

# Uniform Mediation Act (USA): legal privilege for all mediation communications

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Last year the Uniform Mediation Act<sup>1</sup> (UMA), drafted by the National Conference of Commissioners of Uniform State Laws, was officially endorsed by the American Bar Association. This set in motion the drive to have the UMA adopted into law by legislatures of the various States.<sup>2</sup> The UMA is a significant step towards promoting the use of mediation, as its aim is to protect the integrity and enhance the fairness of mediation through a uniform approach on three elements of mediation. The first element is the requirement that the mediator discloses any potential conflicts of interest and, if requested, his qualifications. The second element aimed at ensuring fairness is the UMA's provision that a party may be accompanied by a friend, family member, or (legal) advisor. Finally, the most important principle is the UMA's establishment of a strong mediation privilege, which allows the parties and the mediator, as well as any non-party participants, to prevent the use of mediation communications in legal proceedings. This article will discuss each of these elements focussing primarily on mediation privilege, but will first comment on the need for and scope of the UMA's application.

## Application

Mediation is an area in which uniformity is increasingly needed in the United States (US). The Prefatory Note to the UMA points out that over the past 30 years more than 2500 different state laws have been enacted which affect mediation and more than 250 of them address the topic of mediation privilege. Not surprisingly, there is a great deal of inconsistency in approach not only between the different States but also within a State. Many such laws can be replaced by the UMA.

When adopted, the UMA will apply to almost all mediations,<sup>3</sup> including 'mandatory mediations' ordered by a court or governmental agency.<sup>4</sup> The only mediations the UMA will not apply to are those involving unions,<sup>5</sup> judicial settlement conferences,<sup>6</sup> and school peer mediations.<sup>7</sup> Consistent with the UMA's underlining theme of self-determination, Section 3(c) allows parties to 'opt out' of the UMA's privilege protections by recorded agreement.

## Mediation privilege

The single most important aspect of the UMA is its provision of a broad legal privilege so as to ensure the confidentiality of everything that is communicated in connection with a mediation. This protection also attaches to what one might call 'pre-mediation'

communications, meaning communications made for the purpose of considering or initiating mediation.<sup>8</sup> The communications which are protected by the UMA are likewise broadly defined so as to cover not only written submissions<sup>9</sup> and oral statements, but also non-verbal conduct and other recorded activity. The Prefatory Note (p. 3) points out that any conduct intended to inform, such as silence in response to a question or the re-enactment of an accident, is a protected communication.

It is fairly well accepted throughout the United States that granting legal privilege is an absolute necessity to adequately protect mediation communications. As noted above, over 250 existing laws covering a multitude of mediation programs, including private, court-annexed, social service related, criminal justice system, and other forms of mediation already provide some form of privilege for either the parties or the mediator. In that respect, the UMA is not particularly ground-breaking. It does, however, seek to harmonise the divergent approaches currently taken to such privilege and extend it to all participants in a mediation.

A large body of commentaries and studies support the conclusion that, in order to create a safe environment for open and frank discussion

1. The text of the UMA can be found at [www.pon.harvard.edu/guests/uma](http://www.pon.harvard.edu/guests/uma).
2. The UMA is a proposed Uniform Law. It does not have the force of law until it is adopted in a given State. Just as the Hague Conference brings together experts from around the world to develop international treaties for possible adoption by the various countries in the world. The National Conference of Commissioners of Uniform State Laws brings together experts from across the United States to similarly develop uniform laws for possible adoption by the various States.
3. The definition of mediation in the UMA emphasises the element of 'negotiation' so as to exclude adjudicative processes like arbitration and binding advice.
4. UMA Section 3 (a) lists three separate conditions which each trigger application of the UMA. The first covers publicly referred mediation, the second mediations pursuant to a signed agreement, and the third those conducted by persons holding themselves out as mediators.
5. UMA Section 3 (b) (1) and (2) exclude so-called collective bargaining mediations. Cf. *CAO-onderhandeligen* in the Netherlands.
6. UMA Section 3 (b) (3). Cf. the *comparite van partijen* procedure in the Netherlands.
7. UMA Section 3 (b) (4). Cf. the pupil mediation projects currently existing at schools in Groningen, Rotterdam, Utrecht and Zwolle.
8. See UMA Section 2 (2). This definition of 'Mediation Communication' covers for example 'the explanation of the matter to an intake clerk for a community mediation program and communications between the mediator and a party that occur between formal mediation sessions'. Reporter's Notes to Section 2.
9. A document, such as a tax filing, does not become privileged just because it is referred to during the mediation. Prefatory Note, p. 5.

that is invaluable in the mediation process, the legal protections of privilege are required so as to ensure the participants that what they say will not be used against them in later legal proceedings.<sup>10</sup> Anyone familiar with the workings of mediation would acknowledge that confidentiality is usually crucial. The security of being able to 'show your cards' to the mediator in a caucus without the fear of disclosure is essential to the relationship of trust a mediator needs in order to be effective. Some argue that because the mediator is a neutral (as opposed to an attorney, physician and priest, who act as personal advisors), the need for protected communication is even greater than for those professionals to gather information from their client, patient or penitent.<sup>11</sup> One is naturally more likely to be candid with one's personal advisor than with a neutral third party.

Confidentiality is also critical in order to preserve the neutrality of the mediator. 'Neutrality is a bedrock principle of mediation that provides the basis for an effective working relationship between a mediator and parties to a mediation.'<sup>12</sup> To the extent that a party can force a mediator to testify against his opponent, the mediator's neutrality in the perception of the opponent is lost. It is precisely that reasonable expectation of confidentiality that the UMA's mediation privilege is designed to safeguard.

There are, of course, commentators who believe that confidentiality can be adequately protected without the application of legal privilege principles.<sup>13</sup> The drafters of the UMA 'upon exhaustive study and consideration' conclude, however, that other mechanisms prove either overly broad, under broad, or under-inclusive. Consequently they ultimately settled on the structure of privileged communications modelled after and drawing heavily upon the American attorney-client privilege doctrine. They seek, however, to narrowly tailor the mediation privilege 'to satisfy the legitimate interests and expectations of participants in mediation, the mediation process, and the larger system of justice in which it operates'.<sup>14</sup>

One way they seek to achieve this is, as noted above, by extending the privilege to all participants, including non-party advisors and others accompanying a party. Unlike the Netherlands legal concept of *verschoningsrecht*,<sup>15</sup> the US doctrine of attorney-client privilege is a right held by the client. Accordingly, the mediation privilege is held to varying degrees by the individuals participating in the mediation. The mediator holds a privilege with respect to his own communications.<sup>16</sup> Like other holders he can invoke it to refuse to testify as well as to prevent others from testifying as to what he said. Non-party participants similarly hold a privilege for their communications.<sup>17</sup> The parties hold a privilege with respect to all mediation communications.<sup>18</sup>

As with other forms of professional privilege held by, for example, an attorney's client, a doctor's patient or a priest's penitent, the holders of mediation privilege may waive their privilege, e.g. by consenting to use of the communication in legal proceedings.<sup>19</sup> All holders of the privilege must expressly waive their respective privileges in that case.

Further tailoring of the privilege to satisfy the interests of the mediation process and the larger legal system is found in UMA

Section 6 limited exceptions to privilege. No protection is granted for communications:

1. contained in a signed (settlement) agreement;
2. threatening to commit a crime or inflict bodily injury;
3. used to plan or conceal a crime;
4. used to prove or disprove misconduct or malpractice by a mediator;
5. used to prove or disprove child abuse or neglect; or
6. available to the public by open records laws.

In addition Section 7 prohibits a mediator from making reports to a court, administration agency or other authority that may make a ruling on the dispute that is the subject of the mediation.

It is important to note that the mediation privilege only operates to prevent use of mediation communications as evidence in court or other legal proceedings. To ensure non-disclosure outside of such proceedings, the parties and mediator will still need the protections of confidentiality provisions in a mediation agreement, adopted mediation rules, applicable government agency rules, or some other binding source.<sup>20</sup> Since those contractual obligations are overridden by a subpoena or court order to testify, legal recognition of a mediation privilege is required to obtain full protection of the parties interests and expectations.

10. See, e.g., Lawrence R. Freedman & Michael L. Prigoff, Confidentiality in Mediation: The Need for Protection, 2 Ohio St. J. Disp. Resol. 37, 43-44 (1986); Philip J. Harter, Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality, 41 Admin. L. Rev. 315, 323-324 (1989); Alan Kirtley, The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, 1995 J. Disp. Resol. 1, 17; Ellen E. Deason, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?, 85 Marquette L. Rev. 79 (2001); all cited in the Prefatory Note, p. 3.
11. See Ellen E. Deason, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability, 85 Marquette L.Rev. 79 (2001).
12. Idem.
13. See, e.g., Eric D. Green, A Heretical View of the Mediation Privilege, 2 Ohio St. J. on Disp. Resol. 1 (1986); Scott H. Hughes, The Uniform Mediation Act: To the Spoiled Go the Privileges, 85 Marquette L. Rev. 9 (2001).
14. Prefatory Note, p. 16.
15. The *verschoningsrecht* applicable to an *advocaat* is grounded in a duty of professional secrecy not to disclose. It is thus more an obligation than a right. The client himself, has no right to invoke this secrecy: 'Ten aanzien van het verschoningsrecht valt op dat de partij-getuige zich niet kan verschonen van het beantwoorden van vragen omtrent hetgeen de partij-getuige heeft toevertrouwd aan personen die uit hoofde van hun ambt, beroep of betrekking verplicht zijn tot geheimhouding' (W.A.J.P. van den Reek, Mededelingsplichten in het burgerlijk procesrecht, Deventer: W.E.J. Tjeenk Willink 1997, p. 33). The US attorney-client privilege, in contrast, is an independent right of the client (rather than an obligation of the attorney) to prevent disclosures (by himself or his attorney) of privileged communications. In addition, attorneys in the US also have a professional obligation of secrecy. See Model Rule of Professional Conduct 1.3.
16. UMA Section 4 (b) (2).
17. UMA Section 4 (b) (3). This goes beyond the protections afforded by most existing mediation privilege statutes in the US.
18. UMA Section 4 (b) (1).
19. UMA Section 5.
20. It may also be advisable to stipulate in a mediation agreement that disclosure pursuant to a subpoena, court order or other compulsory process (e.g. in a jurisdiction not recognising any mediation privilege) be made only after providing the other party notification of the contemplated disclosure.

### Disclosure of conflicts

The drafters of the UMA recognise that 'the credibility and integrity of the mediation process is almost always dependent upon the neutrality and impartiality of the mediator.'<sup>21</sup> Therefore, in addition to the privilege protections designed to prevent a mediator from being forced in court to disclose confidential communications, the UMA's Section 9 requires the mediator to make an inquiry as to potential conflicts of interest and other circumstances which could bring his neutrality into doubt and disclose the same to the parties. If he learns of such matters during the mediation, he must also promptly disclose them. Finally, this Section also requires the mediator, upon request of a party, to disclose his qualifications to mediate.

Like the provisions on 'opting out' of the privilege regime and waiver of privilege, the conflict of interest disclosure duty is designed further the UMA's 'core principles of party self-determination and informed consent' as well as to fulfil the reasonable expectations of the parties.<sup>22</sup> Disclosure of conflicts of interest of course also protects the integrity of the mediation process. The inclusion of such a duty is appropriate since in the US there is no body or regulation covering all mediators. The UMA can thus fill the gaps of the fragmented patchwork of current legislation and institutional mediation rules. The self-determination inherent to mediation allows parties to accept a mediator notwithstanding his disclosure of facts such as a personal interest in the outcome of the mediation or a relationship with a party.

### Party accompaniment

The final element of the UMA is the provision that a party may bring an attorney or other individual to accompany the party and to participate in the mediation. This would apparently overrule statutes in some States that allow a mediator to exclude lawyers from a mediation.<sup>23</sup> The UMA again opts for self-determination allowing the parties, not the mediator, to decide this. Section 10 also states that pre-mediation agreements waiving such participation (for example, in a contract clause) may be rescinded if a party decides ultimately that he prefers to be accompanied by a third party after all.

### Conclusion

The UMA is the product of extensive collaboration of two different drafting committees of the National Conference of Commissioners and the American Bar Association. Its modest focus on mediation privilege, conflict disclosure and party accompaniment reflects that those three topics are the main areas where the need for consistency and predictability across all 50 States was found to justify the development of a Uniform Law. The Prefatory Note explains that, for the rest, the UMA promotes party self-determination by leaving to the parties those matters that can be set by agreement and need not be set inflexibly by law.

If widely adopted, the UMA should indeed encourage mediation as an alternative to formal dispute resolution by promoting predictability and simplicity while safeguarding the integrity of the process and the parties reasonable expectations concerning non-disclosure of confidential information, impartiality of mediators,

and assistance by trusted advisors. Some of its provisions and approaches would not fit the Netherlands context. But it certainly offers an instructive example on solid protection of mediation confidentiality. It is particularly noteworthy that in the US, where there is no consensus on minimum qualifications for mediators, no code of conduct governing all mediators, and no national regulation of mediators, much less anything approaching a true profession as 'mediator' (as is gradually developing in the Netherlands), the acknowledgement of the need for a legally recognised mediation privilege is so long and deeply established that it forms the cornerstone of a Uniform Law.

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21. Prefatory Note, p. 5.

22. Reporter's Notes to Section 9, paragraph 1 (b).

23. See, e.g., Cal. Fam. Code Section 3182.