



ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

S.1340

Senator Volker

AN ACT to enhance the confidentiality afforded to communications made in the context of mediation, as well as promote uniformity among state mediation laws.

THIS BILL IS APPROVED

The Association of the Bar of the City of New York endorses and supports passage of the Uniform Mediation Act ("UMA") in New York.

Mediation: Mediation is the use of a professionally trained person, known as a mediator, to assist parties to a dispute in arriving at a voluntary settlement of their controversy promptly and economically. It is an indispensable tool in the modern business world and the community, and is becoming widely popular in the United States. It is particularly important that mediation be available and effective here in the business capital of the world. It is equally important that it be available to citizens of our state to resolve peacefully and effectively disputes that arise in everyday life.

Uniform Mediation Act: Using the familiar form of an evidentiary privilege like that afforded communications with an attorney, a medical doctor or a clergyman, the UMA will fill a gap in current New York law and provide the confidentiality protection that mediation needs to be effective. The UMA requires that communications made in or in connection with a mediation shall be kept confidential and bars their use in a broad variety of proceedings, including arbitrations, trials, and administrative and legislative hearings.

Authors: The UMA was authored by a joint committee consisting of the conventional Drafting Committee of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), and a committee of experts on mediation assembled by the American Bar Association Section of Dispute Resolution.

Reasons for adoption in New York:

Compatibility of UMA with existing law: There is no existing New York statute governing mediation in general. To the extent that there is any New York law in the area, it is compatible with the UMA. The UMA is also consistent with existing rules concerning mediation adopted by state and federal courts in the state. The UMA can simply be added as a new chapter of the Civil Practice Law and Rules, such as the chapter on arbitration (Article 75).

Mediation and UMA promote party autonomy: Mediation is at heart a vehicle to help parties resolve their own disputes. The UMA reinforces that basic concept. Thus, in mediation under the UMA the parties may control the entire process by agreement. In general the UMA is a default statute to protect parties who are not protected by contract. Thus, as in the case of the various other privileges noted above, the provisions of the UMA may be waived by the holder of the privilege. However, similar to the case of the so-called joint-defense attorney-client privilege, a mediation may involve numerous parties and other persons, and more than one of them may have to agree to waiver of the privilege concerning a particular communication in mediation.

Mediation promotes settlement of disputes: As anyone knows who lives in this country, it has a vibrant economy and way of life. America is no stranger to controversy and has more than its fair share of litigation. While litigation has its place in our society, it can be a burden, particularly for the business community. And litigation and conflict can also invade the everyday life of the individual citizen. Reducing the weight that litigation and conflict place on businesses, workers and members of society in general is a goal that we endorse. Moreover, we believe that facilitating the prompt and inexpensive resolution of disputes in New York will assist our state in maintaining its leadership as a place where companies want to locate their businesses and people want to live. Mediation has been shown to be highly effective in bringing parties to peaceful settlements of their disputes, and we think that it is the means most likely to enable New York to make a material improvement in the process of dispute resolution in the state. The UMA is designed to promote the confidentiality that mediation needs to have that positive effect.

Mediation demonstrated to be highly effective and efficient: Mediation has consistently proven to be a highly successful mechanism for getting disputes resolved, often with a success rate in excess of 80%. Its effectiveness has been demonstrated in this state, for example, in the experience of the New York Community Dispute Resolution Centers ("CDRC"), a state-wide network of locations in all 62 counties that handles cases involving such matters as custody, visitation, support, divorce, separation and "PINS." In fiscal year 2000-2001, of the 26,472 cases (involving 63,641 parties) received by the centers, in which mediation was used, voluntary agreement was reached in 86%. In addition, unlike litigation, mediation is inexpensive and swift. In many CDRC cases only one mediation session was needed to settle the dispute, and these cases, on average, required only 17 days to be resolved. More difficult cases, needing multiple mediation

sessions, averaged only 56 days to resolution. And the average mediated case cost the state only \$150. We believe that the increased use of mediation, which is the almost certain result of passage of the UMA, will have a positive effect in lightening the burdens of business and personal disputes on companies and individuals resident or doing business in our state.

Effective mediation requires confidentiality: It has been found over the centuries that people have difficulty being candid and forthcoming if they can expect that their communications may be revealed to the public or some particular person or group. This was the reason for the development of the privileges against disclosure of communications of a client with an attorney, a patient with a medical doctor and a penitent with a clergyman. Mediation practitioners who are members of our Committee on Alternative Dispute Resolution, and many others, have found that human nature works in the same way in mediation and that the forthrightness that comes only with confidentiality is indispensable if mediation is to be broadly successful.

UMA provides the confidentiality mediation needs: The UMA is receiving wide support as a vehicle crafted to give mediation the confidentiality it needs. For example, it has the support of the Section of Dispute Resolution of the American Bar Association, whose membership contains numerous mediators familiar with the requirements of the mediation process. Moreover, the UMA has the support of [JAMS, the American Arbitration Association, the CPR Institute for Dispute Resolution and the Better Business Bureau], leading organizations that assist in the appointment of mediators and/or the conduct of mediation proceedings.

UMA provides needed uniformity among states: The current state of the law of mediation exhibits broad differences among the states. On the one hand, some states have multiple, specific statutes dealing with one aspect or another of the subject, some 2,500 in all. On the other hand, there are some 25 states with no over-all protection for most mediations. More often than not transactions in today's economy involve multiple jurisdictions, and it is imperative that order be brought to the chaos of mediation law around the nation. As noted above, an assurance of confidentiality is needed for effective mediation, and there can be no such assurance when communications that are treated as confidential under the laws of one state can be revealed under the laws of the state next door. While we are proposing a form of act containing minor variations from the form adopted by NCCUSL, we have been assured that our suggested modifications are consistent with the objectives of the UMA, including uniformity.

UMA uses familiar form of evidentiary privilege: As noted above, the same sort of need for confidentiality is exhibited in mediation as is exhibited in communications with a lawyer, a doctor or a clergyman. Thus, it is not surprising that the UMA uses the vehicle of an evidentiary privilege to ensure that communications are kept confidential and not revealed in other proceedings. This use of a concept already familiar to the bar is an advantage that will facilitate the rapid expansion of the use of mediation.

UMA follows the consensus view: The UMA draws upon existing experience and expertise in the field. It adopts the approach of the 25 states that have existing broad mediation statutes. It is also compatible with existing ethical and best-practices standards.

UMA protects the right to representation: Mediation is used to resolve disputes, and those disputes have often progressed to the point of litigation before mediation is brought to bear to resolve them. Although mediation can be and is frequently used successfully without the involvement of lawyers, parties often wish to be represented by counsel in mediation. The UMA assures the right to such representation. It also assures the right to have the participation and support of family members that some parties in mediation may want.

UMA requires disclosures of relevant interests, relationships and qualifications by mediators: In addition to confidentiality, an indispensable element of mediation is trust in the mediator by the parties. A party to a dispute cannot sensibly trust a person acting as a mediator who may have an undisclosed significant financial or personal interest in the outcome of the parties' dispute or of the mediation. Nor can a party trust a mediator not to divulge confidences to an adversary or to act even-handedly if the mediator may have an undisclosed significant business or personal relationship with a party or other participant in the mediation. For this reason the UMA requires persons acting as mediators to disclose such interests and relationships and decline to act as a mediator if the parties do not agree to the mediator's continuing work after disclosure. Similarly, the UMA requires that the mediator disclose his qualifications for conducting a mediation if asked by a party to do so.

UMA applies to all mediations not already covered by existing rules or customs: The UMA has a broad scope. It applies to almost all mediations commenced through agreement of the parties to a dispute, or directed to go to mediation by a court or administrative agency. The only mediations not covered are those involving labor unions, which are governed by collective bargaining agreements and long-standing tradition, student peer mediations, which are covered by school procedures, and judicial settlement conferences before a judge who will be hearing the case if it goes forward.

UMA contains needed exceptions: As in the case of any other rule, there are circumstances in which competing considerations dictate exceptions to the principle of protection of the confidentiality of mediation communications. The exceptions that have been carved out in the UMA are limited and make very good sense. Thus, there are exceptions for circumstances such as (1) threats of bodily harm, (2) admissions of abuse or neglect, or (3) evidence that (a) the mediation was used to further the perpetration of a crime, (b) a mediated settlement agreement was induced by fraud or duress or (c) the mediator engaged in professional malpractice or misconduct.

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