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## ADR

Mediation, Arbitration and Non-Litigation Strategies

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It's time to suit up and put on the uniform—in this case the Uniform Mediation Act promulgated by the National Conference of Commissioners on Uniform State Laws. NCCUSL completed work on the act in 2001, and in 2005 the act was submitted to the Connecticut legislature. The UMA has received the endorsement of the Connecticut Bar Association as an Association position and previously had been approved by the American Bar Association. The legislature took no action on the act during last session—now is the time.

The primary purpose of the UMA is to ensure confidentiality in mediation. The act establishes an evidentiary privilege, comparable to the attorney/client privilege, for all participants in the mediation process. Assurance that communications made to the mediator and the other parties to a mediation is critical to building trust and promoting an exchange between and among the parties and the mediator. Under the act a "mediation communication," could be disclosed in later proceedings only if the privilege is waived by all parties to the mediation (i.e., the disputants), or pursuant to well-defined exceptions contained in the act. In the case of a privilege of a mediator, the mediator also must waive, and in the instance of a communication by a "nonparty participant," that person must agree to the waiver.

The UMA expressly does not apply to collective bargaining disputes (around which a body of law already has developed), a judicial settlement conference by a judge who might make a ruling on the case, or involves parties who are all minors (such as peer mediation now common in school systems).

## Time To Support Uniform Mediation Act

The use of mediation is only likely to expand further as it becomes an increasingly preferred alternative to protracted litigation, and due to the creative problem-solving potential about which I and others have written in this space. Mediation clearly has attained a level of importance within the overall system of dispute resolution. Passage of the act will both further elevate its stature and provide more certainty when entering into the process. In addition, uniformity of the law of mediation across state borders will become of growing importance as practice becomes more multi-jurisdictional.

The current law of the state is found in C.G.S. section 52-235d, adopted in 1998, which addresses disclosure of communications in mediation. The section refers to protection relating to a "party to a lawsuit," giving rise to the interpretation that the statute applies only to mediations of disputes that are in suit. Thus, mediations that are not convened to resolve a case in court do not fall within the protections of the current statute. Also, the statute has four exceptions. Two of them—disclosure required by court order after notice to the parties, and disclosure required when the "interest of justice outweighs the need for confidentiality"—are broad and of uncertain application.

The 2001 Superior Court case of *Sharon Motor Lodge, Inc. v. Tai* struggled with the "interest of justice" exception to section 52-235d, ultimately finding that it applied to require the mediator to respond to interrogatives posed by the court on the disputed issue of whether an agreement had been reached at the mediation session. The case reflects the lack of clarity that prevails under the present statute.

In the case of divorce mediation, C.G.S.

section 46b-53a provides that within a "program of mediation services for persons filing for dissolution of marriage" established within the Superior Court "[a]ll oral or written communications made by either party to the mediator or made between the parties in the presence of the mediator, while participating in the mediation program ... are privileged and inadmissible as evidence in any court proceedings unless the parties otherwise agree." This statute actually creates a confidentiality privilege, although expressly limited to family mediations under a Superior Court program.

So the two statutes currently in effect that address the protection from disclosure of statements made in mediation are of limited application. Beyond statute, the obligation of confidentiality can be, and usually is, covered in mediation agreements entered into by the parties and the mediator at the outset of the process. This is an important practice to protect statements that might otherwise be the subject of disclosure, particularly in light of the limited statutory scheme that presently exists—but it simply is not as secure as the protection provided by the UMA.

Will the UMA bring about world peace? No. Will it enhance the mediation process within which parties operate to solve problems rather than fight them out. Absolutely. Connecticut would be well served to be among the states adopting the act. ■



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