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The Uniform Mediation Act: Upgrading Confidentiality in Mediation

by David A. Hoffman and Vicki L. Shemin

Twenty years ago Massachusetts enacted a mediation confidentiality statute, ch. 233, s. 23C ("Section 23C") – one of the first such laws in the United States. This year the Massachusetts legislature will consider a new law, the Uniform Mediation Act ("UMA"), which addresses the same topic. Is it time for a change?

In our view, the answer to that question is an emphatic "yes." During the past two decades, a complex patchwork quilt of state laws has developed in the field of mediation. Legislatures in the U.S. have enacted nearly 2,500 statutes concerning mediation. A uniform statute will enhance the usefulness of mediation, which is, to an increasing extent, practiced in multi-state settings.

To date, the UMA has been enacted in six states, introduced in six other state legislatures (pending in Massachusetts as HB-19 in 2004-05), and endorsed by the American Bar Association ("ABA").

Time for a Change

Although Section 23C has served lawyers, mediators, and the public well, it leaves unanswered a number of important questions about the confidentiality of the process, such as:

- *What communications are covered by confidentiality protection?* (Section 23C covers communications "made in the presence of [the] mediator" – but what about pre-mediation memos or email correspondence with the mediator?)

- *Who can assert or waive the privilege against disclosure?* (For example, what if both parties want the mediator to testify, but she does not wish to testify – can the mediator alone assert the privilege? Section 23C does not answer this question. Section 23C does not answer this question.)[1]

- *What exceptions are there to the privilege?* (If a mediator learns of child abuse or neglect but is not a mandated reporter, is she permitted to contact DSS? What if a mediator who is an attorney learns of ethical misconduct by

[1] In 2002, Massachusetts Appeals Court Judge Cynthia Cohen ruled in favor of upholding mediator confidentiality in Leary v. Geoghan, determining that Section 23C does not permit a party to compel a mediator to testify regarding mediation communications. The Court acknowledged that the statute is silent as to whether confidentiality ever may be waived, and if so, by whom.

one of the lawyers – does the duty to report such violations trump Section 23C?)

The UMA does a better job of answering these basic questions than our present statute. This article outlines the main contours of the UMA and seeks to assess its value for Massachusetts.

Why Confidentiality?

Confidentiality is, for many users of mediation, the *sine qua non* of the process. The success of mediation often depends on the parties' candor about their interests and their frank assessment of the strengths and weaknesses of their case. Confidentiality promotes trust, which in turns allows the mediator to explore with the parties the full scope of settlement possibilities. Without statutory protection, the confidentiality of mediation can be assured only by contract, and such contracts do not bind third parties.

As essential as confidentiality is to the mediation process, it is fundamentally at odds with an adjudicatory system that, by definition, favors consideration of all possible evidence. The challenge, then, is how to balance the value of confidentiality in the mediation process with other concerns – such as preventing harm to vulnerable third-parties and rectifying situations in which a party has engaged in misrepresentation in the mediation process. The UMA seeks to achieve such a balance.

The UMA: A Thumbnail Sketch

The UMA 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." The statute covers all mediations, regardless of whether the parties have signed an agreement to mediate or have been referred to mediation by a court or agency, except for labor-management mediations. (This same exception appears in Section 23C.)

The UMA's biggest contribution, and what can be described as its focus, is to codify confidentiality in mediation. The UMA offers a tiered system of privilege that appropriately treats the parties, the mediator, and nonparty participants differently. For example, any of the parties can insist on confidentiality, but if all of the parties waive the privilege, it is waived only as to their own statements – not those of the mediator or non-parties.

Exceptions to Confidentiality

The UMA also specifies certain exceptions from the privilege, such as (a) a written settlement agreement; (b) information that must be disclosed because of state open records or public meetings laws; (c) a threat of harm to an individual; (d) the planned commission of a crime; (e) evidence of abuse or neglect; or (f) evidence of professional misconduct by the mediator, one of the parties, or an attorney occurring

during a mediation. There is also what might be described as a catch-all provision that permits a court to consider, *in camera*, evidence that might be needed in a criminal case or in an action involving enforcement of a mediated settlement agreement; in such cases, the court must find that "the evidence is not otherwise available [and] there is a need for the evidence that substantially outweighs the interest in protecting confidentiality."

The UMA usefully clarifies the role of the mediator with regard to confidentiality. If asked by a court or agency about what has transpired in a mediation, a mediator may disclose only the fact that a mediation occurred, who attended, and whether there was a settlement. In addition, mediators cannot be compelled to testify about issues relating to the enforcement of the mediated agreement or the alleged professional misconduct of the lawyers or parties in the mediation.

UMA as a Boon to Massachusetts

The UMA was the product of several years of drafting by the ABA and the National Conference of Commissioners on Uniform States Laws. Hearings were conducted throughout the United States and revisions were made based on input from commercial mediators, community mediators, scholars, and practicing lawyers who use mediation. The final product is an improvement on existing law in Massachusetts and most other states.

Section 23C is vague in several respects. For example, it states that mediation communications are "confidential and shall not be disclosed" but does not explicitly say whether this protection applies to out-of-court statements as well as court testimony. The UMA resolves this question by creating a privilege – if the parties want to bar out-of-court statements, they may do so contractually in an agreement to mediate.

The most glaring omission in Section 23C is its lack of explicit exceptions to its mediation confidentiality provisions. This is not surprising, given the fact that Section 23C was adopted twenty years ago, when there was far less day-to-day experience with mediation. However, as many mediators intuitively understand, the interest of justice demands that certain mediation communications not be protected by the veil of confidentiality. Evidence of abuse of a minor, a risk of physical harm to self or others, the planned commission of a crime, or mediator malpractice are examples of areas where disclosure is warranted.

Some mediators in Massachusetts, particularly those who are mental health professionals, operate under the assumption that they are obligated by G.L. c. 119, § 51A to report instances of child abuse or neglect. However, Section 23C appears to directly conflict with this assumption, given its failure to exempt any type of mediation communication from its confidentiality protections, let alone require disclosure. The UMA directly addresses this question and gives mediators the right, but not the obligation, to disclose such matters. The UMA properly leaves to state legislatures, or Congress, the question of whether to require reporting of abuse or neglect and, if so,

under what circumstances. Clarity about these specifics will enhance the public's confidence in mediation as a much-needed alternative to litigation in appropriate cases.

In addition, the UMA better protects the public with regard to mediation ethics. Unlike Section 23C, the UMA requires mediators to disclose conflicts of interest and, upon request, their qualifications to serve as a mediator. Although there are court rules requiring such disclosures, those rules apply only to court-connected mediation programs. A far greater number of mediations occur outside the ambit of such programs. The UMA will give the force of law to basic ethical requirements that are well accepted by professional and community-based mediators.

A uniform law will also increase the confidence of lawyers and their clients about the confidentiality of mediation in cases involving multiple states. For example, the parties may be located in more than one state, the law governing their dispute may be that of Massachusetts or another state, and the underlying conduct that gave rise to the mediation may have occurred outside of Massachusetts.

UMA is Not a Panacea

The UMA is not without its shortfalls. For example, it does not answer (nor could it) the question of whether federal law can override the UMA's protection of confidentiality. Thus, it is up to the courts to decide whether, under the Supremacy Clause of the U.S. Constitution, the UMA can shield from disclosure information sought by federal enforcement authorities or evidence sought by individuals seeking to assert rights protected by the Constitution or federal law. In addition, the UMA is dauntingly complex, because it seeks to address the full range of situations in which some but not all participants in the mediation may wish to disclose what occurred in the mediation.

Another disadvantage of the UMA is that it does not specify a minimum amount of mediation training that a mediator must have in order to serve in that capacity. Section 23C requires 30 hours of training in mediation, although it is non-specific as to what such training should include. The drafters of the UMA decided that the statute should leave to the individual states a determination of such qualification issues. Massachusetts could, therefore, adopt the UMA and add to it the 30-hour training requirement. On balance, however, these concerns do not outweigh the value of the UMA as an improvement over Section 23C.

Conclusion

Because the wide variety of existing laws in Massachusetts and other states regarding confidentiality in mediation leaves many questions unanswered, the time for a uniform law appears to be at hand. The UMA will significantly improve the climate for mediating in Massachusetts as it codifies critical issues and concerns related to mediation confidentiality. It will thus benefit the people and businesses that utilize mediation by giving them greater certainty about what to expect from mediators and from the laws that protect the mediation process.

[David A. Hoffman is a mediator, arbitrator, and attorney at Boston Law Collaborative, LLC, and currently serves as chair of the ABA Section of Dispute Resolution. Vicki L. Shemin is of counsel at Boston Law Collaborative and currently serves on the boards of the Massachusetts Council on Family Mediation and the Massachusetts Association of Guardians ad Litem.]