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# PROCEDURAL RULES FOR COMPLEMENTARY SYSTEMS OF LITIGATION AND MEDIATION—WORLDWIDE

*Ellen E. Deason\**

## INTRODUCTION

Among alternatives to adjudication, mediation is arguably even more alternative than arbitration. At least the process differs more: while arbitration offers a different type of neutral decisionmaker, mediation takes decisionmaking entirely out of the hands of a neutral decisionmaker and vests it in the parties. The meaning of the term “alternative” becomes blurred, however, in that mediation is intertwined with adjudication as a means of settling litigation. Mediation’s role in settlement means it will be an important part of the procedural world of the future. So, although the subtitle of this symposium refers only to decisional models of resolution—adjudication and arbitration—this paper focuses on the development of a rule system for mediation.

Some procedural rules for mediation, such as those associated with court-sponsored programs, were created directly for the use of mediation within the adversary system. Other rules apply to mediations generally or were designed for mediation programs with no direct connection to the courts. Both types of rules are linked to the adjudication system, however, in that many of their provisions govern how a mediation will be treated in later litigation. As a result, the growth of mediation procedure is important not only for developing mediation, but also for defining the relationship between mediation and litigation.

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\* Professor, The Ohio State University Moritz College of Law. This Essay is based on a presentation at a joint session of the Dispute Resolution and Civil Procedure Sections at the AALS Annual Meeting, January 3, 2004, on the topic “Competing or Complementary Rule Systems? Adjudication, Arbitration, and the Procedural World of the Future.” I appreciate helpful comments from Sarah Cole and research contributions by Kristen Blankley and David Warren.

This Essay begins with one person's experience of the ongoing changes in the relationship of litigation and mediation, changes that are both reflected in and stimulated by procedure. The acceptance of mediation by "litigators" is part of a transformation in how lawyers think of the way they approach civil disputes. While it has been true for many decades that a significant proportion of court cases end in settlement,<sup>1</sup> the profession's emphasis on settlement and on methods of settlement has intensified in recent years.<sup>2</sup> As court procedures increasingly interweave mediation with litigation, lawyers increasingly associate mediation with the court system as a useful settlement process.<sup>3</sup> Mediation also has its own identity, however, as a process with broader application and a history separate from civil litigation.<sup>4</sup> Thus as developments in mediation and litigation continue, they evolve both individually and together.

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1 Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994).

2 See, e.g., *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986); Marc Galanter, ". . . A Settlement Judge, Not a Trial Judge": *Judicial Mediation in the United States*, 12 J.L. SOC'Y 1 (1985); Hope Viner Sanborn, *The Vanishing Trial*, A.B.A. J., Oct. 1, 2002, at 24.

Some scholars blame the strengthened focus on settlement for what they have identified as the rise of an attitude that views trial as a failure. See, e.g., Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 925, 925-26 (2000). Yet, while trials have declined at an accelerated pace in recent years, with the absolute number of trials in federal courts declining as well as the proportion of cases ending in trial, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004), this trend may be due more to an increase in summary dispositions than in settlements, Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 711-12 (2004).

3 See Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 200-01 & n.32 (2003) (reviewing data and stating: "I think I could achieve judgment as a matter of law at this point on the proposition that mediation is now an essential element of American civil litigation").

4 For discussions of historical perspectives on the development of mediation and mediation objectives, see, for example, JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 1-33 (2001); SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* §§ 5:1-4 (2d ed. 2001 & Supp. 2003); WALTER A. MAGGILO, *TECHNIQUES OF MEDIATION* 12-15, 19-26, 55-71 (1985); R.A. BARUCH BUSH, *Dispute Resolution—The Domestic Arena: A Survey of Methods, Applications and Critical Issues*, in *BEYOND CONFRONTATION: LEARNING CONFLICT RESOLUTION IN THE POST-COLD WAR ERA* 9, 13-16 (John A. Vasquez et al. eds., 1995); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 170-73 (2003).

The Essay then examines several examples of one important element in that evolution: the creation of procedures to establish and encourage mediation in the civil litigation setting. Developing a legal structure to support mediation should not be solely a matter of selecting procedures that will promote it as a means of settlement. Even in a litigation system whose structure reveals a "preference for private ordering,"<sup>5</sup> and whose rules establish a "clear policy of favoring settlement of all lawsuits,"<sup>6</sup> there are other important considerations. Accessible justice, open court proceedings, effective enunciation of rights, consistent outcomes, and the fundamental rule of law are values that must not be ignored in a single-minded effort to encourage mediation.<sup>7</sup>

Of equal concern to many is preserving the principles at the heart of mediation. Dispute resolution scholars worry that core values such as party self-determination, voluntariness, and mediator neutrality are threatened as mediation increasingly becomes an established part of the litigation system.<sup>8</sup> The way in which court-connected mediation programs are structured can make a significant difference in the degree to which mediation values are carried over into the litigation setting.<sup>9</sup> In developing procedures for the world of the future we need to recognize explicitly the values associated with the traditions of

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5 Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996).

6 *Marek v. Chesney*, 473 U.S. 1, 10 (1985).

7 A strong body of scholarship examines how the growth of alternative dispute resolution and a culture of settlement can endanger important goals and characteristics of our justice system. See, e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Hensler, *supra* note 4; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995). But see Subrin, *supra* note 3, at 218-25 (responding to critiques).

8 There is extensive literature examining the changes in mediation practices and values associated with its use in the adversary system. See, e.g., James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991); Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001).

9 See generally Dorothy J. Della Noce et al., *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3

both litigation and mediation and identify the tensions among those values. Then the difficult task is to find the best balance.<sup>10</sup>

To illustrate such tensions and how they have been resolved in recent procedural developments, this paper discusses two law initiatives at the interface between mediation and litigation. First, the Uniform Mediation Act (UMA) was adopted by the National Conference of Commissioners on Uniform State Law (NCCUSL) in 2001 and approved by the American Bar Association (ABA) in 2002 to provide procedures to protect the confidentiality of mediations in subsequent litigation.<sup>11</sup> Second, the United Nations Commission on International Trade Law (UNCITRAL) developed the Model Law on International Commercial Conciliation (Model Law),<sup>12</sup> which was recommended by the United Nations for adoption by member states in 2002.<sup>13</sup> The NCCUSL then revisited the UMA and extended its confidentiality protections into the international commercial mediation arena by adding the Model Law as an amendment.<sup>14</sup>

Finally, the Essay looks to the future and examines conflicts over the values at stake in establishing a procedure for enforcing mediated agreements, which has the potential to become the next major issue in the development of a legal framework for mediation. The extent to which developing the UMA and the Model Law involved compromising and balancing both mediation and adjudication values argues for great sensitivity in considering whether to establish procedures for summary enforcement of mediated agreements.

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PEPP. DISP. RESOL. L.J. 11 (2002) (examining different court-connected mediation programs in light of a "value-based" dilemma).

10 See, e.g., Alfini, *supra* note 8, at 75 (asking "[h]ow the goals and demands of a consensual, nonadversarial process can be reconciled with those of [a] highly adversarial context").

11 The text of the UMA and the accompanying reporters' notes are available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm>, or through the NCCUSL website at <http://www.nccusl.org>.

12 See UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION, *Report of the United Nations Commission on International Trade Law on Its Thirty-Fifth Session*, U.N. GAOR, 57th Sess., Supp. No. 17, Annex 1, at 54, U.N. Doc. A/57/17 (2002) [hereinafter MODEL LAW]. The text of the Model Law is available online through the UNCITRAL web site, at <http://www.uncitral.org/english/texts/arbitration/ml-conc-e.pdf>. See also *Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation*, U.N. Commission on International Trade Law, 35th Sess., at 1, U.N. Doc. A/CN.9/514 (2002) [hereinafter *Model Law Draft Guide*], available at <http://www.uncitral.org/english/sessions/unc/unc-35/514e.pdf>.

13 *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law*, U.N. GAOR, 57th Sess., 52d plen. mtg., Agenda Item 155, at 1, U.N. Doc. A/RES/57/18 (2002).

14 UNIF. MEDIATION ACT § 11 (2003).

## I. PROCEDURAL DEVELOPMENTS AND CHANGING APPROACHES TO DISPUTES

As litigation, mediation, and the relationship between the two evolve, so do the attitudes of lawyers. Although there are undoubtedly still litigators who regard mediation as an abandonment of zealous advocacy or an admission that a case is weak, current patterns of alternative dispute resolution (ADR) use suggest that this strictly adversarial view is no longer the norm.<sup>15</sup> It seems fair to say that lawyers increasingly regard litigation and mediation as complementary processes.

My own growth in conceptualizing the relationship between litigation and mediation tracks, I believe, more general shifts in lawyers' perceptions of their roles. When I was in law school, we learned that lawyers litigate when their clients have disputes and that a judicial decision is the culmination of the process.<sup>16</sup> The professors may have been trying to teach us something more, or something more nuanced, but that is what I learned. I recall discussions about the shortcomings of litigation, but none that examined settlement or resolution models that did not feature adjudication as the endpoint.

In practicing law, I learned that lawyers not only litigate for clients with disputes, but also negotiate and mediate. Almost all of my cases settled at some point during the litigation process. I gradually realized that our clients were often better served by an agreement charting a course for future dealings than by a court-imposed remedy. As a "litigator," my initial activity in a case was primarily a traditional, narrowly defined version of litigation. But as the case progressed, settlement became the central litigation effort. Even when I thought I was focused entirely on classic litigation, the question in the background was always: "How far will this case need to go before the parties can find common ground for an agreement?" In this way, negotiation, mediation, and other settlement procedures were an integral part of the litigation process.

Judicial decisions—even procedural ones—were helpful because they narrowed the issues and allowed the lawyers better to envision

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15 See Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 484 (2004) (reporting that more than half of the Arizona trial attorneys answering a 2001 survey thought other attorneys would not view a proposal to use ADR as a sign of weakness compared to thirteen percent who thought it would be seen as a weakness).

16 This characterization was, of course, the product of earlier alterations in perception. For example, during the 1970s there was a transition in lawyers' description of themselves from "trial lawyer" to "litigator." John F. Grady, *Trial Lawyers, Litigators and Clients' Costs*, LITIG., Spring 1978, at 5, 5-6.

the eventual court outcome. But in most cases no one contemplated that a court would have the final say. From a traditional litigation standpoint, the decisions were punctuation marks indicating progress toward a final judgment in the case. But, in actuality, their chief function was to focus and inform negotiations.<sup>17</sup> We were dedicated to "winning" these decisions, of course, and a win often translated into a more favorable negotiating position. Whether they were positive or negative for our client, however, these judicial decisions were primarily significant because they supplied a sharper definition of the issues that could create movement toward settlement. Not only was settlement an integral part of litigation, but adjudication was an important aspect of the settlement process.

Now, in examples my students bring to dispute resolution classes from their law firm work, I see suggestions of a further change in lawyers' conceptualizations. Some lawyers are beginning to see mediation as a separate, independent process as well as a component of litigation. Students speak of disputes in which litigation is not assumed, or even presumed, to be the process of choice. There are lawyers who view litigation and mediation as different but compatible tools for dispute resolution and who select or combine these tools according to the goals and circumstances of the situation. They may choose to file suit because they seek an adjudication.<sup>18</sup> They may al-

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17 Because much of my work involved cases before the Federal Energy Regulatory Commission, the route to a final court decision involved more layers than a typical court case: an Administrative Law Judge made an initial decision, which was appealed to the Commission and eventually reviewed by the federal court of appeals. The relationship I describe between these decisions and settlement was perhaps more striking and thus more readily observed in an agency setting, but it was not different in kind from my experience in federal district court litigation.

18 There will always be a need to resolve disputes through public adjudication. First, when there is a need to establish rights or create precedent, settlement is functionally inadequate. See Fiss, *supra* note 7, at 1085. Settlements carry no formal weight in later judicial decisions and produce no rules that are binding on nonparties. The value of precedent in guiding future conduct and creating certainty in expectations is thus lost. See Jules Coleman & Charles Silver, *Justice in Settlements*, SOC. PHIL. & POL'Y, Autumn 1986, at 102, 114-19. Public settlement agreements could conceivably affect the direction of the law through the force of an effective example, but confidential settlements do not offer even this contribution to the development of law. See Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1493-95 & n.90 (1994) (observing that there is no third-party right of access to settlements in court-sponsored ADR programs and that confidentiality of settlement agreements is permitted as a means of encouraging settlement).

Second, disputes are better suited to litigation than mediation when they involve matters of strongly held principle or conscience that the parties do not want to com-

ternatively desire an agreed resolution of the dispute. In the latter situation they might choose to file suit as part of a strategy for moving toward a settlement of the litigation. Or, they might choose another process, such as mediation, in the first instance. These options offer a broader way of envisioning how a lawyer can help a client with a dispute than a strict litigation model, even one with settlement incorporated as the endpoint of litigation. There is a subtle, but real, difference between treating litigation as if it will usually end in settlement and choosing instead to shape litigation, if one pursues it at all, entirely in the service of reaching a favorable agreed resolution.

One way to encapsulate the direction of this change is to say that these lawyers' new attitudes place primary emphasis on resolving a dispute rather than on settling litigation of a dispute. In a recent article, Professor Peter N. Thompson asks: "Is mediation a step in the adversary process or an alternative approach to resolving disputes?"<sup>19</sup> My answer, admittedly based only on anecdotes, is: "To a growing extent, both." Law schools now teach students to look beyond winning a lawsuit in serving their clients, and my students' reports suggest that they are conscious of a form of lawyering with rich choices in addition to litigation. I certainly do not mean to indicate that this approach is commonplace for the typical lawyer,<sup>20</sup> but the observations do hint that this change in the relationship between litigation and mediation may be emerging.

These conceptual developments have been inextricably linked to procedural developments. Our system of civil litigation and its rules have both mirrored and shaped the changing relationship between litigation and settlement. Rule 16 of the Federal Rules of Civil Procedure reflected litigation developments, as it developed from a pretrial rule that did not facially contemplate settlement at all into a rule that institutionalizes settlement conferences and "special procedures to as-

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promise. See Frank E.A. Sander & Steven B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 57 (1994).

Finally, settlement is also extremely difficult in cases characterized by the "jackpot" syndrome—when the plaintiff expects a large recovery in excess of his damages, but the defendant disagrees about this likelihood. *Id.* at 59; see also Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOT. J. 259, 267 (1996) (reporting that cases in which one party had a potential for a large recovery or had decided that settlement was not in its financial interest were typically the cases that did not settle).

19 Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 516 (2004).

20 Many students still describe their experience of mediation in a law firm as, "we showed up, we shut up, we left," especially when the mediation was court-ordered.



sist in resolving the dispute.”<sup>21</sup> Pursuant to procedural changes enacted by Congress, many federal courts developed ADR programs in the early 1990s,<sup>22</sup> and federal district courts are now mandated by statute to provide these offerings.<sup>23</sup> By the mid-1990s, every state had one or more court-connected mediation programs.<sup>24</sup> Thus, early changes made ADR processes available within litigation structures. In a parallel development, most law schools made special ADR courses available as part of their procedural offerings.<sup>25</sup>

With many mediation programs now available, procedural developments within the litigation system continue to change the climate and more fully integrate the use of ADR processes in practical terms. Some courts combine litigation and resolution processes through procedures such as court referral<sup>26</sup> or requirements that counsel discuss

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21 FED. R. CIV. P. 16(a)(5), (c)(9). Amendments to the rule in 1983 “recognize[d] that it ha[d] become commonplace to discuss settlement at pretrial conferences.” FED. R. CIV. P. 16 advisory committee’s note to the 1983 amendment. In 1993, the rule was further revised to more accurately reflect “the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation.” FED. R. CIV. P. 16 advisory committee’s note to the 1993 amendment; see David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1986–87 (1989) (pointing out that the 1983 amendments explicitly authorized preexisting judicial settlement activity).

22 Federal programs were initially established as elements of district courts’ local expense and delay plans under the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (2000). By 1996, over half the district courts offered mediation. ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS* 4 (1996). The federal courts of appeals developed active mediation programs in each circuit under the authority of Federal Rule of Appellate Procedure 33, which authorizes settlement conferences. See generally ROBERT J. NIEMIC, *MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK* (1997) (discussing different ADR programs in federal courts).

23 Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652(a) (2000).

24 JUDITH FILNER ET AL., *CONFLICT RESOLUTION INSTITUTE FOR COURTS, 1995: COMPENDIUM OF STATE COURT RESOURCES MATERIALS* 8–10 (1995), cited in Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys’ ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J. 199, 200 (2002).

25 See Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 684 n.12 (2005).

26 For example, the Alternative Dispute Resolution Act of 1998 permits judges to require federal litigants to mediate. 28 U.S.C. § 652(a). The Northern District of California is one court that exercises this authority as part of a multi-option program. See N.D. CAL. ADR LOCAL R. 2–3. In Florida, courts must refer certain cases to mediation on the motion of one of the parties and may refer them otherwise. FLA. STAT. ANN. § 44.102(2) (West 2003). In Missouri, courts have authority to order litigants to an ADR process, although parties may opt out of the referral if they conclude that the process “has no reasonable chance of being productive.” MO. SUP. CT. R. 17.03.

ADR with clients.<sup>27</sup> These procedures—which expose attorneys to mediation in referred cases or require them to consider mediation as part of their normal litigation planning—are thought to have helped some local legal cultures shift toward increased, and earlier, use of mediation.<sup>28</sup> For example, in Ottawa, Canada, a rule that requires the parties (both lawyers and clients) to attend mediation<sup>29</sup> is associated with earlier review of case files for settlement, greater client participation in litigation, changes in settlement strategies and behaviors, and an increased acceptance of mediation.<sup>30</sup> These changes could be interpreted as signs of some convergence between mediation and litigation.<sup>31</sup> Evidence of such integration remains patchy, however,<sup>32</sup> and is as yet rarely reflected in the structure of most law school curricula.<sup>33</sup>

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27 See, e.g., MINN. GEN. R. PRAC. 114.

28 See, e.g., Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 403, 416–19 (2002) (reporting a large increase in mediation under a “mandatory consideration” rule, with more than ninety percent of metropolitan respondents predicting they would continue to use mediation if the rule were repealed); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 842 (1998) (reporting that experience attending mediation sessions helped overcome resistance to mediation); Wissler, *supra* note 24, at 225–27 (finding that experience using a specific ADR process as counsel was the most important factor distinguishing attorneys who did or did not recommend that process to clients). But see Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 528–29 (2002) (reporting that a new rule authorizing judicial referral and requiring lawyers to discuss ADR with clients led to an increased, but still low, rate of mediation participation).

29 Ontario Rule of Civil Procedure 24.1 establishes an “opt-out” model of mandatory mediation that requires an application in person for an exemption. Mediations are held early, usually before discovery begins, and lawyers must bring their clients. Julie MacFarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 244.

30 *Id.* at 288–301.

31 *Id.* at 310–11.

32 For example, several studies have found that lawyers who report they favor the use of mediation do not necessarily use it regularly or recommend it to clients. See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 218 & n.233 (2000); Morris L. Medley & James A. Schellenberg, *Attitudes of Attorneys Toward Mediation*, 12 MEDIATION Q. 185, 194–95 (1994); Rogers & McEwen, *supra* note 28, at 841; see also Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1487 (1994) (reporting a similar finding for early neutral evaluation).

33 For the most part, civil procedure remains a civil litigation course with a small section of the casebook acknowledging the prevalence of settlement. See Sternlight, *supra* note 25, at 682 n.8.

To the extent that integration is taking place, it is perhaps inevitable that tensions between mediation and litigation values will emerge. The following sections explore how recent procedural developments have resolved some of those competing values.

## II. THE UNIFORM MEDIATION ACT

The UMA is a major milestone in the development of procedures to make mediation more effective within, and as a complement to, litigation. It governs both court-connected mediations and mediations conducted pursuant to an agreement by the parties.<sup>34</sup> Consistent with this broad scope, the Act is limited to topics that do not need tailoring to the circumstances of a specific mediation program or specific legal context for a mediation.<sup>35</sup> Primarily, the Act establishes procedures for protecting the confidentiality of statements made in the mediation process.<sup>36</sup> It delineates boundaries between privileged communications and those that need to be disclosed to protect “specific and compelling societal interests.”<sup>37</sup> In doing so, the Act strikes a balance between the encouragement of effective mediation and the fundamental adjudication value of “every [person’s] evidence.”<sup>38</sup> The Act also seeks to support fairness in mediation by respecting core mediation values, which it identifies as the parties’ exercise of self-determination and the impartiality of the mediator.<sup>39</sup>

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34 There are several distinctive types of mediations that are not covered by the Act. In general terms, these include collective bargaining mediations, judicial settlement conferences, student peer mediations, and mediations within correctional institutions for youths. See UNIF. MEDIATION ACT § 3(b) (2003).

35 *Id.* § 3(a), (c); *id.* prefatory note § 6.

36 *Id.* prefatory note § 6; Michael B. Getty, *The Process of Drafting the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 157, 160 (2002).

37 UNIF. MEDIATION ACT prefatory note.

38 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 70 (1961).

39 See UNIF. MEDIATION ACT prefatory note §§ 1–2. For a discussion of core mediation values, see Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 910–16 (1998); Welsh, *supra* note 8, at 3, 15–20. The Act seeks to promote these values by selecting a privilege that can be waived as the mechanism to protect confidentiality, UNIF. MEDIATION ACT § 5, and by adopting provisions that limit mediator reports and testimony, *id.* §§ 6(c), 7. The Act contemplates that parties may agree to opt out of the privilege or to maintain confidentiality outside of legal proceedings, *id.* § 3(c), requires mediators to disclose conflicts of interest and, when asked, their qualifications, *id.* § 9(a)–(c), and allows parties to have counsel or another support person accompany them in the mediation, *id.* § 10.

### A. *The Importance of Confidentiality*

First, a few words are necessary on why legal protection of confidentiality is important to the development and effective use of mediation. In settlement mediation, exchange of information is an important aspect of the process as parties work toward reaching a consensual agreement.<sup>40</sup> Sharing their interests, needs and priorities with the other side, or at least with the mediator, can help the parties reach an agreement.<sup>41</sup> Such information is important if the parties are to trade their priorities in search of an integrative agreement.<sup>42</sup> It becomes crucial if the agreement is to be a “creative” response to the dispute that goes beyond the scope of the remedy offered in court. In short, parties who are more candid and forthcoming are thought to be more likely to maximize the potential benefit of their agreement.

Encouraging a party to reveal information is more challenging in mediation than in other situations where the law protects communications, such as exchanges between attorneys and their clients. Rather than sharing information with a trusted advocate who has the party’s best interests in mind, in mediation a party shares information directly or indirectly with the other disputant, who is an opponent, and may well be a hostile opponent.<sup>43</sup> Within the mediation process, a mediator offers protection against harmful use of information by guarding confidences a party reveals to her in a caucus unless she has permission to share them with the other side. A mediator does not,

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40 Mediation is not limited to seeking an agreement. Transformative mediation, for example, emphasizes empowerment and an improvement in the disputants’ relationship. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 102–04 (1994) (noting the same). But an agreement is the desired goal in much mediation, particularly when it is selected as an alternative to litigation or as part of the litigation process.

41 See, e.g., Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 393 (1994) (stating that “information is the raw material of the mediator’s craft”); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1806 (2000) (arguing that withholding information in a negotiation increases transaction costs and raises the risk of impasse).

42 See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 793 (1984) (maintaining that without information exchange negotiators will fail to discover the full range of issues and the value each party assigns to those issues, which will restrict the range of solutions and leave needs unmet); Dean G. Pruitt, *Achieving Integrative Agreements*, in *NEGOTIATING IN ORGANIZATIONS* 35, 36–41 (Max H. Bazerman & Roy J. Lewicki eds., 1983) (discussing five methods for refocusing a dispute in order to achieve integrative agreements that reconcile, as opposed to compromising, the parties’ separate interests).

43 See Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 245–46 (2002).

however, have this control outside the mediation process, particularly in follow-up or unrelated litigation. Absent adequate legal protection, the opposing party may reveal, or the mediator may be compelled to reveal, mediation communications.<sup>44</sup> There is thus a real risk that information shared in mediation could come back to haunt or hurt the person who disclosed it. As a result, if parties are to participate in mediation wholeheartedly, they need to have confidence that they can predict the extent to which their statements will be protected from disclosure.<sup>45</sup>

Preventing disclosures is also crucial to another important aspect of mediation. Mediator neutrality, “a primary value of mediation,”<sup>46</sup> depends on the mediator’s ability to avoid taking sides. Neutrality is impossible, however, if a mediator is called to testify about events in a mediation; in the win-lose posture of litigation, such testimony will always favor one party over the other.<sup>47</sup> Such lapses in neutrality damage the mediation process itself,<sup>48</sup> for its integrity depends on the institutional trustworthiness of mediators.

Procedural prohibitions on disclosures of mediation communications also safeguard the integrity of courts in a world of intertwined

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44 See, e.g., *FDIC v. White*, 76 F. Supp. 2d 736, 737 (N.D. Tex. 1999) (hearing testimony about a mediation in the absence of a mediation privilege); *In re Marriage of Bidwell*, 21 P.3d 161, 163 (Or. Ct. App. 2001) (holding that Oregon Evidence Code section 408 does not bar admission of mediation communications offered in support of a request for attorney’s fees).

45 See Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 79 (2001) (discussing the need for participant knowledge and confidence in relevant confidentiality rules in mediation); Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 37–38 (1986) (same); Alan Kirtley, *The Mediation Privilege’s Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 15–19 (same).

46 Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 837 (1999). But see James R. Coben, *Gollum, Meet Sméagol: A Schizophrenic Ruminations on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 73–74 (2004) (describing neutrality as “ill-defined” with a “non-interventionist fiction [that] obscures a favoring of the dominant community and dominant values”) (footnote omitted).

47 See *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55–56 (9th Cir. 1980).

48 See *Marchal v. Craig*, 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997) (observing that a neutral mediator is imperative for the mediation process); see also *In re Anonymous*, 283 F.3d 627, 640 (4th Cir. 2002) (establishing the standard that a circuit mediator will be permitted to disclose mediation communications only when “disclosure is mandated [to prevent] manifest injustice, is indispensable to resolution of an important subsequent dispute, and is not going to damage our mediation program”).

mediation and litigation. Judges need to stay separated from the content of mediations because they might adjudicate the underlying dispute or a dispute that arises out of a mediation. Procedures to limit disclosures protect judges from the perception of bias and impropriety that would be raised by the possibility of ex parte communications about a mediation. This is especially true when the court sponsors a mediation program and is thus linked institutionally to the mediation.<sup>49</sup> Absent adherence to such rules, a suggestion that mediation communications served as unauthorized evidence in a case could undermine the promise of confidentiality made in court mediation programs and reduce public confidence in the courts that sponsor these programs. Because of courts' active role in sponsoring and recommending mediation, confidentiality provisions are necessary, not only to encourage mediation, but also to protect the stature of the adjudication system.

### B. *The Inadequacy of Existing Protections*

The shortcomings of other legal protections for confidentiality and the vast variations in these provisions put the achievement of the UMA in context. In the federal system, Rule 408 of the Federal Rules of Evidence offers only limited protection for selected aspects of settlement negotiations,<sup>50</sup> and federal legislation governs confidentiality in only a fraction of mediations.<sup>51</sup> The Alternative Dispute Resolution Act of 1998 (ADR Act), which mandates ADR programs in federal district courts, does not itself establish any procedural protections for confidentiality. Instead, the ADR Act requires each district court to protect confidentiality in its program by

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49 See ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 112–13 (2001).

50 Criticism of Rule 408 abounds. See, e.g., COLE ET AL., *supra* note 4, §§ 9:5–7; Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 957–82 (1988); Deason, *supra* note 43, at 272–74; Kenneth R. Fineberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S33–35 (1989); Freedman & Prigoff, *supra* note 45, at 40–41; Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 348–56 (1989); Kirtley, *supra* note 45, at 12–14. But see Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 102–10, 119–26 (1999) (defending Rule 408 as “promot[ing] many of the interests that would be served by a mediation privilege”).

51 The federal Administrative Dispute Resolution Act includes a limited confidentiality provision that functions like a privilege, but that Act covers only federal agency mediation programs. 5 U.S.C. § 574(a), (b) (2000). The protection covers communications made in a caucus with an ADR neutral, but not in joint sessions with other parties. *Id.* § 574(b)(7).

local rules.<sup>52</sup> These rules vary widely in their scope, terms, and effectiveness,<sup>53</sup> and some courts have found that local mediation confidentiality rules are inadequate to prevent in-court disclosures about the content of court-sponsored mediations.<sup>54</sup> There has been limited common law development of a mediation privilege in some of the federal courts,<sup>55</sup> while others have declined to recognize this privilege in the absence of a clear mandate from Congress.<sup>56</sup>

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52 28 U.S.C. § 652(d) (2000). Courts have held that the ADR Act's "general mandate to establish the confidentiality of court-ordered mediation proceedings" does not itself create a mediation privilege. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1176 (C.D. Cal. 1998), *aff'd mem.*, 216 F.3d 1082 (9th Cir. 2000); *see also* *FDIC v. White*, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999) (stating that neither the ADR Act nor its legislative history creates a privilege for parties in mediation).

53 Many of the federal court rules fail to designate any legal mechanism to protect confidentiality. *See* *Deason*, *supra* note 43, at 311–12 (noting the ambiguity of the term "confidentiality" and uncertainty in court rules regarding their application to disclosures in future cases, other courts, and extra-judicial settings); *see also* Gregory A. Litt, Note, *No Confidence: The Problem of Confidentiality by Local Rule in the ADR Act of 1998*, 78 TEX. L. REV. 1015, 1015, 1023–35 (2000) (arguing that leaving the development of mechanisms for mediation confidentiality to local rules is unwise, in part because of the resultant disparity).

54 *See, e.g.*, *Datapoint Corp. v. Pictoretel Corp.*, No. Civ. A. 3:93-CV-2381D, 1998 WL 25536, at \*2–3 (N.D. Tex. Jan. 14, 1998) (declining to recognize a privilege in Southern District of Texas Rule 20(I) despite terms making mediations confidential and protecting them from disclosure).

Moreover, ironically, local rules may not even be applicable at all in some litigation concerning communications made in federal court mediation programs. For example, under Rule 501 of the Federal Rules of Evidence, state law of privilege is controlling when state law supplies the rule of decision. *See, e.g.*, *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1121–25 (N.D. Cal. 1999) (applying state law on confidentiality rather than the federal court rule to a dispute over enforcement of an agreement reached in mediation).

Furthermore, even when federal law governs, Rule 501 does not by its terms recognize federal court rules as an appropriate source of privilege. *See* *Deason*, *supra* note 43, at 313 (noting that Rule 501 requires federal courts applying federal law to use "the federal common law of privilege unless required otherwise by the U.S. Constitution, an act of Congress or a Supreme Court rule"). *But see In re Anonymous*, 283 F.3d 627, 630 n.16 (4th Cir. 2002) (using an attorney disciplinary proceeding to apply its confidentiality rule rather than recognizing a federal mediation privilege).

55 *See* *Sheldone v. Pa. Turnpike Comm'n*, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000); *Folb*, 16 F. Supp. 2d at 1180. The Sixth Circuit has taken a more comprehensive approach to the problem of confidentiality by creating a privilege for communications in settlement discussions without a limitation to mediation. *See* *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980–81 (6th Cir. 2003).

56 *See In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d 487, 493 (5th Cir. 1998); *White*, 76 F. Supp. 2d at 738; *In re March*, 1994—Special Grand Jury, 897 F. Supp. 1170, 1173 (S.D. Ind. 1995).

The states have taken the lead in providing mediation parties procedural assurances that the confidentiality of the process will be respected. Prior to the UMA, virtually all of them provided some form of confidentiality for some mediation communications. About half had enacted a generally applicable mediation confidentiality provision; other protections were specific to particular types of disputes or dispute resolution programs.<sup>57</sup> This abundance indicates the importance of mediation confidentiality to the states. It nonetheless has serious drawbacks because of the unworkable statutory variation in scope, legal framework, and exceptions.<sup>58</sup> The states have served usefully as the proverbial laboratory, but more uniformity is now necessary if disputants are to select mediation with confidence that their mediation communications will not be disclosed to their detriment.<sup>59</sup> The UMA was prepared in response to this need with the hope that widespread enactment will offer comprehensive confidentiality protection and reduce substantially the current choice-of-law uncertainties in multi-state mediations.<sup>60</sup> In addition, when state law applies, the Act can also bring some degree of uniformity to protection in federal courts. It might even serve as a template for developing a matching federal privilege.

### C. *Fostering Improved Protection and Uniformity*

The goal of the UMA is to improve protection, coverage, and predictability for confidentiality in mediation. NCCUSL and ABA committees worked together in an innovative joint drafting effort to create an Act with widespread support.<sup>61</sup> As of this writing, it has already been enacted in two states—Nebraska and Illinois.<sup>62</sup>

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57 UNIF. MEDIATION ACT. prefatory note § 4 (2003). More than 250 state statutes provided a mediation privilege in some form. *Id.* prefatory note § 3.

58 See Deason, *supra* note 45, at 89–95, for a description of the discrepancies and ambiguities in statutory protection. See also Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 18 (2001) (asserting that “many mediation statutes . . . are poorly worded, unclear, incomplete or internally inconsistent”).

59 See Deason, *supra* note 45, at 84–104.

60 See, e.g., Getty, *supra* note 36, at 161.

61 UNIF. MEDIATION ACT prefatory note § 5; Getty, *supra* note 36, at 158–59.

62 See 710 ILL. COMP. STAT. 35/1–13 (2004); NEB. REV. STAT. §§ 25-2930 to -2942 (2003). The UMA has also been introduced during the 2003–2004 legislative sessions in numerous states and the District of Columbia. See S. 325, 113th Gen. Assem., 2d Sess. (Ind. 2004); S. 2235, 80th Gen. Assem. (Iowa 2004); Assem. 841, 211th Leg. (N.J. 2004); District of Columbia 15-289 (2003); H.D. 4489, 183d Gen. Ct. (Mass. 2003); S. 1340, 226th Leg. Sess. (N.Y. 2003); H.R. 303, 125th Gen. Assem. (Ohio 2003); H.R. 227, 67th Biennial Sess. (Vt. 2003); S. 97, 67th Biennial Sess. (Vt. 2003).



The centerpiece of the Act is a privilege that prevents disclosure of mediation communications, broadly defined, in discovery processes or as evidence in a proceeding.<sup>63</sup> Actually, the Act establishes multiple privileges. A party to a mediation may refuse to disclose, and may prevent another person from disclosing, mediation communications.<sup>64</sup> In addition, the mediator and other participants (such as experts) each hold their own privileges, limited to their own mediation communications.<sup>65</sup> The Act leaves control in the hands of the parties in that they may agree in advance to dispense with privilege for all or part of their mediation.<sup>66</sup> Otherwise, the Act's privileges apply unless the relevant holders have waived their privileges, the information is otherwise subject to discovery or admissible, or the communication is exempt.<sup>67</sup>

Privileges have exemptions that embody a weighing of competing values: they permit disclosures deemed necessary for goals that transcend the justifications for keeping the protected communications confidential. The majority of the UMA exceptions are formulated as bright-line rules to take advantage of the predictability offered to parties by a specific list of exemptions. The Act authorizes disclosures for: a recorded agreement signed by all the parties; communications in mediations open to the public or covered by open record or meeting acts; threats of bodily injury or violence; certain communications connected to criminal activity; information relevant to a claim of professional misconduct or malpractice; and statements that would be introduced in certain abuse, neglect or abandonment proceedings.<sup>68</sup>

The formulation of the UMA exceptions is one of the drafting compromises that centered on the appropriate relationship between mediation and litigation. The drafting committees considered supplementing the bright line exceptions to the privilege with a more flexible exception that would rely on judicial balancing.<sup>69</sup> It would have

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63 UNIF. MEDIATION ACT § 4.

64 *Id.* § 4(b)(1).

65 *Id.* § 4(b)(2)–(3).

66 *Id.* § 3(c).

67 *Id.* §§ 4(a), 4(c), 5(a). In addition, persons are precluded from asserting a privilege if they have prejudiced another person in the mediation by disclosing a mediation communication or if they have used a mediation to plan, attempt, or commit a crime or conceal an ongoing crime. *Id.* § 5(b)–(c).

68 *Id.* § 6(a)(1)–(7).

69 Several statutes provide examples of a balancing approach to determine when exceptions are appropriate. *See, e.g.*, Administrative Dispute Resolution Act, 5 U.S.C. § 574(a)(4)(A) (2000) (prohibiting disclosures unless a court determines disclosure is necessary to prevent “manifest injustice”); LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (West Supp. 2000) (authorizing disclosures to interpret or enforce a mediated agree-

directed judges to authorize disclosures “to prevent a manifest injustice of such magnitude as to outweigh the importance of protecting the confidentiality in mediation proceedings.”<sup>70</sup> Although this provision would have covered unforeseen or exceptional circumstances and guided judges in exercising their discretion, representatives of the mediator community opposed it strongly on the ground that it would stimulate litigation.<sup>71</sup> Their fierce objections seemed motivated by an underlying distrust of judges’ willingness to protect confidentiality adequately.<sup>72</sup> In the end, the general exception to prevent injustice through the judicial process was not included in the Uniform Act.

Some case-by-case balancing to determine exceptions remains in the Act, but it is confined to two instances where a bright-line rule is unworkable: criminal proceedings and proceedings to enforce or void an agreement reached in mediation. In these settings, mediation communications may be disclosed if a judge determines that the need for the evidence “substantially outweighs the interest in protecting confidentiality.”<sup>73</sup> The Act protects confidentiality during this decision process by mandating an *in camera* hearing, and it places the burden of meeting the standard for disclosure on the proponent of evidence to be introduced.<sup>74</sup>

Despite the uncertainty associated with a balancing approach, judicial input and case-by-case decisions are advisable in criminal cases and contract proceedings on a mediated agreement. In criminal proceedings, the stakes associated with the availability of evidence are

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ment if necessary to prevent fraud or manifest injustice); OHIO REV. CODE ANN. § 2317.023(C)(4) (West 2004) (permitting courts to expand the statutory list of exceptions when necessary to prevent “manifest injustice”); WIS. STAT. ANN. § 904.085(4)(e) (West 2000) (creating an exception to prevent manifest injustice only in cases other than the mediated dispute). See Kirtley, *supra* note 45, for an analysis of designing exceptions to a mediation privilege. Courts have also adopted balancing approaches. See, e.g., *In re Anonymous*, 283 F.3d 627, 637 (4th Cir. 2002) (establishing a “manifest injustice” standard); *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1131–32 (N.D. Cal. 1999) (balancing the importance of the interest in confidentiality against the importance of the rights or interests that would be endangered without disclosure).

<sup>70</sup> This provision first appeared in the UNIF. MEDIATION ACT § 2(c)(5) (April 1999 Draft), available at [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm).

<sup>71</sup> See Hughes, *supra* note 58, at 56 (describing the fear that a balancing test “would open the floodgates of litigation as each opportunistic lawyer attempted to take advantage of the provision to pierce the sanctity of the mediation process”).

<sup>72</sup> See *id.* at 63 (reporting that “the mediation community distrusted the court’s ability to fairly and consistently interpret . . . exceptions [for contractual misconduct]”).

<sup>73</sup> UNIF. MEDIATION ACT § 6(b).

<sup>74</sup> *Id.*

high and, depending on the circumstances, excluding evidence may implicate the defendant's constitutional rights. In proceedings to enforce or void a mediated agreement, neither permitting disclosure nor maintaining confidentiality is appropriate for every case. Without an exception to the privilege, a party would be unable to present evidence of duress or fraud that occurred during a mediation. Yet a bright-line automatic exception that would allow disclosure of mediation communications to support any claimed contract defense could be used too easily with unjustified allegations to undermine confidentiality. Given the undesirable outcomes that can flow from either of these blanket approaches to disclosure, a judicial determination for individual cases is the best option to resolve the competing values at stake.<sup>75</sup> Statutes that instead speak in absolute terms invite judge-made exceptions to prevent unjust enforcement of mediated agreements.<sup>76</sup>

Among the Act's most controversial provisions<sup>77</sup> is one that directly implicates conflicting values associated with adjudication and mediation. In two instances, exceptions to the privilege that allow disclosures do not apply to mediators: the mediator may not be compelled to provide evidence of a mediation communication (1) in connection with a complaint of professional misconduct filed against a party, party representative, or nonparty participant, or (2) in a proceeding to enforce or void a contract reached in mediation.<sup>78</sup> These restrictions on otherwise recognized exceptions to the mediation privilege place a strong weight on the principle of mediator neutrality, as mediators are exempted from providing information in situations where it could favor one party over the other.<sup>79</sup> At the same time, however, these restrictions could limit courts' abilities to exercise their traditional equitable powers to void an unfair contract or to sanction misconduct, relegating judicial decisionmaking to a less effective role in ensuring a fair agreement. In my view, this provision goes too far in handicapping the role of the adjudication system.<sup>80</sup>

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75 See Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 89 (2001).

76 See, e.g., *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1139 (N.D. Cal. 1999) (admitting a mediator's testimony on a claim of duress after an in camera hearing).

77 See, e.g., Hughes, *supra* note 58, at 64-68.

78 UNIF. MEDIATION ACT § 6(c). Note that the mediator can be compelled to testify if misconduct allegations are directed at his role in the mediation.

79 See *supra* text accompanying note 47.

80 See also Hughes, *supra* note 58, at 66 (criticizing restrictions on mediator testimony as "protectionism on behalf of mediators").

This special treatment for mediators also reveals conflicts among mediation values. The Act's policy decision to prohibit mediator testimony on contract defenses and misconduct allegations tends to elevate mediator neutrality over the importance of the integrity of the process and party self-determination. As the only neutral observer, a mediator's testimony may be crucial to determining the strength of claims about what occurred during a mediation.<sup>81</sup> If excluding mediator testimony means that a party who was tricked or forced into an agreement cannot avoid enforcement, the outcome is not the product of a truly consensual process.<sup>82</sup> Conversely, mediation does not honor its promise of self-determination if a party is unable to enforce a valid mediated agreement. And, in the case of misconduct by participants, the mediation process itself may be impaired if an aggrieved party lacks recourse in the absence of mediator testimony.

Finally, there are happily some UMA provisions that rest on complementary values rather than on a choice among competing values. For example, the Act keeps judges and mediators institutionally separate by prohibiting mediator reports.<sup>83</sup> Mediators may not communicate with a court about a mediation except to convey limited information on the status of the process or disclosures excepted from the privilege,<sup>84</sup> and courts may not consider a communication made in violation of the rule.<sup>85</sup> This provision furthers adjudication values, party expectations of confidentiality and mediator neutrality.<sup>86</sup>

One may disagree with some of the drafters' choices, but they have performed a difficult balancing act among competing goals. As the above examples show, many aspects of the Act implicate values central to mediation and adjudication. It will be important to track the cumulative effect of these provisions on the practice of mediation and litigation, and their consequences for the ongoing process of integration.

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81 See, e.g., *Ramirez v. Decoster*, 142 F. Supp. 2d 104, 113 (D. Me. 2001) (recognizing the mediator as "the most neutral and dispassionate observer of what was said and done"); *Olam*, 68 F. Supp. 2d at 1136–38 (discussing the importance of mediator's testimony to a claim of duress).

82 See, e.g., *Nolan-Haley*, *supra* note 46, at 806–09 (characterizing fraud and duress litigation as a "thin but growing jurisprudence of 'mediation' informed consent").

83 UNIF. MEDIATION ACT § 7.

84 A mediator may disclose that a mediation was held, if it has terminated, whether or not a settlement was reached, and attendance at the mediation. *Id.* § 7(b)(1). A mediator may also report abuse or neglect to the appropriate agency. *Id.* § 7(b)(3).

85 *Id.* § 7(c).

86 See *supra* text accompanying note 49.

### III. EXPANSION TO INTERNATIONAL COMMERCIAL MEDIATION

As the UMA emerged in the United States, a parallel model law drafting project was conducted simultaneously under the auspices of UNCITRAL.<sup>87</sup> This international project reflected increasing interest in using mediation for transnational private disputes,<sup>88</sup> an interest that has grown along with the perception that international arbitration has taken on some of the procedural characteristics of litigation, particularly U.S. litigation.<sup>89</sup> Thus the impetus for the drafting process was, at least in part, changes that are taking place at another interface between adjudication and ADR. The Model Law was influenced by the UNCITRAL Conciliation Rules,<sup>90</sup> with additional "inspiration" from the UMA.<sup>91</sup> It is a legislative text designed to be

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87 UNCITRAL was established by the United Nations General Assembly in 1966, with a mandate to further the progressive harmonization and unification of the law of international trade. G.A. Res. 2205, U.N. GAOR, 21st Sess., 1497th plen. mtg. at 99, U.N. Doc. A/2205 (1966). It is concerned, among other things, with the resolution of international disputes between private parties. The preparation of the Model Law involved ninety states, twelve intergovernmental organizations, and twenty-two non-governmental organizations. Jernej Sekolec & Michael B. Getty, *The UMA and the UNCITRAL Model Rule: An Emerging Consensus on Mediation and Conciliation*, 2003 J. DISP. RESOL. 175, 183.

88 Sekolec & Getty, *supra* note 87, at 175; Eric van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal*, 21 J. INT'L ARB. 1, 2 (2004).

89 See, e.g., YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATIONS AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 51-57 (1996); ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 340 (2d ed. 2002). The discovery process of document production, oral cross-examination of witnesses, and testimony by party-affiliated witnesses are no longer unusual in international arbitrations. See, e.g., Susan L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5, 24-28 (2003); Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, in MEALEY'S INT'L ARB. REPORT, Apr. 2001, at 11, 37. Some commentators, however, see these developments as part of the harmonization of civil and common law approaches rather than as Americanization. See, e.g., Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 37 (2003); Reed & Sutcliffe, *supra*.

90 The UNCITRAL Conciliation Rules were adopted in 1980; they are designed to provide rules that an organization can use in administering mediations or that parties can adopt by agreement for their mediation. CONCILIATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, U.N. GAOR, 35th Sess., 81st plen. mtg. at 260, U.N. Doc. A/35/52 (1980), available at <http://www.uncitral.org/english/texts/arbitration/conc-rules.htm>.

91 Sekolec & Getty, *supra* note 87, at 194. UNCITRAL's drafting process was in touch with the development of the Uniform Mediation Act through the Chair of the NCCUSL drafting committee, Michael B. Getty, who served as a U.S. advisor to the UNCITRAL drafting committee under the auspices of the State Department. *Id.* at

adopted by individual nations as part of their domestic law. This goal was advanced in the United States in 2003, when the Model Law—with a key addition—became an amendment to the UMA.<sup>92</sup>

The Model Law is more limited in scope than the UMA. While it defines conciliation broadly,<sup>93</sup> it explicitly covers only conciliations that are international and commercial.<sup>94</sup> This limitation is consistent with UNCITRAL's commercial mandate, and it also reflects a judgment that a model law would be easier for many nations to enact if it did not implicate their existing domestic conciliation legislation.<sup>95</sup> This limitation in scope reduced the need for difficult choices between competing values expressed in adjudication and conciliation systems of different countries. The Model Law has the potential, however, to foster a more comprehensive harmonization of mediation law than its stated coverage. The text is designed to provide a model that could be extended to non-commercial international disputes or adapted to govern domestic conciliations by states that do not yet have such law.<sup>96</sup>

The Model Law contains constant affirmations of the autonomy of the parties to a conciliation. They may opt in to its provisions by agreeing that their dispute is international.<sup>97</sup> They may opt out of its coverage by agreement.<sup>98</sup> The parties may also vary the Model Law's

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175; JAMS, *Hon. Michael B. Getty (Ret.)*, at <http://www.jamsadr.com/ neutrals/Bio.asp?NeutralID=1640> (last visited Dec. 2, 2004).

92 UNIF. MEDIATION ACT § 11 (2003).

93 The Model Law defines conciliation as a process

whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

MODEL LAW, *supra* note 12, art. 1(3). The Model Law is intended to apply to mediation and other dispute resolution processes that meet this description without regard to their label. The definition expresses "a broad notion of a voluntary process controlled by the parties and conducted with the assistance of a neutral third person or persons." *Model Law Draft Guide*, *supra* note 12, at 9. It is meant to be inclusive of procedural styles and variations in techniques. *Id.* For example, the Model Law is meant to apply whether the neutral is facilitating dialogue or also making substantive proposals for possible settlements. *Id.*; Sekolec & Getty, *supra* note 87, at 184–85.

94 MODEL LAW, *supra* note 12, art. 1(1).

95 van Ginkel, *supra* note 88, at 12.

96 In Article 1, note 2, the Model Law offers guidance for states that wish to adopt it to govern their domestic disputes. MODEL LAW, *supra* note 12, art. 1 n.2.

97 *Id.* art. 1(6).

98 *Id.* art. 1(7).

individual provisions by agreement,<sup>99</sup> with the exception of its principles for interpreting the law<sup>100</sup> and its principle of fair treatment of the parties.<sup>101</sup> Individual articles reiterate this permission to deviate from the law by agreement.<sup>102</sup>

Compared to the UMA, the Model Law's emphasis on autonomy makes it more entirely a default provision subject to change by the parties. The UMA allows parties to agree in advance to dispense with the privilege, and single parties may waive their privilege,<sup>103</sup> but parties cannot opt out of the entire Act or tinker with its specific provisions. The Model Law's approach not only reflects UNCITRAL's tradition of stressing party autonomy, but also softens the consequences of the drafters' policy choices between competing values. It has been criticized as a lost opportunity for greater harmonization that would have been possible with a binding law regulating the relationship between conciliation and adjudication.<sup>104</sup> As a compromise to encourage widespread enactment, however, and with a flexible process such as conciliation that relies on party self-determination, it does not seem inappropriate to have limited the Model Law's attempts to harmonize widely-varying international adjudication systems to the *framework* within which the parties may exercise their discretion.

The Model Law's treatment of confidentiality has the same thrust as that of the UMA, but differs in its emphasis and details. Most significantly, the Model Law uses an evidentiary exclusion as a legal mechanism to limit disclosures in court proceedings rather than a privilege.<sup>105</sup> (Privileges are not familiar in most other legal systems.)<sup>106</sup> Instead of the UMA's broad protection for "mediation communications," the Model Law protects only a specific list of communications, such as statements by the parties and proposals by the conciliator.<sup>107</sup> The parties can, in effect, agree to waive these evi-

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99 *Id.* art. 3.

100 *Id.* art. 2.

101 *Id.* art. 6(3).

102 For example, the Model Law provides a framework of procedures for conciliations and choosing conciliators, but these are clearly presented as default provisions for parties who have not selected their own approach. *Id.* arts. 5-6; Sekolec & Getty, *supra* note 87, at 187-88.

103 UNIF. MEDIATION ACT §§ 3(c), 4(a) (2003).

104 *See* van Ginkel, *supra* note 88, at 7, 19.

105 MODEL LAW, *supra* note 12, art. 10.

106 For example, the interests protected by the attorney-client privilege are instead furthered in civil law countries by subjecting attorneys to a legal duty of secrecy. EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 470 (4th ed. 2001).

107 MODEL LAW, *supra* note 12, art. 10(1).

dentiary exclusions,<sup>108</sup> but there is no provision for the conciliator or other participants to object to a disclosure if the exclusion is waived by the parties. Another distinction is that there are few exceptions to the Model Law evidentiary exclusions. The listed communications may be disclosed only when required by law or “for the purposes of implementation or enforcement of a settlement agreement.”<sup>109</sup> With the possibility of waiver and these exceptions, the Model Law exclusion could be treated functionally as a privilege, but the holders, scope and exceptions would be inconsistent with those of the UMA. Thus, to avoid conflicts of law, the Model Law needed to be coordinated with the UMA.

The drafters who adapted the Model Law for adoption by the states hoped to develop a text that would be compatible with the UMA, but would also maintain as much as possible the identity of the Model Law in order to promote international harmonization and help foreign parties feel comfortable mediating in the United States. After an attempt at modifying the Model Law to fit within the style of the UMA, the drafters wisely abandoned this effort and decided to retain the Model Law’s exact form and language. The UMA incorporates the Model Law—intact—as an amendment to govern international commercial mediations.<sup>110</sup> It then superimposes the UMA’s privilege, waiver, and exception provisions onto the Model Law,<sup>111</sup> creating a structure that extends the values recognized in those provisions into the international context unless the parties decide otherwise. As with the limited scope of the Model Law and its emphasis on autonomy, this “double-grafting” approach helps minimize the need to choose among competing values. Adding the Model Law without alteration tolerates many differences between the texts that do not pose real conflicts, while further adding the UMA’s privilege avoids what would otherwise be significant inconsistencies in the protections against disclosure.

Because both the UMA and the Model Law offer opportunities for parties to alter their terms by agreement, parties can select the combination of provisions best suited for their circumstances. The UMA amendment offers a “roadmap” for parties that coordinates the opt-ins and opt-outs in both texts. As with any mediation under the UMA, the parties may agree that all or part of an international com-

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108 The permission granted by article 3 for the parties to alter provisions of the Model Law by agreement provides a mechanism for a waiver of the law’s evidentiary exclusion.

109 MODEL LAW, *supra* note 12, art. 10(3).

110 UNIF. MEDIATION ACT § 11 (2003).

111 *Id.* § 11(c).



mercial mediation is not privileged,<sup>112</sup> and in this way select the Model Law without the UMA privilege provisions.<sup>113</sup> Alternatively, under the provisions of the Model Law, parties to an international commercial mediation may agree that the Model Law does not apply.<sup>114</sup> This allows them to select only the UMA provisions for their mediation.<sup>115</sup> Absent any agreement, the hybrid UMA-Model Law governs when a mediation is both international and commercial.

By making international conciliation under the UNCITRAL Model Law compatible with U.S. legal procedures, the UMA provides a vehicle for resolving international disputes that foreign parties seek to avoid litigating in U.S. courts. In addition to its role in defining the interface between mediation and adjudication in the United States, the UMA now creates a new relationship between U.S. and international dispute resolution systems more generally. It will allow mediation to join arbitration as an option for resolving commercial disputes when the distinctive characteristics of U.S. litigation are unattractive to foreign partners.

#### IV. ENFORCING MEDIATED AGREEMENTS

With legal structures developed to support the use of mediation by protecting the confidentiality of mediation communications, the question becomes whether additional procedural measures are needed. An issue that has already been raised and will likely receive continuing attention is the desirability of a mechanism for enforcing agreements reached in mediation.<sup>116</sup> Legal development in this area would again have consequences not only for mediation, but also for its relationships with adjudication and arbitration.

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112 *Id.* § 3(c).

113 *See id.* § 11(c).

114 MODEL LAW, *supra* note 12, art. 1(7).

115 UNIF. MEDIATION ACT § 11(d).

116 These comments focus on the process of enforcing agreements that result from the mediation process and do not consider enforcement of agreements to mediate. There are few reported cases that suggest difficulties with pre-dispute mediation agreements, although perhaps problems will grow with increased use. *See, e.g.*, M.L.B. Kaye Int'l Realty, Inc. v. Prudential Real Estate Affiliates, Inc., No. 03 Civ. 3249(DC), 2004 WL 385034, at \*3-4 (S.D.N.Y. Mar. 2, 2004) (enforcing an agreement to mediate as the first step of the parties' disputing process); *Garrett v. Hooters-Toledo*, 295 F. Supp. 2d 774, 781-84 (N.D. Ohio 2003) (holding unconscionable a mediation agreement that, among other terms, required an employee to file a claim within ten days, mediate without representation, and choose a mediator from a list compiled by the employer).

### A. *The Enforcement Setting—Adjudication and Arbitration*

Within the United States, state courts routinely enforce judgments rendered by a court of another state under the Full Faith and Credit Clause of the U.S. Constitution.<sup>117</sup> In contrast, enforcement poses formidable challenges in international litigation. The United States is not a party to any treaties on recognizing foreign judgments, either bilateral or regional.<sup>118</sup> It is liberal in recognizing judgments of courts in other countries, but foreign courts often refuse to do the same for U.S. judgments.<sup>119</sup> They balk at enforcing a decision made by a court that has exercised jurisdictional powers unrecognized by the enforcing court and applied laws alien to the legal system of the enforcing sovereign.<sup>120</sup>

The primary international forum for attempts to resolve recognition and enforcement problems has been the Hague Conference on Private International Law, which sponsored negotiations of a convention on international jurisdiction and recognition of judgments. Those negotiations produced a draft in 2001,<sup>121</sup> but at that point the parties reached a stalemate on multiple issues.<sup>122</sup> The project has now

117 U.S. CONST. art. IV, § 1.

118 See generally WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 46–49 (1995) (discussing the lack of judgment treaties to limit international forum shopping).

119 See Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 321–22 (2002). But see Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171 (2004) (analyzing the refusal of U.S. courts to enforce foreign judgments based on foreign laws that would be unconstitutional).

120 Silberman, *supra* note 119, at 319–20 (explaining that the reach of U.S. courts' jurisdiction is controversial internationally because U.S. courts impose disfavored procedures such as juries, discovery, class actions, and contingent fees, and apply substantive U.S. law considered pro-plaintiff by other nations).

121 See HAGUE CONFERENCE ON PRIVATE INT'L LAW, SUMMARY OF THE OUTCOME OF THE DISCUSSION IN COMMISSION II OF THE FIRST PART OF THE DIPLOMATIC CONFERENCE 6–20 (2001), available at [http://www.hcch.net/doc/jdgm2001draft\\_e.doc](http://www.hcch.net/doc/jdgm2001draft_e.doc).

122 See HAGUE CONFERENCE ON PRIVATE INT'L LAW, SOME REFLECTIONS ON THE PRESENT STATE OF NEGOTIATIONS ON THE JUDGMENTS PROJECT IN THE CONTEXT OF THE FUTURE WORK PROGRAMME OF THE CONFERENCE (2002), available at [http://www.hcch.net/doc/gen\\_pd16e.doc](http://www.hcch.net/doc/gen_pd16e.doc). Among the topics identified as areas in which “a lack of consensus creates obstacles to progress” were the Internet and e-commerce, activity-based jurisdiction, consumer and employment contracts, and intellectual property rights. *Id.* at 5. For a summary of the position of the U.S. government, see *Negotiations at the Hague Conference for a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments, Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary of the House of Representatives*, 106th Cong. (2000) (statement of Jeffrey D. Kovar, Assistant Legal Advisor for Private Int'l Law, U.S. Dep't of State), available at <http://www.house.gov/judiciary/kova0629.htm>.

been reduced in scale with a new, more limited goal of drafting a less ambitious international convention that would make choice-of-court agreements effective in the international business context.<sup>123</sup> There is currently little hope for a comprehensive treaty,<sup>124</sup> and the lack of adequate enforcement mechanisms remains a major problem in international adjudication.

Arbitration also offers a straightforward mechanism for enforcement of U.S. domestic awards by using the adjudication system. Under the Federal Arbitration Act (FAA),<sup>125</sup> a party may seek an order confirming an arbitral award in federal court.<sup>126</sup> Unless the court vacates, modifies or corrects the award on narrow statutory grounds or judicially crafted standards, it must confirm it, which in effect makes the award a judgment of the court and enforceable as such.<sup>127</sup>

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123 DRAFT ON EXCLUSIVE CHOICE OF COURT AGREEMENTS (Hague Conference on Private Int'l Law, Working Doc. No. 110 E, 2004), available at [http://www.hcch.net/doc/jdgm\\_wd110\\_e.pdf](http://www.hcch.net/doc/jdgm_wd110_e.pdf). In its current draft version, the convention would impose three obligations on courts of Member States for international business-to-business cases with exclusive choice of court agreements: the chosen court would be obliged to hear the dispute rather than dismissing it on grounds of forum non conveniens, other courts would be obliged to decline jurisdiction, and enforcing courts would be obliged to recognize the judgment of the chosen court. *Id.* arts. 5, 7, 9; MASATO DOGAUCHI & TREVOR C. HARTLEY, DRAFT REPORT, PRELIMINARY DRAFT CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS 6 (Hague Conference on Private Int'l Law, Preliminary Document No. 26, 2004), available at [http://hcch.e-vision.nl/upload/wop/jdgm\\_pd26e.pdf](http://hcch.e-vision.nl/upload/wop/jdgm_pd26e.pdf).

124 See, e.g., Arthur T. von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common-and Civil Law Systems*, 295 RECUEIL DES COURS 9, 424 (2002) ("Universal instruments harmonizing broad areas of the law of jurisdiction and enforcement of judgments do not have a bright future.").

125 9 U.S.C. §§ 1-16 (2000).

126 *Id.* § 9. A party has one year from the date the award is rendered to initiate the confirmation process. *Id.*

127 Under the FAA, a court may vacate an award obtained by corruption or fraud, or when the arbitrators exhibited partiality or corruption, were guilty of misconduct during the hearing, or exceeded their powers. *Id.* § 10. In addition, "manifest disregard of the law" is a judicially-created ground that courts describe inconsistently but uniformly apply stringently. See, e.g., *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 381-82 (5th Cir. 2004); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64-66 (2d Cir. 2003); *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 581 (7th Cir. 2001); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 706 (D.C. Cir. 2001); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460-61 (11th Cir. 1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990); see also Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 764 (1996) (discussing other nonstatutory grounds for vacatur of arbitration awards adopted by federal circuits).

Unlike adjudication, arbitration also offers an enforcement mechanism in international disputes. Because it is a private process, it sidesteps sensitive issues of sovereignty that can be problematic with adjudication. If a party seeks to enforce an award, a court need not endorse a decision rendered by a foreign sovereign's legal system, but merely recognize the validity of a privately-agreed process. Over 130 countries, including the United States, have agreed to procedures for recognition in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention.<sup>128</sup>

Under the Convention, domestic courts are to recognize foreign arbitral awards as binding and "enforce them in accordance with the rules of procedure of the territory where the award is relied upon."<sup>129</sup> The Convention provides limits on this enforcement obligation by permitting courts to refuse to enforce awards (1) if they fall within a list of limited defenses based on procedural infirmities, or (2) if enforcement would be contrary to the public policy of the enforcing country.<sup>130</sup> There are some enforcement uncertainties created through the reference to domestic law in the enforcement obligation,<sup>131</sup> the resort to domestic law necessitated by the lack of definition in some of the procedural defenses,<sup>132</sup> and flexible definitions of

128 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. In the United States, the Convention is codified as Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201–208, which governs international commercial arbitration. *Id.* § 202.

129 New York Convention, *supra* note 128, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 39.

130 The procedural defenses include an invalid agreement to arbitrate, lack of notice or an opportunity to present one's case, an award that exceeds the scope of power delegated to the arbitrators, an irregularly constituted panel or procedure, or an award vacated in the country that was the situs of the arbitration. *Id.* art. V(1)(a)–(e) III, 21 U.S.T. at 2520, 330 U.N.T.S. at 39. A court may also refuse to enforce an award by reason of the law of the enforcing country if the dispute is not arbitrable or enforcement would be contrary to public policy. *Id.* art. V(2), 21 U.S.T. at 2520, 330 U.N.T.S. at 39.

131 See *supra* text accompanying note 129. The uncertainty created by this reference to domestic procedural law is illustrated by recent U.S. decisions refusing to confirm foreign awards on grounds of *forum non conveniens*, *Monegasque de Reassurances v. Nak Naftogaz*, 158 F. Supp. 2d 377 (S.D.N.Y. 2001), *aff'd*, 311 F.3d 488 (2d Cir. 2002), and lack of minimum contacts for personal jurisdiction, *Glencore Grain v. Shivnath Rai Harnarain*, 284 F.3d 1114 (9th Cir. 2002). See Pelagia Ivanova, *Forum non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards Under the New York Convention*, 83 B.U. L. REV. 899 (2003).

132 One prominent example of the uncertainty created by unspecified standards is the provision permitting courts to refuse to enforce an award that has been vacated in

public policy under domestic law.<sup>133</sup> The potential for procedural problems has, however, been reduced by wide-spread harmonization of arbitration standards through enactment of the UNCITRAL Model Law on International Commercial Arbitration around the globe.<sup>134</sup> The Convention generally functions to minimize variation in enforcement of arbitral awards, which is a major reason why arbitration is attractive for international commercial disputes. This degree of predictability is particularly important for citizens of countries, like the United States, that lack treaties establishing reliable mechanisms for enforcing court judgments.

### B. Mediated Agreements

There are no comparable special enforcement mechanisms for agreements parties reach in mediation. Evidence suggests that mediation results in a high rate of compliance because parties are more accepting of a consensual solution than an imposed decision.<sup>135</sup> Nonetheless, the amount of litigation over enforcement of mediated agreements indicates that some compliance problems do exist.<sup>136</sup> Because enforcement often takes the form of separate time-consuming

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the country where it was rendered. New York Convention, *supra* note 128, art. V (1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 39. The absence of detail in the Convention has generated multiple interpretations that make enforceability of a vacated award vary depending on the forum where enforcement is sought. See, for example, Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451 (2000) (presenting an economic analysis of when a court should enforce a vacated award), and sources cited therein.

133 The India Supreme Court recently set aside an arbitral award for legal error, which it defined as a matter of public policy. *Oil & Natural Gas Corp. v. SAW Pipes Ltd.*, (2003) 5 S.C.C. 705, 737–38 (India); see Nadia Darwazeh & Rita F. Linnane, *Set-Aside and Enforcement Proceedings: The 1996 Indian Arbitration Act Under Threat?*, 7 INT'L ARB. L. REV. 81, 81 (2004) (arguing that the court conducted a review of the merits of the case by making error of law a new ground to set aside an award).

134 UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 19th Sess., Supp. No. 7, Annex 1, at 1, U.N. Doc. A/40/17 (1985), available at <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>. The 1985 Model Law has been enacted into law, or served as the basis for domestic law, in forty-eight countries and five U.S. states. See U.N. Comm'n on Int'l Trade Law, *Status of Conventions and Enactments of UNCITRAL Model Laws*, at <http://www.uncitral.org/english/status/index.htm> (last modified Apr. 16, 2004).

135 See, e.g., Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 241 (1981) (reporting that compliance with mediated agreements was higher than with adjudicated decisions).

136 See Coben, *supra* note 46, at 65 n.1 (stating that litigation over mediation is increasing and most often involves disputes about enforcement of mediated settlements).

contract litigation, an expedited method could contribute to mediation's attractiveness as a reliable, speedy, and relatively low-cost process.

When a federal court suit is settled, enforcement of the agreement "requires its own basis for jurisdiction,"<sup>137</sup> or else the parties can end up in a separate state court suit. This can be avoided if there is an independent federal ground of jurisdiction<sup>138</sup> or, alternatively, ancillary jurisdiction.<sup>139</sup> Since contract enforcement is typically a matter of state law,<sup>140</sup> if the parties are not diverse they usually must rely on ancillary jurisdiction. To do so, they should have their agreement approved and entered as a consent decree, have it incorporated into the dismissal order, or have the court retain jurisdiction in the dismissal order.<sup>141</sup>

When a mediated case was originally filed in state court, settlement enforcement can take a number of paths. For example, in Louisiana, a party may file a motion to enforce a settlement rather than a new suit.<sup>142</sup> In contrast, Texas requires a separate suit to enforce mediated agreements, a practice that has been criticized as detracting from the goal of efficient settlement.<sup>143</sup> In some states, settlement en-

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137 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994).

138 *Bd. of Trs. of Hotel and Rest. Employees Local 25 v. Madison Hotel, Inc.*, 97 F.3d 1479, 1490 (D.C. Cir. 1996) (ruling that federal courts have jurisdiction to enforce settlement agreements when enforcement raises issues of federal law).

139 *Kokkonen*, 511 U.S. at 381–82; see Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33, 37–38 (2003).

140 Federal courts tend to apply state contract law to enforcement issues, but sometimes they emphasize the settlement of a federal right and use federal common law. Discrepancies in the cases make predicting the applicable law for settlement enforcement in federal court difficult. See Deason, *supra* note 43, at 298–301; Parness & Walker, *supra* note 139, at 47–49.

141 *Kokkonen*, 511 U.S. at 381–82. Unfortunately, the *Kokkonen* opinion created confusion among lower courts over what steps are necessary to incorporate a settlement or retain enforcement jurisdiction. See Parness & Walker, *supra* note 139, at 38–43. Also, parties may hesitate to enter a consent decree because it will be on the public record unless secrecy is necessary to protect trade secrets or for another compelling reason. See, e.g., *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002). Alternatively, Federal Rule of Civil Procedure 60(b)(6) may permit federal district courts to reopen dismissed suits for breach of a settlement agreement, but cases on this issue are split. See Parness & Walker, *supra* note 139, at 45–47.

142 *Banque de Depots v. Bozel Mineracao E Ferroligas*, 98-0742, p. 10 (La. App. 4 Cir. 1/27/99), 728 So. 2d 533, 538.

143 See, e.g., *Davis v. Wickham*, 917 S.W.2d 414, 416 (Tex. App. 1996); George B. Murr, *In the Matter of Marriage of Ames and the Enforceability of Alternative Dispute Resolution Agreements: A Case for Reform*, 28 TEX. TECH L. REV. 31 (1997).

forcement is eased if the agreement is approved by the court,<sup>144</sup> while in others approval is necessary to enforce certain agreements.<sup>145</sup>

Standards for enforcement also vary widely. Many state courts apply general principles of contract law to enforce mediated settlement agreements.<sup>146</sup> Some states expedite enforcement by treating certain mediated settlements—typically those of international commercial disputes—as arbitral awards enforceable in summary proceedings.<sup>147</sup> In contrast, other states make it more difficult to prevail in an enforcement proceeding when the contract is a mediated agreement. They

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144 See, e.g., KAN. STAT. ANN. § 5-514 (2001) (providing that a mediated settlement agreement can become an order of the court if the parties present it as a stipulation and the court approves it).

145 See, e.g., N.D. CENT. CODE § 14-09.1-07 (2004) (pertaining to mediated agreements in contested child proceedings). In some states, court approval of agreements reached in court-annexed mediation programs is a prerequisite to enforcement. See, e.g., COLO. REV. STAT. ANN. § 13-22-308 (West 1997) (“[T]he agreement . . . if approved by the court, shall be enforceable as an order of the court.”); KAN. STAT. ANN. § 23-603(c) (1995) (“Any understanding reached by the parties as a result of mediation shall not be binding upon the parties nor admissible in court until it is reduced to writing . . . and approved by the court.”).

146 See, e.g., *Sheng v. Starkey Labs., Inc.*, 117 F.3d 1081, 1083–84 (8th Cir. 1997); *Chappell v. Roth*, 548 S.E.2d 499, 500 (N.C. 2001); *Kaiser Found. Health Plan v. Doe*, 903 P.2d 375, 378 (Or. Ct. App. 1995), *modified*, 908 P.2d 850 (Or. Ct. App. 1996); *Martin v. Black*, 909 S.W.2d 192, 195 (Tex. App. 1995); *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 40–41 (Va. 1995).

147 See, e.g., CAL. CIV. PROC. CODE § 1297.401 (West Supp. 2004) (treating conciliated settlement of an international commercial dispute as a final arbitral award when the agreement is written and signed by the conciliator and the parties or their representatives); TEX. CIV. PRAC. & REM. CODE ANN. § 172.211 (Vernon Supp. 2004) (same).

Enforcement is expedited in other contexts by treating violations of a conciliated agreement as a violation of the underlying statute. See, e.g., HAW. REV. STAT. § 515-18 (2000) (treating violators of civil rights agreements as having engaged in a discriminatory practice); IND. CODE ANN. § 22-9-1-6(p) (West Supp. 2004) (treating violators as subject to a cease and desist order issued by the Civil Rights Commission); IOWA CODE ANN. § 299.6 (West Supp. 2004), *amended by* Act of Apr. 7, 2004, H.F. 2350, 2004 Iowa Legis. Serv. 42 (West) (making a person who violates a school truancy mediation agreement guilty of a misdemeanor).

Other states have strengthened the enforceability of certain mediated settlements less directly by awarding attorney’s fees to the enforcing party, GA. CODE ANN. § 45-19-39(c) (2002) (covering collective bargaining mediations); KY. REV. STAT. ANN. § 344.665 (Banks-Baldwin 1994) (governing Civil Rights Commission mediations of housing discrimination), by setting more stringent standards to set aside a mediated settlement, *Tilden Groves Holding Corp. v. Orlando/Orange County Expressway*, 816 So. 2d 658, 660 (Fla. Dist. Ct. App. 2002), or by disallowing traditional grounds for challenging a mediated settlement, *Crupi v. Crupi*, 784 So. 2d 611, 612–13 (Fla. Dist. Ct. App. 2001) (holding that a party cannot challenge a mediated post-nuptial agreement on grounds of “unfairness,” although that ground is usually available).

require formalities, such as a writing, mediator or attorney signatures, or a statement that the parties intend the settlement to be enforceable, which become enforcement hurdles.<sup>148</sup> Enforcement can also be impeded in practical terms by measures designed to protect mediation confidentiality when they make crucial evidence inadmissible in a contract action to enforce or void a settlement agreement.<sup>149</sup>

Scholarly commentators have raised worries that mediation values may suffer in court enforcement proceedings. Based on a review of enforcement cases, James J. Alfani and Catherine G. McCabe noted that courts were generally sensitive to mediation principles, but expressed concerns about the ability of the judicial process to discern and correct “troubling issues relating to mediation’s core values of party self-determination, voluntariness, and mediator impartiality” that are raised by allegations of settlement coercion.<sup>150</sup> They saw the adjudication policy favoring settlements as emphasizing judicial economy at the expense of mediation principles and urged that courts enforce mediated settlements within “a framework that recognizes mediation’s unique character and attributes.”<sup>151</sup>

Few scholars have explicitly analyzed using alternatives to contract principles for the enforcement of mediated agreements. Early on, Robert P. Burns urged the use of contract law to enforce settle-

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148 See Deason, *supra* note 75, at 52–55. In addition, some states have a rescission period that permits a party to avoid enforcement altogether. See Thompson, *supra* note 19, at 539 n.170. Enforcement may also be subject to special defenses applicable only to mediated agreements. See, e.g., MINN STAT. ANN. §§ 572.35, .36 (West 2000) (making mediator’s malfeasance a defense to an enforcement action); Vitakis-Valchine v. Valchine, 793 So. 2d 1094, 1098, 1099 (Fla. Dist. Ct. App. 2001) (permitting an attack on a mediated settlement on the ground of mediator misconduct in a court-sponsored program).

149 See, e.g., Eisendrath v. Superior Ct., 134 Cal. Rptr. 2d 716, 720 (Ct. App. 2003); Ryan v. Garcia, 27 Cal. App. 4th 1006, 1011–12 (1994); Nat’l Union Fire Ins. v. Price, 78 P.3d 1138 (Colo. Ct. App. 2003); Wilmington Hospitality v. New Castle County, 788 A.2d 536 (Del. Ch. 2001); Hudson v. Hudson, 600 So. 2d 7 (Fla. Dist. Ct. App. 1992); Vernon v. Acton, 732 N.E.2d 805, 806 (Ind. 2000); Vick v. Waits, No. 05-00-01122-CV, 2002 WL 1163842, at \*3 (Tex. App. June 4, 2002); Rendon v. Avance, 67 S.W.3d 303 (Tex. App. 2001). But see Few v. Hammack Enters., Inc., 511 S.E.2d 665, 669–70 (N.C. Ct. App. 1999) (reading confidentiality statutes narrowly and requiring a mediator to testify about an alleged oral settlement); Riner v. Newbrough, 563 S.E.2d 802, 808–09 (W. Va. 2002) (suggesting that a mediator could testify in an enforcement action without disclosing confidential information); Metz v. Metz, 61 P.3d 383, 389 (Wyo. 2003) (reasoning that a decision to admit a mediator’s testimony was not prejudicial because the court and counsel were “sensitive” about not probing settlement discussions).

150 James J. Alfani & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 205 (2001).

151 *Id.* at 206.



ment agreements, citing its flexibility to protect mediation values.<sup>152</sup> More recently, Peter N. Thompson followed suit, but with reservations. He added a caveat that courts should “temper” their focus on settlement and finality and be “cautious” about reading ambiguous language in mediated agreements to create legal rights.<sup>153</sup>

Others have proposed modifying contract law outright in order to safeguard mediation’s values in a litigation setting. Nancy A. Welsh advocated several special rules for enforcing mediated agreements, including an expanded coercion defense and a cooling-off period that would allow rescission immediately following a mediation.<sup>154</sup> Professor Welsh argued that these modifications are necessary to protect self-determination in mediation, which she distinguishes from the objective manifestations of assent that are the focus of contract analysis.<sup>155</sup>

In addition, without considering the possibility of summary procedures, I have argued elsewhere for altering contract standards to accommodate confidentiality values in the mediation process. Mediated agreements should be subject to a statute of frauds in enforcement proceedings and mediation communications should be admitted as evidence of contract defenses only after a threshold review establishes that disclosure is needed and justified in the particular case.<sup>156</sup> This approach, which is similar to that of the UMA, represents a compromise between the values of efficiency in enforcement and maintaining confidentiality in mediation.

If enacted, an enforcement mechanism for mediated agreements would presumably provide an alternative to a full application of contract principles and eliminate any need for a separate lawsuit. The UMA Drafting Committees sought a way to extend enforcement beyond existing court procedures for retaining jurisdiction<sup>157</sup> to a mech-

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152 Robert P. Burns, *The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity*, 2 OHIO ST. J. ON DISP. RESOL. 93, 115 (1986) (“No persuasive general argument exists for giving the mediated nature of an agreement necessary legal consequences. Contract law provides a flexible set of considerations relevant to the issue of enforceability that more adequately structure deliberation about that issue than could any single general rule.”).

153 Thompson, *supra* note 19, at 562–63.

154 Welsh, *supra* note 8, at 82–92.

155 *Id.* at 80; see also Steven Weller, *Court Enforcement of Mediated Agreements: Should Contract Law Be Applied?*, JUDGES’ J., Winter 1992, at 13, 39 (suggesting that because a mediator’s power distinguishes mediation from arms-length settlement, judges should rescind agreements if there is a disparity in expertise between the parties and the weaker party misunderstood the agreement or its consequences).

156 See Deason, *supra* note 75, at 45–50.

157 See *supra* text accompanying note 137.

anism that would apply to private mediations as well. Over the course of several years, they discussed multiple approaches to expedited enforcement by the courts.<sup>158</sup> In their final draft, enforcement took the form of a registration provision that would allow the parties and their lawyers to move jointly for a court to enter a judgment in accordance with the mediated agreement and thereby receive expedited enforcement.<sup>159</sup> The Committees recommended against adoption of this provision, however, concluding that by the time the enforcement provision was “circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation.”<sup>160</sup>

NCCUSL followed the Committees’ recommendation and the UMA, as adopted, does not provide procedures for expedited enforcement of mediated agreements. Enforcement was similarly considered in the UNCITRAL drafting process, but in the end the Model Law contains only a provision that permits an enacting state to insert its own enforcement procedures.<sup>161</sup> No single approach could be agreed upon because of the wide variety of approaches to enforcing conciliated agreements around the globe.<sup>162</sup>

Views are deeply divided on the issue of summary or expedited enforcement of mediated agreements. There are important values at stake on each side, and any enforcement procedure, including the status quo, compromises some of those values. On one hand, summary enforcement could support the growth of mediation. From the point of view of many international transactional lawyers, finality is the crux of the matter: “What’s the point of mediation if one has to go and litigate to get the agreement enforced?” For these and other law-

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158 These approaches included treating a mediated agreement as an arbitral award by incorporating mediation into the enforcement provision of the Revised Uniform Arbitration Act, *see, e.g.*, UNIF. MEDIATION ACT § 5 (Apr. 1999 Draft), and several versions of a stipulated judgment model, *see, e.g.*, UNIF. MEDIATION ACT § 10 (Jan. 2000 Draft); UNIF. MEDIATION ACT § 11 (June 5, 2001 Annual Meeting Draft). The UMA drafts are available at <http://www.law.upenn.edu/bll/ulc/ulc.htm#umediat>.

159 UNIF. MEDIATION ACT § 11 reporter’s notes (June 5, 2001 Annual Meeting Draft), *available at* <http://www.law.upenn.edu/bll/ulc/ulc.htm#umediat>. A summary enforcement procedure was also proposed in Florida in 2002 as part of the Family Court Reform Bill, S. 1226, 2002 Sess. § 14 (Fla.). The legislation was not enacted, but would have requested the Florida Supreme Court to establish a procedure for filing and approving settlement agreements. *See* Paul Dayton Johnson, Jr., *Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 497 (2003).

160 UNIF. MEDIATION ACT § 11 reporter’s notes (June 5, 2001 Annual Meeting Draft), *available at* <http://www.law.upenn.edu/bll/ulc/ulc.htm#umediat>.

161 MODEL LAW, *supra* note 12, art. 14.

162 *See Model Law Draft Guide, supra* note 12, at 25–26; Sekolec & Getty, *supra* note 87, at 193.

yers, standardizing and streamlining the enforcement process would remove a practical barrier and encourage mediation. Summary enforcement could also make it easier to maintain the confidentiality of mediation communications by reducing the need for evidence pertaining to the validity of agreements in contract actions. Ironically, while an enforcement mechanism involving courts would further integrate mediation and adjudication, it would also disentangle mediated agreements from contract litigation.

On the other hand, contract rules set standards we have come to regard as indicia of fair agreements.<sup>163</sup> Many forms of summary enforcement would bypass any consideration of contract defenses and thus eliminate the application of those standards in court. This could enable sophisticated parties to take advantage of weak or uninformed parties and in this way threaten mediation's core principle of party self-determination. If this happens, summary enforcement procedures applied in the adjudication system could produce results that are antithetical to mediation values.

Concern about enforcing agreements that are inconsistent with informed self-determination is complicated, however, by potential unfairness in the converse situation. When a party is avoiding compliance with a fair agreement, summary enforcement would support, not undermine, the self-determination of the parties who freely entered the agreement. In this context, extensive proceedings that are protective of unsophisticated parties may have the unintended consequence of impairing self-determination if they deter enforcement. Which form of impairment is more important to avoid?<sup>164</sup> Perhaps we should be more concerned with enforcing an agreement that was not a product of self-determination than with failing to enforce one that does reflect self-determination. In the former situation, enforcement means the aggrieved party would have no further avenue for recourse, whereas in the latter, the aggrieved party would have the option of litigating the dispute. Even if finality argues against summary enforcement, however, any form of enforcement, summary or not, unfortunately carries a risk of impairing self-determination in one of these situations.

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163 *But see* Thompson, *supra* note 19, at 527 (distinguishing contract disputes from mediated settlements); Welsh, *supra* note 8, at 60–64 (distinguishing mediation's concept of self-determination from the focus in contract law on objective manifestations showing an agreement reached with free will).

164 In social science terms, the question is whether to design a test to best avoid false positive or false negative results. A legal example of avoiding false positives is the "beyond a reasonable doubt" burden of proof for criminal convictions. We would rather err on the side of freeing the guilty than convicting the innocent.

Perhaps effective means for protecting weak parties can be found that would eliminate this dilemma concerning self-determination. Proposals have been made to require that the parties' agreement include a statement that they intend summary enforcement,<sup>165</sup> which could heighten the parties' awareness of the significance of their actions. But probably the most effective safeguard would be to limit summary enforcement to mediations in which both parties are represented by counsel.<sup>166</sup> The presence of lawyers would provide a check on unfairness and assist parties in understanding the consequences of their agreement.<sup>167</sup> In addition, mediations that cause some of the greatest concerns—those where a strong party is paired with an unrepresented weaker party—would be ineligible for summary enforcement.

Another approach would be to abandon any attempt at “one-size-fits-all” enforcement and create a mechanism limited to a class of mediations that are least prone to abuse. For example, a U.S. enforcement provision for mediated agreements could be limited to the international commercial setting. This is a context where fairness is less of a problem because parties are likely to be relatively sophisticated and represented by counsel. Because of the shortcomings of international enforcement of judicial decisions, it is also where parties most need mediation enforcement mechanisms. A compromise on special rules for enforcing this limited class of mediations would take advantage of this fortuitous intersection between the greatest need for enforcement and the least problematic setting for enforcement. Taking a page from the limited scope of the Model Law, this approach could also blunt the effects of difficult decisions on mediation and adjudication values.

One drawback to isolating international commercial mediations, however, is that any rule that is limited to a specific category of media-

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165 See, e.g., UNIF. MEDIATION ACT § 11(a)(4) (June 5, 2001 Annual Meeting Draft), available at <http://www.law.upenn.edu/bll/ulc/ulc.htm#umediat>. Note that the proposal to require a special statement affirming the parties' desire for enforcement would apply only to summary enforcement, not to enforcement via a contract action. Requirements that run counter to community expectations, such as this, create uncertainty and leave otherwise valid agreements unenforced if applied to all enforcement. See James R. Coben & Peter N. Thompson, *The Haghghi Trilogy and the Minnesota Civil Mediation Act: Exposing a Phantom Menace Casting a Pall Over the Development of ADR in Minnesota*, 20 *HAMLIN J. PUB. L. & POL'Y* 299, 323–24 (1999).

166 UNIF. MEDIATION ACT § 11(a)(3) (June 5, 2001 Annual Meeting Draft), available at <http://www.law.upenn.edu/bll/ulc/ulc.htm#umediat>.

167 See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 *MINN. L. REV.* 1317 (1995) (discussing the “lawyer-participant” approach to mandated divorce mediation).

tion creates definitional problems. There is always the potential for surprise and/or litigation if parties do not realize their dispute falls within the special rule.<sup>168</sup> This is a risk that was accepted, however, in amending the UMA to provide confidentiality rules limited to international commercial conciliations and it might be acceptable in the context of summary enforcement as well. In addition, the risk of surprise could be greatly reduced with safeguards that support awareness and self-determination, such as requiring a lawyer.

Should it make a difference if the parties have been required to participate in mediation or ordered to do so by a court? Perhaps it is reasonable for parties to expect that the court will also provide procedures to minimize the burden of enforcement litigation that can follow from its mandate. But it seems equally reasonable for parties to expect that the court will provide a fair procedure and a mechanism for correcting the situation if the mediation does not live up to this promise.

Some approaches to enforcement involve turning to arbitration. One suggestion is that parties could agree to arbitrate, then mediate a settlement prior to the arbitration and have it entered as an arbitral award subject to normal enforcement procedures.<sup>169</sup> A shortcoming to this procedure, however, is that entering into an agreement to arbitrate in advance of mediation is a risky course for a party that wants only to mediate. If the mediation does not lead to a settlement, the other party could enforce the agreement to arbitrate under the FAA or the New York Convention.<sup>170</sup>

An alternative suggestion is to mediate without an arbitration agreement and then convert the mediated agreement to an arbitral award to make it enforceable. There are some countries that provide this mechanism domestically. In Argentina, for example, parties can conditionally confer the powers of an arbitrator on their mediator. If they are successful in mediation, the mediator-as-arbitrator then converts their agreement into an award enforceable in Argentine

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168 See van Ginkel, *supra* note 88, at 12, 17–18.

169 Some states provide this procedure by statute for international commercial mediations. See, e.g., FLA. STAT. ANN. § 684.10(2) (West 2003) (“If before a final award is issued the parties agree to settle their dispute, the arbitral tribunal shall . . . , if requested by the parties and accepted by the tribunal, record the agreed settlement in the form of a final award.”); N.C. GEN. STAT. § 1-567.60(b) (2003) (“If, during arbitral proceedings, the parties settle their dispute, the arbitral tribunal shall . . . if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.”).

170 See 9 U.S.C. § 4 (2000).

courts.<sup>171</sup> In China, where arbitrators can conduct conciliations, the outcome of a conciliation may be either a conciliation statement or an arbitral award. Both have the same legal force and effect.<sup>172</sup> It is an open question, however, whether once a mediated agreement has taken the form of an arbitral award it could be enforced internationally under the New York Convention.<sup>173</sup>

In the absence of procedures for summary enforcement of a mediated agreement, adapting arbitral enforcement to mediation is a pragmatic response. Unfortunately, an enforcement mechanism designed to provide very limited review for neutral decisions may fail to take into account infirmities in a bargaining setting that could make an agreed solution unfair. Both awards and agreements draw their authority from the consent of the parties, but with an important difference. With an award the parties consent to a process in which a neutral intervenes to make a decision, whereas with an agreement they consent directly to the outcome. Some courts have used language that captures the significance of this distinction for the enforcement of agreements:

[W]e recognize that settlement of claims is favored in the law, . . . and that mediated settlement as a means to resolve disputes should be encouraged and afforded great deference . . . [but] given the consensual nature of any settlement, a court cannot compel compliance with terms not agreed upon or expressed by the parties in the settlement agreement.<sup>174</sup>

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171 Am. Bar Ass'n Task Force on Elec. Commerce & Alternative Dispute Resolution & Shidler Ctr. for Law, Commerce and Tech., Univ. of Wash. Sch. of Law, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 Bus. Law. 415, 456 (2002).

172 *Model Law Draft Guide*, *supra* note 12, at 25 (citing Arbitration Law of the People's Republic of China art. 51).

173 There is some uncertainty as to whether courts would treat a converted mediation agreement as governed by the New York Convention. The Convention applies to awards "arising out of differences between persons, whether physical or legal." New York Convention, *supra* note 128, art. I, 21 U.S.T. at 2519, 330 U.N.T.S. at 39. When the parties reach a mediated agreement before invoking arbitration, there is then arguably no dispute and no "differences" to give rise to the arbitration. Another possible interpretation of the Convention, however, would avoid this barrier to enforcement. The phrase "arising out of differences" allows some flexibility in how directly the differences must lead to the award and could support enforcing an award arising out of differences that were resolved via mediation. This interpretation would broaden the application of enforcement provisions that were tailored for arbitration, but would have the advantage of respecting the self-determination of the parties who choose this approach.

174 *Chappell v. Roth*, 548 S.E.2d 499, 500 (N.C. 2001); *see also Riner v. Newbraugh*,

The FAA arbitration enforcement provisions provide minimal review of a neutral's decision under standards that were not designed for establishing the bona fides of an alleged agreement by the parties.<sup>175</sup> Moreover, under international standards, the discrepancy between efficiency via summary court enforcement and fairness as defined in terms of mediation values is potentially even greater.<sup>176</sup>

Summary enforcement of mediated agreements based on an arbitration model could also have undesirable consequences for adjudication values. In confirming arbitration awards, courts have shown great tolerance for enforcing measures they have had no role in crafting. There are tensions in this role, however, that have been exacerbated by extending arbitration to statutory claims. Some of the stress fractures are indicated by proposals for expanded judicial review of the legal basis for awards<sup>177</sup> and objections to arbitrations authorized by adhesion agreements in consumer and employment settings.<sup>178</sup>

Enforcing mediated agreements could further call courts' roles into question. While arbitration of statutory issues can be justified as the application of law in a different forum, mediation agreements may bear no resemblance at all to what a court would decide. Self-determination allows parties to consider needs and interests that do not have currency in the world of legally-cognizable categories. The corollary is that they may ignore publicly-endorsed values expressed in legal doc-

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563 S.E.2d 802, 809–10 (W. Va. 2002) (limiting enforcement to agreements that are “fairly made and are not in contravention of some law or public policy”).

175 The FAA does permit a court to vacate an award “procured by corruption, fraud, or undue means.” 9 U.S.C. § 10(a)(1). Contract law, however, invalidates agreements on additional grounds, such as duress and mistake, that are not a concern in a decisional process.

176 Under the U.S. enabling legislation, the New York Convention dictates the exclusive grounds for refusing to confirm an international award. *See id.* § 207 (“The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in said Convention.”); *see also* Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997) (“There is now considerable caselaw holding that . . . the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award.”); M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 851 (6th Cir. 1996) (“Article V of the Convention lists the exclusive grounds for justifying refusal to recognize an arbitral award.”). These grounds do not include fraud.

177 *See, e.g.,* Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1205–06 (2000).

178 *See, e.g.,* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 452 (1996) (suggesting that the “use of executory arbitration agreements be limited to those parties who share similar negotiating incentives”).

trine.<sup>179</sup> If arbitration-like enforcement procedures are applied to mediated agreements between parties who have stepped outside “the shadow of the law,” there may be stark questions about the appropriate enforcement role of the courts.

Many questions remain. Does the incidence of enforcement difficulties justify a summary procedure? Despite indications that much of the mediation-related litigation centers on enforcing mediated agreements, how does the frequency of such cases compare to the frequency of mediation? Would parties elect an expedited procedure often enough to make a difference in the frequency of such cases? Even if widely chosen, some parties may argue that their acceptance of the procedure was not informed or fair, thus creating another layer of litigation about enforcement.

Would summary enforcement of mediated agreements make sense in the broader context of settlement? It is not clear that the participation of a mediator justifies enforcing a mediated settlement in a different manner than a negotiated settlement. Perhaps both processes should be eligible for summary enforcement if the parties so desire. If requiring the participation of a lawyer would safeguard self-determination in mediation, could it also do so in negotiation?

What effect would summary enforcement have on the role of the mediator? Perhaps she would feel a greater responsibility to ensure a just agreement if it were subject to summary enforcement. Should the role of the mediator have an influence over the acceptability of summary enforcement? As part of the debate over the role of the mediator in ensuring justice, scholars have challenged the classically-defined concept of mediator “neutrality.”<sup>180</sup> Would movement toward a more interventionist role for mediators make summary enforcement of agreements more acceptable?

My goal here has been to stimulate debate on the question of summary enforcement. At our present state of knowledge about problems enforcing mediated agreements, I am unconvinced that mediation necessarily needs to offer the finality associated with arbitration. I fear that incorporating such finality through summary enforcement procedures might stretch the capabilities of mediation in much the same way that extending arbitration to disputes based on statutory rights has stretched arbitration beyond its comfort zone. But

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179 See, e.g., Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 49 (1996) (“The promise of mediation is different: Justice is derived, not through the operation of law, but through autonomy and self-determination.”).

180 See, e.g., Coben, *supra* note 46, at 73–74, 78–83 (citing scholarship).



perhaps procedures for summary enforcement could be developed that would not impair the characteristic attributes of mediation.

#### CONCLUSION

The world of courts and litigation is thoroughly intertwined with the practice of mediation, both as a source of cases and as the ultimate forum for resolving disputes that arise out of mediation. Concomitantly, mediation is integrated into the practice of law as a means of settling litigation and, somewhat, as an independent process. All three procedures I have discussed—the recent domestic uniform law, the international model law, and potential enforcement mechanisms—share the goal of making mediation more attractive and effective both when used independently and in the court-connected context. This general goal, however, obscures the extent to which the UMA and the Model Law are the products of compromises among procedural values that characterize mediation and adjudication. Any development of summary enforcement procedures for mediated agreements would pose a new set of challenges for these values that should be assessed with care. Seeking to strengthen mediation by truncating the process of adjudicatory enforcement to a summary procedure could erode characteristics that help make mediation and adjudication valuable and effective.