UMA: Some Roads Not Taken, The

Joseph B. Stulberg

Follow this and additional works at: https://scholarship.law.missouri.edu/jdr

Part of the Dispute Resolution and Arbitration Commons

Recommended Citation
The UMA: Some Roads Not Taken

Joseph B. Stulberg

I. INTRODUCTION

The Uniform Mediation Act\(^2\) (hereinafter "UMA" or "Act") and its remarkable commentary is a significant milestone in the growth of mediation in the United States. Its strengths are broad-based and important. While there are individual substantive provisions that remain controversial and, from my perspective, undesirable, I would urge any state legislator to cast a favorable vote on the statute in its final form.

Yet, there is something significant missing from the Act. What is it?

The UMA drafters tried to address only that matter - confidentiality - they felt was both important and best addressed by a uniform statute. That laudable approach raises two questions: first, what topics did the drafters choose not to address and are those matters more important to the practice of mediation than confidentiality? Second, in developing the statutory scheme to deal with confidentiality, did the drafters develop provisions or render judgments about the mediation process that will shape or eliminate possible answers to those topics that were not the central focus of the Act? I want to place these questions into a broader context of analysis: what vision of the mediation process and what "quality of justice" experience might persons have who will participate in a mediation conducted under the aegis of the UMA? I explore that question by analyzing what the drafters chose not to emphasize in the statutory scheme, for sometimes examining what persons believe to be either tangential or unimportant to the statute helps make salient those fundamental values or visions that govern their aspirations for the statutory initiative itself. I believe the result of such an analysis warrants drawing the following conclusions about the UMA, stated in their most critical form: first, the UMA does not sufficiently support and advance the fundamental right of persons to decide together about how to deal with their differences; second, in some instances, the UMA permits states to compromise the very value - neutrality - that enables mediation to be an effective dispute resolution process within a rule of law regime. The disturbing outcome is that participants in the mediation process conducted under the UMA umbrella might experience a dispute resolution process that is as alienating and as polarizing as what persons, perhaps stereotypically, experience in a conventional adversarial dispute resolution procedure.

I do not want to overstate my claim. There is nothing in the UMA that precludes conducting a mediated conversation in a manner consistent with what I frame below as a "robust vision" of the mediator's role. The Act, however, does

1. Professor of Law and Director, Program on Dispute Resolution, Moritz College of Law at The Ohio State University. Member of Faculty Advisory Group for UMA project.

not provide sustained support for it and, more seriously, appears to license the type of intervener behavior that I believe is inconsistent with basic process goals. Hence, I am conjecturing - though I do not believe it is "idle conjecturing" - as to how parties, representatives, and the mediator shall conduct their mediation conference under the vision of mediation embedded in the Act; it is a vision, I believe, that diminishes rather than promotes mediation's salient values.

II. VISION OF MEDIATION

The Act defines mediation as "...a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." That definition captures many pictures of how people might reach agreement regarding their dispute. Consider two examples. First, an employee sues her employer, claiming that she was a victim of sexual harassment in violation of relevant state and federal anti-discrimination statutes. The parties meet in mediation. The mediator, as is typical in such cases, conducts the conversation with intensive caucus use; the plaintiff, having been persuaded by the mediator that her claim lacks any merit whatsoever and shall almost certainly fail in court, "voluntarily agrees" to drop her action. In the Act's language, they have "reached a voluntary agreement regarding their dispute." Second, a high school senior complains that the faculty advisor for her school newspaper improperly prohibited the publication of her editorial in which she criticizes the school faculty and administration for over-reacting to allegations of student drug use. She agrees to meet with the faculty advisor in mediation prior to filing a lawsuit against the school. During the mediation, the mediator persistently reminds the student and her lawyer that whatever her aspiration, there is little likelihood that she will succeed with her legal claim that the school cannot censor "free speech" in that manner. The mediation ends with the student agreeing to drop her complaint. Again, the parties have "reached a voluntary agreement regarding their dispute."

What is disturbing about the pictures of the mediated conversations in each of these situations? While it is certainly possible that the participants confidently, knowingly, and with utmost personal dignity resolved their controversies in the manner described above, it is equally plausible to envision different and more troubling scenarios: the plaintiff in the employment setting, rather than "reaching a voluntary agreement," simply resigned herself to that outcome; feeling unsupported by her counsel and the mediator, and despairing of what she perceives to be the inadequacies of "the system" (as she understood what the law did or did not allow), she "agreed" not to proceed. Similarly, the student might not so much have "agreed" to the outcome as she chose simply to be submissive and "obedient" to the "adults" in the room, including the mediator. Even under these latter scenarios, however, the mediator, according to the UMA, served the parties successfully. Why is that conclusion cause for concern?

4. See Hazelwood School Dist. v. Kuhlmeier et al, 484 U.S. 260 (1988) (holding that a school district official is entitled to regulate in a reasonable manner the contents of a student newspaper that is supported by school).
The troublesome element in each of these pictures is that the dialogue process described has, as its overriding dynamic, an intervener who is trying as constructively as possible to persuade or convince one (or more) participants to agree to abide by an independently established rule. That intervention posture is one of a compliance officer; it is not someone who, in the important phrases of the Commentary, promotes "informed self-determination" and "autonomy." I believe that a robust vision of mediation systematically supports the notion that a mediator assists parties to a controversy: (a) develop an improved understanding of their situation, and (b) based on that understanding, (i) collectively develop options to structure their relationship (or its termination) that (ii) each embrace. This robust vision is embodied in the very domain of mediation practice that the Act excludes from coverage.

Section 3 (a) establishes the UMA’s scope of application. While the Act’s application is quite far reaching in important respects, its first exclusion is the following:

(b) The [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement.

How do the drafters defend this restriction on scope? The Commentary states: "Collective bargaining disputes are excluded because of the longstanding, solidified, and substantially uniform mediation systems that already are in place in the collective bargaining context." What "longstanding" system is in place? A brief history is warranted.

"Collective bargaining" is itself a legal term of art that references an important practice in the distinguished history of private sector labor-management relations in the United States. Section 7 of the National Labor Relations Act as amended guarantees to employees in the private sector the right to "bargain collectively through representatives of their own choosing." The statutory language describes in skeleton form its vision of collective bargaining:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in

5. For a discussion of these varying approaches to intervention, see Joseph B. Stulberg, Taking Charge/Managing Conflict 5-9 (Wooster Book 2001).
7. Id. at 167, 190.
9. Unif. Mediation Act § 3(b) (1), (2), 7a U.L.A. Supp 74, 75.
good faith with respect to wages, hours, and other terms and condition of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. 12

To assist parties in making the collective bargaining process succeed, Congress created the Federal Mediation and Conciliation Service (FMCS) in 1947 to provide direct, third-party mediator assistance to parties engaged in negotiation. 13 FMCS has enjoyed an illustrious history of providing capable interveners to assist parties locked in bargaining impasses to reach a mutual accommodation.

The use of collective bargaining (or “collective negotiations” as frequently referenced in statutes) among public sector employers and their employees began to emerge in the 1960's when a limited number of states adopted statutes affirming a public employee's right to join a union and to engage in collective negotiations with their employer over targeted employment conditions. 14 A scenario similar to the approach created under the NLRA developed: as various groups of employees - teachers, recreation workers, clerical staff, and law enforcement officials - gained, in varying degrees, the right to bargain collectively, the state identified “impasse procedures” 15 for the parties to use, creating modified versions of FMCS in the process. 16

Therefore, the UMA drafters are correct to note that there is an established, sustained history of practice of using mediation in the collective bargaining context, in both the private and public sectors. Why, though, does that warrant excluding mediation activities in these arenas from coverage of the Act?

The UMA’s primary purpose is to clarify whether statements made during a mediation can be used in a subsequent “proceeding.” It defines “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.” 17 If one is mediating a “case” that is characterized initially as involving parties to a lawsuit, then the UMA’s focus is straightforward and appropriate; the obvious BATNA 18 to an unsuccessful mediation is for parties to continue their litigation. But what is a “case” when

---

12. Id. §8(d).
14. A representative sample of such statutory approaches was the Taylor Law adopted in New York State in 1967. See N.Y. Civ. Serv. Law § 209-a (McKinney 1983). (For a full discussion of development and administration of this Act, see Public Sector Labor and Employment Law (Jerome Leffkowitz & al. eds., 2nd ed., New York State Bar Assn. 1988)).
15. Id. at §209.
16. In administering such statutes, an agency might complement a small full-time staff of paid mediators with a panel of individuals assigned to mediate cases on an ad hoc basis.
18. Roger Fisher, William Ury & Bruce Patton, Getting to Yes 97-106 (2d ed., Penguin Books 1991). The acronym, BATNA - Best Alternative to a Negotiated Agreement - refers to that standard against which a negotiator ought to measure the desirability of accepting any negotiating proposal. Id. at 100. The UMA paradigmatic “alternative” to a proposed settlement offer in mediation is the likely outcome a party would achieve as a result of the litigation process.
mediating a collective bargaining impasse? It is not a lawsuit; it is a negotiation. If parties do not reach agreement, they are free to engage in concerted activities - frequently, the creative use of economic power - to attempt to persuade their counterpart to agree to proposed settlement terms; they cannot, however, obtain through a trial the particular outcomes they offered their bargaining counterpart.\(^\text{19}\) Is this the critical difference that warrants exclusion? Of course not.

There are several "proceedings" in which statements made in a mediated collective bargaining session might be helpful. If a union, in an administrative proceeding, wants to try to persuade a trial examiner that the employer violated its statutory duty to bargain "in good faith," the testimony of a mediator describing what happened during the mediation process might be most helpful. Similarly, if, during a grievance arbitration, the parties contest the appropriate interpretation of a particular phrase in a provision of the collective bargaining agreement, the parties might wish to adduce the testimony not only of their own negotiators who developed the agreement's language, but also that of the mediator who helped fashion the settlement. Of course, no mediator is called upon to provide such testimony and, if they were, they would decline participation on the basis that the mediator's conduct is governed by considerations of confidentiality.\(^\text{20}\) That is precisely the result the UMA provides; excluding mediation of collective bargaining disputes from its coverage, then, cannot turn on the simple distinction that the UMA envisions as its paradigm case that of parties to a lawsuit who, by choice or reference, are participating in a mediation while parties involved in the mediation of collective bargaining disputes start from a different legal framework. The question remains: what is it about the "longstanding, solidified, and substantially uniform mediation systems that already are in place in the collective bargaining context"\(^\text{21}\) that warrants exclusion from UMA coverage?

The Commentary does not elaborate beyond the principle noted above. But that certainly is not adequate, for there were other domains of longstanding practice that UMA drafters either embraced as "best practice"\(^\text{22}\) or deemed inconsistent with "best practice" and developed provisions to prohibit it.\(^\text{23}\) So, simply referencing an established practice cannot be dispositive. We can speculate, of course, about other reasons both conceptual and political for this exclusion, but that, in the end, is probably of historical interest only.\(^\text{24}\) Rather, I focus on this scope exclusion and find it troublesome for one overriding reason: it


\(^{20}\) See *N.L.R.B. v. Macaluso*, 618 F.2d 51, 55 (9th Cir. 1980).

\(^{21}\) See *supra* n. 6, at 192.

\(^{22}\) See *Unif. Mediation Act § 6(a)(7)* and related commentary appearing in *supra* n. 6, at 218.

\(^{23}\) Unif. Mediation Act § 7(a) prohibits a mediator from making a report to a court providing an assessment of how the parties negotiated and what outcomes might be appropriate, thereby forbidding a practice made popular in California family court. Unif. Mediation Act § 10 (and commentary at *supra* n. 6, at 240.) overrides some state laws and practices that prohibit lawyers from being present in domestic mediation conferences.

\(^{24}\) I do not want to revisit the plausibility of various arguments advanced to the drafting committee by representatives from the affected constituencies, such as how the confidentiality provision might apply to each negotiating team discussing and getting constituent ratification of the proposed settlement terms.
exempts from coverage a domain of mediation practice that signals and reaffirms the central role that bargaining parties play in the mediation process.

A. Democratic partnerships

The Findings and Policies clause of the National Labor Relations Act includes the following:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining....\(^{25}\)

[A] sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of the employers and employees can most satisfactorily be secured by the settlement of issues...through the processes of conference and collective bargaining....[T]he settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for ...mediation...to aid and encourage employers and the representatives of their employees...to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining....\(^{26}\)

Central to this vision of the mediator’s role is that the primary, preferred method of establishing effective working terms to govern the employment relationship is through collective bargaining. That vision warrants repetition; the fundamental difference between the so-called “non-union” and “union” sectors is that, absent the presence of a certified union representative, an employer\(^{27}\) has the legal discretion to establish terms of employment as she sees fit. The discretion is not unlimited; an employer must comply with various federal or state anti-discrimination statutory guidelines. Market-place competition exerts significant influence on what wage scale and personnel policies an employer adopts; pro-actively, the non-union employer might try to promote effective employer-employee relations by developing or adjusting wage and personnel practices only after extensive consultation with multiple employee groups. But Congress, through the NLRA, boldly declared a different vision: the preferred method for stabilizing industrial peace, advancing the general welfare, health, and safety of the Nation, and promoting the best interests of the employers and employees is collective bargaining. Collective bargaining is not an “adjunct” to other processes, such as legislative action; it is not subservient to hierarchical decision

---

27. I am assuming a private sector context here; comparable practices, with suitable modification, applies to public sector labor relations as well.
making; it is not something to be tried but if not successful, a wise decision-maker shall determine what is to happen. Rather, collective bargaining is central. In the "union" setting, decisions regarding wages, hours, and other terms and conditions of employment must be reached collectively between the employer and employees. In this targeted, but unusually significant respect, the employer and employee are partners in the enterprise.

Why is this feature significant? If neither party to the conversation can unilaterally impose a decision on the other, or refuse to participate because it believes it can make persuasive arguments to a independent decision-maker who will rule in its favor, then both parties - the employer and employee representative - must, in a fundamental sense, address or treat one another with a minimum of respect. That posture does not foreclose parties from believing their bargaining counterparts are corrupt, short-sighted, or selfish; it does not prevent them from engaging in activities to try to change who the bargaining representative is (the collective bargaining version of a "regime change.") It does require bargaining parties, however, to listen to one another, consider the strengths and weaknesses of their counterpart’s proposals, and offer some rationale to sustain its position that is plausibly acceptable to the bargaining counterpart. Succinctly, noting that the threat of exerting raw power is not a sufficient reason for agreeing to a proposal, parties in a bargaining relationship must engage in a dialogue process in which they propose settlement terms that could be justified to others and that, in principle, others could not reasonably reject. Some commentators reference this type of dialogue interaction as embracing values of deliberative democracy; those tenets include a willingness to consider an opponent’s ideas and separate, where possible, attitudes of respect and concern for another’s well-being from strong disagreement about their proposed actions or policies.

This description of a dialogue or negotiation interaction, of course, probably strikes many as wishful thinking, naively optimistic, uselessly general, or, at best, prescriptive. What it is not, they might argue, is sufficiently tangible to be of service in helping actual negotiators develop settlement agreements to real controversies. What value, then, is there in pursuing this?

Contrast collective bargaining with an alternative dialogue form: making a legal argument to a third-party decision-maker. The thrust of conversation in that adversarial decision-making process is a presentation about entitlements; one person claims that the other’s conduct violates a duty owed and that remedies

28. Many faculty members working in a university environment view the notion of "shared governance" among faculty and administrators as embracing comparable values.

29. Some will quickly note that this overstates the case, since a private sector employer can, once the parties reach impasse, unilaterally impose the terms of her last offer. Given the difficulty of knowing when parties have bargained to impasse, the practical effect is that parties must bargain thoroughly before engaging in unilateral action. For a case illustrating these concepts, see ConAgra, Inc. v. N.L.R.B., 117 F.3d 1435 (D.C. Cir. 1997).

30. For a theoretical discussion of dialogue embracing these themes but grounded in a moral contractualism framework, see T. M. Scanlon, What We Owe to Each Other (Belknap Press 1998).

31. I believe the most compelling statement of the fundamental moral values and framework shaping citizen dialogue over contentious social policy matters is Amy Gutmann and Dennis Thompson, Democracy and Disagreement 52-164 (Belknap Press 1996). In my judgment, their comments describe the collective bargaining process, although they contrast bargaining with deliberation. Id. at 43. A more recent penetrating discussion of these matters is found in Henry S. Richardson, Democratic Autonomy (Oxford University Press 2002).
should be forthcoming. Although treating one’s adversary with respect is certainly possible within the adversarial system, it is not required. Adversarial argumentation licenses advocates to systematically ignore the consequences of their argument on the well-being of their adversary; within the framework of the rules, one adversary can humiliate or embarrass the opposing party without concern that that person’s predictably angry and hurtful response could undermine recovery on one’s claim. The advocate in no sense must view her counterpart as a partner, other than the broader framework of “partners” agreeing to participate in a public dispute settlement forum of the court. If one were to transplant that form of argumentation into a bargaining session, it would likely trigger a predictable, rapid impasse. Even if the content of proposed settlement terms were plausible, the advocate has complicated matters by introducing into his opponent’s thinking the notion that he does not have to be treated in such a derogatory, insulting manner. Failing to ground bargaining in values of fundamental respect of one another as important partners removes the required anchor for a constructive conversation.

The concept of “respect” among “partners,” then, is not too ephemeral to be of practical use. I do not want overstate the case: not all partners are “equal” in terms of their stature, influence, or role. The formal authority to make decisions over particular matters may still be spread along a “one person/one vote” principle, but the practical reality of matters is very much influenced by dimensions of power; when some partners have more power than others, the capacity to influence others to “agree” shifts. Nevertheless, unless everyone endorses the outcome, there is no resolution.

In addition to this notion of partnership, I believe the other central feature of the collective bargaining relationship established in the National Labor Relations Act relates to the notion of what constitutes the correct bargaining outcome.

**B. The “No Right Answer” Thesis**

A second central conceptual feature of collective bargaining that shapes the history of mediation practice in that domain lies in the answer to the question of what constitutes a “correct answer” to the resolution of each issue in negotiation. In the context of a civil trial - the presumptive paradigm of the UMA - the answer is straightforward (at least conceptually): there is an adjudicatory body - a court - established to provide answers to each legal cause of action asserted between the parties and to fashion remedies to implement its decision. That vision is foreign to the collective bargaining context: it is precisely the process of bargaining among partners that generates “the answer;” if they cannot do it through dialogue, then their issues, in important ways, have no answers.

32. I have had the privilege of mediating a number of collective bargaining impasse situations. I have always found it amusing - and wrong - to hear practicing mediators point to the collective bargaining relationship between labor and management as being the one domain of mediation’s use in which no one needs to worry (unlike, for example, mediating disputes in the family area) about there being a power imbalance among the parties.

33. I recognize that there are at least two types of exceptions to this statement in the real world: first, as noted supra n. 29, an employer, at point of impasse, can unilaterally implement the terms of its final offer. Second, while parties are negotiating about targeted issues but their current contract expires,
underscores is that the criterion for establishing what constitutes the “right” answer in collective bargaining is acceptability: whatever outcome is acceptable to the parties is the right answer for them. The mediator knows this and must shape her intervention strategies accordingly.

C. Collective Bargaining Values and Mediator Roles

If my portrayal of the fundamental values lacing collective bargaining is accurate - that the parties operate importantly with a sense of partnership and that there is “no right answer” for how matters should be resolved - a mediator operating in this environment who respects these values must, in my judgment, operate with a “robust” vision of the mediator’s role. The mediator enters with humility. Her goal is to assist partners in conducting a dialogue and developing a plan of action. Parties need not love one another in order to develop operative terms for working together, so it is not the mediator’s task to promote such “affection.” But the mediator, through her various tactics and behaviors, must be a consistent champion of the need for parties to treat one another with a level of respect that is at least minimally sufficient to cement their capacity to work with each other and be creative in developing settlement possibilities. It is meaningful and credible - not aspirational or pragmatic- to observe that the mediator’s role in promoting party autonomy and self-determination does not collapse to that of simply urging party compliance with a rule.

The UMA drafters removed this domain - and its “robust vision” of mediation - from the Act’s scope. How different from collective bargaining controversies - in the nature of their parties and possibilities of outcomes - are those situations that fall within the presumptive paradigm of the UMA? I would like to consider several different dispute settings, each moving sequentially closer to the UMA’s paradigm conflict, in order to assess whether the “robust vision” of mediation that supports a collective bargaining situation is applicable in these other areas. I conclude that a “robust vision” of mediation is not only a viable framework for addressing these matters, but also that it is the only plausible account of mediation that should be supported. I want to approach this discussion by first considering the UMA’s account and vision of the mediator’s role.

The Commentary to the UMA’s definition of mediation states that the word “facilitates” is “...not intended to express a preference with regard to approaches of mediation. The Drafters recognize approaches to mediation will vary widely.”34 This, of course, is a deft reference to the recent debate about facilitative/evaluative mediator orientations generated by Riskin’s grid.35 I believe that the facilitative/evaluative distinction proffered by Riskin is fundamentally flawed,36 as it is neither an accurate description of how many

34. See supra n. 6, at 181.
36. I have argued for this conclusion in Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock, 24 Fla. St. U. L. Rev. 985 (Summer 1997).
mediators operate nor plausibly defended at a normative level.\textsuperscript{37} Whether or not I am correct, the UMA drafters' decision to accept Riskin's distinction as meaningful bolsters its credibility by eliminating from the Act's scope of coverage that very domain of sustained, visible mediation practice in which the notion of "evaluative mediation" is fundamentally inconsistent with the values of self-determination and autonomy.\textsuperscript{38} There is no reason to revisit the merits of the facilitative/evaluative debate here; it is important to examine, though, what might be said about mediator "styles" that might help illustrate how mediators of collective bargaining disputes bear a family resemblance, if they do, to those who mediate controversies covered by the Act.

It seems commonplace to note that individual mediators have different intervener styles: our differing voice timbres, senses of humor, language ability, habits of decorum, degrees of patience, and range of human experience combine to shape our distinctive mode of interpersonal interactions. But do those style differences mean that persons who mediate do not share common or identical values regarding the role they are to perform?\textsuperscript{39}

One helpful approach to answering this question is offered by Stephen Sawicki.\textsuperscript{40} Assume that a typical personal injury case is referred to mediation. Sawicki observes that some mediators, given their experience in certain areas (law, education, business, etc.), quickly and sharply envision the parameters of the "end game" for those mediated discussions. The mediator, drawing perhaps on her own extensive litigation experience, familiarity with the court system, local bar and jury practices and the like, can visualize the "end game" in terms of possible judicial decisions or jury outcomes; those without that experience cannot do that. Sawicki's insight is not that the mediator who visualizes the end game quickly should tell the parties what to do (that is, he rejects the plausibility and desirability of Riskin's evaluative mediator). Rather, he insightfully observes that the mediator is likely to conduct the conversation in a way that shapes and moves the discussion somewhat expeditiously around those elements of the envisioned and conventionally predictable "end game." By contrast, those who do not envision the end-game as clearly are more likely to focus on getting parties to engage in a dialogue - i.e. focus on "process" - to stimulate discovery and collaboration among the parties. Therefore, a mediator's style is shaped by her personal characteristics, including her experience and background. She displays that style not by "asking questions" (facilitative) or "giving answers" (evaluative), but by

\begin{footnotesize}
\textsuperscript{38} While scholarly literature references varying approaches to mediator practice within the collective bargaining context, those orientations are utterly foreign to Riskin's evaluative mediator. See Deborah M. Kolb, The Mediators (MIT Press 1983), describing approaches to mediation used by interveners in collective bargaining environments.
\textsuperscript{39} As I hope will be or become clear, this discussion blends notions of practice - how one executes her role as mediator - with "concepts" of "what is mediation?" The result of blending these two perspectives is that it highlights, I hope, a fortuitous coincidence of two theses merging: for a broad range of disputes, the (1) practical impact of individual styles of mediation should be to promote (2) the values of self-determination and autonomy in the "robust mediation" vision discussed in the text. That approach would reinforce the distinctive role that mediation plays in a rule of law environment.
\textsuperscript{40} Mr. Sawicki is a nationally prominent mediator; in addition to his practice, he serves as Executive Director of the American College of Civil Trial Mediators. He shared these perspectives with me in a telephone conversation on January 30, 2003.
\end{footnotesize}
the degree of emphasis she places on the dialogue process itself to create a shared vision by the parties as to their possibilities. How might this insight help us?

What is the "end game" that the mediator of a collective bargaining impasse might visualize? Quite straightforwardly, the "end game" is constitutionally ambiguous. No one knows what will happen if the parties do not reach agreement. Unlike the mediator of the personal injury case, the mediator in collective bargaining is confronted with negotiators who are partners and for whom no external decision maker - judge or jury in whose shadow one is negotiating - is available to dictate an answer if they fail to reach agreement. So the mediator in this context, on Sawicki's analysis, focuses heavily on discussion, dialogue, and exploration with the confidence that it might lead to shared outcomes. The values of self-determination and autonomy are prominently reinforced because the mediator, perhaps humble to the core, recognizes that she cannot "scope" out the outcome. In practitioner lingo, the less one can visualize the "end game," the more one's mantra is: "I don't know where it's going - just have faith in the process."

With this framework, I now examine several different dispute settings, each moving sequentially closer to the UMA's paradigm conflict, in order to assess whether the "robust vision" of mediation that supports collective bargaining situations remains.

a. Social challenges with political ramifications

Private medical doctors in New Jersey engage in a collective job action: they agree not to provide normal medical services to their private patients in order to trigger conversation among legislators, insurance companies and bar leaders about what they perceive to be the malpractice insurance premium crisis in their state. If a mediator were invited to assist in those negotiations, the values governing the conversation replicate collective bargaining. There is no bargaining in the shadow of the law; the BATNA is not litigation, and no mediator could visualize its "end game." So, the mediator would target her efforts to make certain that appropriate stakeholders participated in the process, that issues were identified in a comprehensive manner, and that parties used their creative capacities to address and shape responses to challenging social problems.

b. Social controversies with related litigation

The central concerns shaping many social controversies are visible to all; those concerns often get relegated to a subsidiary position when parties get enmeshed in satellite litigation. Our long-standing social controversy over abortion frequently erupts when abortion opponents picket service providers. If there are physical skirmishes among the picketers and providers, the legal issues become trespass or assault and battery. If pro-life advocates believe a service provider is delivering services in violation of a parental consent requirement, it will initiate litigation to prohibit that targeted practice. For each such instance, the

legal causes of action can be clearly stated; yet, in each of them, the governing social controversy that frames their context is reasonably straightforward to understand,”\(^{42}\) and is notably absent from the radar screen in dealing with the particular legal challenges. However, if we were to rewind the tape and had a mediator invited to intervene on the picket lines to manage negotiations between representatives of pro-life and pro-choice persons, the negotiating agenda and dynamics would not resemble the litigation, but be comparable to those of collective bargaining. The mediator might invite persons to negotiate over matters that could include whether any services should be available,\(^{43}\) what services to provide, if they were to go forward, and what guidelines should govern the conduct of those persons protesting the service delivery. The mediator would not likely be able to visualize an “end game” on these matters; instead, she would emphasize the discussion process and deliberation. The more challenging inquiry is: if one of the “litigated” cases was referred to mediation, would the mediator visualize the “end game” and move the discussion in that direction, or invite, encourage, or prod the litigants to consider the broader themes? This, of course, is what Riskin’s grid captures as the horizontal axis that assesses defining a problem, ranging from narrow to broad. If the mediator chooses not to view the litigants as partners in an on-going democratic dialogue who themselves must develop settlement results, then the mediator, operating under the UMA, can claim to promote self-determination and autonomy through efforts to have parties agree to comply with the relevant statutory provision.

c. Litigation involving multiple parties.

Consider a group of tenants in a housing development who, to protest unsanitary living conditions in their units, engage in a rent strike. The landlord seeks payment of rent, and possibly eviction of some or all tenants. The matter is referred to mediation. Can the mediator, in Sawicki’s words, quickly visualize the “end game”?\(^{44}\) A challenging task, though perhaps not impossible. But were she to do so, would there have been opportunities lost? There appear to be many matters to address, with multiple opportunities for partnering: developing safe recreational space for children, establishing tenant patrols to insure safety, creating joint oversight committees to insure compliance with commitments to deliver basic services, and the like. Most mediators, I hope, would quickly see such opportunities and develop joint discussion about those matters. Though elements of the controversy are framed as legal causes of action, those terms provide a roadmap for addressing multiple matters; people will need to bargain as partners to rectify their concerns. And there is no one “right” answer for how each of the several matters are to be resolved.

These same features - where the legal framework provides a roadmap rather than an answer book - arguably characterize controversies ranging from complex construction controversies to reasonably “routine” marital dissolution cases. If

---


43. Of course, the service provider would predictably state that providing services was “non-negotiable,” but that just highlights the challenge of whether or not an agreement could be reached, not what vision of mediation shaped the mediator’s intervention.
that is so, then their impact on the mediator’s role should be comparable: the intervener should respect the participants as partners in an enterprise that, in some meaningful sense, is shared, and work to trigger conversations that spark discussion about possible answers that parties believe are responsive to their concerns.

\[d. \text{Conventional litigation (a)}\]

A plaintiff files a private action against her employer, claiming she was terminated from employment on account of her sex in violation of state and federal anti-discrimination statutes. The parties and their counsel agree to meet in mediation. In this setting, the statutory provisions arguably provide more stringent guidance than those “roadmap” situations considered above. The strength of the Plaintiff’s claim is importantly fact-intensive; it certainly appears that a mediator with suitable experience could visualize the end-game. Is there any plausible sense in which the parties to such a controversy are “partners” searching for a solution? They are not postured that way initially; each seeks a vindication of their legal rights, which in no way requires them to be polite or respectful of one another’s situation. The law, unlike the National Labor Relations Act, does not require a joint effort to work out such matters. So why should they, alone or at the mediator’s urging, view one another as partners in any sense? This question, I believe, highlights mediation’s distinctive values effectively reinforced by Bush and Folger: self-determination and empowerment involves the exercise of one’s capacity to articulate relevant concerns, and recognition grounds interpersonal communication in an ethical norm that guides each party to recognize their counterpart as a moral agent worthy of respect and concern.\(^{44}\) Mediators who act to sustain those values would choose to invite parties to address their challenge as partners, much like the collective bargaining mediator. The mediator who works with parties to reach a voluntary agreement regarding their dispute but discards that framework is managing a conversation with different values.

\[e. \text{Conventional litigation (b).}\]

A party injured in an automobile accident sues the driver of the other car for damages; the case is referred to mediation. Some mediators who handle such cases describe these situations in the following way:

All participants to such a case - plaintiff, plaintiff’s lawyer, and the insurance adjuster - view such a matter as being strictly a money - numbers - game. There is no on-going relationship among the parties. The plaintiff wants the most he can get; the defendant wants to pay as little as possible. What these parties want - and need - is a mediator who

will rigorously explore with them the strengths and weaknesses of their respective case and get guidance from an informed mediator as to where the best prospects for voluntary resolution should be. 45

I respect - and bow to - those mediators with substantial experience in handling such cases who report this to be their experience. I have two reactions to it. First, I am skeptical of its accuracy for “all” such cases; my instinct is that there is a noticeable percentage of such cases that are more complex. Second, even if I am incorrect, the vision of mediation displayed by this stereotypical conversation about “money only” is certainly one for which the mediator, in Sawicki’s terms, could visualize the end game and move the parties towards that outcome. To compare it with the collective bargaining environment, the conversation appropriate for addressing this personal injury matter appears to have little room for any notion of partnership, and, within a range, there appears to be a “right answer” as to what the case is worth. The mediator who helps generates a settlement of such a case certainly assists the parties. To me, though, it is difficult to discern how her role differs from that of being a compliance officer or, more charitably, a consultant. But there is a role for this. I find it hard to believe, though, that this description of a neutral intervention was the UMA drafters’ driving vision of how a mediator promotes self-determination and autonomy among parties to a mediation.

I want to stress again that I do not believe the UMA prohibits mediators from structuring their conversation so that it invites parties to partner in their efforts to explore settlement options of their own making. By removing the mediation of collective bargaining from its scope, however, it eliminates a dominant area of practice in which mediation, as a dispute settlement process, is viewed as an independent, and not a subsidiary, method of dispute settlement. In so doing, the Act makes it more difficult to celebrate that approach as a distinctive or preferred approach. But the overall matter becomes more worrisome when considering another scope limitation and it is to a consideration of that matter to which I now turn.

D. Is Neutrality Important?

What values support the following provision of the UMA?

SECTION 3. SCOPE

(b) The [Act] does not apply to a mediation:

(4) conducted under the auspices of:

(A) a primary or secondary school if all the parties are students...

45. This is not a direct quote, but tries to capture the general themes of observations made to me by the professional mediators attending the annual conference of the American College of Civil Trial Mediators in Ashville, North Carolina on Oct. 14-15, 2002.
The Commentary candidly cites the value supporting this exemption from scope: peer mediation sessions are exempt from the Act’s confidentiality privilege:

...because the supervisory needs of schools toward students, particularly in peer mediation, may not be consistent with the confidentiality provisions of the Act. For example, school administrators need to be able to respond to, and in a proceeding verify, legitimate threats to student safety or domestic violence that may surface during a mediation between students.46

In this, and related sections,47 considerations of safety to other persons trump protecting the mediator and parties’ privilege.

This is a sensitive discussion; one clearly does not want to be apparently cavalier, insensitive, or harsh about such obviously important considerations as a person’s physical and emotional safety. So I proceed with caution. I want to highlight my concern about the Drafters’ exempting this type of mediation from coverage by considering the mediator’s perspective in the following hypothetical.

**Hypothetical**

The mediator is a high school senior; the disputants are two high school juniors. The disputants got into a fight on school grounds just before the school day began; a school counselor stopped it and demanded an explanation from the students; each replied: “nothing.” The counselor gave them a choice: go to peer mediation and work it out “so this doesn’t happen again” or be suspended from school for five days. The students chose mediation.

The mediation began at 9:00 a.m. and concluded at 9:45 a.m. During the mediation, the mediator declared a caucus. Student A, the instigator of the fight, revealed that he assaulted Student B because A’s sister, a 10th grader, had told him the night before that B had sexually raped her after school that day. In the caucus with Student B, B denied having raped Student A’s sister; he did acknowledge, though, that there had been four other boys with him that afternoon who had “taunted” A’s sister into having sex with one of the other guys (a 22 year old) while the rest of them watched. B does not know why the girl is accusing him of having had sex with her, but he does not want to say anything for fear getting himself, and others, into trouble.

In the subsequent joint session, B simply told A that his sister “was lying;” A threatened to beat up B for calling his sister a liar. The mediation session ended with B agreeing not to make any statements of a derogatory nature about A’s sister and A and B agreeing to refrain from having any verbal or social contact with one another on school grounds for the next two weeks.

---

46. See supra n. 6, at 194.
47. For example, Unif. Mediation Act § 6(a)(7) creates an exception to the privilege in those proceedings in which the communication is “sought or offered to prove or disprove abuse, neglect, abandonment or exploitation in a proceeding in which a child or adult protective services agency is a party.”
At 1:30 p.m. that afternoon, the school principal called the mediator into her office. Student A’s sister and mother had met with the Principal at noon that day, reported to her that B had raped the sister, and demanded action. When the Principal met with Student B at 1:00 p.m. and asked how he responded to the charges, Student B said: “Nothing to say, but like I told the mediator, it ain’t like she said it was.” The Principal demands to know what, if anything, was said in mediation that could shed light on this situation. What should the mediator do?

Under the UMA, the answer is clear: the conversation is not privileged. The student mediator has no legal basis for refusing to share this information with the principal. Is this cause for concern? Some persons, perhaps, do not see this as the dilemma that I do. They might say that for mediation conferences like this, the procedure is straightforward: assume the UMA governs. When the mediation begins, the mediator should inform everyone that what is said in mediation is not private, by which she means that what is said might have to be reported to the principal, and that everyone should proceed accordingly. If persons, having been put on notice, still discuss such significant matters, they know the consequences. What, then, is the tension?

The UMA drafters repeatedly assert that promoting candid conversations is desirable for developing workable settlement options; often, it is more than simply desirable - it is essential.48 People need to able to confide in someone without fear that those statements will return to haunt them. Practically, though, every practitioner knows that even when the intervener - a mediator - indicates that she would honor all confidences, no party immediately begins to share sensitive information with her. There must be a process of engagement, dialogue, and interaction that occurs to create a climate in which a person develops confidence and trust in the mediator so as to feel comfortable in sharing otherwise guarded comments. But it is even more than that.

A person becomes engaged and confident in confiding information to other people only when they know how that person might use the information; a person develops confidence in the person playing the mediator’s role in part because that mediator has assured that individual that she will not be judgmental about that information in a way that operates adversely to that person’s interests. The mediator’s commitment to being neutral anchors a party’s openness to sharing information; once that is clear, then the mediator’s promise to keep the information confidential serves to motivate the party, when she is comfortable, to share it. To state it differently, a person simply telling someone else that whatever is said to them will remain confidential is not sufficient to motivate that person to actually share the information; one must know the way in which the information might be used. A mediator’s commitment to neutrality insures the party that sharing information will not affect her in a way over which she has no control.49

48. Supra n. 6, at 168.
49. The following example might clarify this point. Suppose that Law student A is meeting alone with the Dean of Students to discuss Law student B’s charge that A stole B’s laptop computer. The Dean states: “Just tell me if it is true. I promise that I will not use your statement to initiate disciplinary procedures against you. If you took it, I’ll ask you to simply arrange for the machine to be delivered to my office and I’ll inform B to retrieve it; I’ll not indicate to B how I came into possession
If this description of how the mediation process and its various participants interact is accurate, and the UMA is designed to support that dynamic, what warrants the UMA treating the student mediator's interaction differently?

The Commentary cites the principle that a school supervisor needs access to such information to verify legitimate threats to the physical and emotional harm of others. While in other settings the UMA requires there to be a venue for determining the equivalent of whether or not there is a "legitimate threat" before piercing the privilege, the Act does not do so here; the UMA simply removes all such proceedings from its scope. Have we lost anything by this approach?

I grant that this might all be speculative, but it is troublesome nonetheless: among the things I believe lost in this approach is our confidence in and respect for the ability of a high school student to conduct conversations with their contemporaries in a way that promotes enhanced understanding among the affected participants and enables a peer to effectively engage her contemporaries in a problem-solving process. Under the UMA, everything these students say and do is subject to review by an adult. That paternalistic approach may be warranted when talking about asking a 10-year old "conflict manager" about what was said when she intervened between classmates who were pushing and shoving each other in the hallway; it is a much harder judgment to sustain, I believe, when the students are not only young adults, but also very likely to be the persons who are the most effective in getting their contemporaries to "open up" about things that are happening to them.

Grant, for discussion's sake, that my claim that this loss is significant is persuasive. In the scheme of mediation operating as a dispute resolution process in the broader community, how can I plausibly argue that confidentiality should weigh so heavily as to override safety concerns of innocent or vulnerable individuals? I believe the rationale is straightforward: but for the capacity of the intervener to develop a relationship of trust with the parties, cultivated by an atmosphere of conducting a private conversation among contemporaries, the student B in the hypothetical probably would not have shared that information with anyone. That is, it was the peer mediation forum that triggered the comments. Exempting that process from the UMA, then, takes on the sinister form of having supervisors use those individuals who might effectively engage the confidence and trust of the parties as a conduit for capturing information relating to the safety and security of others. Using an intervener - particularly a youthful intervener - as a spy is not, as a matter of public policy, consistent with supporting a dispute resolution process that is grounded in fostering mutual respect among the parties.

When the UMA supports exempting the mediator privilege in the name of public safety, it assaults the integrity of a mediator's neutrality. That choice of it." Would that assurance of confidentiality be sufficient to motivate the student to be candid with the Dean? I do not believe so, for what student A must calculate is whether the proposed deal - no disciplinary hearing and confidentiality - is attractive. But, of course, a mediator has no authority to strike a "deal"; she must be neutral with respect to outcome and has no authority to pursue other investigatory (and punitive) procedures to resolve the situation. Given that mediator posture, student A might comfortably choose to be candid with a mediator who is exploring precisely the settlement terms that the Dean was pursuing: arrange for the computer's return and confidentiality will be respected

50. The elements of such a procedure are set out in Unif. Mediation Act § 6(b).
shatters the fragility of the trust relationship between the mediator and a party. Most fundamentally, it signals a conviction that, in the end, mediation is not a parallel process of dispute resolution, but one that is subsidiary to the dominant legal system. Perhaps one was naive to believe that the situation was ever any different, but it is not naive when one reflects on what is so striking about the mediation of collective bargaining disputes: in that context, bargaining and mediation are dispute resolution processes that are parallel with, and not subservient to, the adjudicatory process.

III. CONCLUSION

We often reveal much about ourselves - our values and aspirations - by analyzing those aspects of living that we routinely minimize or choose to ignore; we treat those activities, concerns, and principles in that way because we do not believe they are central to our chosen style of life.

In that vein, I believe we can glean much about the visions and values of the mediation process promoted by the UMA by analyzing those domains of mediation activity its drafters chose not to include within its coverage. Such an analysis reveals that while the UMA has much to offer our citizens, mediator practice under the Act's umbrella, like everything else in a free society, could quickly reduce the process to a simple, power-dominated compliance hearing if concerned practitioners and scholars are not vigilant in their oversight.