

**THE UNIFORM MEDIATION ACT AND MEDIATION IN NEW YORK**

**BY THE NEW YORK STATE BAR ASSOCIATION'S  
COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION**

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## **I. Introduction**

In February 2002, the Uniform Mediation Act Subcommittee (the “UMA Subcommittee”) of the New York State Bar Association’s Alternative Dispute Resolution Committee (the “ADR Committee”) was asked to evaluate whether the Uniform Mediation Act (the “UMA”)<sup>1</sup> should be adopted in New York. The UMA is an evidentiary and discovery privilege act that primarily defines the parameters of mediation confidentiality in legal proceedings. It is in this context that this Report<sup>2</sup> analyzes the UMA’s effectiveness and its impact on New York mediation practice and whether New York should adopt the Act.

Mediation is a field that has seen tremendous growth over the past decades. It has affected almost every aspect of the judicial system, including the commercial, criminal, matrimonial, juvenile and appellate arenas. In addition to the judiciary, corporations, Community Dispute Resolution Centers, government agencies and private individuals use mediation to avoid ever having to climb the courthouse steps. Mediation often fosters goodwill among its participants, it permits for greater self-determination, it can be dramatically less expensive than other forms of dispute resolution and has myriad other benefits. It is no surprise that, given all of these advantages, mediation has seen widespread proliferation throughout the United States

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<sup>1</sup> Uniform Mediation Act as adopted by the National Conference Of Commissioners On Uniform State Laws, February 4, 2002 (“UMA”), Attached hereto as Exhibit A. Throughout this Report, page numbers refer to Exhibit A. Please note that the Prefatory Notes to the UMA are not paginated and, therefore, do not have page citations herein. Drafts of the Uniform Mediation Act may be found at <http://www.law.upenn.edu/bll/ulc/mediat/med300nc.htm> and <http://www.ponharvard.edu/guests/uma>. The first draft was disseminated in June of 1999 (hereinafter “UMA Draft 1”) and was superceded by a second draft proposed in November of 2000, (hereinafter, “UMA Draft 2”).

<sup>2</sup> On October 28, 2002, the ADR Committee adopted the Subcommittee’s Report.

and, indeed, throughout the world. At its core, however, mediation is one tool that those in disagreement can use to resolve their dispute.

As parties have increasingly used mediation, a wide array of rules to govern the field have developed. Traditionally, parties have enjoyed the freedom to agree to mediate and to agree to the rules that will guide their mediation. These rules may cover many areas, from mediator selection and the process of the mediation sessions to how and when the mediation will occur and when it should end. When mediation is court-annexed, however, many of the rules surrounding the process may be court-ordered thereby reducing the parties' flexibility. For example, in New York, there are as many different court rules governing court-annexed mediation as there are court-annexed programs. Not only can this create uncertainty and confusion in the mediation process, but it diminishes the parties' right to choose which rules they want to apply to their mediation.

One area that is of great significance and that often influences the decision to use mediation is confidentiality. Parties must decide if what is said in a mediation (and defining what is "in a mediation" is no easy task) will be confidential. They must reach agreement on whether the mediator(s), parties, counsel and non-party participants will be required to maintain the confidentiality of "mediation statements." Parties also are faced with the daunting challenges of interpreting how their personal choices about confidentiality might interface with existing court rules and with predicting if a court is likely to agree with their interpretation in subsequent proceedings. Generally, settlement discussions are considered not only confidential, but inadmissible in court, at least in the proceeding that was the subject of the settlement. Thus, one might expect the same rules

to apply to mediation. Many court rules cover these difficult issues, but some do not. Moreover, there is only a smattering of case law and very little statutory law in New York that address this issue or any other issue related to mediation.

It is against this backdrop that the UMA was developed and eventually adopted in February 2002. The concept of a uniform act that would govern mediation throughout the country has appeal for many reasons, including promoting certainty, uniformity and simplicity. The Act, however, does not have universal appeal. Some states already have sophisticated and comprehensive mediation statutes. These states may not see the benefit of the UMA. Other states, like New York, may not be ready for a uniform act, especially one drawn as narrowly as the UMA.

Despite its name, the UMA is an Act that addresses only whether mediation communications are discoverable or admissible in legal proceedings. Other than preserving the rights of parties to contract for confidentiality, it does not prescribe any rules governing confidentiality generally. Although it is debatable whether the UMA should be more comprehensive, the important fact for legislators and others in the legal community to remember is that the UMA is a very narrow Act addressing only the issue of privilege. That many of those who would be impacted by the Act had and likely still have a misperception about the scope and purpose of the Act, was one of the first indications to the ADR Committee that a thorough and detailed analysis of the Act was needed.

After reviewing the Act, researching the Act and incorporating comments from a cross-section of individuals who would be affected by the Act, the Subcommittee drafted this report and the ADR Committee adopted it. One result of the Committee's

work and one area about which there is almost unanimity, is that the drafters of the UMA undertook a complex and difficult task on issues about which many individuals hold very strong and deeply rooted opinions. The Act that the drafters produced reflects a significant amount of work and effort. Although our Committee stands by our initial recommendation in favor of the American Bar Association's ("ABA") adopting the UMA,<sup>3</sup> this Committee concludes that now is not the right time for New York to adopt the UMA.

**A. The History And Scope Of The UMA**

The UMA was promulgated, in part, to harmonize the proliferation of state and local mediation laws that address mediation confidentiality. There is little question that there are many rules and regulations that govern mediation in general and the admissibility of mediation communications specifically. Consequently, the once clear vision of confidentiality that had been one of the longstanding benefits of mediation has become increasingly blurred by these diverse and sometimes divergent confidentiality statutes and rules.

With the uncertainty and complexity surrounding the rules of confidentiality in mediation has come a weakening of the self-determination that participants in the mediation process have valued. Against their wishes, parties who opt for mediation because they believe it allows them choices are finding that their decision-making rights are eroding. Parties can no longer predict with certainty which laws might apply or which rules will govern their mediations. Thus, court rules and statutes in different states and even within states frequently are defining mediation practice rather than the parties.

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<sup>3</sup> See below at 7.

Partially in response to this growing problem, the National Conference of Commissioners on Uniform State Laws began a four-year collaboration with the ABA's section on Dispute Resolution to develop the UMA in 1997. Many respected scholars and practitioners in the field, representing diverse perspectives on mediation, participated. After multiple drafts, the UMA was issued in its final form in January 2002. The goals of the UMA are to "promote candor"; "encourage resolution in accordance with other principles" and to promote uniformity.<sup>4</sup> Encouraging candor and resolving disputes in accordance with the other principles discussed in the Prefatory Notes to the UMA are laudable goals. Uniformity also can be an important goal, although, as discussed in greater detail below, it is unclear whether uniformity for the issues the Act addresses is an appropriate goal for New York at this time. In stressing the importance of uniformity, the Prefatory Notes identify three main benefits that uniformity will provide: (1) simplifying the confidentiality laws governing mediation; (2) creating national uniformity of the mediation confidentiality laws and (3) preserving the integrity of the mediation process in a way that ensures fairness and party self-determination.<sup>5</sup>

As mentioned above, the UMA's title and the repeated use of the word "confidentiality" throughout the Prefatory Notes suggest that the Act is either a comprehensive proposal designed to address mediation generally or, at least, an Act that governs confidentiality of mediation broadly. In truth, the UMA actually has a much more specific focus. The UMA is an *evidentiary privilege and discovery act*. The UMA serves a purpose very similar to any one of a number of statutes in New York that define other privileges, such as the attorney-client privilege or the doctor-patient privilege.

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<sup>4</sup> UMA Prefatory Notes.

<sup>5</sup> UMA Prefatory Notes.

The UMA, however, creates a privilege not only for parties that are using mediation to resolve their disputes, but for non-parties (such as experts or potential witnesses that may participate in the mediation) and for mediators. The goal of the UMA is to prevent discovery and the admissibility of communications made as part of the mediation process.<sup>6</sup> As with most legal privileges, the Act does not prohibit parties, non-parties or participants (other than the professional) from disclosing mediation communications in contexts other than legal proceedings.<sup>7</sup> The Act provides for waivers and exceptions to the privilege in instances where the drafters believe that public policy needs outweigh the need to preserve confidentiality in mediation.<sup>8</sup> The Act recognizes its own limitations and expressly provides that parties and States retain the right to define rules for the confidentiality of mediation communications generally, outside of the evidentiary or discovery contexts.<sup>9</sup> The Act also states that a party may elect to have an attorney or an individual participate with them in mediation<sup>10</sup> and imposes an obligation on mediators to disclose their reasonable conflicts of interest as well as to disclose their qualifications upon request.<sup>11</sup> The Act also prohibits a mediator from making a report to any authority that may make a ruling on the matter that is the subject of the mediation. The parties cannot waive this prohibition.<sup>12</sup>

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<sup>6</sup> See UMA §§ 4, 7 at 15, 36.

<sup>7</sup> Although disclosures outside of a legal proceeding may vitiate most other privileges that is not necessarily the case with the UMA. See, e.g., *AMBAC Indemnity Corp. v. Bankers Trust Co.*, 151 Misc.2d 334, 340-341 (Sup. Ct. N.Y. Co. 1991); *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987).

<sup>8</sup> See UMA §§ 5, 6 at 22, 25-26.

<sup>9</sup> See UMA § 8 at 38.

<sup>10</sup> See UMA § 10 at 47.

<sup>11</sup> See UMA § 9 at 40. The penalty for failing to disclose conflicts, however, is that the mediator may not invoke the privilege. Thus, the disclosure requirements are linked directly to the privilege and do not exist independently.

<sup>12</sup> See UMA § 7 at 36.

## B. The Genesis And Structure Of This Report

For almost three years, the ADR Committee has followed the development and eventual creation of the UMA. Various members of the ADR Committee have, throughout the past years, also been members of other city, county and national bar associations involved in the drafting of and commenting on the UMA. As the UMA moved closer to its final form, the ADR Committee created a formal sub-committee (in early 2001) to begin examining the Act. In January of 2002, the ADR Committee, along with other NYSBA committees and sections, was asked to provide feedback on whether NYSBA's delegates to the ABA should vote in favor of the ABA's formally adopting the UMA. The ADR committee, following the advice of the UMA Subcommittee, voted in favor of recommending that the ABA adopt the UMA. However, the ADR Committee also stated that:

Several members of our Committee . . . have expressed concerns with the UMA as written in a variety of areas. Moreover, although the Committee endorses adopting the UMA as a *uniform act*, we take no position at this time about whether it would be appropriate for the State of New York to enact legislation implementing the UMA in its current form or with modification. Assuming the ABA adopts the UMA, our Committee will continue its analysis of the Act and how it complements or undermines the goals of mediation in the State of New York. We expect to issue a report in the coming months summarizing our conclusions.<sup>13</sup>

Over the past ten months, the UMA Subcommittee has focused its review of the UMA on whether the New York State legislature should adopt the Act. During this time, the Subcommittee, at first independently and then in consultation with the broader ADR Committee, evaluated the UMA, reviewed literature concerning the UMA, distributed surveys and held forums to discuss the UMA.

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<sup>13</sup> Letter from ADR Committee Chair, Gregory H. Hoffman to Ms. Kathleen R. Mulligan Baxter, Counsel, NYSBA (January 18, 2002) (emphasis in original).

When the Subcommittee’s formal analysis began in February 2002, there appeared to be a rush to judgment by some about the UMA – even before there was a comprehensive statewide evaluation of the Act. Drafting of the UMA had just been formally completed in December 2001 and the UMA had been issued in its final form by the National Conference of Commissioners on Uniform State Laws in January 2002. Shortly thereafter, the Association of the Bar of the City of New York came forth with its own evaluation and modification of the UMA. In April 2002, Senator Volker introduced Senate Bill S06842 in the New York State Senate, which was, essentially, a version of the UMA formatted as a new Article 74 of the Civil Practice Law and Rules (“CPLR”).<sup>14</sup> Despite this activity and the fervent support of the Act by some, the UMA Subcommittee could find no statewide evaluation of the Act nor any analysis by, or feedback from, many of those who would be impacted if the Act were adopted in New York.<sup>15</sup>

One of the goals of the UMA Subcommittee was, therefore, to ensure a statewide, multi-disciplinary analysis of the UMA and its impact in New York State. This Report is based on an in-depth study and review of the UMA that includes a review of the relevant literature,<sup>16</sup> including analyses of the UMA in other states,<sup>17</sup> a statewide

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<sup>14</sup> S06482, New York Assembly (New York 2001).

<sup>15</sup> In fact, according to the website of National Conference of Commissioner’s on Uniform State Laws, no state has adopted the UMA and only five states (including New York) have introduced legislation to adopt it. See [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-uma2001.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uma2001.asp)

<sup>16</sup> See, e.g., Michael B. Getty, *The Process of Drafting the Uniform Mediation Act*, 22 N.Ill. U. L. Rev. 157 (Spring 2002), Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. Ill. U. L. Rev. 265 (Spring 2002), James J. Alfini, *Mediation’s Coming of (Legal) Age*, 22 N. Ill. U. L. Rev. 153 (Spring 2002), Andrea K. Schneider, *Which Means to an End Under the Uniform Mediation Act?*, 85 Marq. L. Rev. 1 (Fall 2001), Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 Marq. L. Rev. 79 (Fall 2001). See also Exhibit B, annexed hereto, “Selected Bibliography”.

<sup>17</sup> See, e.g., James F. Carr, et al., *The Uniform Mediation Act: Its Potential Impact on Colorado Mediation Practice-Part II*, Colo. Law. 67 (June 2002); Greg Dillard, *The Future Of Mediation Confidentiality In Texas*, 21 Rev. Litig 137 (Winter 2002).

survey directed at those whom we could identify as interested and impacted by the UMA<sup>18</sup> and public forums on the UMA in Rochester and New York City.<sup>19</sup>

As part of analyzing the UMA, this Report also addresses recent recommendations relating to mediation practice that the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York made in an April 2002 report.<sup>20</sup> In its April Report, the Advisory Committee recommended adoption of a new rule, Rule 4510-a, to ensure broad confidentiality in court-annexed mediation.<sup>21</sup> The Advisory Committee also recommended an amendment to Judiciary Law 39 – c that would extend immunity to mediators in court-annexed programs.<sup>22</sup> Senators Volker and Lack incorporated the Advisory Committee’s recommendations into Senate Bill S3495.

This Report is divided into three parts. First, it evaluates whether the UMA achieves its goals of simplicity, uniformity and maintaining mediation integrity. Second, the Report examines the potential impact of the UMA on New York practice. Included in this section are the results of the survey and forums. Finally, the Report concludes with a summary of the ADR Committee’s recommendations.

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<sup>18</sup> The purpose of the survey was to stimulate interest in the importance of the UMA and encourage broad-based evaluation of the UMA by many of those that would be impacted. The survey was sent to bar associations, ADR providers, neutrals and litigators inviting their comments.

<sup>19</sup> It was the Subcommittee’s hope that the public forums would spark much needed attention, education and debate concerning the UMA.

<sup>20</sup> 2002 Report of the Advisory Committee On Civil Practice To The Chief Administrative Judge Of The Courts Of The State Of New York, at 33 *et seq.* (April 2002).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

## II. Evaluating The UMA

### A. **Simplicity**

The Prefatory Notes of the UMA state that a goal of the UMA is to simplify the 2500 plus legal rules effecting mediation by replacing them with one uniform act.<sup>23</sup> The sentiment is that simplicity of rules will encourage increased use of mediation. Yet, the UMA's text and construction lack simplicity. They are, in many ways, confusing to read and difficult to understand. Even the title "Uniform Mediation Act" is somewhat misleading because it suggests a more sweeping statute. For the reasons discussed below, the ADR Committee recommends simplifying the Act to make it more easily understandable and more accessible to those whom it will impact.

The confusing nature of the Act is evidenced in a very fundamental way – it took the UMA Subcommittee, whose members are attorneys sophisticated in the field of mediation and experienced in reading statutes, many meetings and repeated readings of the Act and its comments before being able to understand fully its plain meaning. The UMA Subcommittee is not alone in having difficulty understanding the UMA's potential application. Other commentators have published articles expressing the confusing nature of the Act.<sup>24</sup> Moreover, respondents to the Subcommittee's survey expressed some degree of confusion about the Act. One respondent complained that she could not understand the UMA, while another group of non-attorney mediators complained that they needed an attorney to interpret the UMA because they did not have the ability to understand its provisions. Given that the UMA will directly affect the mediation of community disputes and other disputes where lawyers may not be participating and that a

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<sup>23</sup> See UMA Prefatory Notes.

<sup>24</sup> See, e.g., *supra*, notes 15, 16.

significant number of mediators are, themselves, not lawyers, it is vital that any law governing mediation be drafted in a manner that allows those it affects most to have at least a modicum of understanding. This is especially true with respect to the concept of privilege, which is often unfamiliar to lay people who may not appreciate its meaning and pragmatic effects.

The text of the UMA is difficult to interpret, in part, because it is unclear how to integrate the different provisions defining confidentiality into a clear understanding of what the UMA intends to be privileged in judicial proceedings. Only through repetitive readings of the provisions addressing privilege, waiver, exceptions to privilege and prohibited mediator communications can one understand how the different sections impact each other and how they might operate in practice.

## **B. Uniformity**

A fundamental premise of the UMA is that uniformity is beneficial.<sup>25</sup> The drafters reason that by simplifying the many mediation privilege rules into one uniform act, mediation will be easier to use and used more often. Mediation consumers will be able to predict the bounds of confidentiality across state lines. Participants in cross-jurisdictional mediations will benefit from uniformity by having the certainty of knowing that one confidentiality law applies in whichever jurisdiction the mediation is conducted. Presumably, this certainty would enhance a party's informed self-determination.

There is a question, however, about whether the UMA, if implemented, would create a beneficial result for mediation in New York. The Act proposes uniformity not only among all states, but also among all subject areas of mediation. It is unclear if

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<sup>25</sup> See UMA Prefatory Notes.

uniformity is equally beneficial and achievable for conflicts involving different subject matters. There is generally agreement that uniformity across jurisdictional lines and mediation settings is advantageous for many commercial disputes because it ensures the predictability and certainty that the commercial world requires. Although commercial transactions may vary from state to state, an overarching goal in many commercial contexts is to create uniformity where possible (*e.g.* the Uniform Commercial Code). Yet, uniformity may not be beneficial or achievable in some commercial areas such as real estate or in other areas such as domestic relations or criminal law, in which disputes and proceedings are governed by often radically different state statutes and local rules. When each state retains its own unique statutory scheme, the interpretation and impact of the UMA on that discipline in any given state may actually have a non-uniform impact.

By way of illustration, in the area of family law, the UMA may have a different impact in a state such as New York where there is fault divorce than in a state like California where there is no-fault divorce.<sup>26</sup> Assuming both New York and California were to adopt the UMA, a party participating in mediation in New York might have a greater need to pierce the evidentiary protections of the UMA to prove the grounds of fault required for a divorce. Skillful divorce lawyers, seeking to admit evidence of mediation communications to prove their clients' grounds for divorce, may rely on the UMA's exceptions to privilege as their ally. If this practice becomes commonplace, parties are less likely to want to mediate divorce. Thus, in New York, the Act as written might act as a disincentive to mediate.

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<sup>26</sup> See N.Y. Dom. Rel. Law § 170 (McKinney 2002).

In another example, a misdemeanor in one part of the country might be a felony in New York. So the same conduct may be characterized differently in different states and consequently discoverability and admissibility of mediation communications under the UMA would vary among states. Thus, under sections such as Section 5(c) “Preclusion for use of mediation to plan or commit a crime” or Section 6(b)(1) “Exceptions to privilege, in camera hearings for mediation communications that is sought or offered in a court proceeding involving a felony,” the UMA fails to establish uniformity because of the different characterizations of criminal conduct in different state statutes.<sup>27</sup> It does not appear that these issues and how they will affect New York specifically have been fully considered by the legislature or by groups urging the legislature to adopt the UMA in New York.

It also is important to note that the UMA will promote certainty in legal proceedings only, not in other contexts. The UMA grants states and parties the discretion to define the scope of the confidentiality of mediation communications outside of the evidentiary and discoverability settings. Section 8 provides: “Unless subject to the (open meetings act and open records act) mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state.”<sup>28</sup> The Reporter’s Notes to section 8 explain its purpose is to further the parties’ rights to self-determination by allowing them to decide whether they want mediation communications disclosed.<sup>29</sup> Thus, different states and parties may have different confidentiality

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<sup>27</sup> See *UMA* §§ 5(c), 6(b)(1) at 22, 26.

<sup>28</sup> See *UMA* § 8 at 38.

<sup>29</sup> See *UMA* Reporter’s Notes at 38.

protections apply to their mediation communications. Consequently, parties seeking broader uniformity should recognize that the UMA offers limited benefits.

### **C. Integrity Of Mediation**

The UMA's goals of preserving and promoting the integrity of the mediation process and informed self-determination are unquestionably important. By way of illustration, the UMA honors the integrity of mediation by obligating the mediator to disclose conflicts and to inform Mediation Parties about the mediator's qualifications when requested.<sup>30</sup> With respect to self-determination, the UMA seeks to allow parties the freedom to select the style and type of mediator. Moreover, section 10 provides that counsel *or* other support persons may attend the mediation at a party's invitation. In order to create even greater opportunities for informed self-determination, the UMA Subcommittee recommends the addition of notice and opt-out provisions to the UMA.<sup>31</sup> The Subcommittee also suggests that section 10 be modified to allow parties to bring both counsel *and* other support persons to the mediation.

#### *1. Notice*

Consistent with the spirit and intent of the UMA, the ADR Committee recommends several changes that would further promote informed self-determination. First, the UMA should include a notice requirement whenever (1) a mediation comes within the scope of the UMA or (2) there is an attempt to introduce a purportedly privileged mediation communication into a legal proceeding. This is critical to ensure informed self-determination.

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<sup>30</sup> See UMA § 9 at 40.

<sup>31</sup> See UMA § 10 at 47.

To further the goal of providing notice, the Subcommittee recommends that section 3(a)(3) be eliminated. As drafted, section 3(a)(3) states that the UMA applies to a “mediation in which the mediation parties use as a mediator an individual who holds himself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.”<sup>32</sup> Thus, parties participating in mediation may not even realize that they are bound by the UMA because section 3(a)(3) does not provide for a record evidencing the intent of the parties that mediation communications will be privileged. In contrast, Section 3(a)(2) states that the Act applies when the mediation parties and the mediator agree to “mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure.” Section 3(a)(2) provides broad enough applicability without blind-siding potential mediation participants.

The Subcommittee also recommends adding a specific notice requirement to section 3(a)(1), which currently reads that the Act applies when “the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator.” By adding the phrase “and when the parties receive notice that [this Act] will apply ” to the end of section 3(a)(1), the UMA would protect unknowing parties from being bound by the Act without having adequate notice.

These proposed changes are consistent with the concerns that the drafters expressed in the Reporter’s Notes that some cultural and religious practices such as the Ho’oponopono, circle ceremonies, family conferencing and pastoral or marital counseling may erroneously be characterized as mediation.<sup>33</sup> To further the principles of

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<sup>32</sup> UMA § 3(a)(3) at 7.

<sup>33</sup> See Reporter’s Notes at 11.

self-determination, those parties agreeing to mediate and that want to be bound by the UMA should record that intent.

Although some may argue that an intent requirement does not attach to the exercise of other laws and other privileges, the Subcommittee asserts that mediation is unlike other professions in terms of its ubiquity and usage. Mediation, unlike established professions such as law and medicine, which also enjoy privileges, is relatively new and is still emerging. The field is continuing to define itself, its standards, its qualifications and its practices. The public is less familiar with these evolving mediation rules, practices and standards. Therefore, in order to promote parties' informed self-determination, parties' should be notified in writing when their mediation comes within the scope of the UMA.

The UMA also should require notice to all mediation participants whenever a person attempts to introduce a privileged mediation communication into a legal proceeding. As written, the UMA does not grant the holders of the privilege the right to be notified of testimony in a subsequent "proceeding" at which the holder is not present or represented. Interestingly, the UMA addresses notice in the comments to the Act. The Reporter's Notes state, "As a practical matter, a person who holds a mediation privilege can only assert the privilege if that person knows that evidence of a mediation communication will be sought or offered at a proceeding. . . . To guard against the unusual situation in which a party or mediator may wish to assert the privilege, but is unaware of the necessity, the parties or mediator may wish to contract for notification of the possible use of mediation information, as is the practice under the attorney-client

privilege for joint defense consultation.”<sup>34</sup> Similarly, the Reporter’s Notes advise that, “Any individual who wants notice that another has received a subpoena for mediation communications or has waived the privilege can provide for notification as a clause in the agreement to mediate or the mediated agreement.”<sup>35</sup> The Reporter’s Notes further state that “...mediation participants are advised to consider including notice provisions in their agreements to mediate that call for participants who receive subpoenas for privileged testimony to provide notice to other participants of such a request.”<sup>36</sup>

Although these comments are conceptually on point, they do not have the force of law. Notice is a critical issue that should be part of the Act itself. Allowing parties to contract for notice is inadequate. Many parties and even their counsel may assume that notice is required because it is the usual practice with other privileges. Moreover, courts are likely to impose a notice requirement. Thus, it seems inadequate to permit disclosure without notice to those whose communications may be disclosed.

## 2. *Right To Opt Out*

Parties also should have the right to opt out of the UMA in its entirety, if they so choose. These proposals are consistent with the informed self-determination that the UMA seeks to foster. As drafted, the UMA only allows parties to opt out in whole or in part of the privileges in sections 4 through 6 if they do so “in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged.”<sup>37</sup> The comments explain that this opt-out language furthers the parties’ self-determination by “fulfilling the parties reasonable expectations regarding the

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<sup>34</sup> UMA Reporter’s Notes at 21.

<sup>35</sup> UMA Reporter’s Notes at 25.

<sup>36</sup> UAM Reporter’s Notes at 45.

<sup>37</sup> UMA § 3(c) at 8.

confidentiality of that mediation.”<sup>38</sup> There is no basis for not extending this same option to the entire Act.

#### **D. Highlights Of Problematic Language**

In addition to the foregoing issues that weigh against adopting the UMA in New York as written, the sub-committee has identified (without setting forth every problem) other examples of language that are either confusing or contrary to the policies the Act purports to further. The following are all from the UMA’s definitional section, Section 2.<sup>39</sup>

The definitional section raises as many questions as it answers and should be re-worked so that it is clear, accessible and easily comprehensible. At the most basic level, the terms should be listed in alphabetical order making them easier to locate. Currently, the terms that the UMA defines appear to be listed in random order. Another suggestion that reflects the basic rules of statutory construction is to use initial caps for defined terms or phrases. The current version of the UMA defines certain terms in the definitional section, but then uses those same terms throughout the Act – sometimes intending the defined meaning, sometimes not.<sup>40</sup> Although these issues may seem insignificant, they relate directly to the infirmities of the current version of the Act: it is not simple and it contains ambiguities that will unquestionably complicate the ability of

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<sup>38</sup> UMA Reporter’s Notes at 14.

<sup>39</sup> See UMA §2 at 1.

<sup>40</sup> For example, the term “Mediation” is used in the text of the UMA to mean both a process and a proceeding. While mediation is certainly a “process” in one sense, it appears that the UMA more often uses the term “Mediation” to refer to a “proceeding” rather than a “process.” By way of analogy, “litigation” can also be described as a “process” for resolving disputes, but one does not speak of confidentiality in the litigation “process.” Generally, one refers to confidentiality orders in a litigation, *i.e.*, in a “proceeding.” A “process” connotes something generic, while a “proceeding” connotes something specific. By defining “Mediation” as a process, but using the term generally to refer to a proceeding, the UMA creates ambiguity. Therefore, the Subcommittee recommends deletion of the word process from the definition of “Mediation.”

lawyers, litigants and judges to predict and interpret the Act's meaning with the very certainty the Act is trying to promote.

In redrafting the definitional section, it will be important to use more precise language. Examples of definitions in the UMA that warrant revision are the definitions of "Mediation"; "Mediator"; "Mediation Communication" and "Mediation Party."

*1. "Mediation"*

Section 2(1) of the UMA defines "Mediation" as a "process" in which a mediator "facilitates" communication and negotiation between "parties" to assist them in reaching a voluntary agreement regarding their dispute.<sup>41</sup>

Use of the term "facilitates" in the definition of "Mediation" is confusing, notwithstanding the disclaimer in the Reporter's Notes.<sup>42</sup> By using the term "facilitates" to define "Mediation," the UMA ignores the distinction between "evaluative" and "facilitative" mediation styles. One example of how this can result in confusion is that it is unclear if the UMA's definition of "Mediation" includes a mediation in which the mediator functions in an evaluative rather than a facilitative mode. Although the drafters in their comments state they intend for the UMA to cover both types of mediation,<sup>43</sup> the plain meaning of the proposed statute is ambiguous.

As mediation continues to develop, it is important to ensure that all philosophies and styles of mediation fall under the purview of the Act. For example,

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<sup>41</sup> See UMA §2 at 1.

<sup>42</sup> See UMA Reporter's Notes at 2.

<sup>43</sup> See Reporter's Notes to section 2 at 2.

transformative mediators raised concerns that their practice of mediation does not fit within the definition of mediation currently prescribed by the UMA because their philosophy and practice of mediation focuses on process, not on the goal of reaching agreement. According to the transformative philosophy, mediation is defined as a process in which a third party works with people in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive as they discuss and explore issues and possibilities for resolution.

The definition of "Mediation" in Section 2(1) uses the term "parties."<sup>44</sup> Although the Act separately defines the phrase "Mediation party,"<sup>45</sup> it does not define the individual term "party" (or "parties"). Presumably, the reference to "party" in the definition of "Mediation" is to a "Mediation party." Again, however, the text of the UMA is ambiguous. This seems to be only one of a number of inconsistencies that is the result of the UMA's having had many iterations. For example, the June 1999 draft of the UMA used the term "Disputant" in Section 2(1).<sup>46</sup> In the November 2000 draft "Disputant" became "Party" in Section 3(5).<sup>47</sup> In the August 10-17, 2001 final version, the term was changed to "Mediation party" in Section 2(5).<sup>48</sup>

To clarify these and other ambiguities, the Subcommittee recommends the following definition of "Mediation":

The use by Mediation Parties of the services of one or more persons, each identified as a Mediator, to assist the Mediation Parties to negotiate a resolution of their dispute or to change the quality of their conflict interactions or to make whatever progress they choose; and where each Mediator:

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<sup>44</sup> UMA § 2 (1) at 1.

<sup>45</sup> See UMA § 2(5).

<sup>46</sup> See UMA Draft 1.

<sup>47</sup> See UMA Draft 2.

<sup>48</sup> UMA § 2(5) at 1.

- (a) does not have a pecuniary or any other interest in the outcome of the dispute in question; and
- (b) does not possess the power to make any ruling or decision in connection with the dispute in question that is binding on the Mediation Parties [or on anyone else].
- (c) Parties may waive subsection (a) of this section.

2. *“Mediation Communication”*

Section 2(2) of the UMA defines “Mediation Communication” as a statement, “whether oral or in a record or verbal or nonverbal,” that occurs “during” a mediation “or” is made for “the purpose of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.”<sup>49</sup> On its face this definition is difficult to understand. Only through reading the Reporter’s Notes is it possible to decipher that “oral”, “in a record”, “verbal” and non-verbal” are meant to distinguish among (1) oral statements, (2) written statements (in a formal record or otherwise), (3) verbal conduct intended as a communication (which is somehow meant to be distinguishable from an oral statement) or (4) non-verbal conduct intended as a communication.<sup>50</sup>

Moreover, the scope of the definition of a mediation communication is too broad. The definition creates two types of “Mediation Communications”: (1) any “statement” made “during” a mediation or (2) a “statement” *not* made “during” a mediation, but made for one of the other listed purposes. One example of the definition’s overbreadth is including statements made in “considering” a mediation. The statute does not define to whom the statements must be made in order to be considered a mediation

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<sup>49</sup> See UMA § 2(2) at 1.

<sup>50</sup> See UMA Reporter’s Notes at 2-3.

communication and, therefore, subject to the privilege. Potentially, a party could make statements to anyone – even individuals unrelated to the dispute or the mediation process such as a spouse or friend or reference of the mediator – and, as long as the statements were for the purpose of “considering” a mediation, they would be privileged. Moreover, the term “considering” is vague.

The Subcommittee proposes the following alternative language as a possible definition of "Mediation Communication" to address the foregoing issues:

A communication made:

- (a) orally;
- (b) in a writing or some other Record; or
- (c) by conduct a reasonable person would interpret as intended to constitute a communication, which communication is made as part of:
  - (i) a Mediation;
  - (ii) the negotiation of, or attempt to negotiate, an agreement to mediate or to continue a mediation; or
  - (iii) the process of retaining or attempting to retain a Mediator.

### 3. “Mediator”

Section 2(3) of the UMA defines a "Mediator" as an individual who "conducts" a Mediation.<sup>51</sup> The UMA’s definition, however, does not address the basic characteristics that are the hallmarks of a mediator, such as impartiality, a lack of decision-making power and a lack of coercive power. It should be noted that the UMA contains an optional Section 9(g) that allows the "parties" to waive the requirement that the Mediator be "impartial." Therefore, the Subcommittee recommends the following alternative language for the definition of "Mediator":

An individual (a) who does not have a pecuniary or any other interest in the outcome of the dispute in question; (b) whose services the Mediation Parties agree to utilize to assist their efforts to negotiate a resolution of their dispute, to change the quality of their conflict interaction or to make whatever progress they choose; and (c) who does not possess the power to make any ruling or decision in

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<sup>51</sup> See UMA § 2(3) at 1.

connection with the dispute in question that is binding on the Mediation Parties [or on anyone else].

4. *“Mediation Party”*

Section 2(5) of the UMA defines "Mediation Party" as a "person" that "participates" in a "mediation" and whose agreement is necessary to resolve the dispute.<sup>52</sup> With respect to the second prong of the test, the requirement that a "Mediation Party" be someone "whose agreement is necessary to resolve the dispute" is confusing. Suppose, for example, that a corporation is one of the disputants. The definition of Mediation party does not clearly establish the status of the representative that the corporation sends to represent it at a face-to-face mediation session. Although such an individual meets the participation test, he or she is not the person whose agreement is necessary to resolve the dispute. Moreover, that representative may not have authority from the corporation to settle the dispute at various times during the mediation.

The UMA likely intends that such a representative is a Mediation Party, but that individual arguably does not meet the literal definition contained in the UMA. Although the Reporter's Notes state that "...A person, as defined in Section 2(6), may participate through a designated agent," the Reporter's Notes do not have the force of law and do not overcome deficiencies in the language actually used in the UMA.<sup>53</sup>

The Subcommittee recommends the following definition of "Mediation Party":

A Person who participates in a Mediation, including the duly authorized representative of that Person, whose agreement is necessary to resolve that part of a dispute which is the subject of a Mediation.

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<sup>52</sup> See UMA § 2(5) at 1.

<sup>53</sup> See Reporter's Notes at 6.

The foregoing present examples of problems in the UMA. Although simplicity is a worthwhile goal, these examples show that the UMA is often not simple or clear. The UMA should be rewritten so that it is more understandable and accessible to all those whom it may impact, consistent with the goals of informed consent and self-determination that the UMA purports to extol.

### **III. The Impact Of The UMA On Mediation Practice In New York**

The Prefatory Notes indicate the decision to adopt a unified approach to privilege that cuts across all applications is based on the experience of 24 states that have adopted and experimented with broad mediation statutes.<sup>54</sup> Significantly, New York lags behind other states that have years of experimentation with and development of mediation standards and statutes. Unlike some states, New York case law and statutory law related to mediation are just beginning to be developed. New York is only starting to define the parameters of acceptable mediation practice. It is unclear whether New York has enough experience with mediation across all areas and in all venues even to evaluate whether the UMA is beneficial for New York.

#### **A. The Impact Of Adopting The UMA On Existing Mediation Rules And Statutes**

##### *1. Interface With Proposed Legislation And Rules*

There is no consensus about how the UMA would impact existing mediation rules and statutes. In theory, the UMA should impact only those rules or statutes that are inconsistent with its narrow evidentiary privilege in legal proceedings. The Prefatory Notes state that the UMA was not intended to “preempt state and local

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<sup>54</sup> See Prefatory Notes “4. Ripeness of a uniform law.”

court rules that are consistent with the act.”<sup>55</sup> Therefore, provisions dealing with such issues as mediator qualifications and standards would not be preempted. However, if an existing provision deals with privilege, it will be up to that state’s legislature to decide which statutes and rules will remain and which will be repealed.<sup>56</sup> Despite these apparently simple guidelines, which are not in the text of the Act itself and do not have the force of law, it remains unclear how adoption would impact existing New York law.

By way of example, compare the UMA to Judiciary Act 21-A, which provides confidentiality for community dispute resolution centers.<sup>57</sup> Specifically, Article 21-A § 849b(6) of the Judiciary Act states that “[e]xcept as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.” It is unclear how the UMA would impact this statute. To a certain extent, the UMA provides broader protection in terms of what is privileged. On the other hand, the privilege that 21-A provides is a blanket privilege and thus confidential communications are afforded stronger protection under 21-A. It will be difficult for a court to harmonize these two statutes or, alternatively, to decide which law governs. It will be even more difficult for mediation participants to predict what communications will be privileged and the strength of that privilege. One possible outcome, were New York to adopt the UMA, is that the Legislature could repeal

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<sup>55</sup> See Prefatory Notes.

<sup>56</sup> See Prefatory Notes; UMA § 15.

<sup>57</sup> See N.Y. Jud. Law § 849(b) (McKinney 2002).

section 849(b)(6) of the Judiciary Act. By repealing the existing law, the Legislature would be promoting uniformity, consistent with goals of the UMA and the rationale expressed in the Reporter's Notes to section 12. Yet, the legislation proposed thus far appears to ignore the issue.

New York's current proposed version of the UMA, S06842, introduced by Senator Volker in April 2002, highlights the problem of conflicting statutes and appears to run counter to the UMA's express goal of uniformity.<sup>58</sup> Specifically, Article 74, section 7407 states that "[u]nless subject to Article 6 or 7 of the Public Officers Law, mediation communications are confidential to the greatest extent agreed to by the parties or provided by this Article or other law or rule of this State." Although this appears to provide a solution, the foregoing example involving section 21-A shows that it is not clear when a statute provides greater or weaker protection. Moreover, allowing other laws to remain in effect if they provide greater protection to mediation communications does not foster uniformity. In fact, it only adds confusion by providing a false sense of certainty about which standards will govern whether communications are privileged. Many proponents of the UMA are supporting Senator Volker's version of the UMA apparently without appreciating that, in fact, it may yield a non-uniform result or general confusion when the time comes to apply the Act.

Another example of conflicting statutes is Senate Bill S3495, introduced by Senators Lack and Volker in March 2002. S3495 responds to the recommendations in the 2002 Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge to the Courts of the State of New York and provides for confidentiality in court-

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<sup>58</sup> *Supra*, note 13.

annexed mediations with eight delineated exceptions. The bill also provides for mediator immunity. If New York were to adopt the UMA, the Act would likely supersede the confidentiality aspects of S3495 because the Act provides greater protection.

Alternatively, the Legislature could decide to repeal or not enact those sections of S3495 that govern confidentiality. In any event, it is somewhat unusual to enact two statutes that contain conflicting positions.

These examples show that rather than providing a uniform set of rules, the UMA will create a piecemeal set of laws that will require significant study to determine how they relate to each other and how they impact mediation practice. The more prudent course is to compile all laws touching on mediation privilege in New York State and develop a comprehensive Act that establishes new standards and repeals the old standards.

## 2. *Examples Of The Impact Of The UMA On The Practice Of Mediation*

The UMA can be a catalyst for dispute resolution providers to re-examine and possibly improve their practices. One survey respondent for the New York City Commission on Human Rights commented on the re-structuring that would have to take place in the Commission's mediation program if the UMA were adopted in NY. The restructuring to promote fairness was viewed positively.

Some providers of court-annexed mediation, however, raised concerns about the impact of the UMA on the confidentiality of their screening processes. Currently, some programs screen potential parties to assess their appropriateness for participation in the court-annexed mediation program. The results of these screenings may then be communicated to the judge. If the UMA were adopted in New York, under

the broad definition of mediation and under the prohibition of mediator reporting, this practice would be prohibited. Although there might be a solution for this particular problem, it does not appear that the overall impact of the UMA on practices such as these has been addressed in any of the reports promoting adoption of the UMA thus far. Further dissemination of the UMA and greater feedback from many New York entities affected by it are needed.

**B. The UMA And Other New York Privileges**

The UMA defines a privilege, but leaves the parameters of confidentiality generally to the parties. It is unclear, however, that there is a need for a mediation privilege. A more appropriate goal of the Act might be to provide a baseline for the confidentiality of mediation communications. Obviously, many of the issues addressed in Section 5 of the UMA would disappear or be recast were the Act to focus on confidentiality rather than privilege. Assuming, however, that a privilege remains part of the statute, the UMA defines that the privilege is held by the parties, mediator and non-parties and delineates how it may be asserted or waived. The concept of privilege has much history in the law and, therefore, there is a rich field of study on which to draw in addressing how the mediation privilege should function.

Focusing on New York, there are more than eight privileges, either codified or at common law. Privileges hinge on the concept of encouraging a particular type of behavior, but there is no question that privileges exact “a heavy toll” because they bar admissibility of otherwise competent evidence.<sup>59</sup> Most of the privileges New York and the federal courts recognize are designed to encourage open and frank disclosure

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<sup>59</sup> 8 Wigmore Evidence S. 2380(a)

between an individual and a professional. These include the attorney-client (CPLR 4503), physician-patient (CPLR 4504), psychologist-patient (CPLR 4507), social worker-client (CPLR 4508) and rape counselor-client (CPLR 4509) privileges.<sup>60</sup> By fostering open and frank communication, these privileges allow the professional to perform his or her job more effectively and, in turn, to provide a greater benefit to the individual receiving the service. Generally for “professional” privileges, the individual, not the professional, is the holder of the privilege and the right to waive the privilege lies with the individual.

Among the other privileges in New York are the journalist’s privilege, the informer’s privilege, the government communications privilege and the political vote privilege.<sup>61</sup> These are mostly common law privileges and are rooted in the belief that protecting certain types of information is in the public interest. Hence, the government has the right to protect its sources, as do journalists, because the public interest benefits from the added ability that the privilege provides both the government and the press to obtain information from otherwise reluctant sources. Thus, the holders of these privileges are the government and the press, not the sources of the information.

One analytical approach to deciding who should hold the privilege is to determine whether the mediation privilege should be most akin to a professional privilege, a public interest privilege or a hybrid of the two.<sup>62</sup> Mediation certainly serves the public by reducing court dockets, expediting resolution of disputes and facilitating

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<sup>60</sup> N.Y. CPLR §§ 4503, 4507, 4508, 450-9 (McKinney 2002).

<sup>61</sup> *E.g.*, N.Y. Civ. Rts. § 79h (McKinney 2002).

<sup>62</sup> Regardless of whether “mediation” is more akin to a professional or public interest privilege, it is worth noting that the statutes defining privileges in New York are almost uniformly less complicated than the UMA.

resolutions that, hopefully, allow parties to rebuild their relationships after the matter has concluded or at least to avoid the “scorched earth” outcome in which litigation often results. These benefits, however, are different than those implicated in “public interest privileges” such as preserving First Amendment rights or the government’s ability to gather information in an effort to protect the rights of the entire community.

The public benefits most closely associated with the mediation privilege are more similar to the public benefits associated with professional privileges. For example, the protections afforded patients in communications with their physicians can help doctors uncover serious illnesses that could have a widespread affect on the health of the entire country. The privilege also helps to ensure doctors have the information necessary to provide better and more efficient health care, keeping costs down. The attorney-client privilege helps lawyers to defend their clients and to ensure that our adversarial system operates optimally by fostering the rights set forth in the Constitution – a general good.

The mediation privilege also is more similar to professional privileges in terms of the relationships that give rise to the privilege. Individuals or their counsel approach a professional to obtain that professional’s assistance. In the private context and increasingly in the public context, the professional is compensated for his or her efforts. The fundamental goal in enacting the privilege is to advance the mediation process, which first and foremost benefits the parties. The Reporter’s Notes also recognize the similarities between the mediation privilege and other “communication”

privileges and draw comparisons between the mediation privilege and what we have coined “professional” privileges.<sup>63</sup>

*1. Waiver*

Section 5 of the Act sets forth when the mediation privilege may be waived. The UMA’s approach to waiver of the privilege, however, is somewhat unique and not necessarily appropriate when compared to how the concept of waiver is applied in the context of other privileges. For example, the Act provides for express waiver.<sup>64</sup> Although permitting express waiver is common, the UMA requires that in order for waiver to occur, *all* parties must expressly waive the privilege. In addition, if the waiver involves a privilege held by the mediator, the mediator as well as the parties must waive the privilege. If the waiver involves a communication by a non-party participant, the non-party participant as well as the parties must waive the privilege. Thus, only when all those who hold the privilege expressly agree to waive it, will the privilege actually be waived.

There are other fundamental differences between the waiver provisions in the UMA and those related to other privileges, including the UMA’s not allowing implied waivers and the UMA’s granting of a privilege to professional and non-party participants as well as the parties.<sup>65</sup>

With respect to implied waivers, the Reporter’s Notes state that the drafters elected not to have an implied waiver to safeguard against inadvertent disclosure

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<sup>63</sup> See UMA Reporter’s Notes at 16-17.

<sup>64</sup> See UMA § 5 at 22. The two other instances when a waiver may occur are when a person discloses or makes a representation about a mediation communication that prejudices another person in a proceeding and when a person uses a mediation to plan, attempt or commit a crime or to conceal an ongoing crime.

<sup>65</sup> See UMA Reporter’s Notes at 19-21, 22-23.

as through the often “salutary” practice of discussing the dispute and mediation with friends.<sup>66</sup> It is unclear why or how discussion with friends is more “salutary” in the mediation setting than in any of the contexts that give rise to an implied waiver of other professional privileges.

The underlying premise behind implied waiver is that if the holder seeks to invoke the privilege and to thwart the truth-finding goal of the justice system through the use of the privilege, then he or she must also be willing to maintain the confidentiality of the communication in all settings. The implied judgment that there is some benefit to cloaking mediation communications with a privilege while allowing parties to discuss these communications outside the mediation proceeding is contrary to the underpinnings of other privileges (such as attorney-client or therapist-patient) and lacks any substantive foundation.

If the attorney-client privilege, which is generally considered the most sacrosanct of all privileges, can be waived impliedly, why should other privileges not be subject to the same paradigm. If an individual wants to maintain the confidentiality of communications made during a mediation, then he or she should not be permitted to disclose those communications when it suits him or her, yet invoke the privilege at whim, particularly when the communications disclosed are those made by the party seeking to invoke the privilege.

In addition, these rules will apply not only to *individuals* participating in mediation but also to businesses making use of mediations. Corporate employees and other professionals should not be able to invoke the privilege after treating the information they claim is confidential cavalierly. Critical to this analysis is the

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<sup>66</sup> See UMA Reporter’s Notes at 23.

understanding that privileges should encourage behavior, but that they come with a large price tag. If parties truly want to be able to keep evidence from being admissible in our courts, which depend on as broad a picture as possible to effectuate the goal of seeking the truth, then that information should be truly confidential information. The drafters have not provided an adequate rationale for omitting implied waivers from the UMA.

Section 5 also states that a mediation participant has waived the privilege if he or she has made an assertion about a mediation communication that prejudices another person in a proceeding.<sup>67</sup> The waiver, however, is limited and allows the person prejudiced to disclose only as much as is necessary about the mediation to respond to the prejudicial representation or disclosure. Although this exception prevents mediation participants from using the privilege as both a sword and a shield, it does not go far enough. If a person discloses communications about a mediation, he or she should be deemed to have waived the privilege regardless of prejudice. The rules, however, make no justification for allowing the original speaker, who first disclosed the mediation communication, to continue to assert the privilege if there was no prejudice. Again, the cost of allowing a privilege is high and privileges should be tailored as narrowly as possible.

Finally, Section 5 states that a party will waive the privilege if he or she intentionally uses the mediation to plan, attempt to commit or commit a crime or to conceal an ongoing crime or ongoing criminal activity.<sup>68</sup> The drafters draw a distinction between (1) a section 5 waiver of all mediation communications where the entire purpose of the mediation was related to criminal conduct and (2) a section 6 exception to the

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<sup>67</sup> UMA § 5(b) at 22.

<sup>68</sup> UMA § 5(c) at 22.

privilege for certain communications related to criminal activity.<sup>69</sup> Although the Subcommittee agrees that mediation communications arising from a mediation used for a criminal purpose should not be protected, the waiver that the UMA provides is inadequate. By categorizing the removal of protection for such communications as a section 5 waiver, rather than a section 6 exception, the UMA creates confusion and an unfortunate result. Bearing in mind that the waiver rules apply to non-parties and mediators as well as parties, section 5 might be construed to prevent a mediator from being compelled to testify about conduct or communications he or she witnessed during a purportedly “criminal” mediation unless he or she agreed to waive the privilege and all other parties agreed to waive the privilege relating to the mediation.

The more sensible approach, according to some and discussed below, is to allow the privilege to attach only to the actual parties in a mediation. If a party waives the privilege he may not prevent anyone from testifying about his communications and no other party may invoke the privilege to avoid testifying against the waiving party’s interest.

Another ill-advised difference between the UMA and other privileges is that individuals cannot waive the privilege with respect to their own communications without the consent of the other parties. The Subcommittee has concluded that any mediation participant should be able to waive the privilege with respect to his or her own communications and should be able to compel any other party to testify about those communications, provided it can be done without disclosing the communications of other parties in the mediation. It is difficult to see how such a waiver would dissuade others involved in the mediation process from speaking openly or freely. Although it opens

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<sup>69</sup> UMA §§ 5(c), 6(a)(4) at 22, 25; Reporter’s Notes at 24-25, 30-31.

those participating up to the threat of testifying, that threat would exist as part of any settlement negotiation.

## 2. *Asserting The Privilege*

The UMA provides that parties, mediators and non-parties are holders of the privilege. The ADR Committee agrees that an actual participant and counsel on his or her behalf should be able to assert the privilege. The ADR Committee is not in agreement, however, about whether the mediator should be granted a privilege. Some members can see no basis for granting the mediator a privilege – other professionals generally may not assert a privilege on their own behalf. Not resting the privilege with other professionals, such as attorneys, doctors or clergy, has not had a chilling or otherwise deleterious effect on their conduct in a way that has necessitated changing those privileges. Other ADR Committee members strongly support mediator privilege as fundamental to preserving the mediator’s perceived impartiality and to maintaining the integrity of the mediation process. If the parties believe there is potential for the mediator to testify, the parties may exert more effort on spinning the mediator than in engaging in candid discourse. At least one court has suggested that allowing the mediator to assert the privilege might help to maintain the mediator’s neutrality.<sup>70</sup>

The ADR Committee also questions whether non-party participants should have any right to the privilege. The parties are the primary entities that provide the facts and are seeking to settle the matter. They are the ones whom the Act is seeking to encourage to speak openly and freely. Non-party participants would almost always be involved in the mediation only at the request of a party. The need to provide them with

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<sup>70</sup> See *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9<sup>th</sup> Cir. 1980).

any right to assert a privilege is unclear. Certainly, the parties to the mediation should have the right to assert the privilege with respect to communications by non-party participants, but it is unclear why the non-party should have such a right. Although the right to assert the privilege might encourage some non-parties to speak more openly, whether it would result in any materially greater advantage than a simple confidentiality agreement has not been established. This is especially true for experts or counsel who have likely received compensation for their time.

Nevertheless, for purposes of this discussion, we will assume that the privilege exists for mediators and non-party participants. The rule as written recognizes that the primary protection for the privilege goes to the parties and requires all parties' consent to waive the privilege in virtually all circumstances. One aspect of Section 5 is that the mediator must expressly agree to waive the privilege if he or she is to provide testimony about the communications of the parties or non-parties, as opposed to testimony about the mediator's communications.<sup>71</sup> This is wholly inconsistent with other professional privileges. Moreover, it is unclear why the mediator receives this special privilege that allows him or her not to testify about the communications of others even if all parties to the mediation have agreed to waive the privilege. The drafters make no justification for this rule. It also appears that the UMA is inconsistent in that non-party participants do not have the same right as mediators to assert the privilege to prevent themselves from having to testify about the communications of others.

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<sup>71</sup> See UMA § 5 at 22; Reporter's Notes at 23.

### C. Lessons Learned From The Survey And Forums

Among those who responded to the survey<sup>72</sup> and participated in the forums,<sup>73</sup> there is overwhelming support for adoption of the UMA. The general consensus is that the codification of mediation will both elevate the stature of the field by legitimizing mediation and spur mediation development. Respondents believe that if New York implements the UMA, it will accelerate the promulgation of long overdue mediation standards, mediator qualifications, accountability and ethical guidelines. For example, if the UMA imposes affirmative obligations on the mediator, there would then be a need to develop regulatory controls to ensure those obligations are satisfied. Although these are important objectives, they are not reasons for adopting any legislation, including the UMA, that will impact the admissibility of evidence into our justice system and that will have a widespread impact generally. The legislature should adopt the UMA only if it is an independently strong statute that will benefit New York's evidentiary rules and will further encourage the type of positive conduct that privileges generally foster.

One difficulty some respondents had in evaluating whether the UMA should be adopted in New York is that New York has yet to develop a well-thought out mediation plan that defines the state's priorities. Although the NYS Office of ADR continues to develop and prioritize standards, guidelines and rules for court-annexed mediation programs, they apply only to court-annexed programs. There is no such regulatory agency for private mediations that occur outside the Office's umbrella. Therefore, without an articulated mediation vision that applies to all mediators, it is

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<sup>72</sup> There were approximately a dozen responses to the hundreds of surveys that were mailed, including a response by the Labor and Employment Section of NYSBA.

<sup>73</sup> There were approximately a total of 40 attendees at both forums.

difficult to assess if endorsement of the UMA is right for New York. Similarly, without a mediation vision, there is no coordination of mediation legislation initiatives. Currently, New York has other pending mediation legislation that addresses mediation confidentiality and that may conflict with the UMA. Without a plan and vision, the field appears disjointed and unprofessional. A few respondents questioned whether the adoption of the UMA would have a chilling effect on other mediation legislation in the near future. Others feared if the UMA were not adopted, then it would be a “lost opportunity.”

Beyond general support for the UMA, many respondents were defensive and reluctant to evaluate how the UMA might impact their practice. Some had not read the Act. Others felt a critical evaluation of the UMA might be interpreted as a breach of their commitment to supporting the UMA. In fact, one respondent voiced concerns that the questions during the forum were raising problems with the Act and that these problems should not overshadow endorsement of the UMA.

Several respondents, however, took the time to evaluate the UMA from their professional perspective. Some of the issues they raised include:

1. Some programs will have to modify their screening reporting practices.
2. Law clerks and other court support staff that currently conduct settlement conferences could be considered to be mediating under the UMA and not able to report back to the judge. The definitions of mediation and mediator need to be revised to exclude these people.

3. At this time, it is unclear how consumers of mediation would be informed about the UMA and exactly what they would be told. There is concern about having non-lawyer mediators interpret the statute.
4. The UMA needs to be adopted to allow for different styles of mediation. The current definition of mediation does not comport with transformative mediation practice.
5. There remain questions about how the UMA will interface with existing court rules. It is unclear what affirmative obligations the UMA imposes on mediators. There are questions about whether and what type of liability a mediator will incur for not adhering to the UMA.
6. Respondents questioned the reporting obligations of mediators when there is discussion of a crime, abuse or neglect. It is unclear if a mediator's reporting obligations might differ based on the mediator's background.

#### **IV. Summary**

The ADR Committee respects the dedicated work of the drafters and appreciates all the thought, wisdom and compromise that went into the UMA. This Report should not be construed as a diminution of these efforts. Yet, the issues and concerns addressed above are real and significant, especially for New York.

The ADR Committee acknowledges and whole-heartedly endorses uniformity as a laudable goal. The ADR Committee also appreciates the urgency of

those who believe that the UMA is New York’s only bite at the “golden apple” that will legitimize the mediation field. However, it would be a dereliction of duty to be swayed by popular sentiment and ignore the problems with the current version of the UMA. Unlike some states, New York is just beginning to define formally the parameters of acceptable mediation practice and this is simply not the right time for adoption of a uniform act, at least not the UMA. In order to move toward adoption of the UMA in the future, the ADR Committee recommends:

1. Continued consensus building in New York about mediation priorities;
2. Further clarification of how adoption of the UMA might impact existing court rules and statutes;
3. Further examination about how to achieve uniformity across different subject matters;
4. Further evaluation about how to achieve uniformity among states;
5. Redrafting the UMA so that it is simple and easy to understand;
6. Inclusion of a notice provision for when a mediation falls within the scope of the UMA;
7. Inclusion of a notice provision for when a mediation privilege is being waived;
8. A provision allowing parties to opt out of the entire UMA;
9. Provisions addressing the concerns about the dissimilarities between the UMA and other professional privileges.

An important outgrowth of the debate about the UMA is an increasing momentum to professionalize mediation. Discussions about the UMA have served as a springboard for analyzing not only an evidentiary privilege, but such important issues as mediator credentialing, a regulatory agency for mediation, training guidelines and confidentiality. The recommendation to defer endorsement of the UMA is not an effort to thwart mediation professionalism. Rather, New York should develop a mediation plan for the state that addresses these defining issues. The ADR Committee issued a report entitled, “Bring ADR into the New Millennium – Report on the Current Status and Future Direction of ADR in New York” (February 22, 1999) with specific recommendations about how to proceed and those recommendations should continue to be followed.

The ADR Committee also recommends a continued statewide effort to conduct forums and continue dialogue among mediation providers and users so that the continued growth of mediation practice in New York is defined by all.

**EXHIBIT A**

**THE UNIFORM MEDIATION ACT**

**FEBRURY 4, 2002**

**EXHIBIT B**  
**SELECTED BIBLIOGRAPHY**