults, including the right to confrontation and cross-examination. In *Foxgate*, however, the plaintiffs had no comparable supervening due-process-based right to use evidence of statements and events at the mediation session.¹⁰⁷

The *Foxgate* court also distinguished *Olam v Congress Mortgage Company*, 68 F Supp 2d 1110 (ND Cal 1999) in which the federal district court weighed the public policy of mediation confidentiality against that of establishing the competence of one of the parties to enter into a settlement agreement, whereby the magistrate judge decided to compel the mediator's testimony notwithstanding EC ss 703.5¹⁰⁸ and 1119 (which were held to be applicable) because it was the most reliable and probative evidence and there was no likely alternative source.

Confidentiality of communications in mediation

Here, the leading case is *Rojas v Superior Court for the State of California, County of Los Angeles*, 33 Cal 4th 407

(2004).¹⁰⁹ In this case, the California Supreme Court overturned the ruling by the Court of Appeal which had constructed an exception to mediation confidentiality in order to allow plaintiffs in a subsequent proceeding access to documents which the trial court had held (as a non-appealable finding of fact) to have been prepared for the sole purpose of mediation. In reversing that ruling, the Supreme Court held that confidentiality of mediation communications is absolute as it applies to evidence prepared for the sole and limited purpose of mediation (with the exception only of evidence expressly specified by statute).¹¹⁰

Enforceability of mediation settlement agreements

In California, the statutory scheme provides that no exceptions to mediation confidentiality exist for the enforcement of mediated settlement agreements unless all the parties, *including the mediator*, waive mediation confidentiality.¹¹¹ It is not surprising therefore that courts have attempted to construct exceptions such as the *Olam* case¹¹² in order to allow evidence to come in.

In *Olam*, a 65-year-old woman alleged that her signature on a mediated settlement agreement had been obtained by 'undue influence'. Both parties had waived the confidentiality protection provided by EC s 1119 and had asked the mediator to testify. The district court held that the mediator (who had not waived his right not to testify¹¹³) could be made to testify because the public interest in the rule that a mediator cannot be compelled to testify in a civil action was outweighed by 'the fundamental duty of a public court in our society to do justice'.¹¹⁴

As Professor Robinson notes, mediation confidentiality's interference with enforcement proceedings is likely to be rare because parties to a settlement agreement almost always voluntarily satisfy the terms of the agreement.¹¹⁵ Nonetheless, Professor Robinson researched the case law in the United States where the enforcement of mediated settlement agreements became an issue. He found no fewer than ten cases in which issues were raised as to whether an agreement was in fact reached because some term or condition was added or overlooked; nine cases in which fraud was alleged; six cases in which conditions precedent to a binding agreement were alleged not to have been fulfilled; four cases in which the plaintiff alleged mistake; eight cases alleging duress; three cases in which the agreement should be declared void as against public policy; and six cases in which the terms of the agreement were alleged to be ambiguous.¹¹⁶ I have made no further enquiry as to how many of such cases have come down since Professor Robinson's article (which was published in early 2003).

In normal circumstances, the law of contracts requires 'evidence of prior or contemporaneous agreements and negotiation', and a 'definiteness of essential terms'.¹¹⁷ Obviously, settlement agreements should be voided if

duress, mistake or fraud can be shown. Professor Robinson indeed cites cases in which mediated agreements have been voided because of duress,¹¹⁸ mutual mistake¹¹⁹ and fraud.¹²⁰ On the other hand, courts have also enforced mediated agreements in spite of alleged duress,¹²¹ mistake¹²² and fraud.¹²³ In many of these cases, the court did allow evidence, but mainly because the applicable standards did not involve a strict standard of mediation confidentiality. Professor Robinson notes that the resolution of most of these cases would be dramatically different under a strict standard of mediation confidentiality,¹²⁴ which, he says, transforms mediated agreements into 'super contracts' because they are essentially exempt from the established standards for the enforcement of agreements under the common law of contracts.¹²⁵

Professor Robinson concludes that courts have taken one of four avenues in deciding these cases in which contract common law in enforcement proceedings clashed with mediation confidentiality. The courts have hindered the application of contract law because of mediation confidentiality with or without explanation, and pierced mediation confidentiality with or without explanation. This undesirable result creates unpredictable standards for the enforcement of mediated settlement agreements.

Professor Robinson points to the fact that courts have already noted that the interest in protecting mediation confidentiality is diminished in the context of enforcing a mediated agreement.¹²⁶ He cites four cases in which the courts have depended on mediator testimony (the best available evidence) while resolving contract law enforcement issues.¹²⁷ In conclusion, Professor Robinson urges that the UMA's exception to mediation confidentiality when enforcing mediated agreements (already contained in s 6(b), but severely limited by the provision of s 6(c) that precludes the mediator from testifying) be expanded. Pointing to the fact that many of the party's statements are transmitted through the mediator from one caucus to another, the exclusion of mediator testimony when the court has found that the need for evidence substantially outweighs the interest in protecting confidentiality is a flaw in the UMA as currently worded. Section 6(c) should therefore be broadened so as to allow or compel the mediator to testify when the court has made a finding pursuant to s 6(b) (2).

Notes

* Eric van Ginkel is a mediator and arbitrator specialising in international commercial mediation and arbitration.

1 *Allied-Bruce Terminix Cos v Dobson*, 513 US 265 (1995).

2 See John M McCabe, 'Uniformity in ADR: Thoughts on the Uniform Arbitration Act and Uniform Mediation Act', 3 *Pepp Disp Resol LJ* 317, 318 (2003).

3 The RUA is currently pending in Arizona, California, Connecticut, Indiana, Iowa, Oklahoma, Vermont, West Virginia, and the District of Columbia, and it has been adopted by Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota,

- Oregon, Utah and Washington. See www.adrworld.com/sp.asp (last visited, 19 May 2005).
- 4 Mediation is said to have traceable origins that go back to the Chou Dynasty (BC1100–256), more specifically to the writings of Confucius (BC551–479). See www.who2.com/confucius.html (last visited, 14 May 2005). See generally, Donald C Clarke, 'Dispute Resolution in China', in Tahiri V Lee (ed), *Contract, Guanxi, and Dispute Resolution in China 369* (1997).
 - 5 See Mark S Hamilton, 'Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission', 3 *Asian-Pacific L. & Pol'y J* 10, under 'II B. The History of Dispute Resolution in China' (2002); Robert Perkovich, 'A Comparative Analysis of Community Mediation in the United States and the People's Republic of China', 10 *Temp Int'l & Comp Lj* 313, n 6 (1996) and the works cited therein.
 - 6 See Scott H Hughes, 'The Uniform Mediation Act: To the Spoiled go the Privileges', 85 *Marq L Rev* 9, 17 (2001).
 - 7 *Ibid*; Colo Rev Stat Ann 38-12-216 (West 2000) (originally enacted in 1981).
 - 8 Hughes, 'The Uniform Mediation Act', *supra* note 6, at 17; Iowa Code Ann 654.2C (West 1995) (originally enacted in 1986).
 - 9 *Id.*, at 16–17.
 - 10 *Id.*, at 17.
 - 11 National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act with Prefatory Note and Comments, at Prefatory Note, Part 3, 'Importance of Uniformity' (August 10–17, 2001) available at www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm (last visited, 14 May 2005). The Uniform Mediation Act was drafted by Drafting Committees of the NCCUSL and the Section on Dispute Resolution of the American Bar Association.
 - 12 Hughes, 'Uniform Mediation Act', note 6, at 17.
 - 13 See Eric van Ginkel, 'The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal', 21 *J Int Arb* 1, 3 (2001).
 - 14 As at time of writing, the Uniform Mediation Act has been adopted by six states: Illinois, Iowa, Nebraska, New Jersey, Ohio and Washington. Bills to enact the UMA are currently under consideration in five more states (Connecticut, Indiana, Massachusetts, Minnesota and Vermont) and the District of Columbia. See www.adrworld.com/sp.asp?id=38352 (last visited, on 14 May 2005).
 - 15 See, eg, California Code of Civil Procedure S 1775(a)–(e).
 - 16 *Accord*, McCabe, 'Uniformity in ADR', *supra* note 2, at 319 (2003).
 - 17 See www.courtinfo.ca.gov/about/ (last visited, 15 May 2005).
 - 18 See www.lasuperiorcourt.org/aboutcourt/history.htm (last visited, 15 May 2005).
 - 19 See www.lasuperiorcourt.org/locations/ (last visited, 15 May 2005).
 - 20 CCP S 1775(e).
 - 21 Available at www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=01001-02000&file=1775-1775.15 (last visited, 15 May 2005).
 - 22 Available at www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=00001-01000&file=700-704 for S 703.5, and www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=01001-02000&file=1115-1128, for Ss 1115–28 (last visited, 15 May 2005).
 - 23 Available at www.courtinfo.ca.gov/rules/titlefive, under Division III, Alternative Dispute Resolution Rules for Civil Cases (last visited, 15 May 2005).
 - 24 Available at www.lasuperiorcourt.org/courtrules/Chapter12.htm (last visited, 15 May 2005).
 - 25 CCP, s 1775.2(a).
 - 26 LASC Rule 12.2.
 - 27 Note that for court-mandated or court-suggested mediation to come into play the action must have been commenced by filing a complaint with the clerk of the court. Thus, there is no issue here of tolling any statute of limitation that would arise if mediation were initiated by the parties prior to filing suit. For an example of 'domestic' mediation that tolls the applicable statute of limitation, see Conn CGS, s 52-192a (pre-suit medical malpractice claims toll statute of limitation).
 - 28 Within three years from the date the complaint has been filed with the court. CCP, s 583.210.
 - 29 Within five years from the date the complaint was filed with the court. CCP, s 583.310.
 - 30 CCP, s 583.410 *et seq.*
 - 31 CCP, s 1775.7(b).
 - 32 CCP, ss 1297.381 and 1297.382. Generally, the few states that have adopted international conciliation statutes do provide for tolling of applicable time periods. See, eg, North Carolina (NC Gen Stat 1-567.82), Ohio (Ohio Rev Code Ann 2712.82), Oregon (Or Rev Stat 36.538), and Texas (Tex Civ Prac & Rem Code 172.207). But see the Colorado International Dispute Resolution Act (Col Rev Stat 13-22-501 to 13-22-507).
 - 33 LASC Rule 12.6.
 - 34 See www.lasuperiorcourt.org/adr/, 'How Neutrals are Notified and How ADR Hearings are Scheduled' (last visited on 31 May 2005).
 - 35 CRC Rule 1637(b), which time period may be extended up to 30 days. In practice, the mediation completion date may be set as many as 180 days following the assignment of the mediator.
 - 36 For limited jurisdiction cases, mediation and arbitration hearings must be completed within 120 days (CCP, s 1141.11(d)).
 - 37 CRC Rule 1634, LASC Rule 12.15.
 - 38 LASC Rule 12.15.
 - 39 *Ibid.*
 - 40 LASC Rule 12.37. The procedures are described in some detail at www.lasuperiorcourt.org/adr/process.asp?source= (last visited, 16 May 2005).
 - 41 CRC Rule 225(a) (1) and (2). See also LASC Rule 12.5.
 - 42 CRC Rule 225(b).
 - 43 CRC Rule 1620.6(a).
 - 44 Other counties (including San Diego and Santa Barbara) have programmes in which mediators receive hourly compensation in all cases.
 - 45 See www.lasuperiorcourt.org/adr/process.asp?source= (last visited, 16 May 2005).
 - 46 *Ibid.*
 - 47 CCP, s 1775(d) provides as follows:
'Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a civil action.'
 - 48 See www.lasuperiorcourt.org/adr/whatis.asp (last visited, 15 May 2005).
 - 49 The author gratefully acknowledges the assistance of Julie Bronson and Gina Collura of the LASC ADR office, who provided the author with these and the other statistics reported in this section.
 - 50 This number included 22,068 cases of general jurisdiction and 9,560 cases of limited jurisdiction (which includes civil disputes with claims for damages up to and including US\$25,000 and small claims (up to and including US\$5,000).
 - 51 Out of these 17,421 completed cases, 12,012 cases were of general jurisdiction, of which 7,359 (or 61 per cent) settled, and 5,409 cases were of limited jurisdiction cases. The latter enjoy the highest success rate (3,642 cases or 67 per cent).
 - 52 Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil cases, Adopted by the Judicial Council of California, Effective 1 January 2003, available at www.courtinfo.ca.gov (last visited, 17 May 2005).
 - 53 The author has been unable to find any state that has adopted a *general* code of ethics for all mediations conducted in the state, other than North Carolina (but the North Carolina Standards of Conduct apply only if the mediation is not governed by any other statute, programme rules or standards of conduct) (see www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Conduct.asp (last visited, 18 May 2005); Virginia, – the Virginia Standards of Ethics and Professional Responsibility for Certified Mediators (which apply to all certified mediators in that state) (available at www.courts.state.va.us/soe/soe.htm (last visited, 18 May 2005) and Tennessee, – the Tennessee Supreme Court Standards of Professional Conduct for Rule 31 Neutrals (available at www.tsc.state.tn.us/opinions/tsc/rules/TNrulesofcourt/06supct25_end.htm#31 (last visited, 18 May 2005)). Like California, the Supreme Court of New Jersey adopted a Standard of Conduct for Mediators in Court-Connected Programs (available at www.judiciary.state.nj.us/notices/n000216a.htm (last visited, 18 May 2005)).
 - 54 See 'Ethics Standards for Neutral Arbitrators in Contractual Arbitration', www.courtinfo.ca.gov/rules/appendix/appdiv6.pdf (last

- visited, 18 May 2005), effective since 1 July 2002. These standards constituted the first of their kind in the United States.
- 55 See www.admin.fmcs.gov/assets/files/OGC/MediatorCodeofConduct.doc (last visited, 17 May 2005).
- 56 See www.adr.org/sp.asp?id=22118 (last visited, 17 May 2005).
- 57 This organisation has since merged into the Association for Conflict Resolution (ACR). See *infra* note 64.
- 58 See www.adr.af.mil/general/ethics.htm (last visited, 18 May 2005).
- 59 See generally, Max Factor III, 'Thirty FAQ's for California Mediators on Ethical Minefields Involving Business, Construction, Employment and Real Estate Mediations', mediate.com/articles/factorm2.cfm (last visited, 18 May 2005).
- 60 See www.cdrc.net/pg2.cfm (last visited, 17 May 2005). For private membership organisations in other states, see, for example, the Colorado Council of Mediators' 'Revised Code of Professional Conduct' (available at www.coloradomediators.org/codeofconduct.htm (last visited, 18 May 2005)); the Maine Association of Dispute Resolution Professionals' 'Standards of Professional Conduct' (available at www.madrp.org/Ethics.html (last visited, 18 May 2005)); and the New Hampshire Conflict Resolution Association's 'Standards of Professional Conduct' (available at www.nhcr.org/standards.htm (last visited, 18 May 2005)).
- 61 Similarly, the Wisconsin Association of Mediators has a Standard of Conduct based on the Model Standards described *supra* at note 56. See www.wamediators.org/pubs/ethicalguidelines.html (last visited, 18 May 2005). See also the Iowa Association for Dispute Resolution's Model Standards of Conduct for Mediators (www.iowaadr.org/Standards.htm (last visited, 18 May 2005)). In addition, the Michigan Supreme Court adopted Standards of Conduct for Mediators that are based on the Model Standards (available at www.courts.michigan.gov/scao/resources/standards/odr/conduct.pdf (last visited, 18 May 2005)).
- 62 *Supra* note 56.
- 63 *Supra* note 60.
- 64 The ACR is an organisation that in 2001 resulted from the merger of three ADR organisations, including SPIDR mentioned in the text accompanying note 57 *supra*. See www.acrnet.org/about/ACR-FAQ2.htm (last visited, 17 May 2005). In January 2005, the ACR announced that the final version of revised Model Standards of Conduct for Mediators, along with the Joint Committee's recommendation for approval, had been sent to the ACR Board of Directors and to the leadership of the AAA and the ABA Section of Dispute Resolution. See www.acrnet.org/publications/ACRUpdate41.htm#2 (last visited, 18 May 2005).
- 65 Pursuant to LASC Rule 12.36(b)(2), '[a]ll Court mediators must ... [a]gree to abide by the Court's Standards of Professional Conduct for Mediators'. Presumably, the reference in the older LASC Rules 12.36(b)(2) is now to the newer CRC Rules 1620–1640.8.
- 66 CRC Rule 1620.
- 67 CRC Rule 1620.4(b).
- 68 See www.cdrc.net/pg21.cfm (last visited, 18 May 2005).
- 69 Available at www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=00001-01000&file=170-170.9 (last visited, 18 May 2005).
- 70 CRC Rule 1620.5(f).
- 71 Advisory Committee Comment to CRC Rule 1620.6.
- 72 See LASC Rule 12.36. See also, *supra* note 40 and accompanying text.
- 73 See Van Ginkel, 'UNCITRAL Model Law', *supra* note 13, at 36.
- 74 CRC Rule 1620.4(c) provides as follows:
'(c) [Confidentiality of separate communications; caucuses] If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorised to do so by the participant or participants who revealed the information.'
- 75 See, for example, CPR Mediation Procedure art III(VIII) ('The mediator will not transmit information received in confidence from any party to any other party or any third party unless authorized to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.') (available at www.cpradr.org/med_proced.asp?M=9.2.4#rules (last visited, 19 May 2005)); LCIA Mediation Procedure art 5.3 ('Nothing which is communicated to the mediator in private during the course of the mediation shall be repeated to the other party or parties, without the express consent of the party making the communication') (available at www.lcia.org/med/ (last visited, 19 May 2005)). Most of the somewhat older mediation rules tend to provide the reverse, ie that the mediator is free to share information obtained in caucus to the other mediation participants unless the person revealing the information specifically requests that the mediator keeps this information confidential. See, eg, Article 12, UNCITRAL Conciliation Rules (available at www.uncitral.org (last visited, 19 May 2005)). This provision was adopted almost verbatim by the UNCITRAL Model Law on International Commercial Conciliation (available at www.uncitral.org (last visited, 19 May 2005)). See, generally, Van Ginkel, *supra* note 13, at 36–7.
- 76 Also, there is no corresponding provision in the ICC ADR Rules, www.iccwbo.org/drs/english/adr/pdf_documents/adr_rules.pdf (last visited, 19 May 2005), nor in the ICDR International Mediation Rules, www.adr.org/sp.asp?id=22090#M12 (last visited, 19 May 2005), among others.
- 77 EC S 1122(a) reads as follows:
'1122
(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:
(1) All persons *who conduct or otherwise participate* in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.
(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, *and* the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation [*emphasis added*].'
- 78 See 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. See also, Van Ginkel, 'UNCITRAL Model Law', *supra* note 13, at 41.
- 79 EC, ss 1119(a) and 1119(b) provide as follows:
'1119 Except as otherwise provided in this chapter:
(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.'
- 80 *Rojas v Superior Court for the State of California, County of Los Angeles*, 33 Cal 4th 407 (2004).
- 81 Eric van Ginkel, 'Rojas v Superior Court: the Battle of Two Opposing Public Policies', 1 *IBA Mediation Committee Newsletter*, 1, 31–7 (April 2005).
- 82 *Infra*, notes 109–10 and accompanying text.
- 83 Section 1120(b) reads as follows:
(b) This chapter does not limit any of the following:
(1) The admissibility of an agreement to mediate a dispute.
(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

- 84 See *supra* note 77 and accompanying text. Of course, s 1122(a) applies equally to ss 1119(a) and 1119(b) as it does to s 1119(c) discussed there.
- 85 See Van Ginkel, 'UNCITRAL Model Law', note 13, note 213 and accompanying text.
- 86 See Hughes, 'Uniform Mediation Act', note 6, at 24-6.
- 87 *Id.*, at 25-34.
- 88 *Id.*, at 33-4.
- 89 See Kirtley, 'Mediation Privilege's Transition', *supra* note 78, at 19. See also, Van Ginkel, 'UNCITRAL Model Law', note 13, at 43.
- 90 *Ibid.*
- 91 Section 2(7) UMA defines 'proceeding' as '(A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (B) a legislative hearing or similar process.'
- 92 Section 2(2) UMA defines 'mediation communication' as '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.'
- 93 *Comment* to s 4 UMA, *supra* note 11, under the heading '1 In general'.
- 94 *Reporter's Notes* to s 5 UMA, *supra* note 11, under the heading '1 Section 5 (a) and (b). Waiver and preclusion'.
- 95 Section 6(a) reads as follows:
SECTION 6 EXCEPTIONS TO PRIVILEGE
(a) There is no privilege under Section 4 for a mediation communication that is:
(1) in an agreement evidenced by a record signed by all parties to the agreement;
(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;
(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or
(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the [Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.] [Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].
- 96 Section 6(b) UMA reads as follows:
(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:
(1) a court proceeding involving a felony [or misdemeanor]; or
(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.
- 97 *Reporter's Notes* to s 6 UMA, *supra* note 11, under the heading '1. In general'.
- 98 *Reporter's Notes* to s 6 UMA, *supra* note 11, under the heading 'Section 6(b) Exceptions requiring demonstration of need'.

- 99 *Reporter's Notes* to s 6 UMA, *supra* note 11, under the heading 'Section 6(b) (2) Validity and enforceability of settlement agreement'.
- 100 Section 6 (c) UMA reads as follows:
(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a) (6) or (b) (2).
- 101 Section 6 (d) UMA reads as follows:
(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.
- 102 See Peter Robinson, 'Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened', 2003 *J Disp Resol* 135.
- 103 See Bob Hornberger, *Court-Ordered Mediation Issues*, www.arkbar.com/Ark_Lawyer_Mag/Articles/CourtOrderedMediationSpring05.html (last visited, 19 May 2005).
- 104 Section 1121 provides as follows:
'1121 Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.'
- 105 26 Cal 4th at 15.
- 106 62 Cal 4th at 169-70.
- 107 26 Cal 4th 1, 15.
- 108 Section 703.5 provides as follows:
'703.5 No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.'
- 109 See *supra* notes 80-2 and accompanying text.
- 110 For an extensive discussion of the *Rojas* case, see Van Ginkel, 'Battle of Two Opposing Public Policies', *supra* note 81.
- 111 Robinson, 'Centuries of Contract Common Law', *supra* note 102, at 138-9.
- 112 *Supra* note 108 and accompanying text.
- 113 The wording of EC, s 703.5 could be interpreted as not even giving the mediator the option to waive this prohibition ('No ... mediator shall be competent to testify in any subsequent civil proceeding').
- 114 68 F Supp 2d at 1136.
- 115 Robinson, 'Centuries of Contract Common Law', *supra* note 102, at 142.
- 116 *Id.*, at 143-8.
- 117 *Id.* at 151-2.
- 118 *Id.* at note 134
- 119 *Id.* at note 142.
- 120 *Id.* at note 152.
- 121 *Id.* at note 133.
- 122 *Id.* at note 143.
- 123 *Id.* at note 153.
- 124 *Id.* at 159.
- 125 *Id.* at 161-2.
- 126 *Id.* at 169.
- 127 *Id.* at 170.