



Update

The Uniform Mediation Act

By Andrew Kidde

The Uniform Mediation Act (UMA), RCW 7.07, which goes into effect on January 1st, 2006, establishes a new legal framework for the practice of mediation. It includes statutes on mediation privilege, mediation confidentiality, conflicts of interest for mediators, qualification of mediators, and who may participate in mediation. The UMA will replace the current patchwork system of statutes covering mediation that many believe is cumbersome, inconsistent, and incomplete. The UMA is a significant improvement -- a lot of thought went into the deliberation and drafting of the law. Many of the inconsistencies of existing law are resolved in the new UMA, and we now have one convenient act that establishes the legal framework for mediation practice.

The bulk of the UMA concerns mediation privilege. Mediation privilege protects communications from being used in judicial proceedings, arbitrations, or legislative hearings. There is a broad, but not blanket, privilege for mediation parties under the UMA. The following types of mediation communication are exceptions to the privilege and can be submitted in judicial proceedings:

- written agreements signed by all parties
- communications in mediations that are open to the public
- threats to inflict bodily harm
- plans to commit or conceal crimes
- admissions of abuse or neglect of a child or vulnerable adult
- mediator malpractice issues

Mediators are also allowed to report the following limited list of facts: whether the mediation occurred or has terminated, who attended, and whether an agreement was reached. School peer mediators should note however -- mediations conducted

under the auspices of a primary or secondary school are not protected by the UMA.

The mediation privilege is triggered with the first contact between the client and the mediator or mediation organization. Thus, all communications for purpose of convening of a mediation are covered by the privilege. The privilege also includes all participants in the mediation: the parties, the mediator, and "non-party participants." The privilege includes both oral and written statements made in the mediation process as well as conduct intended to communicate (e.g. a head nod). As with existing law, however, information or evidence that existed before the mediation process does not become privileged by raising it in the mediation. Also the privilege may be waived by the parties.

Mediation privilege is different from confidentiality, which is a broader concept relating to outside disclosures in general. The UMA deals with confidentiality very briefly by stating that "mediation communications are confidential to the extent agreed by the parties..." This is a significant change from current law, which states that mediations conducted at Dispute Resolution Centers are confidential. Apparently, the drafters of the UMA believed confidentiality to be too complex and problematic issue for specific legislation, and opted to leave it up to the parties participating in mediation to clarify how they wanted to handle confidentiality.

The UMA requires mediators to make a reasonable inquiry into whether he or she has any of conflicts of interest in the dispute. The mediator also has a duty to disclose any conflicts of interest he or she might have as soon as practicable. The UMA also requires mediators to disclose her/his

qualifications to mediate the dispute, but does not require mediators to have any specific qualifications. Under the UMA, a mediation party is entitled to bring an attorney or other individual to the mediation, except in small claims mediation.

For the Bellevue Neighbor Mediation Program the changes brought by the UMA will not significantly affect the way we practice mediation. However, we will be redrafting our Agreement to Participate in Mediation, so that it makes reference to the UMA's privilege statute, and clarifies our own terms on confidentiality. Fortunately, Alan Kirtley and Julia Gold, of the University of Washington School of Law, have generously begun working on a model Agreement to Participate in Mediation for Dispute Resolution Centers. And we will be able to draw on their very well-informed efforts, in redrafting our own new Agreement to Participate in Mediation. Mediators can expect to see these new Agreements starting January of 2006. Also, if you would like a copy of the User's Guide to Washington's Uniform Mediation Act, by Alan Kirtley, please come by the office and pick one up (or call us and we'll send you one).

Some provisions of the UMA do raise questions for our program. For example, do we need to inform parties in High School peer mediation cases that their mediations are not covered by the UMA privilege? Now that there is no state statute guaranteeing confidentiality, in how much detail should we describe our own confidentiality terms? For example, do we need to inform the parties that mediators may discuss cases, without

any identifying information, to colleagues within the program? Should we articulate the possibility that the parties may negotiate exceptions to confidentiality as part of the final agreement. (For example, a party wants to be able to discuss the settlement with an arborist or a surveyor about the terms of the mediation). Or should we just simply say, "the mediation is confidential," based on the idea that simplicity is better than presenting a bunch of potentially confusing qualifications?

The right of a party to have his or her attorney attend the mediation is a new provision in the law, but it will probably have little affect on our mediations. Currently, our policy is that parties are allowed to bring their attorney to mediations, if the other party doesn't object. The new law doesn't really change this, mediation is voluntary, if a party does not want to mediate with the other party's attorney present, they can simply decline to mediate with someone who insists on having their attorney there.

Over the last several weeks I have participated in numerous seminars, e-mail threads, and discussions of the affect of the new UMA. The implications of the new law can generate quite a lot of concern, when hypothetical situations are spun out. Despite all this, I remain quite convinced that the UMA will be an improvement on the old law, and will not significantly affect how we practice mediation here at BNMP. But, if you have any questions or concerns about the new UMA, please feel free to call or e-mail me at (425) 452-4091 or akidde@ci.bellevue.wa.us.