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Andrea K. Schneider

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## WHICH MEANS TO AN END UNDER THE UNIFORM MEDIATION ACT?

ANDREA K. SCHNEIDER<sup>1</sup>

As part of Marquette's commitment to alternative dispute resolution, this issue of the *Marquette Law Review* is pleased to present the first critiques of the final draft of the Uniform Mediation Act (UMA).<sup>2</sup> Like other uniform acts, the UMA is officially authored by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The drafting committee of NCCUSL was joined by a drafting committee sponsored by the Section on Dispute Resolution of the American Bar Association (ABA). The drafting committees also benefited from numerous scholars assisting the process<sup>3</sup> and observers from many dispute resolution organizations who provided feedback and suggestions. Our three authors in this issue come from those groups. Professor Scott Hughes served as an official observer on behalf of the Society for Professionals in Dispute Resolution, now merged into the Association for Conflict Resolution. Professor Ellen Deason was one of the academics who gave commentary and advice to the drafting committees. As a member of the Council of the ABA's Section on Dispute Resolution, Professor Phyllis Bernard was an active participant in the Council's discussions and directions given to the ABA drafting

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1. Associate Professor of Law, Marquette University Law School. B.A., Princeton University; J.D., Harvard Law School. I would like to thank both this board and the previous board of the *Marquette Law Review* for their work on these articles. As the UMA continued to evolve, so did the responses. And just like the collaboration in the two drafting committees of the UMA, the publication of these articles is a collaboration between last year's board and this one. My thanks in particular to Rob Pluta, Basil Loeb, Mike Iasparro, and Jacqueline Champagne from last year's board and to Elizabeth Poling, Bridget Kenney, and David Turek from this year's board.

2. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MEDIATION ACT (2001) [hereinafter UMA]. All citations to the UMA will refer to the final version of the UMA that is printed in full in the pages that follow within this edition of the *Marquette Law Review*. Since the final version of the Prefatory Note and Reporter's Notes was not completed at the time of publication, all citations to these Notes were taken from the September 2001 Draft of the UMA [hereinafter SEPT. 2001 DRAFT].

3. See, e.g., *Symposium on Drafting a Uniform/Model Mediation Act*, 13 OHIO ST. J. ON DISP. RESOL. 787 (1998) (outlining the current mediation legal structure and the need for a uniform act).

committee. Marquette thanks them for their participation in this debate.

The process of drafting the Uniform Mediation Act has taken multiple years and drafts. The final deadline for the Act was even pushed back a year given the numerous controversies and debates over several provisions. The final draft was just finished in October 2001. Thus, this edition of the *Marquette Law Review* will have some of the earliest academic assessments and responses to the final draft of the UMA as well as the final text itself. The UMA will be presented to the ABA House of Delegates in February 2002 where approval is expected. The UMA will then go to the states for passage.<sup>4</sup> As each state legislature will face the decision whether to adopt the UMA and replace their own state laws, a critical analysis of the strengths and weaknesses of the UMA is necessary. These three articles are an excellent starting point.

The goals of the UMA are quite simple. Given the explosion in the use of mediation over the last decade and the overlapping, often conflicting, state laws applicable to mediation, the UMA provides a template for states to adopt uniform laws regarding mediation. As outlined by the Prefatory Note to the UMA<sup>5</sup> and Hughes,<sup>6</sup> the UMA tries to meet the following three obligations: (1) the reasonable expectations of parties regarding confidentiality, (2) the integrity of the mediation process, and (3) the policy that parties have the ultimate decision-making authority or self-determination.

The UMA meets these obligations by focusing on the confidentiality of the mediation process or what Hughes calls the "means of confidentiality" used to promote the "ends of self-determination."<sup>7</sup> The confidentiality of the mediation process is at issue when either the parties or the mediator is permitted to testify about what actually transpired in the mediation session. Currently, as the articles outline, this question is often answered differently depending on the type of mediation, the need for the information, the venue, and even the judge hearing the arguments. The articles contained in this issue give us three different views on how the UMA and, by implication, how mediation

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4. ADR Briefs, *Uniform Mediation Act is Ready for Fall Examinations*, ALTERNATIVES, Sept. 2001, 198, at 198.

5. SEPT. 2001 DRAFT, *supra* note 2, at Prefatory Note § 1.

6. Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 23 (2001).

7. Hughes, *supra* note 6, at 24.

itself should be structured.

As the leading critic of the UMA, Hughes leads off the debate with his article *The Uniform Mediation Act: To the Spoiled Go the Privileges*.<sup>8</sup> As the title of his article suggests, Hughes attacks the mediation community for providing itself with more protections against testifying than are necessary. Hughes focuses on the third obligation of the UMA—party self-determination—which he views as the primary obligation.

First, Hughes notes that in other confidential relationships—attorney-client, doctor-patient, clergy-penitent—the privilege against testifying belongs to the party and can be waived. Mediators are granted privileges unlike other confidential relationships; the UMA grants a separate privilege to the mediator against testifying.<sup>9</sup>

Hughes then focuses on the narrow question of confidentiality in some of the most controversial scenarios arising under the UMA. As he notes, the least controversial provisions on confidentiality (such as plans to commit a crime or child abuse) were separated out in the drafting process of the UMA and do not require any sort of balancing test.<sup>10</sup> The more controversial exceptions such as felony proceedings and contractual misconduct (unfair agreements) require both procedural and substantive hurdles before a mediator can testify. Procedurally, the party wanting the evidence must demonstrate in a separate hearing that the evidence is not otherwise available. Substantively, the party must demonstrate that the need for the evidence substantially outweighs the interest in protecting confidentiality. These hurdles, Hughes argues, are unnecessarily high and protect mediators at the expense of the parties. Furthermore, he argues, the lack of a general "manifest injustice" exception to confidentiality in the UMA demonstrates this bias in favor of mediators.<sup>11</sup>

Hughes's final point to demonstrate this bias is in the section of his article entitled "We Are All Equal Here, But Mediators Are More Equal Than Others."<sup>12</sup> If a mediator is accused of malpractice, he is able to waive confidentiality and testify in order to defend himself.<sup>13</sup> He can

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8. Hughes, *supra* note 6.

9. UMA, *supra* note 2, § 4.

10. *Id.* § 6(a); Hughes, *supra* note 6, at 38–40.

11. Hughes, *supra* note 6, at 54–63.

12. Hughes, *supra* note 6, at 64.

13. UMA, *supra* note 2, § 6(a)(6).

also force the parties of the mediation to testify.<sup>14</sup> As Hughes points out, when one party is suing the mediator for malpractice and the other party is presumably happy with the mediation, we can hardly expect neutral or unbiased testimony.<sup>15</sup> Nonetheless, the mediator is entitled to all useful testimony in order to defend herself. A party, however, cannot compel the mediator to testify when the party wants to overturn the agreement. Admittedly, the mediator's testimony also may not be completely neutral but the value of protecting the mediator is placed above the needs of the parties. Hughes cites this as a further example of how the UMA gives the mediator every benefit of waiving confidentiality while not providing the same benefits to the parties.

Ironically, Hughes points out, parties may wise up to the fact that it is easier to pierce the confidentiality veil when alleging mediator misconduct than contractual misconduct by the other party. In future suits, parties may join the mediator as a defendant in order to have access to the mediator's testimony thus undercutting the goal of protecting the mediator.

In the second article on the UMA, Deason focuses on the first obligation of the UMA—the reasonable expectations of the parties regarding confidentiality. She begins her article by focusing on the importance of confidentiality in mediation and then argues that predictability is necessary for parties to feel confident in using the mediation process. A party not able to predict if and when any confidential information from the mediation might be used will be less likely to engage in and to trust the mediation process. Predictability is best ensured with uniform laws of confidentiality across state lines. Furthermore, Deason points out, uniform state laws might also influence interpretation and development of federal law along the same lines. Although Hughes has previously argued that uncertainty has not inhibited the growth of mediation,<sup>16</sup> Deason stresses that that potential is surely growing.

Her second point of departure from Hughes is when mediator testimony should be permitted. Deason has argued that these exceptions to confidentiality should only be rarely permitted.<sup>17</sup> Deason defends the

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14. *Id.*

15. Hughes, *supra* note 6, at 64.

16. Scott H. Hughes, *A Closer Look—The Case for a Mediation Confidentiality Privilege Still Has Not Been Made*, DISP. RESOL. MAG., Winter 1998, at 14.

17. Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. (forthcoming 2001).

standard used in the UMA to permit disclosures in felony cases and in cases alleging contractual misconduct, noting the necessity of some balancing act. Although, in Deason's view, the UMA's allowance for judicial discretion under section 6(b) does not provide maximum predictability, this shortcoming is unavoidable.<sup>18</sup> Permitting disclosure without a hurdle would unnecessarily infringe upon confidentiality. On the other hand, if these exceptions were never permitted, Deason argues that courts will find ways to do so around the UMA.<sup>19</sup> At least the UMA standard provides the courts some guidelines. In the end, Deason notes that most readers of the UMA will probably disagree with it on one point or another; the question is whether those disagreements should stand in the way of uniformity.<sup>20</sup> She believes that the goal of overall uniformity is paramount in fostering a favorable mediation climate.

In our third article on the UMA, Bernard focuses on the second obligation of the UMA—the integrity of the mediation process. She argues that it is more important to properly manage the mediation while it is ongoing than it is to focus on fixing unfair agreements after they occur.<sup>21</sup> In making her argument, Bernard actually takes more issue with Deason's goal of uniformity than with Hughes's specific points on confidentiality. Unlike other uniform state laws that have responded to a demonstrated need, Bernard finds that there is not a crisis of conflicting mediation cases regarding confidentiality.<sup>22</sup> Instead, she addresses three other ways that the body of case law regarding mediation demonstrates a need to fix the mediation process.

First, Bernard lauds the UMA rules regarding mandatory disclosure of conflicts of interest<sup>23</sup> and supports standardization of these rules across the country. She argues that the UMA rules will actually give teeth to the Model Rules of Professional Conduct<sup>24</sup> in crucial ways that will lend more knowledge and empowerment to mediation parties.<sup>25</sup>

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18. Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 89–90 (2001).

19. *Id.* at 91.

20. *Id.* at 111.

21. Phyllis E. Bernard, *Only Nixon Could Go to China: Third Thoughts on the Uniform Mediation Act*, 85 MARQ. L. REV. 113, 119 (2001).

22. *Id.* at 123.

23. UMA, *supra* note 2, § 9.

24. MODEL RULES OF PROF'L CONDUCT (2001).

25. Bernard, *supra* note 21, at 129–35 (focusing on Rules 1.7, 1.8, and 1.9).

Second, Bernard praises UMA section 8, (section 7 of the NCCUSL approved draft), which prohibits a mediator from making a report to a judge regarding a mediation.<sup>26</sup> This prohibition fixes some of the problems found in early mediation processes. When the mediator can switch from neutral to evaluator, this grants the mediator undue influence and power over the parties.<sup>27</sup> The UMA would eliminate this potential and create greater fairness.

Finally, Bernard commends section 9 of the UMA, (section 10 of the NCCUSL approved draft), which permits parties to bring an attorney or any other individual with them to the mediation.<sup>28</sup> Bernard argues that allowing individuals to bring someone with them will guard against coercion and power politics in the course of the mediation. In the end, Bernard argues, if coercive mediations are eliminated through the use of section 9 of the UMA, (section 10 of the NCCUSL approved draft), then there will be less need to pierce mediation confidentiality in order to reassess the fairness of agreements. In other words, if the process is fair, then a court could comfortably find that the agreement is also fair without requiring the mediator to testify. Given these three crucial sections, Bernard is able to give her support to the UMA.

These three articles mirror the three goals of the UMA. Deason focuses on the reasonable expectations of the parties regarding confidentiality, the first goal of the UMA. Bernard examines the second goal and offers suggestions as to how to improve the integrity of the mediation process. Hughes highlights the third goal of self-determination by implicitly arguing that the first two goals are only the means to the ultimate end, the power of the parties. These means must be balanced against that final end and should fail if self-determination is not ensured.

An interesting thing to note about all three of these articles is their agreement. Hughes frames the UMA as a battle between self-determination and confidentiality. His argument is that confidentiality should not be a value in and of itself—it is secondary and should serve the greater good of ensuring that parties have ultimate power over the final agreement. The importance of self-determination is vital if we are to ensure a fair process.

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26. UMA, *supra* note 2, § 7.

27. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991).

28. UMA, *supra* note 2, § 10.

Neither Deason nor Bernard actually disagrees with this ultimate premise; they just differently reach the value of self-determination. Deason reasons that uniformity provides predictability for the parties. When parties know what will be confidential and what will not, they are in a better position to understand and correctly use the mediation process. Predictability will help the parties make better agreements. Hughes does not actually disagree with this premise. In fact, one of his arguments for allowing mediators to testify when there is a substantial need is that without this provision, states will be less likely to adopt all of the provisions of the UMA. In the end, there will still be a lack of uniformity among the states. Again, the professors agree on the overall goal while disagreeing on the method necessary for achieving that goal.

Bernard also views self-determination as crucial to the process, but she focuses on the elements of the ongoing mediation process as opposed to Hughes's focus on potential testimony after the fact. Bernard argues that her suggested fixes to the process would do more to ensure self-determination.

All three of these scholars recognize the pervasiveness of mediation and the likelihood that courts will become more involved in ruling on the process as more mediations occur. Their differences are primarily concerning the means of party empowerment rather than the end. Are parties best served by being able to review unfair agreements, by enjoying predictability in confidentiality, or by improving the neutrality of the mediator? Ideally, we have all three, but each author argues that their prong should be paramount.

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