

How Much Confidentiality Does the UMA Provide?

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The parties and their lawyers are seated around the conference table. The mediator speaks: “Good morning, everyone. First, I want to stress that this proceeding is confidential. Anything you tell me privately will not be disclosed without your consent.” A true statement? If the Uniform Mediation Act (UMA) applies to the proceeding, that might be hard to predict.

The UMA is now law in at least four states; legislation is pending in another six and the District of Columbia. Its primary goal is to impose uniformity and predictability on the patchwork of statutes governing mediation confidentiality—the cornerstone of the mediation process. The act’s drafters bill it as providing expansive protections. But the breadth of the UMA’s confidentiality exceptions has prompted detractors to argue that the act exacerbates the very problems it set out to fix.

The UMA was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), a group of lawyers, judges, legislators and academics appointed by the states to research, draft and promote the enactment of uniform state laws. The NCCUSL has created a host of uniform acts during its 114-year history, the best known being the Uniform Commercial Code. In the case of the UMA, the NCCUSL’s work began in 1997 with a letter to its president-elect from a mediator with a problem: He had been subpoenaed to testify about a case he had mediated in South Dakota. Although that state’s laws granted confidentiality protection to the mediation, the subpoena had issued from a neighboring state whose laws did not.

Such dilemmas are not uncommon. Mediating parties must feel confident that their candid disclosures will remain secret. However, the welter of roughly 2,500 mediation laws and 250 state-privilege statutes across the country provides inconsistent protection for such confidences, particularly if the mediation implicates more than one state’s laws. In promulgating the UMA, the NCCUSL recognized the dramatic growth nationwide in the use of mediation to resolve a wide variety of disputes. Uniformity in confidentiality protection would, it argued, foster increased use of mediation, which provides a more efficient, amicable and economical process for the resolution of disputes than standard adjudicatory processes.

With the help of the American Bar Association, the NCCUSL drew input from various stakeholders and what it considered to be the best features of various state laws. The drafters spent three years shaping what would become the UMA.

The UMA was finalized in 2001. See Uniform Mediation Act (2001) (amended 2003), available at www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm. The NCCUSL is now engaged in promoting the act across the country.

The UMA's Protections

The heart of the UMA is its creation of a privilege against disclosure for mediation communications. Mediation communications are broadly defined to cover written, oral and nonverbal statements during the mediation process, as well as statements made for the purpose of convening or continuing mediation. Id. § 2(2). The mediation privilege may apply in judicial, administrative, arbitral or other adjudicative proceedings, as well as legislative hearings. Id. § 2(7) (A), (B).

The UMA applies to court- or agency-ordered mediations as well as those that are voluntary. There are exceptions to its applicability; for example, mediations associated with collective bargaining agreements are excluded. Id. § 3(b) (1).

The UMA privilege is unusual, and somewhat complex, in several respects. Id. § 4. In essence, it creates a sliding scale of privilege. The parties to mediation are given the greatest blocking power against disclosure. A party may refuse to reveal, and may prevent disclosure by another, of any participant's mediation communication. The mediator has an independent right to refuse to testify about any mediation communication. He cannot, however, prevent disclosure of a mediation communication other than his own. Nonparty participants—such as friends, relatives or experts who attend the mediation—are given even more limited rights; they may invoke the privilege for their own communications only.

The privilege will not protect information otherwise admissible or subject to discovery simply because it was disclosed in mediation. Id. § 4(c). This mirrors the policy found in Federal Rule of Evidence 408. As with other privileges, the mediation privilege can be waived, but because it is a shared privilege, the waiver must be executed by all parties to the mediation, not just the party making the communication. Id. § 5(a).

There are a number of exceptions and qualifications to the privilege, some predictable, others less so. First and most fundamentally, the UMA does not define or impose any duty of confidentiality on mediation participants. Nor does it create a blanket prohibition on disclosure of mediation communications. Indeed, the word “confidential” appears only once in the UMA: Section 8 states that mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of the state. Id. § 8. While that distinction may appear unimportant at first glance, it is in fact quite significant. The UMA creates an evidentiary rule preventing, under certain circumstances, the disclosure of mediation communications in a subsequent legal proceeding. What the act does not do is attempt to prevent parties from revealing mediation communications in any other venue.

Indeed, the UMA creates no penalties for breach of confidentiality except for the potential waiver of the right to assert the privilege. Thus, the act would not prevent a

mediation party from holding a press conference and describing to the world the entirety of what was said and done by the other participants. Nor does the UMA define such behavior as a violation of any generalized right to mediation confidentiality. A party's ability to prevent such behavior must derive either from another law, regulation or rule, or by virtue of the parties' prior agreement to refrain from such behavior. Thus, the parties would still need to look to that patchwork of rules governing mediation confidentiality—and the choice of law issues that may accompany a particular mediation communication—unless they had agreed beforehand to forbid such conduct.

Second, the enforcement of the privilege, as a practical matter, requires the presence of parties with the knowledge and wherewithal to assert it. There is no notice requirement in the UMA. Unless all the mediation participants also happen to be parties to the proceeding in which the privileged communication is sought to be introduced, the evidence may be admitted simply because the other participants are unaware of the proceeding or unable to intervene. Again, the parties must look to some other law for protection, or else agree to provide prior notice if the act is to have any practical effect.

Finally, the exceptions to the privilege are quite broad. For example, the act does not apply to mediations conducted by a judge “who might make a ruling on the case.” *Id.* § 3(b) (3). This means that parties who participate in a settlement conference with their trial judge may later disclose what was said and done with impunity. The primary exceptions to the privilege are contained in § 6. Among other exemptions, the UMA permits the disclosure of mediation communications, should the evidence be sought to prove or disprove claims of professional misconduct or malpractice against the mediator, or against a party, a nonparty participant or a party representative. *Id.* § 6(a) (5), (6). The other exception of note is contained in § 6(b): If mediation communications are sought in a felony proceeding, or a proceeding challenging the validity of a mediated agreement, the privilege may be disregarded if a court finds that there is need for the evidence that substantially outweighs the interest in confidentiality. *Id.* § 6(b).

However, in an odd twist, only the mediator may avoid testifying in connection with disputes over a settlement agreement for claims of misconduct against other mediation participants. All the other participants may be forced to testify. *Id.* § 6(c). The justification given by the drafters is that the mediator should not be used as a tie-breaking witness—although in many cases he or she may be the only neutral witness. *Id.* § 6, cmt. 12.

One Way to Pierce Privilege

Consider this real-world scenario: A defendant settles a claim in mediation, then seeks to avoid enforcement of the settlement agreement on the basis of duress. He claims that he had heart trouble and was suffering from chest pains during the mediation, but the mediator refused to let him leave. See Randle v. Mid Gulf Inc., No. 14-95-01292-CV, 1996 WL 447954 (Texas App. Aug. 8, 1996).

Under the UMA's balancing test, the ailing defendant would likely be permitted to pierce the privilege and obtain evidence of confidential mediation communications by all participants. Certainly, the defendant will wish to disclose what he and the mediator discussed. But his search for evidence need not end there. He might also wish, for example, to discover what the plaintiff and his counsel said in private caucus with the mediator in an attempt to prove the plaintiff's knowledge and participation in the claimed coercive tactics. Or the defendant might seek to discover what conversations nonparty participants—say, the plaintiff's son—had with the plaintiff during the mediation. In seeking to refute the duress claim and enforce his settlement agreement, the plaintiff will undoubtedly have the right to explore the confidential discussions the defendant and his lawyer had with the mediator and with other participants. And so it goes. While the court has the power under § 6(d) to limit the extent of the confidential disclosures, as a practical matter that line may be a difficult one to draw.

It is true that many other privileges may be voided in the course of proving or rebutting a claim. For example, an attorney defending against a claim of malpractice may reveal privileged communications of his client that bear on his defense. See Model Rules of Professional Conduct R. 1.6(b) (5) (1983) (amended 2003). However, the UMA exceptions have a far broader reach. A party prosecuting a claim of mediation misconduct against his own lawyer, his opponent's lawyer or the mediator may seek to discover and admit not only the alleged wrongdoer's confidential communications, but the other participants' communications as well, claiming that those statements also bear on the alleged misconduct.

The flip side is that the party, lawyer or mediator defending against such a claim may likewise seek to reveal a mediation communication made by any participant to the mediation. As a consequence, the pool of parties who may potentially lose their expected confidentiality protection is radically expanded.

While the UMA has its supporters, it has also had significant opponents. Some of the strongest opposition has come from those within the mediation community who expressed a variety of objections, including the complaint that the confidentiality provisions did not go far enough. Some state bar associations, such as those of Texas and Pennsylvania, also objected to the UMA on that basis.

Status of the UMA

Nonetheless, the UMA is now law in Illinois, New Jersey, Nebraska and Ohio. Bills to enact the UMA are currently pending in Connecticut, Indiana, Iowa, Minnesota, Vermont, Washington and the District of Columbia. Other states, such as Massachusetts and New York, had UMA bills introduced in prior legislative sessions but failed to pass them.

It remains uncertain whether the UMA will gain momentum across the country. Some states, like Florida and Virginia, have recognized the need for more stringent mediation confidentiality, but have adopted non-UMA statutory schemes. The Alabama Legislature

is currently considering similar action. As states respond differently to the controversial nature of the UMA's confidentiality provisions, this lack of consensus may ultimately prevent the act from achieving the very purpose for which it was created—a uniform standard for mediation confidentiality.

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