SURVEY OF ILLINOIS LAW: MEDIATION — TO MAXIMIZE CONFIDENTIALITY PROTECTIONS FOR FAMILY MEDIATIONS, THE COURTS SHOULD RELY ON THE ILLINOIS UNIFORM MEDIATION ACT

SUZANNE SCHMITZ*

I. Introduction
II. Background
III. Authority Over Mediation
  A. IUMA
  B. Supreme Court Rules
  C. Comparison of the IUMA and the Supreme Court Rules
IV. Mediation Privilege
  A. IUMA
  B. Circuit Rules
  C. Comparison of the IUMA and the Circuit Rules
V. Waivers of Confidentiality
  A. IUMA
  B. Circuit Rules
  C. Comparison of the IUMA and the Circuit Rules
VI. Preclusions of Confidentiality
  A. IUMA
  B. Comparison of the IUMA and the Circuit Rules
VII. Exceptions to Confidentiality
  A. Protect Children and Victims of Domestic Violence
  B. Other Exceptions to Confidentiality
VIII. Confidentiality of Mediator Reports
  A. IUMA
  B. Circuit Rules
  C. Comparison of the IUMA and the Circuit Rules
IX. Court Rules May Control Over IUMA
X. Conclusion

* Suzanne Schmitz is Professor Emeritus from Southern Illinois University School of Law. She was the Coordinator of the ADR Clinic at SIU where she taught ADR, trained law students and lawyers to mediate, and conducted family mediations. The author thanks Marshall Rinderer, J.D. 2014 for research assistance and thanks those judges, scholars and practitioners who offered comments and suggestions.

I. INTRODUCTION

Confidentiality is one of the hallmarks of mediation in Illinois. The Illinois Supreme Court requires every circuit with a mediation program to have a rule addressing confidentiality.[1] Also, the Illinois General Assembly has adopted the Illinois Uniform Mediation Act (IUMA or the Act), which is primarily an act creating a mediation privilege.[2] Scholars and practitioners believe confidentiality is one of the reasons for the success of mediation.[3] Yet, with few exceptions,[4] most of the 24 circuit courts throughout the state have enacted local circuit rules that offer less protection for confidentiality than does the Act itself. Some circuits have even adopted rules that conflict with the Act.

For example, while most circuits protect the mediator from testifying, few protect a non-party mediation participant, such as a teen-aged child who participated in the mediation. The Act protects mediations conducted prior to filing a lawsuit in court, but the circuit rules do not. Some circuits expect mediators to make recommendations that are prohibited by the Act. The comparison that follows demonstrates that the Act provides more complete protections for mediators and those participating in mediation than do the circuit rules.

The inconsistencies between the circuit rules and the IUMA are particularly troubling because where the rules of court conflict with statutes that involve a matter within the authority of the court, the rules of court control.[5] It is possible, therefore, that the Act's protections could be disregarded in favor of the circuit rules on confidentiality. Should the Act be superseded, the result may be a decrease of attorney and public confidence in the mediation process. The circuits need not face that

---

1 ILL. SUP. CT. R. 99; ILL. SUP. CT. R. 905. One sign of the importance of confidentiality is that most circuits require mediators, prior to commencing mediation, to inform the parties that the mediation process is confidential. ILL. 1ST CIR. CT. R. 7-2(II)(B)(1)(a); ILL. 2D CIR. CT. R. 21(II)(B)(1); ILL. 3D CIR. CT. R. 4(A)(6); ILL. 4TH CIR. CT. R. 11-4(a)(6); ILL. 5TH CIR. CT. R. VIII(I)(6)(a)(6); ILL. 6TH CIR. CT. ADMIN. ORDER 06-3(IV)(E)(4)(A)(6); ILL. 7TH CIR. CT. R. 308(2)(c)(xi); ILL. 8TH CIR. CT. R. 7.4(VI)(a)(6); Ill. 9th Cir. Ct. R 6.25 A (6); ILL. 11TH CIR. CT. Appendix A(3)(L); ILL. 13TH CIR. CT. R. 8.19(A)(6); ILL. 14TH CIR. CT. R. 9(A)(m)(5); ILL. 15TH CIR. CT. R. 9A.4(a)(6); ILL. 16TH CIR. CT. R. 15.18(h)(4); ILL. 17TH CIR. CT. R. 14.08(4)(A)(6); ILL. 19TH CIR. CT. R. 11.13(I)(4); ILL. 21ST CIR. CT. R. 9.1; ILL. 22D CIR. CT. R. 18.07; ILL. 23D CIR. CT. R. 6.60(h)(4); ILL. COOK COUNTY CIR. CT. R. 13.4(e)(v)(d)(8).

2. 710 ILL. COMP. STAT. 35/1-99 (2014). *See generally*, Thomas D. Cavenagh, *Survey of Illinois Law: The Uniform Mediation Act*, 28 S. ILL. U. L.J. 877 (2004).

3. *See generally* Uniform Mediation Act, Prefatory Note, 2001, available at http://www.uniformlaws.org/shared/docs/mediation/mediat_am00.pdf.

4. Ill. Cook County Cir. Ct. R. 13.4(e)(ix); Ill. 4th Cir. Ct. R. 11-2 and 11-8; Ill. 19th Cir. Ct. R. 11.13(A)(1) and 11.13(H); Ill. 22nd Cir. Ct. R. 18.05(a)(3).

5. Peile v. Skelgas, Inc., 645 N.E.2d 184, 189 (Ill. 1994); O'Connell v. St. Francis Hosp., 492 N.E.2d 1322, 1326 (Ill. 1986).

possibility if they take steps now to adopt the Act as their confidentiality rule.

The Illinois Supreme Court should adopt a rule that all Illinois court-ordered mediations be conducted in accord with IUMA.[6] The Court should revise Illinois Supreme Court Rule 99 and its companion Rule 905 to rely solely on IUMA as its confidentiality provision. Should the Court fail to act, the circuits should adopt IUMA as their sole confidentiality rule and should eliminate all other references to confidentiality.

This article will review the background to the Supreme Court rules and the IUMA, and then will analyze the various aspects of confidentiality, comparing the approach of the IUMA with that of the various circuits that have not adopted the Act. The analysis will address the authority over mediation, the privilege and its exceptions, and the reports made by mediators. Additionally, the analysis will further discuss the implications that could result if the circuit rules superseded the IUMA.

II. BACKGROUND

Illinois Supreme Court Rule 99,[7] effective in 2001, permits circuits to establish mediation programs subject to certain conditions. One condition is that the circuit develops rules addressing mediation confidentiality. Each of the twenty-three judicial circuits and the circuit of Cook County has adopted circuit rules for mediation, rules that have been approved by the Illinois Supreme Court. The rules address confidentiality.[8]

In 2006, the Illinois Supreme Court adopted Rule 905, requiring circuits to establish a mediation program "for cases involving the custody of a child or removal of a child or visitation issues . . . ."[9] This rule requires the circuits to comply with the mandates of Rule 99, including adopting rules governing mediation confidentiality.

The IUMA,[10] enacted in 2004, is primarily a statute protecting mediation confidentiality. It does so in several ways. First, it creates a

---

6. The author previously made this argument. *See generally* Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783 (2005).
7. Ill. Sup. Ct. R. 99.
8. Ill. Sup. Ct. R. 99; Ill. 1st Cir. Ct. R. 7-2(II)(A); Ill. 2d Cir. Ct. R. 21(A); Ill. 3d Cir. Ct. R. 1(A); Ill. 4th Cir. Ct. R. 11-8(b)(6); Ill. 5th Cir. Ct. R. VIII(I)(1)(a); Ill. 6th Cir. Ct. Admin. Order 06-3; Ill. 7th Cir. Ct. R. 308(5)(f); Ill. 8th Cir. Ct. R. 7.4(I)(a); Ill 9th Cir. Ct. R 6.05B(1); Ill. 10th Cir. Ct. R. 51; Ill. 11th Cir. Ct. R. 154 E; Ill. 12th Cir. Ct. R. 8.17(F)(1); Ill. 13th Cir. Ct. R. 8.16(A)(1); Ill. 14th Cir. Ct. R. 9(A)(m)(2)(A); Ill. 15th Cir. Ct. R. 9A.7(b); Ill. 16th Cir. Ct. R. 15.18(a)(1); Ill. 17th Cir. Ct. R. 14.08(1)(A); Ill. 18th Cir. Ct. R. 15.15(F); Ill. 19th Cir. Ct. R. 11.13; Ill. 20th Cir. Ct. R. 8.01; Ill. 21st Cir. Ct. R. 9.1; Ill. 22d Cir. Ct. R. 18.02(a); Ill. 23d Cir. Ct. R. 6.60(a)(1). In a few cases, the circuit rule on mediation applies only in selected counties within the circuit.
9. Ill. Sup. Ct. R. 905.
10. 710 Ill. Comp. Stat. 35/1-99 (2014).

privilege for mediation communications.[11] Second, it makes mediation confidential to the extent permitted by law.[12] Third, it limits what the mediator can report to the court concerning the mediation.[13] The Act also imposes several other duties on mediators, which are not directly related to the issue of confidentiality and not the focus of this article.

The IUMA is modeled on the Uniform Mediation Act, a product of the Uniform Law Commission Drafting Commission working with the American Bar Association. The Drafting Commission benefitted from the study and comments of academics, mediation professional organizations, and state and local bar associations.[14] The Uniform Mediation Act is annotated, with comments discussing the language chosen by the Commission and the policy reasons for those choices. The Comments to the Uniform Mediation Act offer guidance to interpreting the Act.

This review examines only the confidentiality portion of circuit rules enacted pursuant to Rules 99 and 905, and applicable to mediations involving issues of parental responsibility, custody, visitation, removal or access to children, often referred to as Family Mediation.[15]

III. AUTHORITY OVER MEDIATION

A. IUMA

The IUMA governs mediations: (1) which are required by state, court or agency rule; (2) where the parties are referred to mediation by a court, agency or arbitrator; (3) where the parties and mediator agree to mediate and demonstrate their expectation that mediation communications are

11. *Id*. at 35/4.
12. *Id*. at 35/8.
13. *Id*. at 35/7.
14. Uniform Mediation Act, Prefatory Note, 2001, available at http://www.uniformlaws.org/shared/docs/mediation/mediat_am00.pdf.
15. ILL. SUP. CT. R. 905. Rule 905 does not apply to mediations concerning child protection or to civil mediations, such as mediations involving personal injuries or construction disputes, to name a few examples. While much of the discussion in this article is relevant to confidentiality rules for any type of mediation, the author limits her analysis to the rules directly affecting family mediations conducted by a private mediator rather than a judge. The author is unable to provide a thorough critique of each circuit's rules. Rather, the author describes the patterns of circuit rules applicable to family mediation and compares them to the IUMA. The author relied on the version of family mediation rules posted on the website of the circuit or one of the counties within the circuit. Presumably, this is the version most accessible to lawyers and the public. Note that the 6th Circuit Court rules are found on its website under Administrative Orders, 2006. http://sixthcircuitcourt.com/. In some cases, the rules make reference to a form not available on the website. The author was unable to locate forms not posted on the website.

privileged; or (4) where the parties use as a mediator someone who holds himself or herself out as a mediator.[16]

B. Supreme Court Rules

Illinois Supreme Court Rule 905 requires each judicial circuit to establish a mediation program for cases involving the custody of a child, removal of a child, or visitation issues."[17] Rule 99 states "[e]ach judicial circuit electing to establish a mediation program shall adopt rules for the conduct of the mediation proceedings."[18]

C. Comparison of the IUMA with the Supreme Court Rules

The circuit court rules protect mediations ordered by the court, while the Act protects mediations whether or not they are court-ordered. IUMA also protects those mediations conducted prior to filing a lawsuit, but the circuit rules do not. For example, a couple planning to divorce may choose to mediate parenting issues before filing for divorce. Or an unmarried couple may work out a visitation plan without any filing. In either case, the Act may well protect them, but the rules may not. Because the circuit rules apply to court-related activities, they would not apply to mediations initiated without a court order or rule.

IV. MEDIATION PRIVILEGE

A. IUMA

1. Who holds the privilege?

The IUMA creates a mediation privilege for three categories of participants: the mediator, the mediation parties, and any nonparty mediation participant.[19] Examples of nonparty participants include an older child, a grandparent or a tax accountant, who participate in a child custody mediation.

The privilege permits the protected party to refuse to disclose a mediation communication and to prevent certain other disclosures:

16. 710 ILL. COMP. STAT. 35/3(a) (2014). The IUMA does not apply to the mediation of collective bargaining agreements, or to mediations conducted by a judge who might make a ruling on the case, or in a few other cases. *Id.* at 35/3(b).
17. Ill. Sup. Ct. R. 905.
18. Ill. Sup. Ct. R. 99.
19. 710 Ill. Comp. Stat. 35/4 (2014).

> (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
>
> (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the **mediato**r.
>
> (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the **nonparty participant**. (emphasis added).[20]

2. What is privileged?

The IUMA defines a mediation communication as "a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."[21] Thus, the IUMA protects statements, verbal or nonverbal, made **before** mediation begins when a party might be considering mediation or being screened for impediments to mediation. Also protected are those communications made **after** mediation for the purpose of continuing or reconvening the mediation.

3. Where does the privilege apply?

Under the IUMA, a mediation communication is privileged and not subject to discovery or admissible in evidence in a proceeding.[22] A "proceeding" is defined as "(A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (B) a legislative hearing or similar process."[23]

B. Circuit Rules

Only the Cook County, the Nineteenth and the Twenty-second Circuits describe the confidentiality provision as a privilege. The Cook County rule reads: "[m]ediation communications shall be confidential and privileged, not subject to discovery or admissible in evidence in accordance

20. *Id*. at 35/4(b).
21. *Id*. at 35/2(2).
22. *Id*. at 35/4(a).
23. *Id*. at 35/2(7).

with the provisions of the Uniform Mediation Act, 710 ILCS 35/1, et seq."[24]

The Twenty-second Circuit rule states: "[p]rivileges and exceptions to privilege shall be as is set forth in the Uniform Mediation Act."[25] The Nineteenth Circuit adopts various provisions of the Act throughout its rules, in effect, adopting all the confidentiality provisions.[26] Although the Fourth Circuit does not explicitly refer to a mediation privilege under the IUMA, it adopts the definition of mediation and mediation communications as used in the Act and appears to adopt the entire Act regarding confidentiality.[27]

A few additional circuits reference the IUMA, but these same circuits adopt rules that provide much narrower protections than does the IUMA.[28] The following discussion focuses on those circuits that do not adopt the Act.

Those circuits not adopting the IUMA draft their own rules regarding confidentiality. One such rule, typical of many, reads:

> Except as otherwise provided by law, all written and verbal communications made in a mediation session are confidential and may not be disclosed, except the parties may report these communications to their attorneys or counselors. . . . Admissions and other communications made in confidence by any participant in the course of mediation session shall not be admissible as evidence in any court proceeding. . . . [n]o participant may be called as a witness in any proceeding by a party or the court regarding matters disclosed in a mediation session.[29]

---

24. Ill. Cook County Cir. Ct. R. 13.4(e)(ix).
25. Ill. 22d Cir. Ct. R. 18.07(c).
26. Ill. 19th Cir. Ct. R. 11.13(H).
27. ILL. 4TH CIR. CT. R. 11-2(a); *see also* ILL. 4TH CIR. CT. R. 11-8(b)(6) which reads, "[o]ther relevant information not considered privileged or confidential under these rules or the Uniform Mediation Act 710 ILCS 35/1 et seq. which is adopted and incorporated herein to the extent same is not inconsistent with the procedural rules set forth in this mediation program."
28. The First and Second Circuits state that mediations are conducted pursuant to the IUMA. ILL. 1ST CIR. CT. R. 7.2(I)(A)(1)(e); ILL. 2D CIR. CT. R. 21(I)(A)(1)(e). The Fifth Circuit states, "subject to the provisions of the Uniform Mediation Act (710 ILCS 35/1 et seq.), the following provisions govern mediation proceedings." ILL. 5TH CIR. CT. R. VIII(I)(8). These three circuits also adopted rules inconsistent with the Act as discussed *infra*. The Fourteenth Circuit requires mediators to be familiar with the IUMA, but does not refer to the IUMA in its rules concerning confidentiality. ILL. 14TH CIR. CT. R. 9(B)(1)(B)(iii). The author assumes the First, Second, Fifth, and Fourteenth Circuits have not fully adopted the Act.
29. Ill. 1st Cir. Ct. R. 7-2(II)(A)(2); Ill. 2d Cir. Ct. R. 21(II)(A)(2); Ill. 3d Cir. Ct. R. 6(B); Ill. 5th Cir. Ct. R. VIII(I)(8)(b); Ill. 6th Cir. Ct. Admin. Order 06-3(IV)(E)(6)(B); Ill. 8th Cir. Ct. R. 7.4(VIII)(b); Ill. 10th Cir. Ct. R. 52; Ill. 13th Cir. Ct. R. 8.21(B) and C(1); Ill. 14th Cir. Ct. R. 9(A)(m)(7). *See* rules to the same effect: Ill. 9th Cir. Ct. R. 6.35(B); Ill. 17th Cir. Ct. R. 14.08(7)(B); Ill. 20th Cir. Ct. R. 6(B); Ill. 21st Cir. Ct. R. 9.1(6)(b).

Other circuits protect confidentiality in similar ways. Two circuit rules read "the mediator and the parties shall be barred from testifying as to any statement made at the mediation sessions. Neither mediation records nor work product of the mediator shall be subpoenaed in any proceeding except by leave of the Court."[30]

Another rule states: "[t]he content of all mediation sessions shall be confidential and the mediators(s) shall not be served with a subpoena or called as a witness."[31] Still another reads: "[t]he mediator shall be barred from testimony as to confidential mediation issues, and mediation records shall not be subpoenaed in any proceeding except by leave of the judge for good cause shown."[32]

If a mediator is subpoenaed, the Eighth Circuit requires that the mediator "shall immediately notify the participants, counsel for the participants, the Chief Judge of the Eighth Judicial Circuit and the judge to whom the case was assigned so that an appropriate response may be made to insure confidentiality."[33]

Several circuits require the mediator and the parties sign a mediation agreement.[34] Several have drafted their own confidentiality agreements.[35]

As an additional protection for confidentiality, some circuits also exclude from the mediation session everyone but the mediator, parties and their attorneys, unless otherwise agreed by the mediator.[36]

C. Comparison of the IUMA and the Circuit Rules

The provisions of the circuit rules fall short of the privilege created by the IUMA. The circuits do not define when a mediation communication occurs or where it is protected. Communications made prior to mediation may not be protected by the local rules, but are protected under the IUMA. The circuit rules prohibit the introduction of evidence only in court proceedings. Indeed, only court proceedings are in the court's jurisdiction.

30. Ill. 12th Cir. Ct. R. 8.17(F)(1); Ill. 18th Cir. Ct. R. 15.15(F)(1).
31. Ill. 7th Cir. Ct. R. 308(5)(f); Ill. 11th Cir. Ct. R. 154(E).
32. Ill. 23d Cir. Ct. R. 6.60(g). *See also* Ill. 16th Cir. Ct. R. 15.18(g).
33. Ill. 8th Cir. Ct. R. 7.4(VIII)(b)(1). *See also* Ill. 15th Cir. Ct. R. 9A.7(b).
34. Ill. 1st Cir. Ct. R. 7-2(II)(A)(2); Ill. 2d Cir. Ct. R. 21(II)(A)(2); Ill. 3d Cir. Ct. R. 6(B); Ill. 6th Cir. Ct. Admin. Order 06-3(IV)(E)(6)(B); Ill. 8th Cir. Ct. R. 7.4(VIII)(b); Ill. 9th Cir. Ct. R. 6.35; Ill. 10th Cir. Ct. R. 52(c); Ill. 12th Cir. Ct. R. 8.17(F)(2); Ill. 13th Cir. Ct. R. 8.21(B); Ill. 14th Cir. Ct. R. 9(A)(m)(7)(B); Ill. 17th Cir. Ct. R. 14.08(7)(B); Ill. 18th Cir. Ct. R. 15.15(F); Ill. 20th Cir. Ct. R. 6(B); Ill. 21st Cir. Ct. R. 9.1.
35. Ill. 8th Cir. Ct. R. 7.4(VIII)(b); Ill. 9th Cir. Ct. R. 6.35(A); Ill. 14th Cir. Ct. R. 9(A)(m)(7)(B); Ill. 21st Cir. Ct. R. 9.1.
36. Ill. 1st Cir. Ct. R. 7-2(II)(A)(2); Ill. 2d Cir. Ct. R. 21(II)(A)(2); Ill. 3d Cir. Ct. R. 6(A); Ill. 5th Cir. Ct. R. VIII(I)(8)(a); Ill. 6th Cir. Ct. Admin. Order 06-03(IV)(E)(6)(A); Ill. 8th Cir. Ct. R. 7-4(VIII)(b); Ill. 9th Cir. Ct. R. 6.35(A); Ill. 13th Cir. Ct. R. 8.21(A); Ill. 14th Cir. Ct. R. 9(A)(m)(7); Ill. 17th Cir. Ct. R. 14.08(7)(B); Ill. 18th Cir. Ct. R. 15.15(F); Ill. 20th Cir. Ct. R. 6(B); Ill. 21st Cir. Ct. R 9.6(A).

The IUMA's privilege, however, extends to arbitrations, agency and legislative proceedings, and discovery, as well as trial itself. With a few exceptions,[37] the circuits do not define a mediation communication, but the IUMA does. The Act protects nonverbal communications, such as the nod of a head or the raising of a fist, but the circuit rules do not. When the rules provide a definition of what is protected, they refer to "written or verbal statements."[38]

Additionally, the circuit rules fail to define the holders of the privilege or the protections the privilege affords. The Act gives the mediator and each participant, including any nonparty participants, the right to refuse to disclose mediation communications. The Act also grants mediators and mediation participants the privilege of preventing anyone from disclosing a mediation communication. In contrast, the circuit rules protect the mediator and the parties, but not the nonparty participants.[39]

Finally, those circuit rules restricting attendance at mediation may conflict with the Act. The IUMA states: "[a]n attorney or other individual designated by a party may accompany the party to and participate in a mediation."[40] Many circuits that restrict attendance also authorize the mediator to admit others, if the mediator agrees. If the mediator admits them, the mediator would comply with the Act. If the mediator restricts attendance, the mediator has failed to comply with the Act.

V. WAIVERS OF CONFIDENTIALITY

A. IUMA

The IUMA permits the waiver of the mediation privilege. The privilege may be waived if done so expressly by all parties to the mediation **and**, if the mediator's privilege is at issue, waived by the mediator.[41] If the privilege involves the nonparty participant, that party must also expressly waive the privilege. [42]

37. The 22nd Circuit and the Cook County Circuit adopted the IUMA, which includes the definitions provided by the IUMA. The Fourth and the Nineteenth Circuits incorporate the IUMA definitions into its rule. ILL. 4TH CIR. CT. R. 11-2(a); ILL. 19TH CIR. CT. R. 11.13(A)(1).

38. Ill. 1st Cir. Ct. R. 7-2(II)(A)(2); Ill. 2d Cir. Ct. R. 21(A)(2); Ill. 3d Cir. Ct. R. 6(B); Ill. 5th Cir. Ct. R. VIII(I)(8)(b); Ill. 8th Cir. Ct. R. 7-4 VIII(b); Ill. 9th Cir. Ct. R. 6.35(B)**;** Ill. 13th Cir. Ct. R. 8.21; Ill. 14th Cir. Ct. R. 9(A)(m)(7)(B); Ill. 17th Cir. Ct. R. 14.08(7)(B); Ill. 20th Cir. Ct. R. 6B; Ill. 21st Cir. Ct. R. 9.6(B).

39. While some circuits use the term mediation participants, it is unclear whether those circuits mean parties or nonparty participants.

40. 710 Ill. Comp. Stat. 35/10 (2014).

41. *Id*. at 35/5(a). *See also id*. at 35/6(a)(1).

42. *Id*. at 35/5(a)(2).

B. Circuit Rules

Most circuits provide that the parties may agree to waive confidentiality "if all parties consent in writing to the disclosure."[43]

C. Comparison of the IUMA and the Circuit Rules

Both the IUMA and the circuit rules permit the parties to waive confidentiality. While the circuit rules do not state whether the mediator and the nonparty participant must also consent to waiving confidentiality, the Act requires **all** parties to consent to disclosure.

The Act does not require the consent to be written. The circuits' writing requirement may be the one area where the rules typically provide greater clarity than the Act.

VI. PRECLUSIONS OF CONFIDENTIALITY

A. IUMA

The IUMA provides two ways a person is precluded from asserting the mediation privilege. First, a person who discloses or makes a representation about a mediation communication that prejudices another person is precluded from asserting the privilege.[44] In other words, Party A cannot accuse Party B of doing or saying something in mediation, and then use the privilege to prevent Party B from responding. The preclusion is limited to the extent necessary for a response.

Second, the Act precludes a person from asserting the mediation privilege if that person intentionally uses mediations to plan a crime, attempt to commit a crime, commit a crime, or conceal ongoing criminal conduct.[45]

B. Comparison of the IUMA and the Circuit Rules

In contrast to the Act, the circuit rules do not provide for the preclusions addressed by the Act.

---

43. Ill. 1st Cir. Ct. R. 7-2(II)(A)(2); Ill. 2d Cir. Ct. R. 21(II)(A)(2); Ill. 3d Cir. Ct. R. 6(C)(2); Ill. 5th Cir. Ct. R. VIII(I)(8)(c)(2); Ill. 6th Cir. Ct. Admin. Order 06-03(IV)(E)(6)(C)(2)(a); Ill. 8th Cir. Ct. R. 7.4(VIII)(b)(2)(a); Ill. 9th Cir. Ct. R. 6.35(c)(2); Ill. 10th Cir. Ct. R. 53; Ill. 13th Cir. Ct. R. 8.21(C)(2); Ill. 14th Cir. Ct. R. 9(A)(m)(7)(B)(ii); Ill 17th Cir. Ct. R. 14.08(7)(C)(2)(a); Ill. 20th Cir. Ct. R. 6(C)(2)(a); Ill. 21st Cir. Ct. R. 9.1(6)(D).

44. 710 Ill. Comp. Stat. 35/5(b) (2014).

45. *Id*. at 35/5(c).

VII. EXCEPTIONS TO CONFIDENTIALITY

A. Protect children and victims of domestic violence

The Courts have an understandable desire to protect children, victims of domestic violence or those vulnerable to exploitation.

1. IUMA

The IUMA addresses this concern. It permits mediators to disclose a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to the public agency responsible for protecting those individuals.[46]

2. Circuit Rules

Many circuit rules protect children by creating an exception for "communications [that] reveals evidence of abuse or neglect of a child."[47] Several circuits further provide protections for any in danger:

> While mediation is in progress, the mediator may report to an appropriate law enforcement agency any information revealed in mediation necessary to prevent an individual from committing an act which is likely to result in imminent, serious bodily harm to another. When the mediator knows the identity of an endangered person, the mediator may warn that person and his attorney of the threat of harm and without committing a breach of confidentiality.[48]

The Seventh and Eleventh circuits prohibit the mediator from disclosing any information obtained in mediation, "except when nondisclosure would appear to create a clear and imminent danger to an individual or society."[49]

---

46. *Id*. at 35/7(b)(3).
47. Ill. 1st Cir. Ct. R. 7-2(II)(A)(2); Ill. 2d Cir. Ct. R. 21(II)(A)(2); Ill. 5th Cir. Ct. R. VIII(I)(8)(c)(2); Ill. 6th Cir. Ct. Admin. Order 06-03(IV)(E)(6)(C)(2)(c); Ill. 8th Cir. Ct. R. 7.4(VIII)(b)(2)(b); Ill. 9th Cir. Ct. R. 6.35(c)(2); Ill. 10th Cir. Ct. R. 53; Ill. 14th Cir. Ct. R. 9(A)(m)(7)(B)(ii); Ill. 17th Cir. Ct. R. 14.08(7)(C)(2); Ill. 20th Cir. Ct. R. 6(C)(2); Ill. 21st Cir. Ct. R. 9.1(6)(D). *See also* Ill. 13th Cir. Ct. R. 8.21(C)(2).
48. Ill. 1st Cir. Ct. R. 7-2(I)(H); Ill. 2d Cir. Ct. R. 21(I)(I); Ill. 5th Cir. Ct. R. VIII(I)(6)(b); Ill. 6th Cir. Ct. Admin. Order 06-03(IV)(E)(4)(B); Ill. 8th Cir. Ct. R. 7.4(VI)(b); Ill. 9th Cir. Ct. R. 6.25(B); Ill. 13th Cir. Ct. R. 8.19(B); Ill. 14th Cir. Ct. R. 9(A)(m)(5)(C); Ill. 17th Cir. Ct. R. 14.08(4)(B); Ill. 21st Cir. Ct. R. 9.4(B)..To the same effect, Ill. 10th Cir. Ct. R. 53(f); Ill. 15th Cir. Ct. R. 9A.7(a).
49. Ill. 7th Cir. Ct. R. 308(2)(c)(xi); Ill. 11th Cir. Ct. Appendix A(4)(L).

Several circuits require all mediators to report risks of harm. These circuits make all mediators, including attorney mediators, mandated reporters under the Abuse and Neglected Child Reporting Act, [50] even though attorneys are not mandated reporters under that Act.

3. Comparison of the IUMA and the Circuit Rules

If the circuit courts were to rely solely on the IUMA, mediators would be authorized to disclose communications about children or others who are endangered. The Act does not, however, require mediators to make that disclosure, using the term **may**, not **shall**, in discussing disclosures about domestic violence and child abuse.[51]

B. Other Exceptions to Confidentiality

1. IUMA

The IUMA provides a number of other exceptions to the privilege. There is no mediation privilege for communications required by law to be public;[52] threats to inflict bodily injury or commit a crime of violence;[53] or communications of intentional criminal activity.[54] Another exception relates to communications regarding a claim of professional misconduct or malpractice against a mediator.[55] Additionally, there is no privilege for mediation communications seeking to prove or defend against "a complaint of professional misconduct or malpractice against a mediation party, nonparty participant or party representative based on conduct occurring during a mediation."[56]

50. ILL. 4TH CIR. CT. R. 11-4(c); ILL. 7TH CIR. CT. R. 308(5)(g); *See also*, ILL. 18TH CIR. CT. R. 15.15(E); ILL. 22D CIR. CT. R. 18.05(c). The mandated reporting requirements of the Abuse and Neglected Child Reporting Act, 325 ILCS 5/1 et seq., as applied to mental health professionals shall also apply to all mediators. ILL. 4TH CIR. CT. R. 11-4(c). *See also* ILL. 12TH CIR. CT. R. 8.17(E). By extending the reporting mandate to all mediators, regardless of their profession, the circuits take additional measures to protect children. They also eliminate the difference in reporting requirements should a couple choose or be assigned to a mediator with a mental health background rather than a lawyer mediator. On the other hand, these circuits impose a mandate on some lawyers (those who mediate), which was not envisioned by the Abused and Neglected Child Reporting Act. The issue of whether lawyer mediators should be mandated reporters as well as whether such a requirement is consistent with the IUMA are subjects for further discussion and analysis and are outside the scope of this article.
51. 710 Ill. Comp. Stat. 35/7(b)(3) (2014).
52. *Id*. at 35/6(a)(2).
53. *Id*. at 35/6(a)(3).
54. *Id*. at 35/6(a)(4).
55. *Id*. at 35/6(a)(5).
56. *Id*. at 35/6(a)(6).

The IUMA creates a process for considering two additional exceptions to the privilege. First, in the case of a felony, if a party seeks discovery or proposes evidence involving a mediation communication, the court, agency or arbitrator is to conduct an *in camera* hearing.[57] At that hearing, the proponent must show that the evidence is not otherwise available **and** there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.[58] If the proponent meets this standard, the court, administrative agency or arbitrator may find there is no privilege.[59] Second, the same process and the same standard apply to mediation communications seeking to prove a claim of liability resulting from the contract reached in mediation or to prove a defense to that claim.[60]

Even where there is no privilege under any of the exceptions above, only the portion of the communication necessary may be admitted.[61]

2. Circuit Rules

Many circuits list exceptions to confidentiality as follows:

> the communication reveals either an act of violence committed against another during mediation, or an intent to commit an act that may result in bodily harm to another; or
>
> the communication reveals evidence of abuse of neglect of a child; or
>
> non-identifying information is made available for research or evaluation purposes approved by the court; or
>
> the communication is probative evidence in a pending action alleging negligence or willful misconduct of the mediator. [62]

Most circuit rules introduce their confidentiality provision with the phrase: "except as otherwise provided by law."[63] The Twelfth and

57. 710 Ill. Comp. Stat. 35/6 (2014)
58. *Id*. at 35/6(b)(1).
59. *Id*. at 35/6(b)(1).
60. *Id*. at 35/6(b)(2).
61. *Id*. at 35/6(d).
62. Ill. 1st Cir. Ct. R. 7-2(II)(A)(2); Ill. 2d Cir. Ct. R. 21(II)(A)(2); Ill. 5th Cir. Ct. R. VIII(I)(8)(c)(2); Ill. 6th Cir. Ct. Admin. Order 06-03(IV)(E)(6)(C)(2); Ill. 8th Cir. Ct. R. 7.4(VIII)(b); Ill. 9th Cir. Ct. R. 6.35(C)(2); Ill. 10th Cir. Ct. R. 53; Ill. 14th Cir. Ct. R. 9(A)(m)(7)(B)(ii); Ill. 17th Cir. Ct. R. 14.08(7)(C)(2); Ill. 20th Cir. Ct. R. 6(C)(2); Ill. 21st Cir. Ct. R. 9.6(D)..*See also* Ill. 13th Cir. Ct. R. 8.21(C)(2).
63. Ill. 1st Cir. Ct. R. 7-2(II)(A)(2); Ill. 2d Cir. Ct. R. 21(II)(A)(2); Ill. 5th Cir. Ct. R. VIII(I)(8)(b); Ill. 6th Cir. Ct. Admin. Order 06-03(IV)(E)(6)(B); Ill. 8th Cir. Ct. R. 7.4(VIII)(b); Ill. 9th Cir. Ct. R. 6.35(C)(2); Ill. 10th Cir. Ct. R. 53; Ill. 13th Cir. Ct. R. 8.21(B); Ill. 14th Cir. Ct. R.

Eighteenth Circuits bar mediator testimony "except by leave of court"[64] and the Twenty-third Circuit's exclusionary rule bars testimony "except by leave of the judge for good cause shown."[65]

3. Comparison of the IUMA and the Circuit Rules

In time, Illinois courts will face claims involving the sort of issues discussed above.[66] The use of phrases such as "except as otherwise provided by law" or "except by leave of court" or "except for good cause" opens the door to more exceptions to confidentiality. These terms fail to guide the court in weighing the need for the exception against the need for confidentiality in mediation. Further, this lack of a standard and lack of a process to determine exceptions invites differences among the circuits. The more exceptions there are to confidentiality, the greater the chance of undermining the public's confidence in mediation as a confidential process.[67]

On the other hand, the IUMA offers a comprehensive but limited set of exceptions, based on public policy. Also, it offers the court a standard and process for overruling confidentiality when it may be necessary to do so.[68] Additionally, it offers the courts the guidance of the Uniform Law Commissioners.[69] The drafters of the circuit court rules do not provide the same manner of commentary.

9(A)(m)(7)(B)(ii); Ill. 17th Cir. Ct. R. 14.08(7)(C); Ill. 20th Cir. Ct. R. 6(B); Ill. 21st Cir. Ct. R. 9.6(D).

64. Ill. 12th Cir. Ct. R. 8.17(E); Ill. 18th Cir. Ct. R. 15.15(F).

65. Ill. 23d Cir. Ct. R. 6.60(g); *see also* Ill. 16th Cir. Ct. R. 15.18.

66. The Drafters of the Uniform Mediation Act observed that "disclosure may be necessary to promote accountability of mediators by allowing for grievances to be brought against mediators, and as a matter of fundamental fairness, to permit the mediator to defend against such a claim." Uniform Mediation Act, Prefatory Note and Comments, 2001, Sec.6 n.6, available at http://www.uniformlaws.org/shared/docs/mediation/mediat_am00.pdf. Another observation: "[s]ometimes the issue arises whether anyone may provide evidence of professional misconduct or malpractice occurring during the mediation." *Id*. at Sec. 6 n. 7. And another comment from the Drafters: "society's need for evidence to avoid an inaccurate decision is greatest in the criminal context—both for evidence that might convict the guilty and exonerate the innocent…" *Id*. at Sec. 6 n. 8. *See also* Michael Moffitt, *Ten Ways to Get Sued: A Guide For Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003).

67. The Uniform Mediation Act Prefatory Note states, "The law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of mediation process are met, rather than frustrated. … the Drafters viewed the issue of confidentiality as tied to provisions that will help increase the likelihood that the mediation process will be fair." Uniform Mediation Act, Prefatory Note and Comments, 2001, available at http://www.uniformlaws.org/shared/docs/mediation/mediat_am00.pdf.

68. 710 Ill. Comp. Stat. 35/6(b) (2014).

69. The Uniform Mediation Act Prefatory Note and notes throughout. While the drafters of the Illinois Supreme Court offer comments on the rules, the comments to Rule 905 do not address confidentiality. ILL. SUP. CT. R. 905.

VIII. CONFIDENTIALITY OF MEDIATOR REPORTS

A. IUMA

Another protection to mediation confidentiality provided by the IUMA relates to mediator's reports to the court or other referring entities. The IUMA states that a mediator may not make a report, assessment, evaluation, recommendation, finding or other communication to a court, agency or other authority that will rule on the dispute.[70] If a mediator makes reports not permitted by the Act, the court or other entity is to disregard them.[71]

Mediators are permitted under the Act to disclose certain statistical information, namely whether the mediation occurred or has terminated, whether a settlement was reached, and attendance.[72]

B. Circuit Rules

In defining the report the mediator submits at the end of mediation, most circuits follow a path similar to the IUMA, but several circuits then add reporting requirements that are problematic.

A typical rule regarding reports to the court at the end of mediation reads:

> When agreements or partial agreements are reached by the parties during mediation, the mediator shall provide a written account of the agreements to the parties and their attorneys (if any), but the mediator **shall not provide this written account to the court . . .**
>
> Upon termination without agreement, the mediator shall file with the court a final mediator report stating that the mediation has concluded **without disclosing** any reasons for the parties' failure to reach an agreement.[73] (emphasis added).

Another commonly adopted rule reads:

---

70. 710 Ill. Comp. Stat. 35/7(a) (2014).
71. *Id*. at 35/7(c).
72. *Id*. at 35/7(b).
73. Ill. 5th Cir. Ct. R. VIII(I)(9)(c); Ill. 8th Cir. Ct. R. 7.4(IX)(e),(f); Ill. 9th Cir. Ct. R. 6.40; Ill. 13th Cir. Ct. R. 8.22(E) and (F); Ill 14th Cir. Ct. R. 9(A)(m)(8)(E) and (F); Ill. 17th Cir. Ct. R. 14.08(8)(E) and (F); Ill. 20th Cir. Ct. R. 7(E) and (F); Ill. 21st Cir. Ct. R. 9.7(E) and (F). See also to the same effect, Ill. 10th Cir. Ct. R. 54(c).

> the mediator shall provide a written account of the agreement [if one was reached] to the parties and attorneys, but **not to the court**. . . . Promptly upon conclusion of mediation, the mediator shall file with the Circuit Clerk a report . . . specifying any issues on which agreement was reached or whether the matter has concluded unsuccessfully. The report shall **not** specify the reasons for the inability of the parties to reach agreement.[74] (emphasis added).

On the other hand, the Twenty-third Judicial Circuit rule states, "[i]n the event an agreement is reached on any of the issues, the mediator shall supply a written summary of the agreement to counsel and the judge and the same shall be included in any Order or judgment disposing of the dispute."[75]

In addition to describing the report, some circuits have added several reporting requirements that violate the IUMA. These types of reporting requirements appear in the areas of protection of children and participation in good faith.

1. Reporting provisions regarding children

First, in regard to children, several circuits require or permit mediators to recommend that a child representative or *guardian ad litem* be appointed. A typical rule reads:

> If the mediator has concerns for the welfare or safety of the minor child(ren) or feels that it is in the best interests of the minor, the mediator **shall** recommend in the final report that a child representative or guardian ad litem be appointed.[76] (emphasis added).

Additionally, the status report form used in the Ninth Circuit provides for the mediator to recommend or not recommend the appointment of a child representative or *guardian ad litem* and to recommend a custody/psychological evaluation.[77]

---

74. Ill. 1st Cir. Ct. R. 7-2(II)(C); Ill. 2d Cir. Ct. R. 21(II)(C); Ill. 3d Cir. Ct. R. 7(H).
75. Ill. 23d Cir. Ct. R. 6.60(k)(2).
76. Ill. 1st Cir. Ct. R. 7-2(II)(C)(3); Ill. 2d Cir. Ct. R. 21(II)(C)(3); Ill. 3d Cir. Ct. R. 7(H); Ill. 5th Cir. Ct. R. VIII(I)(9)(h); Ill. 6th Cir. Ct. Admin. Order 06-03(IV)(E)(7)(G). To the same effect, see Ill. 9th Cir. Ct. R. 6.40(G); Ill. 13th Cir. Ct. R. 8.22(H); Ill. 17th Cir. Ct. R. 14.08(8)(H); Ill. 21st Cir. Ct. R. 9.7(H)..
77. ILL. 9TH CIR. CT. Mediator Status Report Form.

2. Reporting provisions regarding good faith

Another reporting issue relates to reports of party participation in good faith. Several circuits require that the parties mediate in good faith.[78] At least two circuits ask mediators in making their report on the circuit's mediation report form to indicate whether the parties participated in good faith.[79] The Ninth Circuit asks which party participated in good faith.[80]

C. Comparison of the IUMA and the Circuit Rules

The circuits have a mixed record concerning their reporting requirements. Those that restrict their reporting in accord with an Illinois Supreme Court-designed Mediator Report form[81] comply with the IUMA and with sound public policy. On the other hand, the Twenty-third Circuit's requirement that the written summary of the agreement be provided to the judge is directly contrary to the Act.

Those circuits that expect these additional reports or recommendations are problematic for three reasons. First, they create a conflict between the rules and the IUMA. In the Comments to Uniform Mediation Act, the Uniform Law Commissioners states "[The provisions of the IUMA] would not permit a mediator to communicate, for example, on whether a particular party engaged in 'good faith' negotiation, or to state whether a party had been 'the problem' in reaching a settlement."[82] The same argument applies to recommendations about guardians for the children.

Second, such reporting requirements create a conflict within the circuit's own rules. If a mediator were to make these sorts of reports or recommendations, a party might seek to cross-examine the mediator as to the basis for the recommendation, thus challenging the circuit rule that bars mediator testimony. Alternatively, a mediator might refuse to make this

78. Ill. 3d Cir. Ct. R. 3(A)(3); Ill. 9th Cir. Ct. R. 6.20(A)(2); Ill. 12th Cir. Ct. R. 8.17(C)(3); Ill. 13th Cir. Ct. R. 8.18(A)(4); Ill. 14th Cir. Ct. R. 9(A)(m)(4)(A)(iii); Ill. 16th Cir. Ct. R. 15.18(E)(2);.Ill. 17th Cir. Ct. R. 14.08(3)(A)(2); Ill. 19th Cir. Ct. R. 11.13(F)(3).

79. ILL. 9TH CIR. CT. FORM 660 Statistical Information Sheet; ILL. 14TH CIR. CT. R. 9(A)(m)(8)(G)(ii).

80. ILL. 9TH CIR. CT. FORM 660 Statistical Information Sheet.

81. MEDIATOR REPORT Form AOIC Revised 08-28-13.

82. Uniform Mediation Act, Prefatory Note and Comments, 2001, Sec. 7 n. 1, available at http://www.uniformlaws.org/shared/docs/mediation/mediat_am00.pdf. The subject of whether to require good faith, how to define and assess it, and how to sanction it is beyond the scope of this paper. It has been the subject of much debate within the profession. *See* for example: RESOLUTION ON GOOD FAITH REQUIREMENTS FOR MEDIATORS AND MEDIATION ADVOCATES IN COURT-MANDATED MEDIATION PROGRAMS, approved by Section Council, August 7, 2004, ABA Section of Dispute Resolution, on abanet.org last visited Dec. 29, 2014. Nevertheless, it is clear that the circuits that require a report on good faith are in conflict with the IUMA.

type of report and be disqualified from the court's approved list of mediators, despite the mediator's compliance with the IUMA.[83]

Third, these sorts of reporting expectations do not reflect sound public policy. While it is understandable that the courts would seek whatever assistance it can, these types of reporting requirements undermine the mediation process. In the Prefatory Comments to the Uniform Mediation Act, the Commissioners describe the value of confidentiality in mediation:

> This frank exchange [needed in mediation] is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.[84]

Put another way, parties and their attorneys will be wary about being candid in mediation if they know the mediator can recommend the appointment of guardian *ad litem* or report on party good faith participation. If the parties are not honest and candid, settlements are unlikely and mediation would be a waste of time and cost.

Mediator recommendations or reports will inevitably be perceived as reporting the parties to judge or taking sides in the dispute. Such a perception will undermine mediation not only in the individual case but among the bar and public as well.

IX. COURT RULES MAY CONTROL OVER IUMA

The IUMA provides greater protection for mediation confidentiality than do the circuit rules. Eventually, courts will be asked to protect a mediation statement or to admit one. The court will attempt to reconcile the IUMA and the circuit rules. In some cases, they may be reconcilable. When they conflict, the court may well determine that the rules of court control over the statute.[85]

A determination that the circuit court rules control may render the IUMA irrelevant to mediations conducted pursuant to Rule 905, resulting in less protection for mediation participants and mediators. Such a scenario

---

83. Circuit rules regarding mediator qualifications permit the court to remove mediators from the court-approved mediator roster. ILL. 1ST CIR. CT. R. 7-2(I)(A)(1)(b); ILL. 2D CIR. CT. R. 21(I)(A)(1)(b); ILL. 3D CIR. CT. R. 9(D); ILL. 4TH CIR. CT. R. 11-6(a); ILL. 5TH CIR. CT. R. VIII(I)(5)(c); ILL. 6TH CIR. CT. ADMIN. ORDER 06-03(IV)(C); ILL. 7TH CIR. CT. R. 308(1)(f); ILL. 8TH CIR. CT. R. 7.4(II)(c); ILL. 9TH CIR. CT. R. 6.15; ILL. 13TH CIR. CT. R. 8.15(C); ILL. 14TH CIR. CT. R. 9(B)(1)(C)(3); ILL. 17TH CIR. CT. R. 14.08(5)(C); ILL. 19TH CIR. CT. R. 11.13(E)(3); ILL. 20TH CIR. CT. R. 9(c); ILL. 21ST CIR. CT. R. 9.11(A).

84. Uniform Mediation Act, Prefatory Note and Comments, 2001, Sec. 2 n. 1, available at http://www.uniformlaws.org/shared/docs/mediation/mediat_am00.pdf.

85. Peile v. Skelgas, Inc., 645 N.E.2d 184, 189 (Ill. 1994); O'Connell v. St. Francis Hosp., 492 N.E.2d 1322, 1326 (Ill. 1986).

could also lead to two categories of mediation in Illinois: those conducted pursuant to court order or court rule and governed by the rules of court, and those not conducted pursuant to court order. As discussed above, a couple about to divorce might choose to mediate prior to filing the petition for dissolution. This couple would be protected by the IUMA but a couple ordered by the court to mediate pursuant to Rule 905 would be protected by the circuit rules and not by the IUMA. The circuits do not want to create such a distinction nor do they want to undermine the confidentiality essential to the success of mediation.

X. CONCLUSION

In summary, there are several main distinctions between the IUMA and the circuit rules, which lead to the conclusion that the Act provides more support for the promise of confidentiality in mediation. First, the IUMA offers a more comprehensive definition of the mediation privilege, extends it to more participants, and protects the privileges in more proceedings than do the rules. Second, the Act limits the number of exceptions and creates a process and a standard for determining exceptions. The rules do not provide a process or a standard. Third, the Act provides better limits regarding reports to the courts. In light of this broader protection, the circuits should guard against the rules superseding the Act.

The fact that there are two approaches, even inconsistent ones, to mediation confidentiality in Illinois is primarily a result of history. When Rule 99 was enacted, the IUMA had not yet been enacted in Illinois. Some circuits drafted their rules prior to passage of the IUMA. Others who drafted their rules later often relied on or borrowed from those enacted earlier.[86]

To address the inconsistencies between the circuit rules and the IUMA on mediation confidentiality, the Illinois Supreme Court should adopt the IUMA as the only confidentiality rule governing mediations required under Rule 905. If the Court chooses not to do so, circuits should adopt the Act as its sole protection of confidentiality and for reporting to the court. Circuits should revise their reporting forms to comply with the Act and with those approved by the Court.

Relying solely on the IUMA for confidentiality protections in mediation achieves several purposes:

86. This article does not argue for elimination of circuit rules. The rules are needed because the IUMA does not address all of the issues mandated by Rules 99 and 905.

> provides the broadest possible protection for mediation confidentiality while offering reasonable exceptions to confidentiality;
>
> provides consistency throughout the state. Mediators and lawyers who work in more than one circuit can rely on one statute to govern confidentiality. Judges can rely on appellate decisions that have inter-circuit and statewide applicability;
>
> takes advantage of the extensive study, debate and analysis conducted by the ULA Commissioners;
>
> provides the public with a trusted source of mediation confidentiality, thus enhancing public confidence in mediation.[87]

87. *See* notes 70 and 85, *supra*, regarding comments from ULA Commissioners.