

My Change of Mind on the Uniform Mediation Act

By James R. Coben

Fifteen years ago I was sure the Uniform Mediation Act (UMA) was a bad idea. In fact, I actively lobbied against it in my home state of Minnesota, reasoning that it was built on a flawed foundation — the view of mediation as an evidence-gathering forum.¹ I argued that a privileged approach with multiple exceptions was too porous to adequately protect and encourage the candor necessary for mediation success. Uniformity, I lamented, would undermine the wide variety of practice cultures emerging across the country and stymie mediation creativity and evolution. I worried that the act's overall complexity would undermine people's confidence in the process and lead to a decline in mediation's use and an increase in confidentiality litigation. In fact, some of you may have seen (and perhaps have used as a training tool) a video I prepared during that Minnesota lobbying effort, in which a mediator (me) tries to explain to frustrated clients and their worried lawyers all the UMA's requirements during a six-minute mediation opening statement.² It was an improvised tongue-in-cheek spoof (which, I admit with some pride, is technically accurate regarding the UMA's terms), but it was of course also a direct attack on the UMA's efficacy. And, in hindsight, it was spectacularly misguided.

What changed my mind? I am older (most easily demonstrated by the lack of hair I carry now compared to what I see in that video from 2001). However, it was not the mere passage of time and

its resulting wisdom that brought about my change of heart. What convinced me was evidence showing that the Uniform Mediation Act was — and is — a great idea.

Complexity that Reduces Rather Than Invites Litigation

As a professor of civil procedure, I often exhort my students to master rules so they can exploit those rules on behalf of clients. Generally, the more complex the rule universe, the more litigation is likely to occur. Surprisingly, that has not been the history of the UMA. Though it has been adopted in 12 jurisdictions and was introduced in legislatures in New York and Massachusetts in 2016, there has been a dearth of litigation about its terms (see the list of adopting jurisdictions on page 7).

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For detailed information about the Uniform Mediation Act, including the full text as adopted (with or without reporter's notes), superseded drafts, and legislative fact sheet, visit the website of the National Conference of Commissioners on Uniform State Law, <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act>.

Uniform Mediation Act

Adopting Jurisdictions

District of Columbia

Adopted in 2006 as DC Code
§§ 16-4201 to 16-4213

Hawaii

Adopted in 2013 as Haw. Rev. Stat.
§§ 658H 1-13

Idaho

Adopted in 2008 as Idaho Code Ann.
§§ 9-801 to 9-814

Illinois

Adopted in 2004 as 710 Ill. Comp. Stat.
35/1 to 35/99

Iowa

Adopted in 2005 as Iowa Code Ann.
§§ 679C.101 to 679C.115

Nebraska

Adopted in 2003 as Neb. Rev. Stat.
§§ 25-2930 to 25-2942

New Jersey

Adopted in 2004 as N.J. Stat. Ann.
2A:23C-1 to 2A:23C-13

Ohio

Adopted in 2004 as Ohio Rev. Code Ann.
§§ 2710.01 to 2710.10

South Dakota

Adopted in 2008 as S.D. Codified Laws
§§ 19-13A-1 to 19-13A-15

Utah

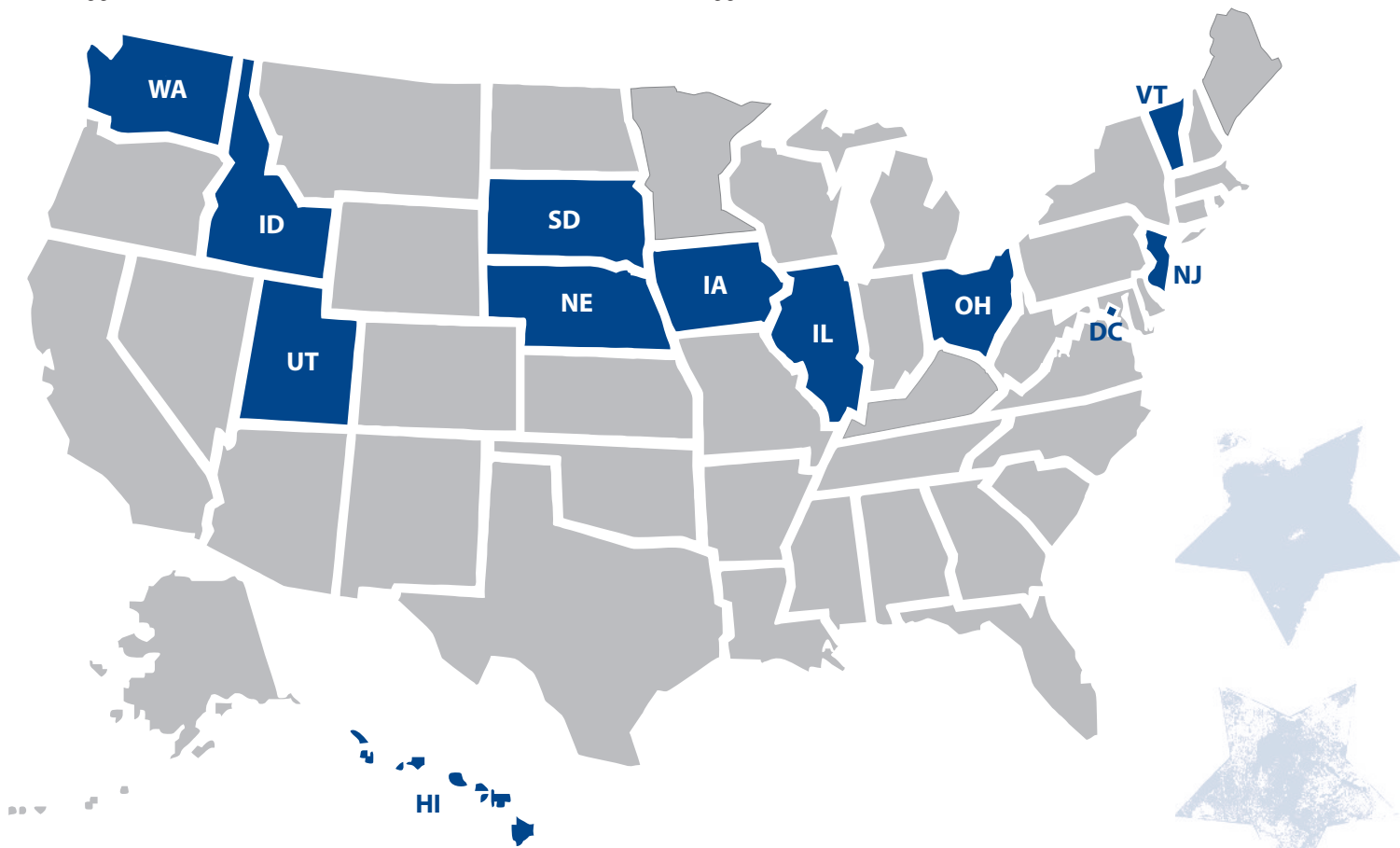
Adopted in 2006 Utah Code Ann.
§§ 78B-10-101 to 78B-10-114

Vermont

Adopted in 2006 as Vt. Stat. Ann. tit. 12,
§§ 5711 to 5723

Washington

Adopted in 2006 as Wash. Rev. Code Ann.
§§ 7.07.010 to 7.07.904



For the treatise *Mediation: Law, Policy & Practice*,³ I analyzed federal and state mediation cases published on Westlaw and found that fewer than 50 cases decided as of 2012 discussed any aspect of the Uniform Mediation Act. A relatively small percentage of these cases addresses a dispute about the act as adopted by a state.

A similar pattern has emerged in the last three years, 2013 through 2015, with state or federal courts interpreting the UMA to resolve a dispute about confidentiality in mediation only 16 times nationwide (just 8% of all state and federal cases addressing mediation confidentiality disputes in that three-year period). By comparison, in that same three-year time frame, California state and federal courts issued more than four dozen mediation confidentiality opinions (25% of all state and federal cases addressing mediation confidentiality disputes in that three-year period). As it turns out, California's more or less absolute confidentiality evidence regime⁴ has always been the source of a disproportionate share of mediation confidentiality disputes. Just by way of example: during the period from 1999 through 2005, judges decided a disputed mediation issue in a total of 2,219 cases. Of these cases, enforcement of the mediated agreement was the most common mediation dispute nationwide, occurring in 42.9% of all cases, and 13% of those enforcement cases came from California state or federal courts. In contrast, of the 237 confidentiality cases in the same time period, a disproportionate 21%, more than one-fifth, were from California. This statistic alone makes me relatively confident that my treatise co-authors and I got it right when we praised the UMA drafters'

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decision to use a categorical approach — stating a broad privilege with exceptions (only two of which involve judicial balancing) — rather than an absolute or qualified approach without listed exceptions.⁵

Equally important, to the extent that there is litigation about the UMA, nothing suggests it is due to the act's complexity or lack of clarity. Nor has the litigation track record suggested, as I feared, that the act would open the doors of the mediation room in potentially chilling ways. Indeed, the evidence points to exactly the opposite. Courts have:

- routinely applied the UMA to prohibit mediation evidence to prove oral settlements;⁶
- been generous in triggering the act's confidentiality protections⁷ but also have wisely chosen not to extend it beyond the obvious ending of the mediation process;⁸
- consistently limited the disclosure of mediator reports;⁹ and
- insisted on express waivers of confidentiality.¹⁰

No Evidence of Decline in Mediation Use in UMA Jurisdictions

Despite my concern that a privilege approach with numerous exceptions might reduce people's confidence in the mediation process, to my knowledge not a single empirical study suggests that the UMA has triggered a decline in the use of mediation. If there are anecdotal reports, I have not heard them. And out of those hundreds of disputed confidentiality cases in state and federal court, I have yet to read a single judicial opinion critical of the act. That stands in stark contrast to the considerable judicial angst expressed in California courts, where one 2007 decision went so far as to warn citizens that the state's near absolute protection for confidentiality effectively means that mediation participants “are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel.”¹¹ Perhaps not surprisingly, numerous California judicial decisions have hinted at or directly invited legislative change.¹² In response, in August 2015, the California Law Commission directed its staff to begin the process of preparing a draft recommendation for exceptions to mediation confidentiality to address malpractice and other misconduct — an effort currently still underway.¹³ Unfortunately, the California

Law Commission does not appear to be considering adoption of the UMA.

Adaptability to Meet “Localized” Concerns

The UMA drafters lauded uniformity both because it is a “necessary predicate to predictability” and because mediation increasingly occurs between parties in different states, thereby creating complex choice-of-law dilemmas.¹⁴ Yet the act itself provides built-in flexibility to meet individual state concerns in several important ways. Among other things, adopting states must choose:

- whether to extend the UMA’s confidentiality exception for communications sought or offered in a criminal felony proceeding to misdemeanors. This exception requires a hearing *in camera* to decide whether “the party seeking discovery or the proponent of evidence has shown that the evidence is not otherwise available” and “that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality”;¹⁵
- whether to apply the confidentiality exception for mediation communications offered to prove or disprove child abuse, neglect, or abandonment only in cases referred by a court or public agency or in all cases in which the public agency participates in the mediation;¹⁶
- whether to include a requirement for mediator impartiality;¹⁷ and
- whether to include a provision on international commercial mediation.¹⁸

Adopting states to date have made different decisions on each of these points. In addition to these “built-in” variations, adopting states have chosen some additional state-specific variations to meet localized concerns.¹⁹

For example, the Washington state UMA includes an exception to mediation privilege for post-decree modifications of a divorce settlement agreement in response to family law bar concerns that the court should continue to have discretion to assess whether a party to a divorce decree is acting in good faith during a post-decree mediation.²⁰ The state’s UMA also makes the right to have a lawyer or other individual accompany a party in mediation not absolute in small claims cases.²¹

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In Utah, the act’s definition of mediation includes a neutrality requirement²² yet permits mediators to assert mediation privilege when defending against a charge that the mediator failed to reveal a conflict of interest.²³ Utah also elected to exempt ombuds from revealing conflicts of interests²⁴ out of concern that state employees who act as mediators would be unduly burdened if required to make such disclosures.

In Vermont, the UMA exempts from the act’s coverage Federal Mediation and Conciliation Service and Vermont Labor Relations Board mediations.²⁵

Such state-specific adaptations arguably are sub-optimal from a uniformity perspective. But as of yet, none has posed any cross-border application problems. And tempering pure uniformity with a desire to support local practice and experience is not necessarily a bad thing.

Even Where Not Adopted, the Act has Promoted Uniformity

Uniformity has also been served, at least partially, in cases where courts invoke or discuss UMA principles to decide confidentiality matters in jurisdictions where the act is not controlling as a matter of law. And, more often than not, when doing so, courts end up invoking the UMA to provide confidentiality protection rather than deny it, contrary to my fears back in 2000 and 2001.²⁶

The UMA drafters in part chose the privilege approach in recognition of the idea that privilege was “the primary means by which communications are protected at law”²⁷ and had already been adopted by “an overwhelming majority of legislatures that have acted to provide broad legal protections for mediation confidentiality.”²⁸ So UMA court decisions, limited as they are, do help inform the dominant approach

to confidentiality in non-UMA jurisdictions. And when three states — Virginia in 2002,²⁹ Florida in 2004,³⁰ and Maine in 2009³¹ — all completed overhauls of their state confidentiality schemes, they drew heavily on UMA principles.

As Mediation Use Increases, Uniformity Is More Important

As the Global Pound Conference Series celebrates 40 years of growth in Alternative Dispute Resolution practice,³² many people around the world are focusing on how to improve access to justice and the quality of justice in civil and commercial conflicts. I suspect many are hopeful that mediation will continue to be a growth industry. But the more mediation, the greater the risk of cross-border confidentiality challenges. Lawyers and their clients make a very big choice-of-law mistake when they assume the law of their mediation state will necessarily control confidentiality in a subsequent dispute about the mediation. Contracting to provide for confidentiality protection beyond that provided by statute, court rule, or common law is a good fallback. Even better would be continued efforts to make the law of confidentiality more uniform.

While I admit to taking perverse pleasure in adding complex mediation confidentiality disputes to the collection of cases about mediation I have gathered over the years, I find it extremely hard to make the argument that this type of litigation serves the interests of clients or the courts. The risk of choice-of-law problems would be dramatically reduced if more states chose to adopt the UMA, and I would lobby heartily for that outcome in light of what has transpired in the decade and a half since the act was created.

While we're on the topic, do not assume that a uniform approach to mediation privilege exists under federal law. It does not.³³ Accordingly, I'll go beyond advocating for more states to adopt the UMA and suggest, as Ohio State University Moritz College of Law Professor Ellen Deason wisely first proposed in 2002, that Congress act to improve



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vertical (federal-to-state) uniformity of privilege law by enacting a federal mediation privilege utilizing the UMA approach of a categorical privilege with limited exceptions.³⁴ That one-two punch of expanded confidentiality uniformity at the state and federal level would be a wonderful goal for the next 15 years of mediation practice. ■

Endnotes

- 1 See, e.g., James R. Coben, *The Perils of Building on a Flawed Foundation: A Critical Look at Construction of the Uniform Mediation Act*, 3 J. OF ALT. DISP. RESOL. IN EMP. 4 (2001).
- 2 Dispute Resolution Institute, *Uniform Mediation Act Overview (As Part of "Fictional" Mediator Opening Statement)* MITCHELL HAMLINE SCHOOL OF LAW (2006), http://open.mitchellhamline.edu/dri_mclvideo/40/.
- 3 SARAH R. COLE, ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 8:15 (2015-2016 ed.). Much of the analysis in the remainder of this short article is derived from more in-depth coverage in §§ 8:13-8:15 of the treatise, available online in Westlaw (database "MEDIATION").
- 4 See CAL. EVID. CODE §§ 1115-1128. Section 1119 provides, in relevant part, that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given." Unlike the UMA, there are no listed exceptions.
- 5 COLE, ET AL., *supra* note 3.
- 6 See, e.g., *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 71 A.3d 888 (N.J. 2013); *Akron v. Carter*, 942 N.E.2d 409, 415-416 (Ohio Ct. App. 2010).
- 7 See, e.g., *Society of Lloyd's v. Moore*, No. 1:06-CV-286, 2006 WL 3167735, *3-4 (S.D. Ohio Nov. 1, 2006) (extending UMA protection to an Arb-Med proceeding, reasoning that the legislature could have, but chose not to, exclude from coverage those cases where an individual served as both mediator and arbitrator, and accordingly excluding from evidence a mediator's e-mail setting forth his assessment of the strengths and weaknesses of the case).
- 8 See, e.g., *Hopes v. Barry*, No. 2010-A-0042, 2011 WL 6881790 (Ohio Ct. App., Dec. 27, 2011) (concluding that an

attorney's e-mail sent several weeks after mediation ended that addressed issues not raised at the mediation was not a protected mediation communication).

9 See, e.g., *BAC Home Loans Servicing, L.P. v. Testa*, No. 2011-P-0045, 2012 WL 5844892 (Ohio Ct. App. Nov. 19, 2012); *Anthony v. Andrews*, No. 2008-P-0091, 2009 WL 4547605 (Ohio Ct. App. Dec. 4, 2009).

10 See, e.g., *A & H Management Services, Inc. v. Chafflose Corp.*, No. 08-3809, 2009 WL 232987 (6th Cir. Feb. 3, 2009); *Rutigliano v. Rutigliano*, No. L-3822-10, 2012 WL 4855864 (N.J. Super. Ct. App. Div. Oct. 15, 2012).

11 *Wimsatt v. Superior Court*, 61 Cal. Rptr. 3d 200, 219-220 (Cal. Ct. App. 2007).

12 See e.g., *Cassel v. Superior Court*, 244 P.3d 1080, 1096 (2011) (concluding "as a matter of statutory construction, that application of the statutes' plain terms to the circumstances of this case does not produce absurd results that are clearly contrary to the Legislature's intent. Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys."); *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*, 25 P.3d 1117, 1127-28 (2001) (noting that "[t]he mediator and the Court of Appeal here were troubled by what they perceived to be a failure of Bramalea to participate in good faith in the mediation process. Nonetheless, the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process. Whether a mediator in addition to participants should be allowed to report conduct during mediation that the mediator believes is taken in bad faith and therefore might be sanctionable . . . is a policy question to be resolved by the Legislature.").

13 California Approved Commission Minutes (August 7, 2015), <http://www.clrc.ca.gov/pub/Minutes/Minutes2015-08.pdf> (last visited November 21, 2016).

14 Unif. Mediation Act, Prefatory Note (2001).

15 Unif. Mediation Act § 6(b).

16 Unif. Mediation Act § 6(a)(7).

17 See Unif. Mediation Act § 9(g) ("A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.").

18 Unif. Mediation Act § 11, adopted in 2003, sets forth a default rule that the Model Law on International Commercial Conciliation (promulgated by the United Nations Commission on International Trade Law [UNCITRAL] in 2002), applies to international commercial mediations but allows parties the option "to take advantage of the privilege protections of the Uniform Mediation Act, which typically are broader than the evidentiary exclusions of the UNCITRAL Model Law." See Unif. Mediation Act § 11 cmt. 1.

19 For a complete summary of state-by-state adoptions and adaptations, see COLE, ET AL., *supra* note 3, at § 8:14.

20 Wash. Rev. Code Ann. § 26.09.015(3)(a)(i)(C).

21 Wash. Rev. Code Ann. § 7.07.090.

22 Utah Code Ann. § 78B-10-102(4). "Neutral" was added to the mediation definition to insure that attorneys who initiate settlement negotiations would not be considered mediators under the act.

23 Utah Code Ann. § 78B-10-109 (omitting § 9(d) of the UMA which provides that "[a] person that violates [disclosure requirements] is precluded by the violation from asserting a privilege....").

24 Utah Code Ann. § 78B-10-109(4).

25 Vt. Stat. Ann. Tit. 12, § 5714(b)(2).

26 See, e.g., *In re Teligent, Inc.*, 640 F.3d 53, 58 (2d Cir. 2011) (opining on the importance of confidentiality and borrowing the Unif. Mediation Act § 6(b) balancing standard to declare a framework for evaluating discovery requests of confidential mediation communications); *Warner v. Calvert*, 258 P.3d 1125 (N.M. Ct. App. 2011) (deeming a valuation report prepared by a party-retained expert to be protected communications under the state's Mediation Procedures Act, and specifically calling its interpretation consistent with the Uniform Mediation Act (UMA), citing specifically the UMA § 2(2) cmt. indicating that whether a document is prepared for mediation is crucial to determining whether the document is a mediation communication).

27 Unif. Mediation Act § 4, cmt. 2a (providing "greater certainty in judicial interpretation because of the courts' familiarity with other privileges").

28 Unif. Mediation Act § 4, cmt. 2a (noting that "of the 25 States that have enacted confidentiality statutes of general application, 21 have plainly used the privilege structure").

29 Va. Code Ann. § 8.01-581.22 (in contrast to the UMA, the Virginia statute does not require judicial balancing after review *in camera* to determine the privilege status of mediation communications offered in actions to vacate a mediated settlement).

30 Fla. Stat. Ann. §§ 44.401 to 44.406 (differing from the UMA by, among other things, not making the mediator and non-party participants partial holders of the privilege and not excepting certain criminal proceedings when the need for evidence is great).

31 Me. R. Evid. 514 (differing from the UMA by, among other things, authorizing mediator testimony in cases of alleged party or counsel misconduct).

32 See GLOBAL POUND CONFERENCE SERIES 2016-17, <http://www.globalpoundconference.org/> (last visited November 21, 2016).

33 COLE, ET AL., *supra* note 3, at § 8:15 (noting that trial courts in Georgia, California, and Pennsylvania have expressly recognized a privilege, while the Fifth Circuit Court of Appeals has expressly refused to do so, and courts in the Second, Fourth, and Ninth Circuit Courts of Appeals have declined opportunities to decide the issue).

34 For an article cogently advocating just such an approach, see Ellen Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 317-19 (2002).