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Major Step Forward

Proposed Uniform Mediation Act goes public for comments

By Richard C. Reuben and Nancy H. Rogers



The move toward a simplified and uniform law for mediation takes an important step forward this summer, with the release of the first integrated draft of the proposed Uniform Mediation Act.

ADR Law & Policy

The act is being drafted by cooperating committees of the American Bar Association Section of Dispute Resolution and the National Conference of Commissioners on Uniform State Laws. If enacted and adopted uniformly, it would replace the hundreds of pages of complex and often conflicting statutes across the country with a few short pages of simple, accessible, and helpful rules.

Strong confidentiality protection

The protection of mediation confidentiality is the centerpiece of the act. There are currently more than 250 state mediation confidentiality statutes, most of which vary greatly in terms of scope and application, even within a single state. While virtually all states have enacted some form of confidentiality protection, only about half have enacted confidentiality laws that apply to most mediation sessions; the rest provide protection only to certain mediation programs. The result is that many mediations in this coun-

try today operate without any specific statutory protection for confidentiality.

The UMA would mend these holes in our national statutory fabric by providing for a strong confidentiality privilege for mediators and participants in mediation in a variety of contexts, subject to certain specific exceptions. If widely adopted, uniform confidentiality protection would be particularly important for mediators with multistate practices, as well as participants negotiating a dispute that might lead to adjudication in another state. Under current law, a mediator could mediate a case where the confidentiality law is highly protective, but still be compelled to testify about that mediation in a state that has low protection. A uniform law would make clear that the same protections apply regardless of where the evidence is sought.

The proposed act also seeks to help assure the fairness of mediation, both in fact and in perception. In short, limited provisions, it requires the disclosure of mediator qualifications and conflicts of interest if requested by a party, renders invalid a mediator's contractual waiver of civil liability unless such immunity already has been authorized by the state, and assures disputants the right of representation. The act also includes, for public discussion only, several bracketed items, as well as novel provisions that call for the enforcement of agreements to mediate and mediation settlement agreements.

Some early criticisms

Early feedback suggests strong support for the measure within the mediation community. However, it also indicates some meaningful concern about at least two key aspects of the act: the structure of the confidentiality provisions, and a "manifest injustice" exception.

The drafting committees have pre-

liminarily decided to structure the confidentiality protection in the form of a privilege that can be asserted by the disputants or the mediator. This approach tracks the general rule for the protection of professional relationships, as well as the majority of confidentiality statutes in the states. The privilege protects expectations of confidentiality at trial, in discovery, at administrative or other proceedings, and in other environments. The narrow tailoring of a privilege also meets the fair and persistent concerns among courts and legislatures about the exclusion of too much relevant evidence on so-called "policy" grounds. Still, the privilege has been criticized by some who would prefer a simpler rule rendering any evidence about a mediation communications inadmissible as a class of evidence in the litigation process, and not subject to discovery.

Even more controversial has been a confidentiality exception that gives judges the discretion to lift the veil of privilege in the truly exceptional situations that the application of the privilege would constitute a "manifest injustice" (typically after an in camera hearing). This exception provides a hedge against unforeseen circumstances, and has been used in the federal administrative context and in a few states. But it has been criticized because it adds a degree of uncertainty regarding confidentiality protections in some cases.

Feedback welcome

The issues in drafting a uniform law for mediation are complex and can easily lead reasonable minds to disagree – despite substantial agreement on the need for at least minimal uniform protections. The drafters recognize that the provisions of the first integrated draft and comments can certainly be improved. The drafting committees welcome your feedback on these and the other issues addressed by

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the UMA: disclosure, contractual immunity, and enforcement to name just a few. The full act and comments, related information, and comment opportunities are also available on the project's web site, at www.pon.harvard.edu/guests/uma.

When suggesting changes or new provisions, commentators may want to keep in mind the drafting committees' philosophy of simplicity, flexibility with regard to mediation style, orientation, and application, and the avoidance of matters best left to practice standards.

The drafting committees expect to

Comments Sought By Oct. 1, 1999

For optimal consideration, formal comments should be received by Oct. 1, 1999. They should be sent to Richard C. Reuben, Reporter for the ABA Drafting Committee, Harvard Law School, 506 Pound Hall, Cambridge, Mass., 02138 (rcreuben@law.harvard.edu; phone: 617-495-1684, ext. 546; fax: 617-495-7818, and Nancy H. Rogers, Reporter for the NCCUSL Drafting Committee, Ohio State University, Office of Academic Affairs, 203 Bricker Hall, 190 N. Oval Mall, Columbus, OH, 43210 (rogers.23@osu.edu; phone: 614-292-5881; fax: 614-292-3658).

meet again in the fall, winter and spring of 2000, before forwarding a final draft to NCCUSL for final approval in July 2000. If approved by NCCUSL, it would be forwarded to the ABA House of Delegates for consideration in February 2001. If approved by both organizations, the act would then be forwarded to the individual states for consideration.

The Uniform Mediation Act presents an unprecedented opportunity for the nation's mediation community to elevate the field by working together to craft minimal but meaningful protections for the process and its participants. We look forward to hearing from you.

PROPOSED UNIFORM MEDIATION ACT (1999)

SECTION 1. DEFINITIONS. In this (Act):

- (1) "Disputant" means a person that participates in mediation and:
 - (A) has an interest in the outcome of the dispute or whose agreement is necessary to resolve the dispute, and
 - (B) is asked by a court, governmental entity, or mediator to appear for mediation or entered an agreement to mediate that is evidenced by a record.
- (2) "Mediation" means a process in which disputants in a controversy, with the assistance of a mediator, negotiate toward a resolution of the conflict that will be the disputants' decision.
- (3) "Mediation communication" means a statement made as part of a mediation unless the disputant would not be reasonable in expecting that the communication is confidential. The term may also encompass a communication for purposes of considering, initiating, continuing, or reconvening a mediation or retaining a mediator.
- (4) "Mediator" means an impartial individual appointed by a court or government entity or engaged by disputants through an agreement evidenced by a record.
- (5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.
- (6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (7) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

SECTION 2. CONFIDENTIALITY: PROTECTION AGAINST COMPELLED DISCLOSURE; WAIVER.

- (a) A disputant may refuse to disclose, and prevent any other person from disclosing, mediation communications in a civil, juvenile, criminal misdemeanor, arbitration, or administrative proceeding. Those rights may be waived, but only if waived by all disputants expressly or through conduct inconsistent with the continued recognition of those rights.
- (b) A mediator may refuse to disclose, and prevent any other person from disclosing, the mediator's mediation communications and may refuse to provide evidence of mediation communications in a civil, juvenile, criminal misdemeanor, arbitration, or administrative proceeding. Those rights may be waived, but only if waived by all disputants and the mediator expressly or through conduct inconsistent with continued recognition of those rights.
- (c) There is no protection under subsections (a) and (b):
 - (1) for a record of an agreement by two or more disputants;
 - (2) for mediation communications that threaten to cause another bodily injury or unlawful property damage;
 - (3) for a disputant or mediator who uses or attempts to use the mediation to plan or commit a crime;
 - (4) in a proceeding initiated by a public agency for the protection of a child or other member of a class of individuals protected by the law, for communications offered to prove abuse or neglect;
 - (5) if a court determines, after a hearing, that disclosure is necessary to prevent a manifest injustice of such a magnitude as to outweigh the importance of protecting the confidentiality of mediation communications;
 - [(6) for communications evidencing professional misconduct in a report required by law to be made to an entity charged by law to oversee professional misconduct.]
 - [(7) to the extent found necessary by a court, arbitrator, or agency if the disputant files a claim or complaint against a mediator or mediation program.]
 - [(8) in a proceeding to establish the validity, invalidity, enforceability, or unenforceability of an agreement evidenced by a record and reached by the disputants as the result of the mediation.]
 - [(9) to the extent found necessary by a court or administrative agency hearing officer if a person who is not a disputant and to whom a disputant owes a duty files a claim or complaint against the disputant related to the disputants' conduct in the mediation.]
- (d) Information otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use in mediation.

SECTION 3. CONFIDENTIALITY: PROHIBITION AGAINST DISCLOSURE BY A MEDIATOR.

- Unless disclosure is permitted under Section 2, a mediator may not:
- (1) disclose mediation communications to a judge or an agency or authority that may make rulings on or investigations into a dispute;
 - (2) make any report, assessment, evaluation, recommendation, or finding representing the opinions of the mediator to those persons described in paragraph (1); or
 - (3) disclose mediation communications to the general public.

SECTION 4. QUALITY OF MEDIATION.

- (a) A mediator shall disclose information related to the mediator's qualifications or possible conflicts of interest if requested by a disputant or representative of a disputant.
 - [(b) Unless immunity from liability is extended to mediators by common law, rules of court, or other law of this state, a contractual term purporting to disclaim a mediator's liability is void as a matter of public policy.]
- (c) A disputant has the right to be represented at any mediation session. A waiver of representation before mediation is ineffective.

[SECTION 5. ENFORCEMENT OF AGREEMENTS TO MEDIATE, MEDIATED AGREEMENTS.

[This section is presented for preliminary discussion only, and would amend the Uniform Arbitration Act to provide for the enforcement of contractual agreements to mediate as well as the confirmation of mediated settlement agreements.]