MEDIATION PRACTICE IN KENTUCKY: ADOPTION OF THE UNIFORM MEDIATION ACT WOULD HELP

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I. INTRODUCTION

Over the last twenty years, Kentucky lawyers have been introduced to the concept and practice of mediation. Since 1993, the Kentucky Bar Association and the courts of the Commonwealth have sought to bring order to a process that utilizes traditional procedures such as interrogatories, requests for admission, and discovery depositions, to achieve a negotiated resolution as opposed to an outcome at trial.[1] Thus, in 2000, the Kentucky Supreme Court promulgated Model Mediation Rules [hereinafter "Model Rules"].[2] Following the supreme court's adoption of the Model Rules, a number of local courts throughout the Commonwealth also adopted the Model Rules.[3] However, a large number of other local courts elected to use the Model Rules as a springboard, thereby creating local mediation rules out of whole cloth.[4]

While Kentucky was considering the need to standardize mediation in the 1990s, the National Conference of Commissioners on Uniform State Laws was considering drafts of the Uniform Mediation Act [hereinafter "the UMA" or "the Act"].[5] The Act was completed by the Uniform Law Commissioners in collaboration with the American Bar Association's Section on Dispute Resolution in 2001; later amended in 2003.[6] To date, eleven states and the District of Columbia have adopted the UMA, and bills to consider adoption have

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1. *See generally* Hal Daniel Friedman, *Court Ordered Mediation in Kentucky: A Boon or Bane for Kentucky Trial Lawyers?*, KY. BENCH & B., 1993, at 10, 11-14. The Kentucky Bar Association's Alternative Dispute Resolution Committee drafted proposed rules for mandatory arbitration that were presented for comment during a public hearing at the 1993 KBA annual convention. In recent years, mediation has gained notoriety for its ability to alleviate crowded court dockets and obtain resolution of disputes, often in a faster and more cost effective manner than traditional litigation. After the case has been filed, pleadings exchanged, and sufficient time for preliminary discovery has passed, the judge will issue an order referring the case to mediation. *Id.*

2. *See* C.A. Woodall, III, *Mediation Practice in Kentucky*, KY. BENCH & B., Mar. 2006, at 8 n.5; *Model Mediation Rules*, KY. CT. OF JUST. (NOV. 1, 2001), http://courts.ky.gov/courtprograms/mediation/Pages/modelmediation.aspx.

3. *See infra* notes 59-91 and accompanying text.

4. *See infra* text accompanying notes 92-104.

5. Author was a member of The Uniform Law Commission when the National Conference of Commissioners on Uniform State Laws was considering drafts of the Uniform Mediation Act.

6. *See* UNIF. MEDIATION ACT, U.L.A. (2003).

been introduced in the 2014 sessions of the New York and Massachusetts legislatures.[7]

This article urges the adoption of the UMA in Kentucky to fill gaps in the Model Rules concerning the areas of confidentiality and privilege, to resolve conflicts between local rules and the Model Rules, and to ensure that all mediators in the Commonwealth operate under a standard set of rules concerning all facets of mediation, irrespective of whether those mediations are conducted under the auspices of a trial court.[8] This article begins with a brief discussion of the UMA's provisions and how such provisions differ from current laws throughout Kentucky. The privilege against disclosure and the confidentiality of oral communications made within the mediation context provided for under Kentucky law, specifically Kentucky Rule of Evidence 408 [hereinafter "K.R.E. 408"], will be examined and contrasted with the privilege and confidentiality provisions of the UMA. This article concludes by urging the Kentucky General Assembly to consider adopting the UMA to bring clarity, consistency, and uniformity to all mediations conducted in the Commonwealth, irrespective of whether such mediations are subject to the Model Rules.[9]

II. THE NUTS AND BOLTS OF THE UMA

As conceived by the Uniform Law Commission, a uniform mediation statute was necessary to combat the problems created by as many as 2,500 separate mediation statutes throughout the United States, and the uncertainty that mediating parties might face in choice of law disputes.[10] "This complexity is especially troublesome when it undermines one of the most important factors promoting mediation as a means of dispute resolution, namely the parties' ability to depend on the confidentiality of the proceeding, and their power to walk away without prejudice if an agreement cannot be voluntarily reached."[11] Accordingly,

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7. *Id.*

8. *See, e.g., Model Mediation Rules*, KY. CT. OF JUST. (Nov. 1, 2001), http://courts.ky.gov/courtprograms/mediation/Pages/modelmediation.aspx. Rules 3-10 specifically contemplate the Model Rules' applicability only when a case is presently in litigation. Thus, the rules only address cases presently under the jurisdiction of the trial court. *Id.*

9. *See* Rebecca Callahan, *Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending?*, 12 PEPP. DISP. RESOL. L.J. 63, 64 (2012) ("Why should mediation confidentiality depend upon (a) whether the dispute has escalated to the point of litigation, and (b) whether that litigation is pending in state or federal court?").

10. *See Why States Should Adopt UMA*, UNIF. LAW COMM'N: THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS , http://www.uniformlaws.org/Narrative.aspx?title=Why States Should Adopt UMA (last visited July 28, 2014).

11. *Mediation Act Summary*, UNIF. LAW COMM'N: THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, http://uniformlaws.org/ActSummary.aspx?title=Mediation%20Act (last visited July 28, 2014). In federal court, some courts have found the existence of a "common law" mediation privilege, while other courts have treated mediation confidentiality in diversity cases as a matter governed by state law pursuant to *Erie v. Tompkins*, 304 U.S. 64 (1983). *See* Michael P.

the need for parties to feel secure concerning the confidentiality of the mediation process and mediation-related communications was a central concern of the UMA drafters.[12]

A. "Mediation Communications"

The drafters determined that any uniform statute addressing mediation must protect the confidentiality of "mediation communications."[13] To accomplish this objective, the UMA defines the term "mediation communication" as follows: "'Mediation communication' means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."[14]

The scope of this definition defines the core protection that the drafters of the UMA sought to implement. Section 4 ensures privilege against disclosure of such mediation communications:

> (a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.
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> (b) In a proceeding,[15] the following privileges apply:
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> (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

Dickey, *ADR Gone Wild: Is it Time for a Federal Mediation Exclusionary Rule?*, 25 OHIO ST. J. ON DISP. RESOL. 713, 731 nn.86-87 (2010).

12. *Mediation Act Summary,* UNIF. LAW COMM'N: THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS , http://uniformlaws.org/ActSummary.aspx?title=Mediation%20Act (last visited July 28, 2014) ("Promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2001, the Uniform Mediation Act (UMA) is intended to address this core concern about the confidentiality of mediation proceedings. The result of a unique joint drafting effort between NCCUSL and the American Bar Association through its Dispute Resolution Section, the UMA is intended as a statute of general applicability that will apply to almost all mediations, except those involving collective bargaining, minors in a primary or secondary school peer review context, prison inmate mediation, and proceedings conducted by judicial officers who might rule in a dispute or who are not prohibited by court rule from disclosing mediation communications with a court, agency, or other authority.").

13. *See supra* notes 10-13 and accompanying text; *infra* text accompanying note 14.

14. UNIF. MEDIATION ACT § 2(2), U.L.A. (2003). Most importantly, the UMA's definition of "mediation communication" encompasses statements made prior to the start of the formal mediation session, including any such communications made for the purpose of setting up the mediation. *Id.*

15. *Id.*§ 2(7) (defining "proceeding" as: "(A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (B) a legislative hearing or similar process").

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.[16]

Therefore, the "UMA's focus on privilege simplifies and strengthens the confidentiality of mediation by creating a privilege for mediators and participants that allows them to refuse to disclose a 'mediation communication' in any discovery or evidentiary proceedings covered by the act."[17]

Prefatory to a discussion of whether the UMA would broaden the scope of any existing privilege embodied in the Model Rules, it is critical to understand the scope of the UMA's privilege. While the creation of privilege was not the only mechanism available to secure the confidentiality of mediation,[18] the drafters recognized that the privilege construct was already familiar to the legislatures and courts. For many years, both have used the privilege concept to provide protection for other forms of professional communications including attorney-client, doctor-patient, and priest-penitent relationships.[19]

Since the use of privilege is the primary mechanism by which communications are protected under the law,[20] the drafters ultimately opted for a

16. *Id.* § 4.

17. *See* John R. Van Winkle, *Van Winkle: Should Indiana Adopt the Uniform Mediation Act?*, IND. LAW., (Oct. 26, 2011), http://www.theindianalawyer.com/van-winkle-should-indiana-adopt-uniform-mediation-act/PARAMS/article/27414 (looking at the existing privilege provided by Indiana Rule of Evidence 408 and concluding that the privilege provided by the rule does not provide the same scope of protection as the UMA's confidentiality provisions); *infra* notes 32-41 and accompanying text.

18. UNIF. MEDIATION ACT § 4 cmt. 2(a), U.L.A. (2003) ("The Drafters considered several other approaches to mediation confidentiality including a categorical exclusion for mediation communications, the extension of evidentiary settlement discussion rules to mediation, and mediator incompetency. Upon exhaustive study and consideration, however, each of these mechanisms proved either overbroad in that they failed to fairly account for interests of justice that might occasionally outweigh the importance of mediation confidentiality (categorical exclusion and mediator incompetency), underbroad in that they failed to meet the reasonable needs of the mediation process or the reasonable expectations of the parties in the mediation process (settlement discussions), or under-inclusive in that they failed to provide protection for all of those involved in the mediation process (mediator incompetency).").

19. *Id.* (citing Unif. R. Evid. 510 (1986); 26 U.S.C. § 7525 (1998)).

20. *See generally* Trish Oleska Haas, *Mediation Confidentiality and Privilege in Michigan: A Case for Adopting the Uniform Mediation Act*, ADR NEWSL., JUNE 2004, at 1, 1, *available at* http://www.michbar.org/adr/pdfs/june04.pdf ("[C]onfidentiality and privilege from disclosure are fundamental components to successful mediation.").

narrowly crafted privilege, explaining that, "[t]he privilege structure also provides greater certainty in judicial interpretation because of the courts' familiarity with other privileges, and is consistent with the approach taken by the overwhelming majority of legislatures that have acted to provide broad legal protections for mediation confidentiality."[21] Finally, it is worth noting that support for such a privilege can be found among scholars and practitioners alike.[22]

B. The Scope of the UMA's Privilege

Through the UMA's utilization of the term "mediation communication" and its expansive definition, the mediation communication privilege broadly attaches to communications made outside of formal mediation sessions, such as those made for purposes of convening or continuing a mediation.[23] The privilege "is not subject to discovery or admissible in evidence."[24] Section 4(a) provides that a court or other tribunal ***must*** exclude privileged communications that are protected, and may not compel discovery of the communications.[25] Moreover, as with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular communications.[26] As explained by the drafters of the UMA, "[t]his blocking function is critical to the operation of the privilege."[27]

The blocking function potentially applies to all persons participating in mediation. First, mediating parties have the ability to block testimony about, or other evidence of, mediation communications made by anyone in the mediation – the attorneys, mediator, parties, or nonparties.[28] On the other hand, if all parties agree that a party should testify about mediation communications, no one else – the mediator, counsel, or nonparties – may prevent the party from doing so.[29]

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21. UNIF. MEDIATION ACT § 4 cmt. 2(a), U.L.A. (2003) (noting that as of 2003, twenty-five states had adopted mediation confidentiality statutes, Kentucky not being among them).

22. *Id.* (citing Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1; Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. DISP. RESOL 37 (1986); Jonathan M. Hyman, *The Model Mediator and Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17 (1988); Eileen Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U.L. REV. 305 (1971); Michael Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988). For a critical perspective, *see generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986); Scott H. Hughes, *A Closer Look: The Case for a Mediation Privilege Has Not Been Made*, 5 DISP. RESOL. MAG. 14 (1998)).

23. *See supra* text accompanying note 14.

24. UNIF. MEDIATION ACT § 4(b), U.L.A. (2003).

25. *See Id.* § 4a.

26. *Id.* § 4 cmt. 2(a).

27. *Id.* § 4 cmt. 4(b).

28. *See id.*

29. *Id.*

Second, the mediator herself ***may*** refuse to provide evidence, including her own statements or anyone else's, even if the parties consent.[30] This allows the mediator to protect the integrity of the mediation process despite the parties' wishes. However, with the parties' consent, a non-mediator may testify to statements made during the mediation process, including statements made by the mediator, and the mediator may not prevent such disclosure.[31] By crafting the ability to disclose evidence of statements made during the mediation process in this fashion, the drafters struck a balance between protecting the expectations of the parties and others during the mediation process and the tribunal's presumed need for relevant information.

Finally, consistent with the protection provided to the mediator and parties, a nonparty participant, such as an expert witness who attends a mediation session, may block evidence of that individual's mediation communication regardless of who provides the evidence and whether the parties or mediator consent.[32] Here again, assuming the willingness of a nonparty to testify, the parties themselves may block such testimony, unless all agree.[33]

In order to thwart parties who may wish to first disclose discoverable evidence in mediation sessions from later seeking to protect such evidence from discovery under the guise of privilege, Section 4(c) provides that "relevant evidence may not be shielded from discovery in such fashion."[34] For purposes of the mediation privilege, it is the ***communication*** made in a mediation that is protected by the privilege, ***not the underlying evidence*** that gives rise to the communication.[35] Evidence that is disclosed and therefore "communicated" in a mediation is subject to discovery and does not itself become a "mediation communication" privileged from disclosure. As such, relevant evidence that is "communicated" during mediation is just as discoverable as it would be if the mediation had not taken place.[36]

Furthermore, as in the case of any privilege, mediation privilege may be waived.[37] In the case of communications made by parties, all parties must waive the privilege.[38] Nonparties and the mediator may assert privilege where their own

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30. UNIF. MEDIATION ACT § 4 cmt 4(b), U.L.A. (2003).

31. *Id.*

32. *See id.*

33. *Id.* ("This is consistent with fixing the limits of the privilege to protect the expectations of those persons whose candor is most important to the success of the mediation process."). To guard against the possibility that a person may wish to assert the mediation communication privilege but is unaware of his need to do so, the drafters suggest that the mediation resolution agreement include provisions requiring notification in the event that mediation communications are sought to be admitted in any ongoing or subsequent proceeding. *Id.* § 4 cmt. 4(a)(5).

34. *Id.* § 4(c); *see also supra* text accompanying note 15.

35. UNIF. MEDIATION ACT § 4 cmt 5 U.L.A. (2003).

36. *See id.* § 4(c).

37. *See id.* § 5(a); *see also* Haas, *supra* note 20 (comparing mediation privilege to attorney-client privilege in ability to be waived).

38. UNIF. MEDIATION ACT § 5 cmt. 1, U.L.A. (2003).

communications are sought to be introduced.[39] In addition, any person who discloses the mediation communications of another and prejudices such person loses his mediation communication privilege, at least to the extent of allowing the person prejudiced to respond to the representation or disclosure.[40]

Lastly, Section 6 contains exceptions to the privileges conferred in Section 4. Pursuant to Section 6, there is no privilege for a mediation communication that is, inter alia, (1) in an agreement evidenced by a record signed by all parties to the agreement; (2) available to the public because of applicable open records or open meetings statutes; (3) involves a threat, a planned crime, or a complaint of professional malpractice filed against the mediator or any mediation participant; or (4) involves abuse, abandonment, or neglect.[41]

III. COMPARING THE UMA'S PRIVILEGE WITH K.R.E. 408

The Model Rules addressed the concept of confidentiality in mediation sessions by simply providing, in Rule 12, that "mediation shall be regarded as compromise negotiations for purposes of K.R.E. 408."[42] Accordingly, one must be fully cognizant of the scope and limitations of K.R.E. 408 to assess whether such provisions adequately protect that which is discussed and disclosed in mediation sessions.

A. Confidentiality Protection

At the outset, it is critical to recognize that K.R.E. 408 differs materially from its counterpart in the Federal Rules of Evidence, F.R.E. 408. K.R.E. 408 provides as follows:

Evidence of:

(1) Furnishing or offering or promising to furnish; or

(2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise

39. *Id.* § 4 cmt. 4(a)(1).
40. *Id.* § 5.
41. *Id.* § 6.
42. *See Model Mediation Rules*, *supra* note 8. The guidelines also provide some confidentiality for communications made in the mediations process. *See* Paula Young & Karen Walker, *Building the Ethical Infrastructure to Support Court-Connected Mediation: Kentucky Supreme Court Takes Important Steps*, KY. BENCH & BAR, Mar. 2006, at 12, 13. The section essentially provides only the level of confidentiality that attaches to settlement negotiations under Kentucky Rule of Evidence 408. *Id.*

> discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the ***evidence is offered for another purpose, such as*** proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.[43]

By contrast, F.R.E. 408 reads:

> (a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — ***either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction***:
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> (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
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> (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.[44]

F.R.E. 408 makes clear that prohibited uses of compromise statements or conduct include impeachment with a prior inconsistent statement made during compromise negotiations. K.R.E. 408 contains no such restriction. Accordingly, in Kentucky courts, conduct and statements made during the course of mediation compromise negotiations may be utilized to impeach a witness who subsequently changes his story at trial.[45]

In addition, K.R.E. 801(a)(1) incorporates the long-standing rule of *Jett v. Commonwealth*, which permits prior inconsistent statements to be received in evidence for substantive purposes.[46] Such prior inconsistent statements are therefore admissible for both substantive and credibility purposes, and no limiting admonition need be given to the jury as such statements are, by

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43. KY. R. EVID. 408 (emphasis added).

44. FED. R. EVID. 408 (emphasis added).

45. *Compare* FED. R. EVID. 408(a), *with* KY. R. EVID. 408(2); *see also supra* notes 28-29 and accompanying text (discussing a parties right to block testimony about mediation communications under the Uniform Mediation Act).

46. 436 S.W.2d 788, 790 (Ky.1969).

definition, excluded from the definition of hearsay.[47] In Kentucky, inconsistent statements between mediation and trial may be utilized at trial for impeachment and substantive evidence of guilt (or innocence) and liability (or no liability).[48]

Moreover, K.R.E. 408(2) makes clear that statements made in the course of compromise negotiations are clearly admissible when such evidence is offered for purposes other than establishing the validity or invalidity of the claim itself. Examples provided in K.R.E. 408(2) include, but are not limited to, "proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."[49] In this regard, K.R.E. 408(2) and F.R.E. 408(b) provide for the same exclusions. However, F.R.E. 408(a), unlike its Kentucky counterpart, makes clear that prior inconsistent statements made during compromise negotiations ***are exclusions*** to the compromise negotiations ban, and therefore ***are not*** admissible in proceedings governed by the federal rules.[50]

Additionally, neither K.R.E. 408 nor F.R.E. 408 provide any protection for mediation participants against the discovery of matters pertaining to settlement negotiations.[51] However, because a party (as opposed to a nonparty participant) is aware of the statements made by the opponent during the negotiations, "the availability of discovery is not as significant as it is when the party is unaware of the evidence."[52] While K.R.E. 408 and F.R.E. 408 do not "prohibit discovery of an opponent's communications regarding negotiation strategies, Rule 26(c) of the Federal Rules of Civil Procedure, as well as the attorney-client privilege and the work product doctrine, may be applicable to protect these discussions."[53] Thus, both K.R.E. 408 and F.R.E. 408 do not bar the discovery of evidence "otherwise discoverable," and make clear that any party's attempt to shield otherwise discoverable evidence under the cloak of compromise negotiations will be thwarted.[54]

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47. *See id.* at 791.

48. *See* KY. R. EVID. 801A(a)(1) ("A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is: (1) Inconsistent with the declarant's testimony . . . ."); *see also* ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.10, at 373 (3d ed. 1993) ("The legislative history of KRE 801A(a)(1) leaves no doubt that the intent of the General Assembly and Supreme Court was to codify the Jett Rule as it had developed in the case law.").

49. KY. R. EVID. 408(2).

50. *Compare* FED. R. EVID. 408(a), *with* KY. R. EVID. 408(2); *see supra* text accompanying note 48.

51. *Compare* KY. R. EVID. 408(2), *with* FED. R. EVID. 408(b); *see also* Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 104 n.49 (1999).

52. Ehrhardt, *supra* note 51, at 104-05.

53. Ehrhardt, *supra* note 51, at 105; *accord*, KY. R. CIV. P. 26.03.

54. *See supra* notes 49-50 and accompanying text.

B. The Kentucky Conundrum

Because the Supreme Court of Kentucky incorporated K.R.E. 408 by reference when it promulgated Model Mediation Rule 12 in 2000,[55] thereby cloaking mediation with the protections of compromise negotiations under the rule, one would assume that discoverable matters, not otherwise excluded by K.R.E. 408, would constitute admissible evidence in all courts in the Commonwealth. Unfortunately, lawyers in the local courts face a plethora of local court rules that amend, modify, or in some cases even nullify the discovery provisions of K.R.E. 408.[56]

Some local courts have mediation rules that either parrot the precise language of Model Rule 12,[57] or substantively incorporate K.R.E. 408 with slight variations in the language.[58] The following local courts have confidentiality rules regarding mediation that are consistent with K.R.E. 408, and the rules have been approved by the Kentucky Supreme Court: Christian Circuit Court[59] and Family Division;[60] Warren Circuit Court[61] and Family Division;[62] Hardin Circuit[63] and Family Division;[64] Laure, Hart and Nelson Circuit and District[65] and Family Division;[66] Green, Marion, Taylor and Washington Circuit;[67] Henry, Oldham,

55. *See supra* note 2 and accompanying text.

56. *See infra* notes 59-104; *see also* KY. R. EVID. 408.

57. *See infra* notes 59-91 and accompanying text; *see also Model Mediation Rules*, KY. CT. JUST. (Nov. 1, 2001), http://courts.ky.gov/courtprograms/mediation/Pages/ modelmediation.aspx.

58. *See infra* notes 92, 102-104 and accompanying text.

59. *Order Approving Amendments to the Local Rules of Practice for the 3rd Judicial Circuit, Christian Circuit Court*, KY. CT. JUSTICE (Apr. 20, 2007), http://courts.ky.gov/Local_Rules_of_Practice/C3LOCALRULES.pdf.

60. *Order Approving the Local Rules of Court Practice and Procedure for the 3rd Judicial Circuit, Christian Circuit Court, Family Division*, KY. CT. JUSTICE (Mar. 22, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C3FAMILYRULES.pdf.

61. *Order Approving Amendments to the Rules of the Court, Practice and Procedure for the Eighth Judicial Circuit – Warren County,* KY. CT. JUSTICE (Mar. 9, 2001), http://courts.ky.gov/Local_Rules_of_Practice/C8LOCALRULES.pdf.

62. *Order Approving the Rules of Court Practice and Procedure for the 8th Judicial Circuit, Family Court Division, Warren County,* KY. CT. JUSTICE (Apr. 4, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C8FAMILYRULES.pdf.

63. *Order Approving the Rules of Court Practice and Procedure for the 9th Judicial Circuit, Hardin County*, KY. CT. JUSTICE (Jan. 14, 2014), http://courts.ky.gov/Local_Rules_of_Practice/C9LOCALRULES.pdf.

64. *Order Approving the Rules of the Court Practice and Procedure for the 9th Judicial Circuit, Family Court Division, Hardin County*, KY. CT. JUSTICE (Feb. 6, 2014), http://courts.ky.gov/Local_Rules_of_Practice/C9FAMILYRULES.pdf.

65. *Order Approving Amendments to the Local Rules of Practice for the 10th Judicial District, Larue, Hart and Nelson Circuit Courts*, KY. CT. JUSTICE (Jan. 27, 2005), http://courts.ky.gov/Local_Rules_of_Practice/C10LOCALRULES.pdf.

66. *Order Approving the Local Rules of Practice and Procedure, Family Practice for the 10th Judicial Circuit and District Courts and 57th Judicial District Court, Hart, Larue, and Nelson Counties,* KY. CT. JUSTICE (Mar. 30, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C10D57FAMILYRULES.pdf.

and Trimble Circuit;[68] Garrard Circuit;[69] Bourbon, Scott and Woodford Circuit[70] and Family Division;[71] Carroll, Grant and Owen Circuit;[72] Harrison, Nicholas, Pendleton, and Robertson Circuit;[73] Greenup and Lewis Circuit;[74] Fayette Circuit;[75] Johnson, Lawrence and Martin Family Division;[76] Jefferson Circuit,[77] District[78] and Family Division; [79] Floyd, Knott and Magoffin Family Division;[80] Boyd Circuit;[81] Pike Family Division;[82] Carter, Elliott, and Morgan Family

67. *Order Approving the Local Rules of Practice for the 11th Judicial Circuit, Green, Marion, Taylor and Washington Counties*, KY. CT. JUSTICE (Dec. 7, 2011), http://courts.ky.gov/Local_Rules_of_Practice/C11LOCALRULES.pdf.

68. *Order Approving the Rules of Court Practice and Procedure for the 12th Judicial Circuit, Family Court Division, Henry, Oldham, and Trimble Counties*, KY. CT. JUSTICE (Apr. 5, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C12FAMILYRULES.pdf.

69. *Order Approving Amendments to the Local Rules of Practice for the 13th Judicial Circuit, Regarding Garrard Circuit Court*, KY. CT. JUSTICE (Oct. 20, 2011), http://courts.ky.gov/Local_Rules_of_Practice/C13LOCALRULES.pdf.

70. *Order Approving Amendments to the Rules of Practice and Procedure of the 14th Judicial Circuit, Bourbon, Scott and Woodford Counties*, KY. CT. JUSTICE (Sept. 5, 2002), http://courts.ky.gov/Local_Rules_of_Practice/C14LOCALRULES.pdf.

71. *Order Approving the Rules of Court Practice and Procedure for the 14th Judicial Circuit, Family Court Division, Bourbon, Scott, and Woodford Counties*, KY. CT. JUSTICE (Mar. 30, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C14FAMILYRULES.pdf.

72. *Order Approving the Local Rules of Practice for the 15th Judicial Circuit, Carroll, Grant and Owen Counties*, KY. CT. JUSTICE (July 8, 2013), http://courts.ky.gov/Local_Rules_of_Practice/C15LOCALRULES.pdf.

73. *Order Approving the Rules of Court Practice and Procedure for the 18th Judicial Circuit, Family Court Division, Harrison, Nicholas, Pendleton, and Robertson Counties*, KY. CT. JUSTICE (Mar. 22, 2012), http://courts.ky.gov/Local_Rules_of_Practice/ C18FAMILYRULES.pdf.

74. *Order Approving Amendments to the Local Rules of Practice for the 20th Judicial Circuit, Greenup and Lewis Circuit Courts*, KY. CT. JUSTICE (July 15, 2005), http://courts.ky.gov/Local_Rules_of_Practice/C20LOCALRULES.pdf.

75. *Order Approving Amendments to the Local Rules of Practice for the 22nd Judicial Circuit, Fayette Circuit Court*, KY. CT. JUSTICE (June 30, 2009), http://courts.ky.gov/Local_Rules_of_Practice/C22LOCALRULES.pdf.

76. *Order Approving the Rules of Court Practice and Procedure for the 24th Judicial Circuit, Family Court Division, Johnson, Lawrence, and Martin Counties*, KY. CT. JUSTICE (May 21, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C24FAMILYRULES.pdf.

77. *Order Approving the Rules of Practice and Procedure of the Thirtieth Judicial Circuit, Jefferson Circuit Court*, KY. CT. JUSTICE (July 11, 2006), http://courts.ky.gov/Local_Rules_of_Practice/C30LOCALRULES.pdf.

78. *Order Approving Amendments to the Local Rules of Practice for the 30th Judicial District, Jefferson District Court*, KY. CT. JUSTICE (Jan. 14, 2008), http://courts.ky.gov/Local_Rules_of_Practice/D30LOCALRULES.pdf.

79. *Order Approving the Rules of Practice and Procedure of the Thirtieth Judicial Circuit, Jefferson Circuit Court Family Division*, KY. CT. JUSTICE (June 22, 2011), http://courts.ky.gov/Local_Rules_of_Practice/C30FAMILYRULES.pdf.

80. *Order Approving the Rules of Practice and Procedure, for the 31st and 36th Judicial Circuits, Family Court Division, Floyd, Knott, and Magoffin Counties*, KY. CT. JUSTICE (May 9, 2012), http://courts.ky.gov/Local_Rules_of_Practice/ C31D36LOCALFAMILYRULES.pdf.

81. *Order Approving the Rules of Practice and Procedure, Domestic Relations/Family Law Practice, for the 32nd Judicial Circuit, Boyd County*, KY. CT. JUSTICE (Mar. 30, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C32FAMILYRULES.pdf.

Division;[83] Breathitt, Powell, and Wolfe Family Division;[84] Marshall and Calloway Circuit;[85] Barren and Metcalfe Circuit;[86] Bell Circuit;[87] Breckinridge, Grayson and Meade Circuit[88] and Domestic Relations;[89] Kenton and Campbell Circuits,[90] Boone and Gallatin Circuit;[91] and Bullitt Family Division.[92]

Notwithstanding that K.R.E. 408 contains no restrictions on the discovery of information disclosed in mediation sessions, to the extent that the civil or criminal rules permit discovery of such matters, many local court rules effectively amend K.R.E. 408 and thereby the incorporation of Model Rule 12, by limiting discovery of the documents and communications that would be fully discoverable under a direct application of K.R.E. 408 and Model Rule 12. These local courts, whose rules have also been approved by order of the Kentucky Supreme Court (after adoption of the Model Rules) include: McCracken Family Division, which provides, "[m]ediation documents and communications are not subject to disclosure through discovery or any other process, and are not

82. *Order Approving the Rules of Practice and Procedure for the 35th Judicial Circuit, Family Court Division, Pike County*, KY. CT. JUSTICE (July 31, 2013), http://courts.ky.gov/Local_Rules_of_Practice/C35FAMILYRULES.pdf.

83. *Order Approving the Rules of Court Practice and Procedure for the 37th Judicial Circuit, Family Court Division, Carter, Elliott, and Morgan Counties*, KY. CT. JUSTICE (Mar. 23, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C37FAMILYRULES.pdf.

84. *Order Approving the Rules of Court Practice and Procedure for the 39th Judicial Circuit, Family Court Division, Breathitt, Powell, and Wolfe Counties*, KY. CT. JUSTICE (Apr. 5, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C39FAMILYRULES.pdf.

85. *Order Approving the Local Rules of Practice and Procedure for the 42nd Judicial Circuit, Marshall and Calloway Circuit Courts*, KY. CT. JUSTICE (June 25, 2009), http://courts.ky.gov/Local_Rules_of_Practice/C42LOCALRULES.pdf.

86. *Order Approving Amendments to the Local Rules of Practice for the 43rd Judicial Circuit, Barren and Metcalfe, Circuit Courts*, KY. CT. JUSTICE (June 8, 2010), http://courts.ky.gov/Local_Rules_of_Practice/C43LOCALRULES.pdf.

87. *Order Approving the Rules of Practice and Procedure for the 44th Judicial Circuit, Bell Circuit Court*, KY. CT. JUSTICE (Apr. 11, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C44LOCALRULES.pdf.

88. *Order Approving Amendments to the Local Rules of Practice for the 46th Judicial Circuit, Breckinridge, Grayson and Meade Circuit Courts*, KY. CT. JUSTICE (Jan. 2, 2008), http://courts.ky.gov/Local_Rules_of_Practice/C46localrules.pdf.

89. *Order Approving the Rules of Court Practice and Procedure, Domestic Relations Rules, for the 46th Judicial Circuit, Breckinridge, Grayson, and Meade Counties*, KY. CT. JUSTICE (May 7, 2014), http://courts.ky.gov/Local_Rules_of_Practice/ C46DOMESTICRELATIONS.pdf.

90. *Order Approving Amended Local Rules, 16th, 17th & 54th Judicial Circuit, Kenton, Campbell, Boone & Gallatin Counties*, KY. CT. JUSTICE 58-60 (Nov. 20, 1997), http://courts.ky.gov/Local_Rules_of_Practice/C16LOCALRULES.pdf (mediation provisions in these Circuit rules apply only to the district courts)

91. *Order Approving Amended Local Rules, 16th, 17th & 54th Judicial Circuit, Kenton, Campbell, Boone & Gallatin Counties*, KY. CT. JUSTICE (Nov. 20, 1997), http://courts.ky.gov/Local_Rules_of_Practice/C54LOCALRULES.pdf.

92. *Order Approving the Rules of Court Practice and Procedure for the 55th Judicial Circuit, Family Court Division, Bullitt County*, KY. CT. JUSTICE (Apr. 11, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C55FAMILYRULES.pdf.

admissible into evidence in any judicial proceeding";[93] Henry, Oldham, and Trimble Circuit;[94] Fayette Circuit;[95] Johnson, Lawrence and Martin Circuit;[96] Clark and Madison Family Division;[97] Knox and Laurel Circuit[98] and Family Division;[99] Calloway and Marshall Family Division;[100] Franklin Circuit[101] and Family Division;[102] Anderson, Shelby and Spencer Circuit, which provide, "[t]hey are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial ***or administrative*** proceeding."[103] In Campbell District, "[r]ecords of the hearing procedures and statements made during the hearing shall be privileged and shall not be admissible or discoverable for any purpose."[104] And in Estill, Lee, and Owsley Circuit, the language provides that "[n]o party shall introduce, for any purpose, a statement made during mediation at any civil trial or hearing."[105]

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93. *Order Approving Rules of Court Practice and Procedure for the 2nd Judicial Circuit, Family Court Division, McCracken County, Kentucky Supreme Court Order*, KY. CT. JUSTICE (Jan. 21, 2014), http://courts.ky.gov/Local_Rules_of_Practice/ C2FAMILYRULES.pdf.

94. *Order Approving the Local Rules of Practice and Procedure for the 12th Judicial Circuit, Henry, Oldham, and Trimble Counties*, KY. CT. JUSTICE (May 21, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C12LOCALRULES.pdf.

95. *Order Approving Amendments to the Local Rules of Practice for the 22nd Judicial Circuit, Fayette Circuit Court*, KY. CT. JUSTICE (June 30, 2009), http://courts.ky.gov/Local_Rules_of_Practice/C22LOCALRULES.pdf.

96. *Order Approving Amendments to the Local Rules of Practice for the 24th Judicial Circuit, Johnson, Lawrence and Martin Circuit Courts*, KY. CT. JUSTICE (Aug. 13, 2007), http://courts.ky.gov/Local_Rules_of_Practice/C24LOCALRULES.pdf.

97. *Order Approving the Rules of Court Practice and Procedure for the 25th Judicial Circuit, Family Court Division, Clark and Madison Counties*, KY. CT. JUSTICE (June 5, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C25FAMILYRULES.pdf.

98. *Order Approving the Rules of Practice and Procedure for the 27th Judicial Circuit Court, Knox and Laurel Counties*, KY. CT. JUSTICE (May 28, 2013), http://courts.ky.gov/Local_Rules_of_Practice/C27LOCALRULES.pdf.

99. *Order Approving the Rules of Court Practice and Procedure for the 27th Judicial Circuit, Family Court Division, Knox and Laurel Counties*, KY. CT. JUSTICE (June 12, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C27FAMILYRULES.pdf.

100. *Order Approving the Rules of Court Practice and Procedure for the 42nd Judicial Circuit, Family Court Division, Calloway and Marshall Counties,* KY. CT. JUSTICE (Apr. 13, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C42FAMILYRULES.pdf.

101. *Order Approving Amendments to the Local Rules of Practice for the 48th Judicial Circuit, Franklin Circuit Court,* KY. CT. JUSTICE (Mar. 27, 2006), http://courts.ky.gov/Local_Rules_of_Practice/C48LOCALRULES.pdf.

102. *Order Approving the Rules of Court Practice and Procedure for the 48th Judicial Circuit, Family Court Division, Franklin County,* KY. CT. JUSTICE (Mar. 30, 2012), http://courts.ky.gov/Local_Rules_of_Practice/C48FAMILYRULES.pdf.

103. *Order Approving Amendment to Rule 13 of the Local Rules of Practice for the 53rd Judicial Circuit, Anderson, Shelby and Spencer, Circuit Courts*, KY. CT. JUSTICE (Dec. 15, 2008), http://courts.ky.gov/Local_Rules_of_Practice/C53LOCALRULES.pdf (emphasis added).

104. *Order Approving the Rules of Practice, Campbell District Court, 17th Judicial District,* KY. CT. JUSTICE (April 21, 2003), http://courts.ky.gov/Local_Rules_of_Practice/ D17LOCALRULES.pdf.

105. *Order Approving the Local Rules of Practice and Procedure for the 23rd Judicial Circuit Courts, Estill, Lee, and Owsley Counties*, KY. CT. JUSTICE (May 8, 2014), http://courts.ky.gov/Local_Rules_of_Practice/C23LOCALRULES.pdf.

The following courts have local mediation rules that do not contain any specific provision regarding K.R.E. 408 or admissibility: Hopkins Family Division;[106] Garrard and Jessamine Family Division;[107] Perry Domestic Relations;[108] Allen and Simpson Family Division;[109] Boyle and Mercer Family Division;[110] Caldwell, Livingston, Lyon and Trigg Circuit.[111]

The resulting cornucopia of local court rules creates a patchwork quilt of seemingly conflicting provisions which, if not addressed by the local courts themselves, will require decisions of the highest courts of the Commonwealth to ultimately resolve the conflicts. In those circuits that bar the discovery of matters and materials that would be "otherwise discoverable" under K.R.E. 408 and Model Rule 12:

> [A] party presents one set of facts during the mediation, and a different set of facts as the case proceeds through discovery trial, faces no consequences. . . . [T]he party's falsehood may well go on exposed to the prior fact. In the name of ensuring "free and frank discussion," . . . [such rules] effectively confer a license to lie.[112]

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106. *See Order Approving the Rules of Court Practice and Procedure for the 4th Judicial Circuit, Family Court Division, Hopkins County*, KY. CT. JUSTICE 10-11 (Apr. 2012), http://courts.ky.gov/Local_Rules_of_Practice/C4FAMILYRULES.pdf. Rule 9.05 merely states that "[n]othing in these Rules shall be construed to discourage or to prohibit voluntary mediation." Additionally, the Court may, in its discretion, refer the parties to mediation services for resolution of some of all the issues pending before the Court. *Id.*

107. *See Order Approving the Local Rules of Court Practice and Procedure for the 13th Judicial Circuit Courts, Counties of Garrad and Jessamine, Family Division*, KY. CT. JUSTICE 10 (Apr. 2012), http://courts.ky.gov/Local_Rules_of_Practice/ C13FAMILYRULES.pdf. Rule 7.03 only states that the Court may order mediation, but that the parties are not required to use it. *Id.*

108. *See Order Approving the Rules of Court Practice and Procedure, Domestic Relations Rules, for the 33rd Judicial Circuit, Perry County*, KY. CT. JUSTICE 9 (Jan. 2014), http://courts.ky.gov/Local_Rules_of_Practice/C33DomesticRelationsRules.pdf. Rule 510 has provisions regarding court-ordered mediation and confidentiality, but nothing regarding admissibility. *Id.*

109. *See Order Approving the Rules of Court Practice and Procedure, Domestic Relations Rules, for the 49th Judicial Circuit, Family Court Division, Allen and Simpson Counties*, KY. CT. JUSTICE 5 (Apr. 2012), http://courts.ky.gov/Local_Rules_of_Practice/ C49FAMILYRULES.pdf. Rule 708 states that the court may order mediation, but nothing regarding admissibility. *Id.*

110. *See Order Approving the Rules of Court Practice and Procedure, Domestic Relations Rules, for the 50th Judicial Circuit, Family Court Division, Boyle and Mercer Counties*, KY. CT. JUSTICE 11 (Apr. 2012), http://courts.ky.gov/Local_Rules_of_Practice/ C50FAMILYRULES.pdf. Rule 7.03 states that the court may order mediation, but nothing regarding admissibility. *Id.*

111. *See Order Approving the Local Rules of Practice and Procedure, Domestic Relations Rules, for the 56th Judicial Circuit and Family Law Rules for the 56th District Courts, Caldwell, Livingston, Lyon, and Trigg Counties*, KY. CT. JUSTICE 12 (Jan. 2014), http://courts.ky.gov/Local_Rules_of_Practice/C56D56LOCALRULES.pdf. Rule 707 in its entirety states only, "[c]onsistent with FCRPP2(6)(a,b,c), mediation of contested issues is not mandated, but strongly encouraged, and will routinely be ordered by the Court prior to trial." *Id.*

112. Lynne H. Rambo, *Impeaching Lying Parties with their Statements During Negotiation: Demysticizing the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes*, 75 WASH. L. REV. 1037, 1066 (2000).

While one can conceive of a seemingly endless array of scenarios where conflicts between local rules can create havoc in subsequent litigation, Professor Dennis Sharp illustrates the shoals of these uncharted waters with this simple hypothetical:

> A two party mediation ends in a fully executed written settlement, but in a subsequent court proceeding one party claims to have discovered evidence clearly establishing fraud by the opposing party during the mediation process. When a court must determine whether a settlement agreement should be enforced, do rules concerning mediation confidentiality permit the court to admit evidence showing a party's misrepresentations during the mediation?[113]

Such a situation might arise, for example, where mediation is ordered in a case pending in the 12th Judicial Circuit, Henry, Trimble and Oldham counties. In such mediation, the plaintiff (not his counsel), knowing that local rules prevent the discovery or utilization of any documents or communications made during the mediation, presents a document to urge settlement, knowing the document is false. The case is resolved at mediation. The defendant subsequently discovers that the document, upon which the mediated settlement was urged and based, was fraudulent. The defendant, who resides in Jefferson County, files suit in Jefferson Circuit Court to set aside the mediated settlement agreement and seeks to introduce the allegedly fraudulent document. The plaintiff answers the complaint and seeks to dismiss the fraud claim on the grounds that it is based upon a document that, pursuant to Rule 5.4(A) of the Local Court Rules of the 12th Judicial Circuit, is privileged, confidential, inadmissible, and therefore cannot support the claim of fraud. If the applicability of the local court rules where the mediation was conducted control, the 12th Judicial Circuit, plaintiff's motion to dismiss will be sustained and the case will be dismissed. On the other hand, if the local rules of the forum hearing the fraud case control, Jefferson Circuit Court, the defendant would not only be able to introduce the fraudulent document as the basis for his case, but he would also be able to utilize the document to impeach plaintiff's prior inconsistent statements concerning the validity of the document made during the mediation. Pursuant to *Jett*, the fraudulent document could be considered by the finder of fact as substantive evidence, in addition to the salutary effect of having impeached the plaintiff.[114]

Irrespective of the outcome in Jefferson Circuit Court, such a case will no doubt be appealed. The outcome on appeal is preordained, given the Kentucky

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113. Dennis Sharp, *The Washington, D.C. Lawyer and Mediation Confidentiality: Navigating the Complex and Confusing Waters*, 7 APPALACHIAN J.L. 179, 195 (2008).

114. Jett v. Commonwealth, 436 S.W.2d 788, 792 (Ky. 1969); *see also* note 46 and accompanying text.

Supreme Court's pronouncements in *Abernathy v. Nicholson*,[115] wherein the Court explained:

> Under Section 116 of the Constitution, the power to promulgate local rules of practice and procedure for the Court of Justice is vested exclusively in the Supreme Court and should not be undertaken by other courts. The authorization to enact local rules pursuant to RULE 1.040(3)(a) is subject to two conditions: ***first, that no local rule shall contradict any substantive rule of law or any rule of practice and procedure promulgated by this Court, and second, that it shall be effective only upon Supreme Court approval.***[116]

Thus, the local court rules on mediation in at least 16 judicial districts are in direct conflict with Model Rule 12, in that they preclude all discovery and all admissibility of mediation communications and documents.[117] Prophetically predicting this outcome, the Court in *Abernathy* eschewed the promulgation of local rules, stating:

> For generations it has been widely believed that local rules were a trap for the unwary and disadvantageous for practitioners unfamiliar with a particular venue. It is this Court's intention to standardize practice and procedure in the Court of Justice to the greatest extent possible and permit local rules only to the extent necessary to satisfy a peculiar circumstance of the locality. In general, the rules of court adopted pursuant to Section 116 of the Constitution are sufficient and need no adornment in the form of local rules. Kentucky attorneys are licensed to practice law in all courts of this Commonwealth and should be able to practice wherever they choose, east and west, rural and urban, without the burden of superfluous local rules, whatever the form in which they may appear.[118]

In summary, practitioners face dilemmas concerning mediation in the Commonwealth of Kentucky. A subsequent trial of a case mediated in the Kentucky courts will allow a party to impeach a witness who was present at the mediation with statements made at trial that are inconsistent with statements made at mediation. Moreover, such prior inconsistent statements will be substantive evidence in such a trial pursuant to *Jett*.[119] In the event the case is removed to federal court, however, F.R.E. 408 will preclude the use of the prior inconsistent mediation statement, even for the purposes of impeaching the witness, and no substantive use of the statement may be made, unless

115. Abernathy v. Nicholson, 899 S.W.2d 85 (Ky.1995).
116. *Id.* at 87 (emphasis added).
117. *See supra* notes 93-105 and accompanying text.
118. *Abernathy,* 899 S.W.2d at 87-88.
119. *See supra* note 46 and accompanying text.

admissibility is premised on some other rule of evidence.[120] Also, with respect to discovery in state and federal court, while both K.R.E. 408(2) and F.R.E. 408(b) provide for exclusions to the offers of compromise ban for purposes such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution,[121] the local court rules of at least 16 judicial districts directly conflict with K.R.E. 408 and Model Rule 12 by prohibiting any discovery of mediation documents and mediation communications, notwithstanding that such materials might be "otherwise discoverable" under applicable civil or criminal rules.[122]

While adoption of the UMA in Kentucky will not resolve the conflict between the current versions of K.R.E. 408 and F.R.E. 408, its adoption would represent a major success in efforts to standardize mediation procedures throughout the Commonwealth; irrespective of whether the mediation is conducted under the auspices of the trial court, and irrespective of whether the mediator is an attorney.

IV. UMA'S SOLUTIONS

A. Mediation Confidentiality

While Model Mediation Rule 12 incorporates by reference whatever confidentiality protections are afforded by K.R.E. 408,[123] the protections afforded by K.R.E. 408 and F.R.E 408 have important limitations. Speaking to the confidentiality protection in F.R.E. 408, David Assey noted the deficiencies in the confidentiality protection of the rule as follows:

> First it applies only when the validity or amount of a civil claim is at issue. Second, it affords no protection when evidence from a mediation is used for some collateral purposes such as demonstrating witness bias or proof of agency. Third, this cloak of confidentiality only covers evidence in court proceedings and offers no protection in administrative or legislative hearings or against disclosure of information to the general public. Finally, the rule applies only to parties in the litigation; thus mediation participants who are not parties to the suit cannot object to the introduction of confidential communications. As a result of these limitations, commentators generally agree that ***Rule 408*** does not

120. *See supra* notes 43-46 and 48-50 and accompanying text.

121. *See supra* notes 46-50 and accompanying text.

122. *See supra* notes 55, 59-62 and accompanying text.

123. *See Model Mediation Rules*, *supra* note 8. Model Rule 12 on confidentiality provides that "[m]ediation shall be regarded as settlement negotiations for purposes of K.R.E. 408." *Id.*

> provide adequate protection against the use of statements made in mediation in subsequent litigation.[124]

Moreover, while Model Rule 2 defines the term "mediation,"[125] this definition speaks only to a "process," without any temporal limitations. In other words, when does "mediation" begin? When does it end? Are preparatory discussions with opposing counsel surrounding the scheduling of future mediations protected? In the event that the formal mediation session concludes without resolution, are post–session discussions with opposing counsel considered part of the "process," such that confidentiality protections preclude the introduction of such statements into evidence?

The UMA's confidentiality provisions have answers to all of these questions. By limiting the confidentiality protections to "mediation communications,"[126] there is no confusion concerning whether something disclosed in mediation is, or is not, subject to confidentiality protections. First, the "mediation communication" must consist of a "statement" that is made orally or in writing, verbal or nonverbal.[127] Second, the UMA's definition of "mediation communications" solves the temporal problem created by Model Rule 12's scanty definition of "mediation." Under the UMA, a "mediation communication" can take place before, during, and after the formal mediation session is convened.[128] As such, virtually any "statement" made "about" the mediation from the first phone call until and unless the case is resolved in mediation, is privileged, inadmissible, and non-discoverable.[129]

While adoption of the UMA and its confidentiality protections would solve the problem of defining what is and is not protected from admissibility and discovery in Kentucky mediations, it would change Kentucky law unless conforming amendments are proposed and passed by the Kentucky General Assembly. The most glaring change would bar a party or witness from utilizing a mediation communication that is inconsistent with a person's testimony at trial to impeach the person at trial.[130] Moreover, as to any mediation communications, adoption of the UMA in Kentucky would permit persons currently subject to subpoena power of the Kentucky courts to refuse to disclose such

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124. James M. Assey, Jr., *Mum's the Word on Mediation: Confidentiality and Snyder-Falkinham v. Stockburger*, 9 GEO. J. LEGAL ETHICS 991, 995-96 (1996) (emphasis added).

125. *See Model Mediation Rules*, *supra* note 8. Rule 2 defines mediation as "an informal process in which a neutral third person(s) called a mediator facilitates the resolution of a dispute between two or more parties." *Id.*

126. *See* UNIF. MEDIATION ACT § 2(2), U.L.A. (2003); *see also supra* note 2 and accompanying text.

127. While the UMA contains no definition of the term "statement," both the Kentucky Rules of Evidence and the Federal Rules of Evidence define the term as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." *See* FED. R. EVID. 801(a); KY. R. EVID. 801(a)(1)-(2).

128. *See supra* text accompanying note 14.

129. *Id.*

130. *See supra* notes 43-46 and accompanying text.

communications.[131] Pursuant to the UMA, a party may refuse to disclose, and may bar any other person, from disclosing a mediation communication.[132] Furthermore, a mediator may refuse to disclose any mediation communication and may bar any other person from testifying concerning the mediator's communications.[133] Finally, a nonparty may bar any other person from disclosing a communication made by such nonparty.[134]

In addition, as to mediators, except where failure to report would be a violation of public policy for the specific grounds stated, UMA Section 7 expressly limits the ability of the mediator to report to the court to the extent of disclosing whether the mediation occurred or has terminated, whether a settlement was reached, and attendance.[135] ***In this regard, the UMA comports with Model Rule 10.***[136] However, Model Rule 12 differs from its UMA counterpart in that, in Kentucky, mediators are given an absolute right to refuse to testify about any mediation communication irrespective of whether the parties may consent to and desire such testimony.[137] Pursuant to the UMA, with all parties consent, the mediator may testify about any mediation communication made by the parties.[138] However, without the consent of the mediator and any nonparties, the mediator may refuse to testify about any of his mediation communications and, absent consent, may refuse to testify concerning mediation communications of nonparties.[139]

In summary, while Kentucky's Model Rule may arguably provide adequate confidentiality protection for mediators themselves, the rule confers no privilege whatsoever on parties and nonparties.[140] Absent such protection, parties and nonparties alike may be required to testify concerning mediation communications, thus thwarting the Commonwealth's public policy objective of

131. *See* UNIF. MEDIATION ACT § 4, U.L.A. (2003).

132. *Id.* § 4(b)(1), U.L.A. (2003).

133. *Id.* § 4(b)(1), U.L.A. (2003); *see also supra* note 30 and accompanying text.

134. *See supra* notes 23-40 and accompanying text.

135. *See* UNIF. MEDIATION ACT § 7(a)-(b), U.L.A. (2003).

136. *Model Mediation Rules*, *supra* note 8. Model Rule 10 provides that "[t]he mediator shall report to the court that the mediation has not occurred, has not been completed, or that the mediation has been completed with or without an agreement on any or all issues. With the consent of the parties, the mediator may also identify those matters which, if resolved or completed, would facilitate the possibility of a settlement." *Id.*

137. *Id.* Model Rule 12(c) provides that "[m]ediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature except on order of the Court for good cause shown. This privilege and immunity reside in the mediator and may not be waived by the parties." *Id.*

138. UNIF. MEDIATION ACT § 5(a)(1)-(2), U.L.A. (2003).

139. *Id.* § 5(a)(1)-(2).

140. *See Model Mediation Rules*, *supra* note 8. Model Rule 12 governs confidentiality in mediation. *Id.*

creating an environment where the parties may be free to express their views in aid of settlement.[141]

If the Kentucky General Assembly considers adoption of the UMA, as to the issue of confidentiality of mediation communications, the legislature will have to wrestle with two competing policy objectives: encouraging free, frank and open discussion in mediation, versus the tribunal's need for relevant evidence.

B. Eliminating Discovery Confusion

While K.R.E. 408 does not bar the discovery of evidence "otherwise discoverable," and makes clear that any party's attempt to shield otherwise discoverable evidence under the cloak of compromise negotiations will be thwarted,[142] at least 16 local courts have rules which bar admissibility as well as discovery of "mediation documents" and "mediation communications" (notwithstanding that such terms are undefined in the local rules).[143] Although *Abernathy* portends that such local rules will ultimately perish and be ruled invalid,[144] in the meantime, adoption of the UMA and its discovery provisions would perhaps strike an appropriate balance between K.R.E. 408, which seeks to protect against the evidentiary use of compromise statements affecting liability without addressing whether such statements are discoverable, and those local court rules which, presumably in the interest of protecting the integrity of the mediation process, bar all evidentiary uses and all discovery of that which could reasonably be construed as a "mediation statement" or a " mediation document" (given that no definition of such terms exist).

If adopted in Kentucky, the UMA would provide a privilege against disclosure or discovery and introduction of "mediation communications." All the UMA seeks to protect is the confidentiality of that which was "said" either orally, in writing, or by nonverbal conduct during the mediation.[145] Thus, any subject matter opened during a mediation may be explored in later discovery or trial, provided the speaker is not asked what was ***said***."[146]

Importantly, neither the UMA nor any other jurisdictions with mediation privilege statutes have extended the privilege beyond communication, to the

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141. KY. REV. STAT. § 454.011 (2006) ("It is the policy of this Commonwealth to encourage the peaceable resolution of disputes and the early, voluntary settlement of litigation through negotiation and mediation. To the extent it is consistent with other laws, the courts and state governmental agencies are authorized and encouraged to refer disputing parties to mediation before trial or hearing.").

142. *See supra* notes 50-67 and accompanying text.

143. *See supra* notes 55-61 and accompanying text.

144. Abernathy v. Nicholson, 899 S.W.2d 85 (Ky. 1995); *see also supra* notes 65-68 and accompanying text.

145. *See* UNIF. MEDIATION ACT § 2(2), U.L.A. (2003); *see also supra* note 14 and accompanying text.

146. *See* Rambo, *supra* note 112, at 1062.

information contained within the communication.[147] In this respect, the UMA comports with the last sentence of K.R.E. 408 which provides that otherwise discoverable evidence does not become undiscoverable simply because it is presented in a compromise negotiation.[148]

If adopted, the UMA would leave the discovery rules applicable in Kentucky civil and criminal proceedings untouched and intact. However, with respect to issues of admissibility at trial, the UMA would bar the admissibility of any "mediation communications," but would not bar the admissibility of any document that has been or would be discovered without mediation. Additionally, consistent with K.R.E. 408, "otherwise discoverable" evidence is not subject to exclusion merely because it is first presented in the mediation context.[149] Adoption of the UMA would severely restrict the ability of a party to make evidentiary use of "mediation communications" for "other purposes" contemplated by K.R.E. 408, "such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."[150]

The UMA attempts to strike a balance between the tribunal's need for relevant evidence and the need for confidentiality in the mediation process, by providing that any documents or statements that are ***not*** "mediation communications" or are "otherwise discoverable" and therefore excluded from the definition of "mediation communications,"[151] can clearly be utilized as evidence for the "other purposes" embodied in K.R.E. 408.[152] Further, the UMA's adoption in Kentucky would thwart any party who seeks to use a mediation communication as a prior inconsistent statement for substantive and impeachment purposes at trial, pursuant to *Jett*.[153]

1. Reports to the Court

In 2005, responding to the increased utilization of mediation, the Supreme Court of Kentucky amended its Administrative Procedures by adding Part XII, "Mediation Guidelines for Court of Justice Mediators," [hereinafter "the Guidelines"] to "promote public confidence in the mediation process."[154] The Guidelines also standardized education and training requirements for mediators who wish to be listed on the Roster of Mediators Serving the Courts of Justice within the Commonwealth of Kentucky. Those requesting placement on the roster must agree to voluntarily comply with the ethical and training

147. *See* UNIF. MEDIATION ACT § 4(c), U.L.A. (2003); *see generally* Kirtley, *supra* note 22.
148. *Compare* UNIF.MEDIATION ACT § 4(c), U.L.A., *with* KY. R. EVID. 408(2).
149. *Id.*
150. *Id.*
151. KY. R. EVID. 408(2).
152. UNIF. MEDIATION ACT § 4(c), U.L.A. (2003).
153. *See supra* note 89 and accompanying text.
154. *See supra* notes 44-48 and accompanying text.

requirements set out in the Guidelines.[155] However, one need not comply with the Guidelines in order to perform mediation services in the Commonwealth. The Guidelines are only "***suggested minimum criteria ... for mediators practicing in the courts of the Commonwealth.***"[156] As such, the Guidelines have no applicability to non-lawyers, except to the extent that they wish to be included on the roster of mediators maintained by Kentucky's Administrative Office of the Courts. Moreover, there is no mechanism for removal of a mediator from the Roster of Mediators, only a mechanism for a mediator to be "reinstated" if his or her name has been removed from the Roster for unspecified reasons.[157] Accordingly, neither the Guidelines nor the Model Rules operate to control the many mediations that take place throughout the Commonwealth pre-suit, with no litigation presently contemplated, or where the mediation is conducted by a non-lawyer.[158]

By contrast, the UMA seeks to instill confidence in the mediation process through the adoption of mandatory requirements applicable to all persons, lawyers and non-lawyers alike, who seek to perform mediation services in the Commonwealth. It is this author's experience that many non-lawyer parties or participants in mediation have concerns that, while the process itself may be confidential, the relationship between the mediator and the court remains unclear and produces fear that subsequent conversations between the mediator and the judge may take place. The Guidelines attempt to address this issue in Section 9, as follows:

> The mediator reports to the court that the mediation has not occurred, has not been completed, or that the mediation has been completed with or without an agreement on any or all issues. With the consent of the parties, the mediator may also identify those matters, which, if resolved or completed, would facilitate the possibility of a settlement.[159]

The tenor of this provision requires the mediator to report to the court concerning the success of the mediation, and with the consent of the parties, allows the mediator to converse with the judge concerning those unresolved matters that would facilitate settlement.

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155. *Amendment to the Rules of Administrative Procedure AP Part XII. Mediation Guidelines for Court of Justice Mediators*, KY. CT. JUSTICE (Apr. 15, 2005), http://courts.ky.gov/courtprograms/mediation/Documents/AdminOrder200502.pdf [hereinafter *Guidelines*]. K.R.E. 408 is applicable to the Guidelines. *Id.* at 4 ("Mediation should be regarded as settlement negotiations for purposes of Kentucky Rule of Evidence 408.").

156. *Mediation FAQs*, KY. CT. JUSTICE, http://courts.ky.gov/courtprograms/mediation/Pages/MediationFAQs.aspx (last visited July 28, 2014) (emphasis added).

157. *See supra* note 96 and accompanying text.

158. *See Ky. Bar Assoc. Ethics Op., KBA E-377*, KY. BAR ASSOC. (March 1995), http://kybar.org/documents/ethics_opinions/kba_e-377.pdf. ("Mediation is not the practice of law . . . .") (citing KY. SUP. CT. R. 3.020).

159. *Guidelines, supra* note 155, § 3(9).

Requiring the mediator to report to the court concerning the status of settlement negotiations serves the aims of the judicial system by promoting the expeditious administration of justice; however, allowing the mediator to have discussions with the judge concerning unresolved issues is fraught with difficulty and danger, notwithstanding consent of the parties. Can the mediator ever be sure that precisely what he is disclosing to the judge was the subject of full disclosure and consent by all parties? If the mediator and the judge discuss unresolved issues, is this done in anticipation of further mediation session? Or, rather, is it to inform the judge where he may apply pressure to achieve a resolution in advance of trial?

Unlike the Guidelines, the UMA resolves concerns about contact with the court by very clearly delineating that the mediator may disclose that the mediation occurred or is terminated, and whether a settlement was reached and who attended.[160] Beyond these precise facts, the mediator is only permitted to report abuse and neglect,[161] and any mediation communications to the extent expressly authorized by the parties.[162]

In summary, while the Guidelines encourage proper conduct, they provide no remedy whatsoever for improper conduct. Lawyers are bound by ethical rules, but those do not apply to non-lawyers conducting mediations.[163] Adoption of the UMA in Kentucky would ensure that both lawyers and non-lawyers alike risk violating state law if their conduct deviates from the required standard.

2. Conflict of Interests Disclosure

With regard to the mediator's need to disclose conflicts of interest, the principal difference between the UMA and the Guidelines concerns the level of diligence that the mediator is required to undertake to learn the existence of potential conflicts. While the Guidelines potentially address all issues regarding conflicts of interest,[164] they only require the disclosure of known relationships with the parties that may affect, or give the appearance of affecting, the mediator's neutrality.[165]

By contrast, the UMA places an affirmative duty on all mediators to ***undertake an investigation*** to determine whether conflicts exist or may exist.[166] UMA Section 9(a)(1) provides:

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160. UNIF. MEDIATION ACT § 7, U.L.A. (2003).

161. *See Guidelines*, *supra* note 155. The Guidelines also permit abuse and neglect reports. *Id.* § 3(8)(d).

162. *See* UNIF. MEDIATION ACT § 5, U.L.A. (2003).

163. *See supra* note 158.

164. *See generally Guidelines*, *supra* note 155, § 3.

165. *Id.* § 3(4) ("Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect, or give the appearance of affecting, the mediator's neutrality.").

166. *See* UNIF. MEDIATION ACT § 9(a)(1), U.L.A. (2003).

> Before accepting a mediation, an individual who is requested to serve as a mediator shall:
>
> (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation. . . .

While the concept of undertaking a conflict investigation will not be new to practicing lawyers,[167] if the UMA is adopted in Kentucky, non-lawyer mediators will be required to adhere to these binding statutory standards. However salutary it may be for both lawyers and non-lawyers to be held to the same set of standards when conducting mediations, it is submitted that adoption of the UMA will be only a partial remedy for the consumers of mediation practices.

Lawyers serving as mediators may be subject to discipline under the Kentucky Rules of Professional Conduct,[168] but non-lawyers failing to adhere to the UMA's statutory provisions may escape liability for violations of the Act unless and until the Kentucky General assembly adopts companion legislation conferring a private right of action upon those who are injured by a mediator's violation of the statutory standards. As such, remedial statutes are commonplace and the Kentucky General Assembly is urged to consider the adoption of such a statute applicable to the UMA so that all persons performing mediations in the Commonwealth have personal liability in the event they fail to adhere to the provisions governing all mediators.[169] This way, citizens of the Commonwealth can be assured of their right to redress injuries they incur from mediator misconduct, irrespective of whether such persons hold professional licenses under the auspices of the Commonwealth.

V. CONCLUSION

The inconsistencies in current Kentucky law governing mediation procedures, mediation communications, and potential discovery issues and abuses, cry out for the adoption of the UMA. While the Supreme Court of Kentucky attempted to bring clarity to the notion of mediation confidentiality, the

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167. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [2] (2011) ("Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.").

168. *See, e.g.*, KY. SUP. CT. R. 3.130 ¶ XX.

169. *See, e.g.*, KY. REV. STAT. § 224.99-020(2) (2006) ("Nothing contained in this chapter shall abridge the right of any person to recover actual compensatory damages resulting from any violation of this chapter.").

loosely drawn language of Model Rule 12 and its failure to address the concept of mediation communications and a myriad of discovery issues, served to create needless confusion.[170] There is no doubt that many local rules were promulgated to address the obvious gaps in the Model Rules.

To bring local rules into harmony and resolve discovery and privilege issues with mediation, an obvious resolution would require the supreme court to undertake a comprehensive revision of the Model Rules. It is submitted that action of the General Assembly is necessary to fully and completely address the subject of mediation in the Commonwealth. A statute, rather than an obscure supreme court rule, would more fully serve to notify the public of the rights and obligations of all participants in mediation.

Moreover, while a supreme court rule is applicable to attorneys serving as mediators, the authority to bind non-lawyers serving as mediators, or out-of-state lawyers performing mediations in the Commonwealth, is questionable. A comprehensive legislative fix is needed to allow the supreme court to step back from the precipice of attempting to regulate the practice of mediation as its authority arguably extends only to the regulation of the courts of the Commonwealth and the practice of law.[171] In short, a new supreme court rule would only affect a partial fix, and if history is any model, the fix may be incomplete. The Kentucky General assembly should act to adopt the UMA.

170. *See supra* note 76.
171. *See supra* notes 103-05.