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Introduction

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Introduction

*David A. Hoffman**

My introduction to the issues that the Uniform Mediation Act seeks to resolve occurred about a dozen years ago when a senior partner at Hill & Barlow, the Boston law firm where I practiced for 17 years, came to me with a question. He wanted to know whether he could recommend mediation as a safe process for discussing some delicate tax issues that had arisen during the breakup of a business partnership. Evidently the partners had taken some aggressive positions on their partnership tax returns, and one of the big issues in the dissolution of the partnership was the allocation of the potential tax liability. “No one is going to feel safe discussing these issues with a third-party,” the senior partner said, “unless we can be fairly confident about confidentiality.”

Although I was at that point only a novice mediator, I thought I could easily determine the answer to this question. The more I looked at the question, however, the more uncertain I felt. In the end I concluded that existing law could give the partners only a modest degree of confidence that their secrets would be kept. The main problem, I found, was not whether the parties and the mediator could bind themselves contractually to keep their discussions confidential. Instead, the uncertainty came from the possibility of third-party interest in the partners’ discussions. To provide a shield from third-parties, a statute or rule of privilege is needed, and the existing statutes did little to inspire confidence on this point. Moreover, even if state law provided reasonably certain protection, the possibility of federal officials invoking the Supremacy Clause to override state law could not be eliminated.

In Massachusetts, where we have had a statute protecting the confidentiality of mediation since 1985, the situation is no better than elsewhere. The vagueness of our statute¹ makes it difficult to determine who qualifies as a mediator. The statute provides confidentiality protection for only those mediations in which the mediator has 30 hours of “training in mediation” and either “has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years.”² There has been no appellate decision to date as to what the quoted language means. Moreover, because the state maintains no list of mediators who meet these qualifications (nor

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1. Mass. Gen. Laws Ann. ch. 233, § 23Cn (2000).

2. *Id.*

has there been any proposal that the state should maintain such a list), parties enter into mediations to some degree at their peril.

Massachusetts is not alone in this regard. With only half of the states in this country covered by comprehensive mediation confidentiality statutes, and a patchwork of 2,500 state and federal laws regulating mediation in some way, shape, or form, uncertainty abounds. In most cases, a lawyer advising a client about the risks and benefits of mediation would be hard pressed to give the client even a moderately certain answer to the most basic questions:

- What communications are covered by confidentiality protection? (oral? written? only those made in presence of mediator? only those made after the initial mediation session has begun?)
- Who can assert the privilege? (only the parties? the parties and the mediator? non-party participants?)
- Who can waive the privilege? (only the parties? the parties and the mediator?)
- What exceptions are there? (fraud? illegality? public policy? child abuse or neglect? domestic violence? enforcement of a settlement agreement? claims against the mediator?)

If that list of difficult questions seems daunting, imagine the plight of the lawyer trying to advise a client in one state about mediation in another state, where the subject matter might involve the laws of yet another state.

In my work as a mediator, I seldom have to answer questions of this kind, and if such questions arise, I refer them to the parties' lawyers. I do, however, have to explain to the parties in every mediation what I mean by saying that mediation is a confidential process. In doing so, I have found that it is easy to promise too much – i.e., assuring the parties that an all-encompassing blanket of legal protection will safeguard any disclosures they make in the mediation. On the other hand, if, as mediator, I gave the parties a “Miranda” warning – i.e., telling them all of the various ways in which mediation confidentiality could be compromised or breached – they would likely abandon mediation altogether.

The method that I have adopted, as a stopgap, is to assure the parties that, if their case does not settle and their dispute must be resolved in court, their agreement would bar either of them (subject to certain exceptions enumerated in the agreement) from offering in evidence the discussions that took place in the mediation. I feel moderately confident in making such a statement because the cases in which courts have overridden confidentiality protections appear to involve either third parties or situations in which the parties themselves lacked a sufficiently protective agreement. In addition, the exceptions that I include in my standard agreement to mediate involve the circumstances most likely to cause difficult ethical or legal quandaries:

The mediator may disclose to appropriate authorities information obtained in the course of the mediation concerning (a) child abuse or

neglect, (b) the risk of serious harm to an individual, or (c) the planned commission of a crime. The confidentiality provided for in this section also shall not apply to evidence relating to the liability of the mediator in a subsequent suit against the mediator or disciplinary proceedings against the mediator, or to information which all parties to the mediation agree in writing, after the conclusion of the mediation, may be disclosed. The Parties may disclose information about the mediation to their respective attorneys, financial advisors, or counselors, and, in the case of a business or non-profit organization, those within the business or organization with a need to know, provided however that all such individuals shall be informed by the Party providing them with the information that it is confidential and governed by the terms of this Agreement. Unless the parties agree otherwise in writing, nothing in this Agreement shall prevent any party from offering an executed settlement agreement or signed memorandum of understanding resulting from the mediation to a court of competent jurisdiction for purposes of enforcement.

The assurance that I offer the parties, however, covers only one dimension of their risk in making disclosures to me and to each other – i.e., how the parties themselves are constrained from using mediation disclosures in litigation of the dispute that brought them to mediation. The other dimension – the parties’ vulnerability to third parties or to each other in the setting of another dispute – is beyond the scope of the confidentiality that I believe is available to them.

Accordingly, the work that the Uniform Mediation Act (“UMA”) drafters accomplished in setting forth a defined confidentiality provision will have an every-day application for mediators. The UMA, if it is widely adopted, will give mediators not only a clearer articulation of what the parties can expect of each other but also a higher degree of confidence about the extent to which their confidential information will be protected from the inquiries of third parties.

The UMA will also be useful to attorneys. Wearing my lawyer hat, I have received a number of inquiries over the years – perhaps a dozen or so – from (a) mediators who have been subpoenaed and (b) lawyers seeking to subpoena mediators. All of these inquiries have involved Massachusetts cases, and in most of them I have been able to dissuade the party seeking to subpoena the mediator by directing them to the Massachusetts statute cited above. The UMA – with its far greater clarity about the scope of confidentiality protection – will provide a higher degree of certainty about whether such subpoenas can be enforced. And however much one might wish that mediators could be relieved of all responsibility of testifying in cases in which they have been involved, there are always exceptional cases (such as a homicide in which the mediator was compelled to testify about evidence of domestic violence that came to light in the parties’ divorce mediation) in which such testimony is arguably appropriate.

The effort to address questions of this kind brought the drafters of the UMA to a complicated crossroads. Various theories about how mediation should be practiced meet public policy concerns advanced by those seeking to protect vulnerable third parties (such as children), constitutional rights of expression (such as the press), and the integrity of our judicial system (in which exclusionary rules are the exception). One could, perhaps, analogize the work of the UMA

drafters to that of a highway architect, trying to design an intersection that would allow all of these interests to proceed without more than the occasional collision. If we complain that the intersection seems complex, with too many fancy cloverleaves and overpasses, we will likely be met with the following response from the drafters: go ahead and try to design a simpler one.

The drafters deserve credit not only because of the magnitude of the task they took on, but also because of the participatory manner in which they managed the process. While the NCCUSL Drafting Committee's Chair, the Hon. Michael B. Getty, and its Reporter, Dean Nancy Rogers, have been rightfully lauded for their effective leadership of that process, the ABA's Reporter, Richard Reuben, is one of the unsung heroes of this major project because of his indefatigable efforts to make sure that every constituency and interest group was heard. In these efforts, Richard proved himself to be a mediator par excellence.

To be sure, reasonable minds may differ as to whether the UMA provides the best possible answers to the basic questions associated with the confidentiality of the mediation process. While I believe the Act is sound and should be widely enacted, I respect the many contrary views. The Act is complicated – perhaps necessarily, but nonetheless the complexity will make it difficult for the parties and work-a-day mediators (particularly those without law degrees) to use. The catch-all “public interest” exception will likely prove to sweep too broadly, lead to litigation, and may even deter some from using mediation from the outset.

On one point, however, I believe most mediators would agree: the parties to a mediation, as well as the mediators themselves, are better off with some degree of certainty about how mediation will be treated by our legal system. A uniform act is, for that reason, a step in the right direction, even if it leaves some questions unanswered.

Perhaps the most important of those questions is credentialing. The UMA wisely leaves to others the job of determining who can and cannot call themselves a “mediator.” For purposes of invoking the UMA's protection, the parties may use anyone “who holds himself or herself out as a mediator.”³ While this may seem to be an alarmingly low standard, it leaves the door open to others – such as professional organizations of mediators, the courts, and legislatures – to fill the void. Efforts to do exactly that are under way and will no doubt gather momentum in the years ahead.⁴ However, the complexity of the questions posed by this important task (such as who does the credentialing, what standards should apply, and should they vary from one type of mediation to another) strikes me as at least as daunting as the many puzzles and dilemmas encountered by the drafters of the UMA.

Another important aspect of mediation that the UMA drafters left largely untouched is ethical standards. Professional organizations in the field – such as the American Arbitration Association, the American Bar Association Section of Dispute Resolution, and the Association for Conflict Resolution – have already

3. Unif. Mediation Act § 3(3), 7AII U.L.A. 74 (Pocket Part 2002).

4. For a current report on these efforts, see ABA Section of Dispute Resolution, *Report on Mediator Credentialing and Quality Assurance* <http://www.abanet.org/dispute/taskforce_report_2003.pdf> (accessed March 14, 2003).

developed standards of practice,⁵ and therefore there seem to be few if any voices advocating for statutory codification of ethical rules that, by their nature, benefit from promulgation and on-going refinement by practitioners. The one exception – a sound one, in my view – is the UMA’s requirement that mediators disclose 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.”⁶ This duty of disclosure, which is already a part of existing codes of ethics for mediators, deserves more uniform treatment and does not implicate the intricacies of mediation practice; instead, the disclosure requirement helps assure the integrity of the process and a level playing field.

There are those in the field of mediation who bemoan the standardization and “legalization” of mediation. They are concerned that the true spirit of mediation – the magic of it, if you will⁷ – will be extinguished by elaborate statutory schemes (such as the UMA) and systems for credentialing mediators. I am sympathetic to those concerns. I was trained by community mediators and conducted my first mediations at the Community Dispute Settlement Center in Cambridge, Massachusetts. I have experienced the transformative potential of the mediation process – moments in which deep emotional chasms were bridged and there was not a dry eye in the room. I recognize that for some mediators whose orientation is transformative⁸ or community-based,⁹ the UMA might seem less like an elegantly designed intersection and more like what Joni Mitchell described in her song about “paving paradise and putting up a parking lot.”¹⁰

From my vantage point, however, the field of mediation is no garden of Eden. There are mediators who hang out shingles but have never been trained. There are others who practice a strong-arm form of mediation that more closely resembles private judging. And there are others still who (contrary to well established ethical principles) fail to disclose the fact that they get a high volume of repeat business from one of the parties to the case. In each of these situations, it is not only the interests of the parties that are at risk – the field of mediation itself is in jeopardy.

I strongly agree with those who say that lawyers should not be permitted to exclude those who lack a law degree from practicing mediation.¹¹ However, the

5. See Am. Arb. Assn., ABA & Socy. For Prof. in Disp. Resol., *Model Standards of Conduct for Mediators* (1995). The Society for Professionals in Dispute Resolution has now merged into the Association for Conflict Resolution <<http://www.abanet.org/dispute/modelstandardsofconduct.doc>> (accessed March 14, 2002).

6. Unif. Mediation Act § 9(a)(1), 7AII U.L.A. 91 (Pocket Part 2002).

7. See e.g. Albie Davis, *The Logic Behind the Magic of Mediation*, 5 *Negot. J.* 17, 20 (1989).

8. See e.g. Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994).

9. For information and resources on community mediation, see Natl. Assoc. for Community Mediation <<http://www.nafcm.org>> (accessed March 13, 2002).

10. Joni Mitchell, *Big Yellow Taxi* (Warner Bros. 1970) (“Don’t it always seem to go, that you don’t what you’ve got til it’s gone. They paved paradise and they put up a parking lot.”).

11. In 1999 the ABA Section of Dispute Resolution adopted a resolution opposing such efforts (“the eligibility criteria for dispute resolution programs should permit all individuals who have the appropriate training and qualifications to serve as neutrals, regardless of whether they are lawyers”).

complexity of the UMA does not limit the field of mediation to lawyers. We live in a highly regulated society in which many of our day-to-day activities are regulated by codes far more complicated than the UMA. We may need someone to turn those codes into plain English (just as few of us could figure out how to pay our taxes if all we looked at was the Internal Revenue Code), but a clear articulation of the law, in a manner that a court would find readily enforceable, advances the field of mediation. Thus, notwithstanding its complexity, the UMA addresses an important set of real-world needs of the many users of mediation, whether they are business partners wrestling with each other over tax liabilities or divorcing spouses.

The debate that lies ahead, as each state decides whether to adopt the UMA, creates an opportunity for the field of mediation. And while there may be a temptation on the part of those who believe that the UMA is anathema to the magic or spirit of mediation to throw sand in the gears of legislative machinery, I invite them instead to use the debate as an opportunity to improve the field – for example, by identifying the best ways to fill the gaps intentionally left open by the UMA drafters in such areas as ethics and credentialing. Mediators, lawyers, legislators, and the public share an interest in preserving the integrity and effectiveness of mediation, and that shared interest should inform these future discussions on which the future of mediation in this country may turn.