

To: Members of MassUMA

From: UMA Confidentiality/Privilege and Exceptions Subcommittee

Date: May 22, 2007

Re: Interim Report

The Subcommittee has met 9 times since its formation in November of 2006 and continues to meet weekly. This report outlines the status of its discussions as of 5-22-07.

Purpose: To review the confidentiality, privilege and exceptions provisions of the UMA, with a goal of reaching consensus on what changes, if any, should be made to them.

Summary of Discussions:

1. The Committee has not reached consensus as to whether the UMA is better than the current law (much of the UMA concentrates on the exceptions).
2. The Committee has reached consensus on and supports Section 6a subsections 1, 2, 5, and 6. Sections 3, 4 and 7 are still under discussion.
3. The Committee has not yet discussed Section 6b or Sections 7, 8 or 9.
4. The Committee is in agreement with the Training and Education Committee that some definition of mediator that includes a training requirement should be contained in the UMA or in a separate statute.
5. The Committee has discussed Section 8 (confidentiality). So far, it has not been able to come to a consensus on whether affirmative confidentiality should be included in the UMA. Progress has been made on this intricate issue and discussions continue (see point 3 of Questions and Discussion below).

Excerpt from the Uniform Mediation Act Executive Summary (ABA):

The Mediation Privilege: As a general matter, anyone who participates in mediation will be able to prevent the statements they make from being used against them in later legal proceedings. (Sections 4-6). Under the UMA, statements made in mediation are treated as inadmissible in much the same way that the law in most states bars the use of statements made to attorneys, doctors, and priests.

The UMA mediation privilege applies to bar the use of mediation communications in a wide range of proceedings that take place after the mediation, including civil and criminal

trials, arbitrations, administrative hearings, and legislative "proceedings." (Section 2(7))

There are only limited exceptions to this general rule, for example to permit disclosures of threats of bodily harm, reports of abuse and neglect, and to establish that a mediation was used as a pretext to further a crime. (Section 6(a)) To ensure the integrity of the mediation process, there are also limited exceptions that would permit a judge to admit mediation communications into evidence to establish that a mediated settlement agreement was induced by fraud or duress, or that the mediator engaged in professional malpractice or misconduct. (Section 6(b))

Relatedly, the Act further bars mediator disclosures to courts, administrative agencies, and other government entities. (Section 7)

Questions and Discussion:

The Confidentiality/Privilege Committee has been discussing a number of issues:

1. The complexity of the language of the UMA, which does not make it apparent to the lay person as to who holds the privilege and what can and can't be disclosed.
2. The difference between *privilege* (communications "not subject to discovery or admissible in evidence" as defined in section 4a) and *confidentiality* (precluded from disclosure to anyone outside the mediation) is confusing to many.
3. Confidentiality:
Currently, confidentiality is not a part of the UMA but can be contracted (for instance in the Agreement to Mediate). Questions that arise include what happens if the contract is violated? How is it enforced? While a breach of contract may make sense in a business setting, it makes less sense in a community or neighborhood setting. Despite the best efforts of the committee, it has so far been unable to agree on whether *affirmative* confidentiality should be part of the UMA (*affirmative*, meaning an assumption of confidentiality). Options were generated to address this issue at the 5-22-07 meeting and significant was made; discussions continue. Those who feel it should *not* be included cite the difficulty of enforcement and the need to include exceptions if it is included, which would further complicate the statute (the UMA *allows* but does not *require* a signed agreement to mediate). Those *supporting* affirmative confidentiality understand that enforcement may be difficult, but suggest that it serves the greater purpose of emphasizing the importance of confidentiality and informed consent; that there should be an assumption of confidentiality unless otherwise agreed to by the parties or contradicted by law.
4. Should the current statute remain along with the UMA, or should a confidentiality provision be included in the UMA? See number 3 above.

5. Can or should mediators be obliged to report and/or testify in court about crimes, violence or abuse? (6a subsections 3, 4 and 7). Generally, the Committee believes that mediators should be permitted but not required to report. So far we have not reached consensus about whether mediators should be compelled to give testimony or not. Most mediators cover these exceptions in their agreements to participate in mediation (explaining that they can waive confidentiality in these circumstances, and that the parties accept this.)
6. Mediators are not mandated reporters under the mandated reporter statute in Massachusetts. However, many mediators are licensed in other professions that are mandated reporters. Neither the UMA nor the current statute addresses this issue directly. The committee would like this to be affirmatively addressed in the statute by adding specific language referencing the statute.
7. Does the complexity of the law discourage mediation, scaring off potential clients? Anecdotal evidence from mediators in states that have adopted the UMA shows no change in practice, and it has not dissuaded people from mediating. However, some on the committee feel this observation may be inappropriate to MA because these states did not have a pre-existing statute on confidentiality; so they are going from “nothing” to “something”.
8. How will mediators explain the UMA to clients? Ohio has quite a number of documents available to mediators for educational purposes and received a grant to train mediators in the UMA. Some in the committee have noted that while this would be helpful, that the challenge lies in educating the public on the UMA.
9. Are mediators open to liability (under subsection 5) because they fail to fully and clearly explain the UMA to clients? To date, there is no evidence that there are more liability claims in UMA states because of the UMA. However, some on the committee have questioned whether this is an appropriate indicator of the likelihood of future claims.
10. Are the exceptions too broad? For example, under subsection 6a 4, who determines what is a crime, and what must or may or may not be reported? How much leeway does a mediator have? Is the mediator obligated to report or just obligated to testify if called on to do so?
11. How uniform or not should the law be? How far can we depart from the UMA and still maintain its purpose? How important is this to us?