

Mass UMA Working Group
February 22, 2007
FMCS Offices at 99 Summer St. Boston

Meeting Notes

Agenda:

- Subcommittee Updates:
 - Process
 - Mediator Definition
 - Confidentiality/Privilege
 - Public Sector
 - Legislative (if have met and can report)
- Other avenues for mediator certification
- Discussion with Stephen Chow
- Check in about where we are and where we are going
- Check-in regarding Mass Bar and Boston Bar Association representation
- Other issues
- Future meeting schedule

Attendees:

Josh Flax (facilitator), Peter Wilbur, Stephanie Craig, Linda Robbins, Sean Denniston, Susan Jeghelian, Ros Cresswell, Brian Blancke, Blair Trippe, Robin DiGiammarino, Vicky Bennet, Melissa Brodrick, Stephen Chow, Chuck Doran, David Hoffman, Arlene Kardasis; [By phone: Diane Levin, Warren Fitzgerald, Harry Manasewich]

Discussion:

Process Subcommittee Update

Melissa Brodrick distributed a *handout* from the prior meeting describing the role for the Process Subcommittee in facilitating general UMA working group meetings and developing community outreach to solicit feedback on a draft UMA, and outlining a process map for the UMA working group activities. Melissa indicated that in addition to developing the agenda for today's meeting, the Process Subcommittee has been working to clarify and ensure proper representation from the BBA and the MBA to this group, and to invite Uniform Law Commissioner Stephen Chow to attend our meetings.

The Process Subcommittee is looking for draft recommendations from the other Subcommittees for this month and next month with the goal of finalizing a document in April, which would then be sent out to the larger community for a response. The goal for today's meeting is to get a better sense of the legislative timeline for taking up the UMA. Outreach options (to be developed by the Process Subcommittee) can then be tied to timelines at the next UMA working group meeting. The Process Subcommittee has already started to identify stakeholder groups to be contacted for this purpose. Working group members with suggestions in this area should email them to Linda Robbins.

Check-in regarding Mass Bar and Boston Bar Association Representation

Warren Fitzgerald stated that he is filling in today for Brownie Swartwood, who is the MBA representative to this working group. Warren described Brownie's role linking information about this process from the UMA Working Group to the MBA and providing the MBA feedback to the working group.

Chuck Doran mentioned that he had spoken with both Bette Roth and Jeff Stern, who are members of the BBA ADR Committee about serving on this working group as representatives of the BBA. Jeff is interested in working with the group but is not sure that he will be serving in the role of BBA representative. Bette expressed reservations about attending the working group meetings and suggested that we provide her with our consensus document for feedback when we have it developed. Chuck will continue to explore this to clarify BBA involvement in this effort.

Discussion with Stephen Chow

Steve Chow, Uniform Law Commissioner, described the status of the UMA in Mass. He stated that there has been a complete change in committees considering the UMA since the last legislative session. The Bill is now in the Joint Committee of Labor and Workforce Development. Typically committee hearings are held in March but this is highly unlikely in this case. It is more likely that the UMA will be taken up in June or over the summer. Sometimes only a few individuals show up at these hearing to explain why they are proposing the uniform act legislation. Sometimes uniform acts sit in committee for a long time because they tend to be legally and technically-oriented, so there are not many stakeholders trying to push them through. The UMA Working Group can give input either when the hearing is assigned, either before, during or after the hearing. The Bill then has to go through the legislature to be enacted. He does not see this happening until sometime next year.

Steve reviewed the history of the UMA, mentioning that it is a relatively new act (approved by the ABA in 2002). The UMA was initiated because there are several hundred mediation-related local laws, and it was needed in order to encourage mediation among entities across borders. A big issue in drafting the UMA was having a privilege to encourage communication in the mediation process that was not subject to discovery in litigation. There was opposition from some trial lawyers who felt they should be able to get at this information for litigation purposes. In response to a question about public mediation issues, Steve said that the Commissioners decided to stay away from state's governmental functions and defer to state laws about public records and open meetings.

Regarding the definition of a mediator, the Commissioners consider the perspective of professional groups and users as stakeholders. The Conference of Commissioners came up with the decision not to have a "real" definition of mediator, but rather to put requirements on mediators to disclose their interests and qualifications.

Regarding the 30 hour training requirement that is under consideration in this working group for insertion into the definition of mediator, Steve proposes a compromise. Speaking as a user of mediation in the commercial context, he has seen how users sometimes want to hire someone with scientific or technical expertise to mediate a dispute who is not a professional mediator, i.e., who has not had training or does not meet the definition of a mediator under Ch. 233, s. 23C. The compromise is that if they mediate with such a mediator, the parties

would still have the privilege under the UMA, but the mediator would not. Only mediators who have the required training could assert the privilege.

The interest behind the UMA is to encourage the use of mediation and make it predictable across jurisdictions for interstate parties, and not to use the UMA as a vehicle for promoting the profession. They want to encourage the ad hoc, informal use of mediation, not just for big intellectual property cases and corporate fights, but also for clergy, behavioral health professionals and others who use mediation all the time informally.

Steve said that the statutory duties of a Uniform Law Commissioner are to introduce the legislation, and in some cases he has personally opposed such legislation. If this group comes up with a consensus version of the UMA, Steve would check in with his former colleagues on the UMA drafting committee and find out what they think. So far in checking in with them, they have not indicated that they would not consider it a uniform act if training were to be added in.

Several meeting participants weighed in with questions and comments regarding mediation as a profession, using the UMA as a vehicle for educating people about mediation, and protecting consumers through standards so they can get the best out of the mediation process. Steve agreed that the perspective of users has to be considered, and not just in the commercial context.

There was a concern voiced that if the UMA does not define mediation, then it is not clear what would be covered. The reach of the statute would be quite broad (i.e., cover most anything) and that could have bad consequences. Another participant observed that by extending the privilege to people who have not been previously entitled to it under Ch. 233, s. 23C, the UMA is in fact defining or expanding the mediation profession.

It was suggested that if the definition of mediation from Ch. 233, s. 23C is adopted, perhaps a sentence could be added to the UMA that requires mediators without the 30 hour training to disclose this to the parties.

Mediator Definition Subcommittee Update

Robin DiGiammarino distributed a *handout* dated 2/22/07 which set forth the provisions of Ch. 233, s. 23C, and then two proposals for language to insert into the UMA. Before describing the proposals, Robin mentioned that the Subcommittee assumed that as a group, our interest is to preserve what is already on the books in order to protect the profession, create some barriers to entry, and protect consumers. The UMA requires mediators to disclose their qualifications but without standards, what does this mean.

The first proposal from the Subcommittee defines mediator similar to Ch. 233, s. 23C but further adds that the 30 hour training needs to comply with the requirements of Rule 8 of the Uniform Rules on Dispute Resolution in the MA Trial Court, and requires the four years of experience after the training. The second proposal adopts the language of Ch. 233, s. 23C. In both proposals, the language from 23C about being appointed by a judicial or governmental body has been removed because under the current statute a mediator can be appointed who does not have the training, and it is the intent of the Subcommittee that this not happen.

The group gave feedback that we may want to revisit keeping that language as an alternative to affiliation with a dispute resolution organization to allow for mentoring of new mediators through court and government entities that would not be considered dispute resolution organizations. The Subcommittee explained that it had spent time trying to define what a “dispute resolution organization” means. Another participant suggested that we also need to figure out what “accountable” to a dispute resolution organization means, i.e., whether it means a mediator without four years experience can only be protected by the UMA if he/she mediates through the dispute resolution organization they are affiliated with as opposed to in their own practice.

It was also suggested that the group think about increasing the number of hours from 30 to 40 as has become the standard in several other states. A question was raised as to whether the Subcommittee considered grand parenting for the Rule 8 proposal and the response was that they have considered a phased in approach to give people time to get the training. There was some feedback that while the Rule 8 proposal would have salutary effect, it could also be a lightning rod that would do more harm than good, based on the experience of participants who were also on the Supreme Judicial Court Standing Committee on Dispute Resolution who created Rule 8. A concern was raised that the insertion of the 30 hour training requirement into the UMA not be seen as a ploy on the part of mediation training organizations to create business for themselves. People need to understand that many of us have deeply held values and commitment to professional standards and high quality dispute resolution. There was a suggestion supported by the group that we need to have a broader deeper discussion about qualifications and mediator certification.

A participant raised the question of whether under the Rule 8 proposal a list would have to be kept somewhere as to who had been trained to track compliance with the UMA – who would do this? It was acknowledged that Rule 8 puts the burden of demonstrating compliance on programs with rosters of neutrals whereas the UMA focuses on individual mediators. Another participant observed that training and qualifications would become a matter of evidence to proven by the person who is trying to assert the privilege in court.

Confidentiality/Privilege Subcommittee Update

Arlene Kardasis presented the update for this Subcommittee. She mentioned that the Subcommittee is still drilling down into the privilege and confidentiality provisions of the UMA. A big issue is should the UMA protect confidentiality like Ch. 233, s. 23C and if so, how. Jeff Stern has created a proposal that they are considering. They are working their way through all of the exceptions to privilege which they need to explore more. They are not ready to make a recommendation. David Hoffman noted that as the Subcommittee marched through the exceptions they understood them and felt that the drafters did a good job, but it is just so complex.

Arlene noted that the Subcommittee is also still talking about the simplicity issue and how to explain the UMA to parties. They decided to contact the nine states who have adopted the UMA and find out how they are explaining the UMA, what the problems are, what changes have occurred from what existed before the UMA. Also there is a concern that the UMA is so specific that it may increase mediator’s exposure to liability if the mediator does not explain the UMA sufficiently. The Subcommittee has reviewed the Ohio website which has lots of information on how they are explaining the UMA through pamphlets and brochures for mediators and users. David mentioned that he has gotten some responses from his inquiries to

other states and so far the UMA has not changed the way mediators are explaining confidentiality and privilege. David sees confidentiality as creating an affirmative obligation on the part of mediators not to disclose; where as the assertion of the privilege would be in response to an effort to compel testimony. Jeff has good language on this. The group asked the Subcommittee to share Jeff's proposal and bring more specific recommendations to the next meeting.

Legislative Subcommittee Update

Chuck distributed a *handout* that gives an overview of the legislative process. He said that he has spoken with the staff attorney for the Joint Committee on Labor and Workforce Development. The UMA has been docketed as House Bill 1814 (it appears as the Uniform Trade Secrets Act but this is an error). The House Chair for this Committee is Representative Torrisi and the Senate Chair is Senator McGee. The Joint Committee is meeting over the next few weeks and they are going to start mapping out their hearing dates which could start in April. If the Joint Committee agrees, we could request that the hearings on the UMA be pushed off to September. Chuck was told that the Committee would be open to us as an entity doing what we can to bring a consensus product to them (agreed upon by BBA, MBA, UMA Working Group and Steve Chow).

The group agreed that we should ask the Joint Committee on Labor and Workforce Development to hold off on a UMA hearing until September. Chuck mentioned that we should see if the BBA and MBA will join in on this request. Warren said he would raise this with at a MBA meeting he will be at on Monday and get back to Chuck with an answer. Chuck will talk with Bette Roth at the BBA and will get back to the Process Subcommittee through Melissa about this.

It was suggested that at the March or April meeting this group should discuss to what extent we should create a report for the Joint Committee to flush out these issues and identify the open questions. This would help to supplement the black letter law. Steve mentioned that in Mass that type of flushing out is typically done through law review articles.

Public Sector Subcommittee Update

Susan Jeghelian distributed a *handout* describing the issues that the Public Sector Subcommittee is looking into. These involve application of UMA privilege and confidentiality protections when a public entity/official is: a) a sponsor or funder of [internal or external] mediation program; b) a participant in a mediation with third party (with potential variations depending on whether using inside agency counsel, outside counsel or AGO); or c) acting as a mediator in public capacity. The concern is that the explicit references to the state public records and open meeting laws in the exceptions sections of the UMA may not protect mediations with a public nexus.

The Subcommittee's plan is to research what has been done in other states and in the federal sector to address these issues and balance the goal of open government with the need to protect the assurance of confidentiality necessary to encourage free communications within the mediation process. Based on this research the Subcommittee will present a range of options to this group at the March meeting, one of which would include potential revised language to sections 6 and 8 of the UMA. Other options could potentially include proposed

amendments to existing laws or the enactment of a state administrative ADR act or confidentiality guidelines for public agencies issued by the Attorney General's Office.

Other issues

David Hoffman mentioned that Chuck Doran, in his capacity as a member of the Budget Coalition for court-ADR programs, has been trying to set up a meeting with the Governor's Chief Legal Counsel and he is wondering if it is okay to give him a heads up about our work. David was a former partner of his at Hill & Barlow and is willing to assist in setting up this meeting. David's intention is to not weigh in on the substantive issues at this meeting but rather just inform about the UMA process and the working group. It was suggested that one of the members of the Public Sector Subcommittee attend this meeting with Chuck and David since the public issues which the Subcommittee is trying to address may be of interest to the Governor's Office.

David requested a voluntary contribution of \$5.00 from working group members to help support website maintenance. Checks should be made payable to the Boston Law Collaborative or Mediation Works, Inc.

Future Meeting Schedule:

Thursday, March 22, 2007, 3:00 pm – 5:00 pm

Boston Law Collaborative, 99 Summer St. 16th Floor, Boston

Thursday, April 23, 2007, 3:00 pm – 5:00 pm

Federal Mediation & Conciliation Service, 99 Summer St. 5th Floor, Boston

Thursday, May 24, 2007, 3:00 pm – 5:00 pm

Federal Mediation & Conciliation Service, 99 Summer St. 5th Floor, Boston