The Uniform Mediation Act
Nondisclosure of Mediation Communications

INTRODUCTION

The need to resolve differences among ourselves has both practical and cultural roots. Throughout history individuals and cultures have survived (and accrued considerable power and wealth) because of the ability to identify, analyze, and design formal processes and efficient technology to solve problems. Like most human systems, mediation has changed because those who practice it have learned through experience. This experience has been gained by living in an ever-changing cultural, commercial, and legal environment.

This paper discusses how the nondisclosure expectations of mediation participants have been formalized by adoption of the Uniform Mediation Act (UMA), subsequent state adoption of the UMA and other state statutes which incorporate some concepts of the UMA.

The UMA as adopted by Ohio tracks the model UMA closely and will serve as the basis of discussion. Other writings which support and amplify the UMA goals and provisions or provide insight into its use will be included. While much of the source material references the law, the intent is not to take a “legalistic” view of mediation but to examine what the law is, and

1 Thomas Bailey, the author of this paper, is a student at the Capital University Law School and is completing the requirements for the completion of the Certificate Program in Mediation. He holds a B.S. Degree from Virginia Tech in Business/Public Administration and a Post-Baccalaureate Paralegal Certificate from Columbus State Community College of Columbus Ohio. He retired from the Army National Guard as a Chief Warrant Officer – Legal Administrator and also American Electric Power after a career managing the implementation of corporate financial systems. He has most recently worked as a part-time paralegal for civil litigation law firms. He serves as a mediator with the Municipal Courts of Columbus and Delaware Ohio, working in the area of civil litigation. He is a member of the Association for Conflict Resolution and the Ohio Mediation Association.

2 For clarity, the version of the UMA adopted by NCCUSL will be referred to as the “model” UMA. References to state laws which have been passed to incorporate its provisions will include the name of the state.

3 Ohio Revised Code §2710.01 et seq. was made effective on October 29, 2005 upon the enactment of Amended Substitute House Bill Number 303, 125th General Assembly
how it can be a guide for understanding and communicating standards long practiced by
competent and dedicated mediators – non-attorneys and attorneys.

**ORIGIN OF THE UMA**

In August of 2001, the UMA was approved by the National Conference of
Commissioners on Uniform State Laws (NCCUSL).\(^4\) This was the result of work by that
organization’s Drafting Committee on [the] Uniform Mediation Act. The American Bar
Association Section of Dispute Resolution\(^5\) worked closely with the NCCUSL committee.

Since approval, a single amendment has been adopted. This 2002 change incorporated the
United Nations Model Law on International Commercial Conciliation.\(^6\) The other provisions of
the 2001 model UMA were not modified.

**PRINCIPLES GUIDING THE DRAFTERS**

Individuals and groups involved in the development of the UMA identified certain principles
they considered fundamental to the development of a uniform mediation process or were
necessary to ensure the highest level of acceptance and adoption by the individual state
legislatures.\(^7\)

The freedom to speak freely and directly to the person (or persons) with whom there is a
conflict is essential. Even when a mediated agreement results in no settlement or a settlement

---

\(^4\) This is the same organization that promulgated the Uniform Commercial Act.

\(^5\) Ohio representatives on this committee were Chief Justice Thomas J. Moyer (committee Co-chair) of the Supreme
Court of Ohio, Jose Feliciano of Baker & Hostetler, Emily Stewart Hayes of the Supreme Court of Ohio, and Nancy
H. of Rogers of the Ohio State University College of Law and Office of Academic Affairs.

\(^6\) The text of this amendment, included in the model UMA as Appendix A, is not within the scope of this writing.

\(^7\) A lengthy discussion of the principles guiding those most directly involved in the drafting of the model UMA is
for the complete text of the UMA and the Prefatory Notes.
with terms less favorable than expected by a party at the start of mediation, the long term level of satisfaction by that party will often be higher if the face-to-face discussion is fostered.

The UMA was drafted to encourage disputants to freely communicate without the worry of making a factual error, misstating a strongly held belief, or committing to something which later would be impossible (or undesirable) to fulfill.

Another guiding principle followed by the drafters was the emphasis on putting the parties in control of the process and the outcome. Participants are competent to mold the process of mediation to suit their needs. They should be able to define the scope of the discussions, set the rules of engagement, and craft an agreement which satisfies their needs, both practical and emotional.

The use of mediation should address disputes as early as possible in the conflict life cycle. Positions can be hardened as the result of animosity as well as the potential great cost of litigation. To this end, the mediation process should be easy to enter, uncomplicated, not threatening, cost effective to the extent that the cost of mediation should be in proportion to the value (emotional or monetary) of the dispute.

The growth of mediation over the last three decades presented the drafters with an opportunity to bring uniformity to both the understanding and practice of mediation. The challenge was to encourage a common vocabulary, and a common understanding of the overall process which is practiced successfully in various legal environments and by practitioners employing differing approaches. They were challenged to foster a high level of uniformity where it did not previously exist. While a particular community mediation organization might be able to employ its own unique approach that same process might not be appropriate when state
State bar associations have been very active in support of Alternative Dispute Resolution (ADR) through the use of their committees. These organizations have developed a communication network out of which the need for more commonly understood definitions, techniques, and standards of practice has been recognized. The development of this model act was not intended to restrict the states by imposing standards that conflict with long established, well accepted, and successful jurisdictional procedures. State customs and laws would have to be accommodated by the model without negating the benefits hoped for through standardization.

The proponents and drafters understood that there was a wealth of experience and knowledge available and they were determined to take advantage of it. The development of the UMA, as noted earlier, was undertaken by committees of the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The two committees, while operating as independent groups, worked together closely during the process. The Drafting Committees were purposefully formed to represent the various forums in which mediation is used, the use of evaluative versus facilitative methods, and the use of mandatory mediation. The individual viewpoints of the participants surely must have tested any cooperative negotiation orientation. Significant funding for research was provided the drafting committees by private grant. This

---

8 A concept that stresses solving a dispute by offering processes to meet differing needs, circumstances, and preferences. The goal is to achieve agreement at the lowest level, by the people who have the most to gain or lose – the parties in dispute.
9 Standardization becomes closer to reality with each state that adopts the UMA.
10 The William and Flora Hewlett Foundation provided funding which allowed participation in the drafting process by individuals who have distinguished themselves in the area of dispute resolution.
funding allowed access to a wide ranging group of scholars. Leading practitioners of mediation and organizations which have been instrumental in the development, promotion, and understanding of mediation and related dispute resolution processes provided.

The UMA language had to be written for persons of varying educational levels, professions, interests, and backgrounds.\(^{11}\) It needed be adaptable to the norms state law structure, but, at the same time not be cluttered with unnecessary “legalese.” It would be applicable to the courthouse, the workplace, religious organizations, community programs, and many other forums were mediation is employed to resolve disputes.

The drafters recognized that the various states had longstanding legal philosophies\(^ {12}\). For this reason, sections addressing areas such as confidentiality and privilege were incorporated into the UMA in such in a way that it created a reasonable compromise. Also, some other areas, such as the certification of mediators, were not addressed in specific terms but it was left to the adopting states to incorporate such standards as desirable.

**CURRENT STATUS\(^ {13}\)**

The District of Columbia, Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Vermont, and Washington have enacted versions of the model Uniform Mediation Act. These nine state statutes differ little from the model. Six states, Connecticut\(^ {14}\), Indiana\(^ {15}\), Massachusetts\(^ {16}\),

\(^{11}\) See model UMA Prefatory Note 6.
\(^{12}\) See model UMA Prefatory Note 6.
\(^{13}\) See for information regarding the status of state implementation of the UMA.
\(^{14}\) Senate Bill 598
\(^{15}\) Introduced in 2005
\(^{16}\) House Bill 1814
Minnesota, Nevada, and New York each have legislation pending to implement it. Other states have adopted some form of mediation legislation which has similar goals.

**OHIO’S UMA**

On October 29th, 2002 Ohio’s Uniform Mediation Act became effective. It has not been amended.

**Scope of Applicability**

Ohio’s UMA is applicable in any of the following situations:

1. The parties are required to mediate by statute, court or administrative agency rule, or referral by a court, administrative agency, or an arbitrator.

2. The mediation parties agree to mediate and a record reflects the desire of the parties for the mediation communications to be privileged. For the purpose of the UMA, a mediation communication is defined as “a statement, whether oral, in a record, verbal, or nonverbal, that occurs during a mediation or is made for the purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” A record is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”

---

17 HF1159/SF1478  
18 Senate Bill 292 would enact the UMA’s confidentiality privilege for communications made in the mediation.  
19 Senate Bill 1527  
20 Codified as O.R.C §2710.01 through §2710.10  
21 As of January 2008  
22 O.R.C. §2710.01(A)  
23 O.R.C. §2710.01(B)  
24 O.R.C. §2710.01(H)
3. The parties utilize a person who holds himself or herself out as a mediator or the provider of mediation.

Based on the above provisions, almost all sessions described as mediations or commonly considered to be mediations are mediations as defined by the UMA.

The Ohio’s UMA is not applicable if the mediation relates to disputes arising under a collective bargaining agreement or where the mediation is being conducted by a judge or magistrate who may make a ruling on the case which is the subject of the dispute being mediated. Finally, mediations are not subject to the UMA if conducted when the parties are primary or secondary school students or are youths who live at a correctional institution.

**Mediation Defined**

As defined by the Ohio UMA, mediation is any process during which a mediator facilitates a discussion of a dispute with the goal of assisting the parties in reaching a voluntary agreement. Mediation is not limited to the courthouse, a lawyer’s office, a governmental office, or a community non-profit agency. There is no requirement that a specific process be employed or that a mediator have any particular educational achievement, training, certification, or skill set.

A “mediation communication” is more than an oral statement made behind closed doors. A communication can be an oral statement or in written form. It can be a gesture or other form of nonverbal communication. A mediation communication my occur at any point in the

---

25 Reference to a magistrate does not exist in the model UMA. Ohio, along with other states, utilizes lawyers who are appointed by judges to perform judicial duties subject to the approval of the judge.  
26 O.R.C §2719.02(B)(3) As discussed later, the heart of the UMA is the protection of mediation communications as privileged.
mediation process, including during activities for the purpose of considering the use mediation, retaining a mediator, planning the mediation, and conducting the mediation to completion.  

The Parties

There is no requirement that all of the “parties” in the mediation be a natural person. A party is defined by the UMA as a person whose agreement is necessary to resolve the dispute. A person can be an individual, corporation, business trust, estate, trust, partnership, limited liability company, and other legal or commercial entities. Some business organizations, for example, a limited liability company, may be owned by one or more other companies and/or individuals. Ultimately, an individual must be “at the table” with the authority to agree, in the name of the party, to any binding settlement coming out of the mediation.

The Mediator

The Ohio UMA defines a mediator simply as an individual who conducts a mediation and specifies no particular qualifications by background, profession, education, or training. However, a mediator must conduct the mediation in an impartial manner. As early in the process as possible the mediator must determine if there are facts which would affect her or his impartiality. Situations which might give rise to a concern would include a business or personal

---

27 O.R.C §2710.01(B) Notice of this agreement must be made to participants prior to a communication being made. Otherwise, the communication is protected.
28 O.R.C §2710.01(E)
29 O.R.C §2710.01(F) This incorporates the Ohio definition of “person” as allowed for in the model UMA
30 An agreement may fully or partially resolve the dispute. It may be final or interim. In order to achieve the desired result, it must clearly state the parties’ agreement with sufficient detail to facilitate performance of its requirements without subsequent confusion or litigation.
31 O.R.C §2710.01(E) Some mediation models utilize more than one mediator. This is especially helpful where personal feelings are strong or where multiple phases of the mediation may require the expertise of mediators in specific practice areas. Although not addressed by the UMA, it should be assumed that the use of the singular does not preclude other forms of mediator participation.
32 O.R.C §2710.08(F)
relationship with a mediation party, perceived differences in culture, lifestyle, and social status. Any conflict of interest (or the appearance of a conflict) must be disclosed to the mediation parties as soon as the conflict is identified. It is preferable for the mediator to identify conflicts before the mediator accepts the mediation. If this is not possible, an inquiry should be made at the beginning of the first mediation session. Even if a potential conflict is identified, the mediation may proceed with the agreement of all mediation parties and the mediator.

Mediator certification, while not required by the UMA, is not prohibited by it either. Many court systems and other providers of mediation services have rules setting standards which must be met before that organization will appoint individuals to mediate within that organization. This process does not prevent anyone from mediating any dispute. It just means that non-certified individuals may not know of available cases and may not be provided with facilities and staff to support the mediation.

The mediator may withdraw as mediator at any time and for any reason deemed sufficient by that mediator. When the mediator withdraws the mediation is over. Should the parties desire to continue mediation a new mediator must be found and the process begun anew. Except for positive persuasion, this is the only method a mediator has of enforcing the mediation rules, preventing what the mediator believes to be an injustice of such magnitude that he or she cannot allow. Also, when a mediator believes that her or his neutrality has been compromised to such a degree that it cannot be regained, then withdrawal is necessary.

Legal Counsel and Other Attendees

33 O.R.C §2710.08
34 O.R.C §2710.08(G)
35 O.R.C §2710.09 This provision is not tied to the participation of the party participant’s attorney or other person accompanying the party participant. The mediator may withdraw for any reason.
Each party has the right to be accompanied by legal counsel and another individual who may participate in the mediation.\textsuperscript{36} Frequently, however, counsel does not attend a mediation where the dispute is over a small monetary claim or where the dispute involves neighborhood or other non-divorce personal relationships\textsuperscript{37} is not common. Parties or should not focus on legal issues, real or not, which must do not need to be resolved before the parties can come to agreement. Participation by counsel could easily exceed the total amount in dispute or, more importantly, the value of the final settlement if any.

The Mediation Process

No specific mediation process is described, endorsed, or required by the UMA. There are significant differences in approaches based on the preference of the mediator, the organization sponsoring the mediation, and the type of dispute. It is also important that the process and ground rules be accepted by the parties in dispute. The mediator must be free to change the process as the mediation progresses if a change is necessary to meet the needs of the parties.

**Nondisclosure of Mediation Communications**

**The Heart of the UMA**\textsuperscript{38}

The highly valued, much discussed, and often misunderstood rules of governing the disclosure of mediation communications is the central issue addressed by the UMA. Unfortunately, the concept of confidentiality is frequently used interchangeably with privilege. They are not the same.

**Privilege:**

\textsuperscript{36} O.R.C §2710.09
\textsuperscript{37} Counsel may be more inclined to attend divorce related mediations because agreements would likely have to be finalized by counsel and filed with the court in a specified format.
\textsuperscript{38} The model UMA anticipated that individual states would incorporate local provisions regarding privileged communication in keeping with that state’s historical positions.
When used in the context of any mediation conducted under the UMA (or similar laws), “privilege” refers to the statutory right, specifically granted by the UMA, of a participant to refuse to disclose any mediation communications made by that person even if ordered to do so by a judicial officer. It also prohibits anyone else from disclosing that same communication without permission (waiver of privilege) by the person making the communication. This is “testimonial” privilege because it is only applicable to proceedings in a court or other forum where judicial officers, after procedural requirements have been met, are otherwise empowered to compel testimony.

Although the UMA specifies certain privileges, the claim of other privileges may also be available to mediation participants. They may be either statutory rights or have their origin in case law. Generally they are based on special relationships, personal or professional, which rely on the confidentiality of communications to meet a need valued by society\(^{39}\). They include attorney-client, doctor-patient, clergy-penitent, husband-wife, journalist, and state secret communications.\(^{40}\)

It is said that a person “owns” a privilege. In mediation communications, participants own two types of privilege – the right not to disclose one’s own mediation communications and the right to prevent other participants from disclosing certain communications made by others. Under the Ohio UMA, a communication made during mediation is generally privileged and not


\(^{40}\) Blacks Law Dictionary 974 (7th ed. 1999)
subject to discovery or admissible in court as evidence. The rules of mediation privilege can be simply stated:

1. A mediation party may refuse to disclose, and prevent anyone else from disclosing any communication made during mediation by any participant.

2. A mediator may refuse to disclose any communication made during mediation and may prevent any other person from disclosing any communication made by the mediator.

3. A nonparty participant may refuse to disclose and may prevent any other person from disclosing a communication made by that nonparty participant.

There are situations where an individual who owns a mediation communication privilege may want to “disown” (waive) her or his privilege relating one or more communications made by that individual. The UMA allows for this possibility. This waiver may take the form of a written or oral agreement but must be agreed to by all parties, the mediator, and nonparty participants.

There are also situations where the State of Ohio has decided that the protection from disclosure is contrary to the public good and no privilege applies.

1. Communications must be divulged when a participant uses mediation to further criminal activity.

2. A mediated agreement, in writing and signed by all parties.

---

41 Id at 277 Defined as (1) the act or process of …learning something that was previously unknown, (2) compulsory disclosure, at a party’s request, of information that relates to the litigation. Black’s Law Dictionary, 277
42 O.R.C.§2710.03(A)
43 This applies to all phases of mediation, from contemplation on the part of a potential party through conclusion of the process.
44 O.R.C §2710.04
45 O.R.C §2710.04(C)
46 O.R.C §2710.05(A)(1)
3. Communication available to the public under Ohio’s public records act.  

4. When a mediation session is open to the public or required to be open to the public.  

5. When a communication constitutes a threat to commit a crime of violence.  

6. When a communication relates to a claim of misconduct or malpractice against any mediation participant.  

7. When a communication is relates to abuse, neglect, abandonment, or exploitation in a proceeding where a child or adult protective service agency is a party. Note however, that where a court refers a case to mediation in which a public agency participates, privilege exists.  

8. When disclosure is required by statute. This includes the Ohio requirement that all persons must report a felony, anyone giving aid to a sick or injured person where there is a gunshot or stab wound or other act of violence.  

9. When a communication sought for a felony criminal proceeding, a delinquent child proceeding where the offense would be a felony if committed by an adult, or a case initiated by the state or a child protective agency where a child is alleged to be abused, neglected or dependent.  

10. When a court, administrative agency, or arbitrator finds that the communication represents information that is not otherwise available and that the communication is necessary to prevent a manifest injustice in a criminal misdemeanor court proceeding.  

O.R.C §149.43 - Availability of Public Records for Inspection and Copying  

O.R.C §149.43  

This is effective after the claim or complaint has been filed.  

See exception in O.R.C §2317.02 and §3109.52  

O.R.C §2921.22 Failure to report a felony is a fourth degree misdemeanor. Failure to report a gunshot or stab wound is a second degree misdemeanor.
11. In a proceeding to prove contract claims arising out of mediation. However, a mediator may not be ordered to disclose evidence of a communication.

12. Unless parties have agreed otherwise, a mediator may not provide a report regarding a mediation to any court or any governmental entity which may make a ruling on the dispute being mediated except that the mediator may disclose whether the mediation occurred or has terminated, who attended the mediation, and whether a settlement was reached. Should any prohibited information be provided, that information shall not be considered by the person or organization receiving it.

Confidentiality:

Unlike privilege, a confidentiality agreement is an enforceable contract and is created and adopted by all persons participating in the mediation it is used to govern the extent to which mediation communications may be divulged to persons outside the court system. These contracts are usually created prior to the beginning of mediation discussions, but can be modified at any time during the process based upon information divulged during the mediation. Confidentiality agreements can be broad or very specific depending upon the desires of the parties to the contract.

The Debate Over the Level of Nondisclosure Required for Effective Mediation?

One of the things we first hear about mediation, as a student or as a participant, is that mediation is “confidential.” Test books, web pages, and informative brochures use confidentiality as a primary reason for and individual to participate in mediation.

---

52 Black’s supra at 780. Manifest injustice is defined as “An error in the trial court that is direct, obvious, and observable, such as a defendant’s guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds.

53 O.R.C §2710.06(B)

54 O.R.C §2710.06(C)
courts have addressed and writers have tackled in scholarly work. As we learn more, we come to understand that there are exceptions. Several situations have been previously described which require statements made in mediation to be disclosed and failure to do so could constitute criminal wrongdoing. We also understand that “rules are made to be broken.” Mediation communications are often revealed during and after the mediation to family and friends in informal settings. The purposes vary but advice and moral support are foremost.

Nondisclosure makes mediation work. The most often stated reason for mediation is to encourage the parties to speak freely. Many mediators believe must be able draw out the positions and interests of the disputants. These are often rooted in deep-seated feelings. The negotiation of agreements requires that parties make admissions which they would never make if the statements could be used to their detriment if made public or admissible in litigation. People are not inclined to “air their dirty laundry” if their shortcomings are subject to being made public. Many apologies would not be made if the apology could later to prove an admission of liability or cause personal embarrassment.

Nondisclosure supports fairness. Mediation communications lack safeguards present in legal proceedings such as rules of evidence and procedure. Juries are not allowed to hear or consider certain prejudicial evidence or settlement negotiation history. Parties in dispute are not always represented by counsel. There may be an imbalance in the level of sophistication of the parties. Mediation communications, if not confidential, could be used as a discovery device if they were admissible. Federal Rule of Evidence 408 and the comparable state provisions have

---

56 The reasonably straightforward text of the rule is: “Rule 408. Compromise and Offers to Compromise. Evidence of (1) furnishing or offering or promising to furnish, or (2) attempting or offering or promising to accept, a valuable
long protected communications make for the sole purpose of negotiating a settlement early in the 
litigation process. If it were not for this rule, litigants in a lawsuit would be unlikely likely to 
make any statement that would imply liability and later be used against them in court.

Nondisclosure supports mediator neutrality and reduces post-mediation involvement on the part of mediators. Mediators strive to remain neutral in fact and in the eyes of the other participants. If a mediator were called to testify, even if the testimony was carefully presented, likely would be seen as favoring one side over the other. Frequent subpoenas, exposure to public scrutiny, and harassment would likely result in a lack of mediators willing to volunteer for community and other voluntary programs. Most mediators do not keep records of their mediations, and those who keep records may not keep them to the level of detail required to respond to a subpoena served months or years later. Participants are often told by the mediator that all notes are destroyed at the conclusion of the mediation. Without nondisclosure protection, some mediators would feel the need to document all the mediations they facilitate. While this would allow for response to later inquiry, this document preservation requirement could also result in volunteer mediators leaving the profession. Mediators might only do mediations where the fee they received justified the potential cost of later involvement. Other potential consequences to mediators would be the opening of their mediations to public scrutiny and the potential of harassment. The real losers would be the parties who, for economic reasons, would

consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”

Many mediators place a high value on being able to assist with a dispute and then move on to the next one, without the need to keep records in sufficient detail to fully respond to unanticipated subpoenas.
simply not utilize paid mediators. Ultimately the entire mediator field would be hurt because former volunteer mediators, because of the variety of disputes and number of their mediations, make a valuable contribution to the field.

As a culture, we have always been suspicious of secrecy because it can be used to obscure a variety of actions and results that a contrary to our perception of what is right. Some degree, even a significant degree, of confidentiality in mediation has been generally acceptable. Neither absolute nondisclosure nor absolute openness would have wide support.

One criticism of complete nondisclosure of mediation communications is that secrecy raises the prospect of unfair outcomes. Parties may be worse off than if another form of dispute resolution, such as litigation or arbitration, is used. Perhaps this argument might be better accepted if litigation as a lofty solution.

Where the process is not subject to any type of review it is not accountable and potentially unfair. Parties may be worse off than if the dispute had been resolved in other ways (such as litigation). Mediation’s closed forum may result in individuals, enterprises, regulatory agencies which are not present being deprived of the information they need prevent being harmed financially or hindered in their ability to perform their duties.

Most mediators would resist a court subpoena but believe that there should be latitude in some situations (e.g. child abuse or imminent harm). Even the Federal Rules of Evidence allows courts the freedom to interpret the applicability of privilege based on reason and experience. The code of the Society of Professionals in Dispute Resolution which stated

---

58 See O.R.C §2710.04 which includes these exemptions, among others.
59 Fed. R. Evid. 501
60 This organization merged, along with other organizations, into the Association for Conflict Resolution.
that confidentiality is critical to mediation but since it could not always be maintained, that mediation participants should be cautioned accordingly. This does not satisfy all mediators because it does not provide the specific criterion under which disclosure is permissible or when the mediator has a duty to withdraw or to report information.

Some courts have applied the “Wigmore Test”\textsuperscript{62} to determine if confidentiality should be protected. The elements of this test are:

1. The parties believed the communications were confidential.
2. The preservation of confidentiality was essential to the process.
3. The relationship between the parties should be protected.
4. The injury caused by disclosure outweighs nondisclosure.

Even where the UMA was not enacted, mediators generally believe that they have immunity from testimony based case law, especially the Wigmore Test. Some\textsuperscript{63} questions these assumptions as follows:

1. Mediation could continue to function with limited confidentiality but could alter the process because parties might be less open in their communications.
2. Effective mediation is necessary for an efficient court system but other improvements could be made to increase efficiency.

\textsuperscript{61} A revised code was approved by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution in September 2005.

\textsuperscript{62} See NLRB v. Joseph Maclcuso, Inc., 618 F.2d 51, 54 (9th Cir.1980) The history of this decision process is traced to 5 Wigmore on Evidence, par. 2494 (1935). This work was relied on by Chills Dry Goods, Co. v. Industrial Commission, 217 Wis 76, 258 N.W. 336 (1935)

3. Confidentiality needs vary depending upon the type of dispute being mediated. A single set of confidentiality rules may not work for both small claims civil litigation and divorce mediations.

4. Courts will increasingly hold that the right to public access to judicial records will overcome a policy of encouraging settlements. The benefit/harm test may not always favor privilege.

5. A mediator, although acting impartially, may hold personal opinions which favor one party over another regardless of the existence or lack of nondisclosure laws. To the extent that mediator opinions steer closed mediation the same would be true in an open mediation.

When Nondisclosure and The Duty to Disclose Collide

What is a lawyer to do? Consider the situation where two attorneys are participating in a mediation session where the confidentiality of mediation communication is in force. One of the attorneys commits professional misconduct. The other attorney, having observing the misconduct, has a duty to report it under the state’s rules of conduct for attorneys and, at the same time, has a duty not to disclose the same conduct because it constitutes a mediation communication under the UMA.

Because attorney-mediators would ultimately have to choose between a law career and a mediation career, the unintended result might be the departure of attorney-mediators from the very dispute resolution programs which they founded or to which they provide valuable services. Frequently these programs are staffed by volunteer mediators, lay and attorney.

Although mediation was envisioned as a process by which individuals could resolve their disputes without the assistance of counsel, the participation by counsel has resulted in a model which incorporates the attorney-advocate into the mediation. As mediator, an attorney is acting only as an advocate for the process, not the individuals in dispute.

The mediation confidentiality legislation in some states approximates the attorney-client privilege. For example, Oklahoma’s statute provides broad confidentiality and specifies that no mediator or party in a mediation proceeding shall be subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during any part of the mediation. A mediator is immune from civil damages if confidentiality is breached unless the breach showed a “willful disregard.” Reporting an attorney-mediator for misconduct would likely be construed as a willful act and the protection otherwise afforded by the statute would not then apply.

The UMA empowers mediation participants, including an attorney, to execute a mediation confidentiality agreement to hold all communications confidential. With such an agreement in force, an attorney in the mediation could then prevent disclosure of her/his unethical conduct -- and would probably do so.

This dilemma can be corrected by either changing the confidentiality requirements of mediation or by changing the professional conduct requirements. Ohio has taken the second approach by addressing this with Rule 8.3 which states that “a lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct…shall inform

disciplinary authority…” (Emphasis added.) The Ohio UMA does not contain an exemption to privilege which would allow the disclosure of professional misconduct.

Ohio’s position is not universally accepted. Some propose changes to allow attorney-mediators to report attorney misconduct on the basis that reporting attorney misconduct is more important to the public than protecting absolute mediation confidentiality.

**New Jersey Superior Court Appellate Decision**

In this case, the former wife filed to set aside a written property settlement agreement which stated that the mediator could not be required to provide testimony related to mediation communications. The court held that the first judge appropriately ordered a hearing but that deposing the mediator and examining his file was inappropriate. The holding of the court did not reference the New Jersey UMA but cited a 2005 case holding that the criminal defendant’s need for the mediator’s testimony did not outweigh the need for confidentiality. In the instant case, the mediation agreement specifically provided for confidentiality.

The New Jersey UMA states that mediation communications are confidential to the extent agreed by the parties or by other law or rule of the state.

On of the issues considered by the court was a claim by the defendant that the right to confront his accuser was being denied in protecting the mediation confidentiality. The court held that the right to confrontation and presentation of favorable witnesses is “not absolute and may, in appropriate circumstances, bow to competing interests.”

**Georgia Supreme Court Decision 2007:**

---

67 This requires a greater emphasis on memorializing the parties expressed desires in maintaining confidentiality. Compare this with Ohio which provides a much broader application of confidentiality/privilege
In a case decided by the Supreme Court of Georgia in November of 2007, a mediator was called to testify in a court action challenging a divorce settlement. The mediator only testified as to the mental capacity of the parties to engage in the mediation and the settlement. No testimony was given by the mediator which revealed the substantive discussions of the mediation in general or specifically to communications related to the agreement. Mr. Wilson contended, among other things, that the trial court erred in failing to give him a jury trial on his competency to enter the settlement agreement.

The Supreme Court of Georgia held that the trial court did not err in calling the mediator to testify in the limited area of assessing the mental capacity of Mr. Wilson. However, the court tempered its decision by recognizing the importance of confidentiality in the mediation process. The court also urges trial court to exercise caution in calling mediators to testify. Citing the model UMA, the court stated an assumption that the mental impressions of the mediator are confidential and that a better process would have been to have conducted a closed hearing. This case is illustrative of the respect the concepts contained in the UMA even when not adopted as law by a state.

CRITICISMS OF THE UMA AND RESPONSES

Critical to the understanding of the concerns are the competing backgrounds, interests, professions and forums employed by the people and organizations involved in the mediation process.

---

68 Wilson v. Wilson, 653 S.E. 2d 702. The Georgia Supreme Court references UMA §2(2) and §6(b)(2) in this decision. This is an example of
69 Sections 2(2) and 6(b)(2)
The prime movers in the effort to achieve a uniform approach were working in parallel for some time before coming together to form the foundation of the drafting committee. By the time the draft was completed, an unprecedented level of cooperation in the area of mediation had been achieved.

The core concept of confidentiality pitted the needs, norms and expectations of the mediation process against the legal system’s insistence on the availability of evidence in establishing or defending legal claims. Mediators questioned the need for a uniform mediation act because, as practitioners, they function on the basis of standards and norms, not hard and fast rules or laws. They also were accustomed to controlling the mediation process and establishing rules based on the forum, dispute, and preferences of the participants. Given the cultural differences, it is not surprising that there would be continuing disagreement over the scope and content of the UMA.

1. The UMA is too complex.

This criticism implies that, for example, attorneys go to great lengths to explain the scope of privilege to their clients. In real life, they probably just tell clients that their conversations are privileged and confidential. Mediators practicing under the UMA would probably not go into great detail about privilege and confidentiality either. The ability to participate effectively in mediation is not dependant upon knowing every application and exception in this area. The mediator would more than likely just say that whatever is said in the room stays in the room.

The result of more than a dozen drafts, the UMA is remarkably clear. The mediator need only tell the parties that mediation communications are confidential and generally not
admissible in a court should the mediation fail. The UMA provides the basis for that statement to be made. The wording is straightforward even if the mediation environment is complex. There are many types of mediation styles and environments. The UMA privilege is unique in that it cannot be waived by conduct. The waiver must be express.

2. The UMA was crafted to be specific, not brief.

A less specific statute would leave more room for court interpretation. Early versions of the UMA contained broader confidentiality language with an exception for “manifest injustice.” The mediation community objected to this exception as inviting courts to interpret it too broadly.

3. The UMA’s title is misleading because it is essentially an evidentiary privilege and discovery limitation and does not address a wide range of mediation topics. Clearly its central focus is privilege. However, the act provides some assurance of process integrity. Mediators must disclose known conflicts. Parties may have attorneys or others accompany them during the mediation sessions. Mediators may not report substantive reports to judicial officers or other authorities.

4. The UMA will never be uniform.

It is true that there will never be a completely uniform implementation. The goal is to achieve a degree of uniformity among the adopting states. It will have to be modified by each state to integrate with other statutes. This was also the case with the Uniform Commercial Code. This is strength rather than a weakness. It will provide a broad framework of uniformity but still adapted to the individual state’s statutory environment.

5. The UMA has undesired provisions.
A mediator must disclose conflicts of interest. Detractors believe that this should be an ethical, not a legal issue. Mediators are not subject to state oversight as are attorneys, barbers, accountants, or plumbers. The public should have protection from mediators who employ questionable methods. Why should mediators have such special treatment? This situation could be alleviated with the implementation of formal standards. Also, parties may jointly agree (and prefer) to utilize a mediator whom they know. The drafters concluded that it was best to put the burden to disclose on the mediator but let the parties waive the conflict if they desire.

6. Things are missing from the UMA.

First, the act does not include a “gag rule” on mediation participants outside of legal proceedings. It relegates the permissibly of such disclosure to a matter to be addressed by contract. This was a difficult area of concern for the drafting committee. While confidentiality is important to mediation, the committee felt that addressing this in a uniform law was not advisable. Concern was expressed that courts would likely impose civil liability for disclosures innocently made to a neighbor. The disclosing party could be liable for significant damages, including emotional distress. The compromise was an evidentiary privilege.

7. A mediator’s observations and impressions are not protected as mediation communication. The drafters considered the implications of Olam v. Congress Mortgage Co.71 which permitted compulsion of testimony by the mediator regarding the mental ability of a party to enter into an agreement reached as the result of mediation. The

---

71 68 F. Supp.2d 1110
committee concluded that the statutory extension of privilege to countermand Olam would be inconsistent with the rest of the law of privilege, including the attorney-client privilege.

**APPLYING THE UMA IN REAL LIFE**

Applying the UMA provisions and concepts to the everyday practice of mediation should be more helpful than restrictive. Its provisions rely on the long experience of mediators who practice in various forums as well as administrators of courts, leaders of community mediation services and legal scholars. It provides a basis for common understanding of the process, defines the roles and responsibilities of the participants, and answers some of the procedural questions mediation parties often have, even if they don’t ask them. It is applicable from the first discussion with a potential participant until satisfaction of the mediated agreement.

**The First Contact**

When having the first contact with a person considering mediation, the mediator should tell the person that nothing they discuss will be revealed to anybody else. It is likely that the person will then begin to tell the mediator a great deal about how “right” they are and how “wrong” the other party is. There is a natural attempt to get the mediator on “their side.” The mediator should avoid the temptation to get the details of the dispute but should briefly (a couple of sentences are sufficient) describe the role of the mediator as a neutral facilitator of the mediation process.

As mediators we frequently encounter those who confuse the process and goal of mediation with arbitration. Most of us have been introduced (or referred to) as “the arbitrator.”
The two processes should be briefly described to the participants and it should be made clear that it is mediation that is being considered.

An expression of interest in mediation should always be reinforced but only in the context of supporting the process as proven method of dispute resolution. Mediators should not encourage mediation by characterizing the potential participant’s position as “a good case” or in any other manner that could be understood as supporting him or her or denigrating the position of the other potential party or parties.

Preparing for Mediation:

Once the parties have agreed to mediate, plans for the mediation must be the focus, not the content of the mediation. The mediator should continue to support each party in their decision to participate. When parties are represented, it is helpful for the mediator to communicate through counsel using a joint letter or by providing copies.

Parties who are not represented should be informed that they have a right (but are not required) to consult an attorney and to have one with them at any time during the mediation. They should also be told that the mediator does not represent either or both parties and does not give legal advice to either party.

This is equally important for the attorney-mediator and non-attorney mediator.

Getting the sides together:

At the first meeting where all the parties we frequently tell people that they are in control during mediation discussions and the final outcome. The most successful outcomes require that

---

72 There seems to be a lack of awareness of this provision. Some mediators state they will only allow the parties to attend the mediation sessions and attempt to prevent the attendance of counsel and/or other non-party participants. If not done earlier, parties should be told that they have a right to have counsel or another individual with them. If they choose to do so and the mediator is not comfortable with that action, the mediator’s recourse is to decline to mediate that dispute.
the parties, while expressing their individual interests, work together to understand the other party’s interest, find common ground and ultimately reach the best agreement they can. Mediators understand that success in reaching agreement comes as the result of small successes recognized along the way.

It is critical for the mediator, parties, and the parties’ counsel to have a clear understanding of the extent to which mediation communications, including any Mediated Agreements reached, can be disclosed. The mediation confidentiality agreement is somewhat like a will. If you don’t do one, Ohio has already done one for you and you might not like what it says. The UMA’s position is that, absent specific circumstances or agreements, what happens in mediation stays in mediation.

The most effective tool for developing and communicating this understanding is a “Mediation Confidentiality Agreement.” This document should clearly identify which communications, if any, are to be subject to disclosure and explicitly prohibit disclosure where applicable. The agreement should stand on its own, without the need for interpretation.

The next opportunity for agreement is the rules for the mediation. The mediator may suggest, or even require, that certain standards of participation be met as a requirement of his or her participation. Beyond that, the parties are free to decide the scope of the mediation, how they will communicate with each other, and what documents will be shared with each other.

While the basic concept of mediation confidentiality was discussed in the early phase, it is important that the topic be revisited at this point. The disputants should be provided an overview of applicable default confidentiality provisions under state law. They should also be told that they may agree to modify certain requirements as they proceed. The best guidance a
mediator can give is to assume that nothing will be disclosed unless required by law and then, at
the conclusion of the mediation, consider any communications for which they may want to waive
confidentiality.\textsuperscript{73}

The Mediation Sessions:

Once the mediation discussions start, the parties should focus on expressing their views,
listening to the other party, identifying the issues, and negotiating the most comprehensive
settlement agreement possible. Confidentiality should only be in the background during these
discussions.

The one exception would be if private meetings with the mediator are initiated. Should
this process be employed, it is imperative that both sides understand that nothing discussed
during the caucus will be disclosed to the other party unless specifically agreed to by the party.
The mediator should be careful that only the message approved by the party is communicated.
This is especially important in the back-and-forth negotiation of settlement.

To disclose information which was intended to be private or to disclose incorrect
information will likely have serious consequences. Consider the ramifications of communicating
an incorrect settlement offer and having it accepted! It can be helpful for the mediator to have a
written message approved by the party when presenting it. The secondary benefit of this is that it
is reflects a “direct” message from one party to the other even though the mediator is carrying it.

In instances where attorney misconduct is observed (as discussed earlier) by the mediator
or counsel for a party, the mediation might be salvaged if steps are taken to mitigate the harm
done by the misconduct. The attorney observing the misconduct should request a caucus with

\textsuperscript{73} All mediation parties must waive privilege and individual participants must waive a privilege they hold. See
O.R.C §2701.04(A)
the mediator to report the nature of the misconduct and to request time to meet with the “offending” attorney. If counsel determines that a party has been prejudiced by the misconduct to the extent that the mediation cannot continue, the mediation should be suspended. If a mediator, attorney or lay, believes that actions by an attorney is detrimental to the mediation or may constitute misconduct, the mediator should meet with the attorneys present. Should the mediator believe that the mediation cannot continue, the mediator should end the mediation by withdrawing.

Agreement and Closing the Mediation

At the conclusion of mediation there will always be an agreement. It may be an oral agreement that they can’t resolve the dispute at that time. The agreement may resolve the dispute in full or in part.

Mediation parties should be made aware that there is no confidentiality protection for a written agreement signed by all parties to the mediation. Unless otherwise advised by counsel, parties should keep the agreement simple. The emphasis should be on clearly stating who is to do what and by when in order for that specific agreement to be performed completely.

At the first small claims hearing the author observed as a mediation student was one that will not be forgotten. The parties returned to court to have the action dismissed based on a written agreement which was the result of court sponsored mediation. After a few questions it was clear that the parties did not remember what they agreed to or what the written agreement meant. After reading the agreement, the magistrate held that the agreement was too vague to

74 O.R.C §2710.05(A)(1)
enforce. The case then proceeded to trial. The effort expended by the parties and the mediator was wasted.

A written agreement should not address unresolved issues. This is especially important should the unresolved issues become the subject of subsequent mediation. To the extent that the positions, plans, or unaccepted settlement offers are incorporated into the written agreement, they are not privileged under the UMA.

Some states privilege laws allow exceptions to allow introduction evidence of an oral settlement. However, for many states, it is not clear that parties may testify about the existence of an oral settlement, or whether a mediator can be called as a witness to testify as to an oral settlement. Since the UMA protects from disclosure any communication unless disclosure is agreed to in writing and the agreement signed by all parties, it has the effect of preventing a party from contesting a purely oral agreement.

There are even situations in which mediation communications underlying a written agreement may have to be revealed in a court proceeding. This would be, for example, to specifically enforce (or prevent enforcement) of an agreement enforceable on its face. For example, a claim that a mediation communication represented extortion may result in examination of mediation communications to the extent required to support or disprove the claim.

CONCLUSION

The UMA reflects a balance between two extremes, absolute secrecy or unfettered inquiry into conversations which most always have no bearing upon anyone but the parties in dispute. It allow for situations where significant fairness or public policy issues may be
addressed without undue encroachment on the confidential nature of mediation. Some argue that this same confidentiality protects wrongdoers by allowing them to secretly resolve disputes which have a detrimental effect on a wider population. States will continue to adopt the UMA but some may not take that course because their existing or proposed statutes reflect a solution more appropriate in their legal, social and business environments..

Mediators and attorneys must understand the principles and provisions to the UMA and be able to explain its application as necessary. The level of detail required and the timing of explanations will differ depending upon the type of mediation being held, the parties involved, and the complexity of the issues.

Non-attorney mediators should take care not to engage in the unauthorized practice of law by attempting to explain in detail how the law applies to specifically to the mediation being held. Organizations sponsoring mediation programs should consider how the topic should be addressed and obtain legal advice if necessary.

Mediation participants should be putting their efforts into reaching a common understanding of the issues underlying the dispute and seeking a mutually acceptable solution. Those of us who revel in the process or the law need to understand that the parties sitting at a table probably just want to get the dispute over with.