

EXAMINING THE EFFECTS OF THE UNIFORM MEDIATION ACT

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INTRODUCTION

In 2001, the National Conference of Commissioners on Uniform State Laws completed the Uniform Mediation Act (UMA), which establishes a privilege against the disclosure of mediation communications.¹ By establishing a privilege against disclosure, the UMA drafters sought to promote candid exchange during mediation² and maintain public confidence in the fairness of mediation.³ At the same time, the UMA drafters also included several exceptions to the privilege for situations in which the public's interest in obtaining information outweighed the need to prevent disclosures.⁴

While most of the mediation community was in agreement about the value of preventing disclosure,⁵ there was sharp disagreement over the UMA's approach to protecting it. Many mediators argued that the UMA's approach, with its three tiers of privilege and nine exceptions, was too complex and legalistic.⁶ These critics of the UMA feared that the statute's complexity

¹ Unif. Mediation Act § 4 (amended 2003). The UMA draws a distinction between privilege and confidentiality. Privilege is a right possessed by an individual to decline to disclose mediation communications, and to stop others from disclosing mediation communications. Confidentiality prohibits individuals from disclosing mediation communications. Throughout this paper, I use the terms "confidential" and "confidentiality" to refer to the general goal of preventing disclosures of mediation communications, rather than the technical meaning prescribed by the UMA.

² *Id.* Prefatory Note ("[A] candid and informal exchange . . . can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings").

³ *Id.* ("public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements").

⁴ *Id.* § 6.

⁵ There has, however, been a vocal minority that has argued that mediation confidentiality may not be necessary. *See, e.g.,* Patrick Gill, *When Confidentiality is not Essential to Mediation and Competing Interests Necessitate Disclosure*, 2006 J. DISP. RESOL. 291 (2006) (arguing that "the need for confidentiality to maintain the effectiveness of and integrity may not be as necessary as once thought when there is a substantial competing interest"); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986) (arguing that a privilege against disclosure is unnecessary and that Rule 408 provides sufficient protection for mediation parties).

⁶ *See, e.g.,* Brian D. Shannon, *Dancing With the One that "Brung Us" – Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. DISP. RESOL. 197, 212–13 (2003).

would result in a proliferation of mediation-related litigation and force mediators to provide parties with lengthy warnings about potential exceptions to the privilege against disclosure.⁷

It has been over ten years since the first state enacted the UMA in 2003, and the UMA is now the law of the land in twelve jurisdictions.⁸ With the passage of time, it is worth examining whether the predictions of UMA critics have come to pass. If the UMA critics are correct, one would expect to see an increase in mediation-related litigation in states that have adopted the UMA, and an increased need for mediators to engage in lengthy discussions about exceptions to the privilege against disclosure. On the other hand, if there has been no significant increase in litigation and little change in mediation practice, then the fears of UMA critics would appear to be unfounded.

This paper examines the effects of the UMA on mediation-related litigation and mediation practice in jurisdictions that have enacted the UMA. Part I discusses the background and history of the UMA, and describe the arguments of critics who contend that the UMA is overly complex and legalistic. Part II presents the findings of an empirical study of the number of mediation-related cases decided in jurisdictions that have adopted the UMA, and the number of pre-UMA cases in jurisdictions that had pre-UMA statutes governing the disclosure of mediation communications. I conclude from the results of the study that there is little evidence that the UMA has significantly increased mediation-related litigation. In Part III, I present the results of a survey of prominent mediators in Ohio and Washington, two UMA states that had

⁷ *Id.*

⁸ Eleven states have enacted the UMA. They are, in alphabetical order: Hawaii, HAW. REV. STAT. §§ 658H-1 to 658H-13 (West 2013), Idaho, IDAHO CODE ANN. §§ 9-801 to 9-814 (West 2013), Illinois, 710 ILL. COMP. STAT. ANN. 35/1 to 35/99 (West 2013), Iowa, IOWA CODE ANN. §§ 679C.101 to 679C.115 (West 2013), Nebraska, NEB. REV. STAT. ANN. §§ 25-2930 to 25-2942 (West 2013), New Jersey, N.J. STAT. ANN. 2A:23C-1 to 2A:23C-13 (West 2013), Ohio, OHIO REV. CODE ANN. §§ 2710.01 to 2710.10 (West 2013), South Dakota, S.D. CODIFIED LAWS § 19-13A-1 to 19-13A-15 (2013), Utah, UTAH CODE ANN. §§ 78B-10-101 to 78B-10-114 (West 2013), Vermont, VT. STAT ANN. tit. 12, §§ 5711 to 5723 (West 2013), and Washington, WASH. REV. CODE ANN. §§ 7.07.010 to 7.07.904 (West 2013). The UMA has also been adopted by the District of Columbia. D.C. CODE § 16-4201 to 16-4213 (2013).

pre-UMA statutes governing mediation confidentiality. I asked the mediators whether they had seen any changes in mediation practice after the enactment of the UMA, and in particular, whether they had seen any changes in the way mediators warn participants about exceptions to confidentiality. I conclude from the results of the survey that most mediators find it neither necessary nor helpful to discuss the details of the UMA's privilege against disclosure.

I. HISTORY AND BACKGROUND OF THE UMA

A. *The UMA Framework*

The drafters of the UMA adopted a privilege-based approach to preventing the disclosure of mediation communications.⁹ In doing so, they rejected several other approaches, such as a blanket rule excluding all mediation communications, the extension of evidentiary rules concerning settlement discussions to mediation, and a rule making mediators incompetent to testify.¹⁰ The UMA drafters rejected a blanket rule of exclusion as overbroad because it would fail to account for the interests of justice that may outweigh the importance of preventing disclosures.¹¹ They rejected the extension of evidentiary rules concerning settlement discussions to mediation as underbroad because it would fail to meet all of the confidentiality needs of the mediation process.¹² And they rejected a rule of mediator incompetence because it would fail to provide protection for all individuals involved in the mediation process.¹³ Ultimately, the UMA drafters decided that a privilege against disclosure was the best approach.¹⁴

⁹ Unif. Mediation Act § 4 (amended 2003).

¹⁰ *Id.* § 4 cmt. 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* See, e.g., Elizabeth Kent, *Privacy and Confidentiality in Mediation—What is the Best Way to Protect it?*, HAW. B.J., Dec. 2005, at 34, 35 (explaining the ways in which the UMA provides greater protection against the disclosure of mediation communications than Rule 408 of the Hawaii Rules of Evidence).

¹⁴ Unif. Mediation Act § 4 cmt. 2 (amended 2003).

The UMA defines a “mediation communication” as a “statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.”¹⁵ The UMA’s privilege against disclosure allows parties to prevent mediation communications from being used in litigation, as it prevents mediation communications from being subject to discovery or admissible in evidence.¹⁶ The UMA identifies three types of mediation participants—mediation parties, mediators, and nonparty participants—each of whom possesses a different privilege against disclosure.¹⁷ Mediation parties possess the broadest privilege. They may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.¹⁸ Mediators possess the second broadest privilege. They may refuse to disclose any mediation communication, and may prevent any other person from disclosing mediation communications that they have made.¹⁹ Nonparty participants possess the narrowest privilege. They may only refuse to disclose and prevent others from disclosing mediation communications that they themselves have made.²⁰

The UMA contains several exceptions to the privilege against disclosure. Seven of these exceptions apply categorically, regardless of the need for evidence. These exceptions apply to any mediation communication that is:

- (1) in an agreement evidenced by a record signed by all parties to the agreement;
- (2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

¹⁵ *Id.* § 2(2).

¹⁶ *Id.* § 4(a).

¹⁷ *Id.* § 4(b)(1)–(3).

¹⁸ *Id.* § 4(b)(1).

¹⁹ *Id.* § 4(b)(2).

²⁰ *Id.* § 4(b)(3).

- (3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- (4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
- (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
- (6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or
- (7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective service agency is a party . . .²¹

The UMA also establishes two exceptions to the privilege against disclosure that apply if, after a hearing in camera, the need to disclose the mediation communication is found to substantially outweigh the interest in protecting confidentiality. These exceptions are for cases involving (1) a “court proceeding involving a felony [or misdemeanor]” and (2) proceedings “to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.”²² The mediator is also permitted to disclose whether the mediation occurred or has terminated, whether a settlement was reached, who attended the mediation, and any mediation communications “evidencing abuse, neglect, abandonment, or exploitation of an individual” as long as the report is directed “to a public agency responsible for protecting individuals against such mistreatment.”²³

In addition to establishing a privilege against disclosure that prevents mediation communications from being subject to discovery or admissible in evidence, the UMA also provides that mediation communications are “confidential to the extent agreed by the parties or

²¹ *Id.* § 6(a).

²² *Id.* § 6(b).

²³ *Id.* § 7(b).

provided by other law or rule of this State,”²⁴ that parties may waive the privilege against disclosure,²⁵ and that mediators must disclose known conflicts of interest.²⁶

B. Criticisms of the UMA

Critics of the UMA have argued that the UMA’s intricate approach to preventing disclosures of mediation communications, with its three tiers of privilege and nine exceptions, is overly complex and legalistic.²⁷ These critics have argued that the UMA’s complexity will lead to two problems in particular.

First, critics have argued that the UMA’s complexity will result in a proliferation of mediation-related litigation.²⁸ Professor Brian Shannon argued that the UMA’s “vast array of exceptions, waivers, and preclusions to privilege, in addition to the differing levels of privilege, will lead inexorably to numerous judicial challenges.”²⁹ Concerning the UMA’s requirement of an in camera hearing for communications needed as evidence in a felony or misdemeanor trial, Professor Maureen Laflin argued that the UMA “provides limited guidance to courts, mediators, and participants concerning the emerging problems associated with confidentiality and mediation privilege” and that the “mediation community cannot wait for the lengthy legal process to resolve all confidentiality issues before taking action.”³⁰

²⁴ *Id.* § 8. The privilege against disclosure only protects mediation communications from being subject to discovery and being introduced into evidence at trial. This provision governs other disclosures of mediation communications.

²⁵ *Id.* § 5.

²⁶ *Id.* § 9.

²⁷ See Shannon, *supra* note 6, at 212–13.

²⁸ See *id.* at 215.

²⁹ *Id.*

³⁰ Maureen E. Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. TEX. L. REV. 943, 983, 985 (2008).

Second, critics of the UMA argued that the UMA will force mediators to give lengthy, convoluted explanations of the law to mediation participants.³¹ This criticism was vividly illustrated in a video of a fictional mediation that the Hamline University School of Law's Dispute Resolution Institute prepared for the 2001 Minnesota State Bar Association Annual ADR Institute.³² The video begins with a mediator in plenary session telling the parties and counsel, "Before we actually begin, there's one last thing I'd like to mention."³³ The mediator then proceeds to explain the intricate details of the UMA for about six minutes, as the parties and their counsel are shown with perplexed looks on their faces.³⁴

Supporters of the UMA responded to these two criticisms by noting that mediation confidentiality is an inherently complex issue because it requires a careful balancing between the competing interests of mediation candor and the justice system's need for relevant mediation communications evidence.³⁵ UMA supporters argued that purportedly simpler alternatives do not eliminate these complexities because they merely shift the decision on how to balance these competing interests from the legislature to the courts.³⁶ An open-ended "manifest injustice" exception, like the one used in Ohio before it adopted the UMA, gives courts unbounded discretion to determine whether the need for the evidence outweighs the parties' expectations of confidentiality.³⁷ A broad, universal rule of non-disclosure also suffers from this problem because such an inflexible statute will inevitably lead courts to fashion ad hoc exceptions to

³¹ See Shannon, *supra* note 6, at 192–201 (presenting a fictional, convoluted opening statement by a mediator practicing in a UMA jurisdiction).

³² *Uniform Mediation Act Opening Statement*, HAMLINE UNIV. SCH. OF LAW, <http://law.hamline.edu/Content.aspx?id=2147496294> (last visited Apr. 17, 2014).

³³ *Id.*

³⁴ *Id.*

³⁵ See Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99, 111–12 (2003).

³⁶ See *id.* at 109–16.

³⁷ See *id.* at 113 (describing how mediators feared that a "manifest injustice" exception would be "an exception that would swallow the rule").

prevent an injustice.³⁸ Thus, the UMA's explicit list of exceptions to the privilege against disclosure simply serves to clarify and provide notice of the situations in which the privilege does not apply.

Which of these competing views about the UMA is correct? Now that it has been over ten years since the first state adopted the UMA, we can examine whether the fears of UMA critics have been borne out by the evidence. If the UMA critics are correct in believing that the UMA is too complex, and will inexorably lead to numerous judicial challenges, one would expect to see a rise in the number of mediation-related cases in the courts after the adoption of the UMA. One would also expect to see mediators and lawyers devoting significant attention to warning parties about the UMA's exceptions to the privilege against disclosure. On the other hand, if there has been no significant increase in mediation-related litigation, and mediators have not significantly changed their approach to warning parties about exceptions to confidentiality, then the fears of UMA critics would seem to be unfounded.

II. THE UMA HAS NOT RESULTED IN A PROLIFERATION OF MEDIATION-RELATED LITIGATION

To examine the UMA's effect on mediation-related litigation, I performed a Westlaw search for all state and federal cases citing the UMA, including unpublished opinions. I included all cases citing any provision of a jurisdiction's UMA statute, except for cases that arose before the UMA took effect,³⁹ cases that cursorily cite the UMA,⁴⁰ cases that cite the UMA as an aid to

³⁸ See Reuben, *supra* note 35 at 114–16 (documenting how the broad confidentiality statutes in California and Texas have been construed by courts to contain numerous exceptions to confidentiality). See, e.g., *Olam v. Cong. Mortg. Co.*, 68 F. Supp. 2d 1110, 1130–1139 (N.D. Cal. 1999) (requiring a mediator to testify in a challenge to an agreement reached at mediation on the grounds of undue influence and incapacity); *Rinaker v. Super. Ct.*, 62 Cal.App.4th 155, 165–67 (Cal. Ct. App. 1998) (holding that the constitutional right to confrontation overrides a mediator's statutory right not to testify).

³⁹ In these cases, the court relied the UMA as persuasive authority because the UMA was enacted after the initiation of the litigation but before the date of the court's decision. *State v. Williams*, 877 A.2d 1258 (N.J. 2005); *Addesa v.*

interpreting a different statute,⁴¹ and cases that erroneously cited the UMA by mistake.⁴² I have not excluded cases that were decided without reaching the issue involving the UMA,⁴³ or cases that held that a party's argument involving the UMA was not preserved for appeal.⁴⁴

TABLE 1
Number of Cases Citing UMA Statute

Year of Enactment	Jurisdiction	Number of Cases
2003	Nebraska	0
2003	Illinois	2
2004	New Jersey	7
2005	Ohio	14
2005	Iowa	1
2005	Washington	6
2006	Vermont	5
2006	Utah	3
2006	District of Columbia	0
2008	Idaho	0
2008	South Dakota	0
2013	Hawaii	0

In five of the twelve jurisdictions adopting the UMA, there has not been a single case citing the UMA. Of the seven jurisdictions in which the UMA has been cited, four

Addesa, 919 A.2d 885 (N.J. Super. Ct. App. Dev. 2007); *Lehr v. Afflitto*, 889 A.2d 462 (N.J. Super. Ct. App. Dev. 2006); *Reese v. Tingey Const.*, 177 P.3d 605 (Utah 2008).

⁴⁰ *Millard v. BNSF Ry. Co.*, No. 08 C 3752, 2010 WL 3515746, at *1 n.2 (N.D. Ill. Aug. 31, 2010) (noting in a footnote that neither party raised arguments under the UMA); *In re Teligent, Inc.*, 417 B.R. 197 (S.D.N.Y. 2009); *Hudson City Savings Bank v. Colyer*, No. F-001214-12, 2012 WL 7017727 (N.J. Feb. 1, 2013) (citing the UMA in the recitation of facts); *Trimble v. Graves*, 947 N.E.2d 885, 889 (Ill. App. Ct. 2011) (citing the UMA in background discussion of how arbitration differs from mediation); *Triplex Co. v. R.L. Pomante Contr., Inc.*, No. 07AP-80, 2008 WL 5104791 (Ohio Ct. App. Dec. 4, 2008) (citing the UMA in the recitation of facts); *In re Von Trapp CU Permit*, No. 51-4-13, 2014 WL 814792 (Vt. Super. Ct. Feb. 5, 2014); *Aurora Loan Services, LLC v. Kirkpatrick*, 2013 WL 3288062 (Vt. Super. Ct. June 1, 2013) (noting in a footnote that neither party raised arguments under the UMA).

⁴¹ *State ex rel. Upper Republican Natural Res. Dist. v. Dist. Judges of Dist. Court for Chase Cnty.*, 728 N.W.2d 275 (Neb. 2007).

⁴² *In re Squire*, 617 F.3d 461, 469 (6th Cir. 2010) (citing by mistake O.R.C. 2710.03 instead of O.R.C. 2701.03); *Fiore v. PPG Industries, Inc.*, 279 P.3d 972, 990 n.21 (Wash. App. 2012) (citing by mistake RCW 7.07.060 instead of RCW 7.06.060).

⁴³ *Zep Inc. v. Midwest Motor Supply Co.*, No. 2:09-cv-760, 2010 WL 2105365 (S.D. Ohio May 25, 2010); *In re Contempt of Feng*, No. 95749, 2011 WL 4389545 (Ohio Ct. App. Sept. 22, 2011); *Moss v. Parr Waddoups Brown Gee & Loveless*, 197 P.3d 659 (Utah Ct. App. 2008).

⁴⁴ *Schmitt v. Force*, No. 357-7-10 Wmcv, 2011 WL 8472900 (Vt. Super. Ct. Mar. 10, 2011).

jurisdictions—Ohio,⁴⁵ Iowa,⁴⁶ Washington,⁴⁷ and Utah⁴⁸—had pre-UMA statutes that specifically protected against the disclosure of mediation communications. In the other three jurisdictions, Illinois, New Jersey, and Vermont, there were no pre-UMA statutes. The following table shows the number of citations to the pre-UMA statutes in Ohio, Iowa, Washington, and Utah, along with the time period during which the statutes were in effect.

TABLE 2
Number of Cases Citing Pre-UMA Statute

Time Period	Jurisdiction	Number of Case
1997–2005	Ohio	20
1998–2005	Iowa	0
1991–2005	Washington	4
1994–2006	Utah	1

In Ohio, the number of cases citing the UMA statute in the nine years after its enactment was less than the number of cases citing Ohio’s pre-UMA statute during the eight years that it was in effect. In Iowa, one case cited the UMA in the nine years after its enactment, while there were no cases citing Iowa’s pre-UMA statute during the seven years it was in effect. In Washington, there has been somewhat of an increase in litigation after the enactment of the UMA. However, it is worth noting that all four pre-UMA cases in Washington were decided in a four-year period from 2003 to 2007.⁴⁹ Thus, the trend toward increased litigation appears to have started before the enactment of UMA. In Utah, there has also been a slight increase in litigation after the enactment of the UMA, but the number of cases is so small that it is difficult to attribute the increase to the UMA’s enactment.

⁴⁵ OHIO REV. CODE ANN. § 2317.023 (West 2013).

⁴⁶ IOWA CODE ANN. § 679C.2 (1998) (repealed 2005).

⁴⁷ WASH. REV. CODE ANN. §5.60.070 (West 2013).

⁴⁸ UTAH CODE ANN. § 78B-6-208 (West 2013).

⁴⁹ See Appendix.

This data suggests that, despite its complex structure, the UMA has not led to a proliferation of mediation-related litigation as critics of the UMA predicted. While there has been a slight increase in litigation in Washington and Utah, the decrease in litigation in Ohio makes it difficult to draw any conclusions about the effects of the UMA. In addition, the complete absence of any cases in Westlaw citing the UMA in five of the twelve UMA jurisdictions suggests that the UMA may actually be quite effective at preventing mediation-related litigation.

What explains the lack of litigation? One possible explanation is that, in most cases, mediation results in a satisfactory outcome that leaves parties uninterested in pursuing further litigation. It may simply be that there are few occasions in which parties actually wish to disclose mediation communications or force others to disclose them. The number of occasions in which a party wishes to invoke an exception to the privilege against disclosure may be so rare that the complexity or simplicity of the law has little to do with the amount of litigation that ensues. If this is the case, then it would appear that the mediation profession has been successful at achieving its goal of providing an effective, trustworthy, informal alternative to the court system.

A second possible explanation for the lack of mediation-related litigation under the UMA is that mediators may have taken steps after the enactment of the UMA to prevent lawsuits from occurring. For instance, mediators may take greater pains to discuss the intricacies of the UMA privilege against disclosure, causing mediation participants to be more careful about the information they disclose during the mediation. However, as I shall explain in Part III, this explanation is probably incorrect because most mediators spend very little time discussing confidentiality with mediation parties, and very few spend any time discussing exceptions to confidentiality.

A third possible explanation for the lack of mediation-related litigation is that the clarity and certainty provided by the UMA's rule-based approach to preventing disclosures has been effective at preventing the legal uncertainty and ambiguity that leads parties to pursue litigation. There is a longstanding debate among legal scholars about the costs and benefits of choosing clear-cut rules over flexible standards. Justice Scalia, one of the most vocal proponents of clear-cut rules, has argued that flexible standards that allow judges to consider the totality of the circumstances lead to unpredictability and "protracted uncertainty regarding what the law may mean."⁵⁰ In contrast, clear-cut rules lead to predictable outcomes, which is inherently valuable to the public apart from the substance of the rule itself.⁵¹

The lack of mediation-related litigation under the UMA can be seen as a vindication of Justice Scalia's preference for rules over standards. While the UMA framework is complex, it has the virtue of providing very clear rules for when a mediation communication may be disclosed. There are only nine exceptions to the privilege against disclosure, and any mediation communication that does not fit within an exception may not be disclosed.⁵² In contrast, an open-ended, standard-based approach, such as the manifest injustice exception formerly used in Ohio, leaves great uncertainty as to whether a particular case qualifies for an exception. While a blanket rule of confidentiality with zero statutory exceptions does provide a clear rule, the experience of states that have adopted such a rule has shown that judges will often grant ad hoc exceptions to prevent a perceived injustice, even when the language of the statute unambiguously

⁵⁰ Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

⁵¹ *See id.* ("Predictability . . . is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.")

⁵² While two of the nine exceptions do require an in camera hearing and a judicial weighing of costs and benefits, the statute provides a clear rule for when those two exceptions should apply. Unif. Mediation Act § 6(b) (amended 2003). This limits the discretion of the court significantly in comparison to an open-ended manifest injustice statute or a blanket statute with the possibility of ad hoc exceptions.

forbids it.⁵³ Therefore, a blanket rule of confidentiality may end up functioning identically to an open-ended manifest injustice provision. The UMA represents a halfway point between the two extremes of excessive open-endedness and excessive inflexibility that is comprehensive in coverage but limited in scope. If this explanation is correct, then it would seem that the decision of the UMA drafters to choose a high level of specificity, even at the cost of greater complexity, has proven to be a wise and prudent choice.

III. THE UMA HAS NOT SIGNIFICANTLY CHANGED HOW MEDIATORS DISCUSS CONFIDENTIALITY

To better understand why the UMA has not caused an increase in mediation-related litigation, and to see whether mediators have changed their approach to discussing confidentiality in response to the UMA, I conducted an informal survey of prominent mediators in Ohio and Washington, two states that had pre-UMA confidentiality statutes. I asked the mediators whether the UMA led to any changes in how mediation is practiced in their state, and in particular, whether it changed the way mediators discuss confidentiality with mediation parties and their attorneys. I received responses from eight mediators, six from Ohio and two from Washington.

Some mediators reported that the enactment of the UMA did not lead to significant changes in the way they practiced mediation, or in the way they have seen others practice mediation. Professor Nancy Rogers, one of the drafters of the UMA, observed there has been “very little change in mediation warnings after Ohio adopted the UMA.”⁵⁴ She noted that in the two post-UMA mediations in which she has participated, the mediators simply indicated that

⁵³ See *supra* note 38.

⁵⁴ E-mail from Nancy Rogers, Professor Emeritus of Law, The Ohio State Univ. Moritz Coll. of Law, to “AUTHOR’S NAME REDACTED”, J.D. Candidate, Harvard Law Sch. (Dec. 9, 2013, 09:53 EST) (on file with author).

there was a privilege that had some exceptions and asked the parties to agree to maintain confidentiality.⁵⁵ Parties who were not represented by counsel were referred to a written summary of the UMA prepared by the staff of the Supreme Court of Ohio.⁵⁶

Professor Marjorie Aaron, who teaches mediation at the University of Cincinnati and is an active mediator in Ohio, stated that the effects of the UMA on her mediation practice have been minimal: “While my mediation agreement now incorporates reference [sic] to the Uniform Mediation Act . . . it has not really resulted in real differences in the way I speak about confidentiality or changed any other aspect of my mediation practice.”⁵⁷

Other mediators reported that the enactment of the UMA did lead to significant changes. Professor Alan Kirtley, who was instrumental to the passage of the UMA in Washington,⁵⁸ noted that Washington’s UMA statute was “vastly different” from pre-UMA statutes concerning mediation confidentiality.⁵⁹ He has observed that mediators have updated their mediation agreements and adjusted their discussions of confidentiality in accordance with the UMA.⁶⁰ Eileen Pruett, the manager of the Dispute Resolution Department at the Franklin County Municipal Court, stated that the Supreme Court of Ohio now provides mediators with extensive training about the UMA.⁶¹

Although a number of mediators reported making adjustments to their discussions about confidentiality, none of them reported increasing their depth of treatment of the issue with

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ E-mail from Marjorie Aaron, Professor of Practice, Univ. of Cincinnati Coll. of Law, to “AUTHOR’S NAME REDACTED”, J.D. Candidate, Harvard Law Sch. (Dec. 9, 2013, 10:21 EST) (on file with author).

⁵⁸ See Alan Kirtley, *The Top Ten Reasons for Adopting the New Uniform Mediation Act in Washington*, 58 WASH. ST. B. NEWS 18 (2004).

⁵⁹ E-mail from Alan Kirtley, Assoc. Professor of Law, Univ. of Wash. Sch. of Law, to “AUTHOR’S NAME REDACTED”, J.D. Candidate, Harvard Law Sch. (Dec. 18, 2013, 15:08 EST) (on file with author).

⁶⁰ *Id.*

⁶¹ E-mail from Eileen Pruett, Manager, Dispute Resolution Dep’t, Franklin Cnty. Mun. Court, to “AUTHOR’S NAME REDACTED”, J.D. Candidate, Harvard Law Sch. (Jan. 9, 2014, 19:20 EST) (on file with author).

mediation participants. Eileen Pruett stated that for mediations involving civil cases that have been filed in court, the Dispute Resolution Department requires participants to sign a written agreement containing a confidentiality provision. Then, at the beginning of the mediation, the mediator states that “we . . . will maintain absolute confidentiality” and conveys “our expectation that neither our mediators nor staff will be asked to disclose mediation communications.”⁶² Mediators do not, however, discuss the intricate details of the situations in which communications may be disclosed.⁶³ In the pre-filing mediation program, there is no written agreement, and the oral agreement is the only discussion of confidentiality that takes places.⁶⁴

Professor Erin Archerd, a clinical instructor at The Ohio State University who works with victim-offender cases at the Prosecutor’s Office and small claims cases at the Franklin County Municipal Court, estimates that a typical mediation will contain about thirty seconds of discussion concerning confidentiality.⁶⁵ The agreement to mediate used in the Prosecutor’s Office contains the following two-sentence statement: “All parties present and the mediator agree to keep what is said in the mediation hearing confidential, unless otherwise required by law. However, the mediator may be required to report neglect or abuse of a child or imminent threats of bodily harm.”⁶⁶

Larry Mills, a Washington mediator who has worked as an American Arbitration Association mediator and is now a mediator with Judicial Arbitration and Mediation Services (JAMS), is required by JAMS to include one sentence in his mediation agreement stating that the mediation is being conducted pursuant to the Washington Uniform Mediation Act. The

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ E-mail from Erin Archerd, Professor, Langdon Fellow in Dispute Resolution, The Ohio State Univ. Moritz Coll. of Law, to “AUTHOR’S NAME REDACTED”, J.D. Candidate, Harvard Law Sch. (Dec. 18, 2013, 09:17 EST) (on file with author).

⁶⁶ *Id.* The term “mediation hearing” is the term used by the Prosecutor’s Office to refer to its mediations.

provision, however, “is largely treated as a perfunctory formality without a great deal of discussion.”⁶⁷ Mr. Mills does not find it necessary to delve into all of the complexities of the UMA, and noted that “I have never experienced a situation in which a party to a mediation tried to get me, the mediator, to breach the privilege relating to mediation communications.”⁶⁸

Not all mediators deal with the issue of confidentiality quickly. For some mediators, a lengthy discussion about confidentiality is an important part of explaining the mediation process. For Jerome Weiss, President of Mediation Inc. in Cleveland, a thorough discussion of the privilege against disclosure is a critical part of his approach to fostering an atmosphere of cooperation and candid discussion.⁶⁹ Mr. Weiss discusses the UMA’s privilege against disclosure with parties extensively during both plenary sessions and caucuses, and includes an explicit reference to the UMA in his mediation agreement.⁷⁰ He finds that discussing confidentiality helps parties set aside their competitive, distributive, litigation-oriented approach to problem-solving, and encourages them to think that, “I don’t have to be that way here. I can be myself, however I need to be, so that I can have a different discussion with people.”⁷¹ However, while Mr. Weiss discusses the UMA’s privilege against disclosure at length, he does not discuss any of the UMA’s exceptions to that privilege. In Mr. Weiss’s view, these exceptions deal with conduct that is “on the fringes,” and it is “hyperacademic” to dwell on them.⁷²

Bea Larson, a Senior Mediator at the Center for the Resolution of Disputes in Cincinnati, takes a similar approach to confidentiality: “I go over confidentiality [in plenary session] with the parties and in caucus, and discussions about confidentiality are a core part of the introduction

⁶⁷ E-mail from Laurence R. Mills, Mediator, Judicial Arbitration and Mediation Servs., to “AUTHOR’S NAME REDACTED”, J.D. Candidate, Harvard Law Sch. (Dec. 18, 2013, 01:35 EST) (on file with author).

⁶⁸ *Id.*

⁶⁹ Telephone Interview with Jerome Weiss, President, Mediation Inc. (Dec. 18, 2013).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

to my practice.”⁷³ However, she has made no changes to the way she discusses confidentiality after the enactment of the UMA in Ohio: “I think the act has made little to no difference to most of us in the way we conduct our practice.”⁷⁴ Ms. Larson mentioned that in the two occasions in which she had been subpoenaed, the attorneys backed off after she showed them the confidentiality agreement, and she did not need to examine or invoke the UMA.⁷⁵

In summation, it appears that for some mediators, discussions about confidentiality occupy a very small portion of the time they spend introducing the parties to the mediation process. For these mediators, the increased complexity of the UMA’s approach to confidentiality has not made much of a difference because they have continued to devote little time to discussions about confidentiality. For other mediators, discussions about confidentiality play a very important role in the way they introduce parties to the mediation process. Yet none of these mediators reported an increase in the level of detail or complexity in their discussions of confidentiality after the enactment of the UMA. On the whole, while all of the mediators who responded to the survey made adjustments to their practice in response to the UMA, none of them reported an increase in confusion due to the complexity of the UMA.

There several possible explanations for why the complexity of the UMA has not led to lengthier discussions about confidentiality. One explanation is that, just as an attorney does not typically explain all of the rules and exceptions concerning the attorney-client privilege, mediators do not find it necessary to explain all of the intricacies of the UMA’s privilege against disclosure. As Jerome Weiss indicated, most of the exceptions to privilege in the UMA occur so infrequently that most mediators find it unnecessary to discuss them at the beginning of a mediation session.

⁷³ Telephone Interview with Bea Larson, Senior Mediator, The Ctr. for Resolution of Disputes LLC (Dec. 18, 2013).

⁷⁴ *Id.*

⁷⁵ *Id.*

Another explanation is that in some states, like Ohio, there are resources available to help nonlawyers understand the Uniform Mediation Act. The Ohio Supreme Court has published a “Reader’s Guide” that summarizes the provisions of the Ohio Uniform Mediation Act for laypersons.⁷⁶ Mediators in Ohio can simply refer parties to the guide, avoiding the need to spend a great deal of time discussing exceptions to the privilege against disclosure at length. As Professor Nancy Rogers explained, “I worried during the drafting of the UMA about how complicated the language of the statute was becoming . . . But I now think the resulting complexity was worth it, on balance. I was wrong to think that lay people would go to the statute to understand the law. As in most areas of the law, they go to summaries of the law that are written with them in mind.”⁷⁷

IV. CONCLUSION

The fears of those who believed that the UMA would cause a proliferation of mediation-related litigation and force mediators to engage in lengthy, confusing discussions about the UMA have proved to be unfounded thus far. An analysis of the number of mediation-related cases reveals that the UMA has not led to a proliferation of litigation. This may be due to the success of mediation in producing satisfactory outcomes, as well as the clarity afforded by the UMA’s rule-based approach. A survey of mediators in UMA jurisdictions demonstrates that many mediators spend little time discussing the privilege against disclosure, and those who spend significant amounts of time discussing it do not find it necessary to explain all of the UMA’s complex details. The fears of UMA critics may be due more to a hyperacademic tendency to

⁷⁶ SUPREME COURT OF OHIO, OHIO’S UNIFORM MEDIATION ACT: A READER’S GUIDE (2005), *available at* http://www.supremecourt.ohio.gov/JCS/disputeResolution/resources/uma/UMA_readerguide.pdf.

⁷⁷ E-mail from Nancy Rogers, Professor Emeritus of Law, The Ohio State Univ. Moritz Coll. of Law, to “AUTHOR’S NAME REDACTED”, J.D. Candidate, Harvard Law Sch. (Dec. 9, 2013, 9:53 EST) (on file with author).

dwell on difficult cases, or a lack of openness to change among mediators in states with pre-existing mediation confidentiality statutes, rather than actual defects in the UMA itself.

APPENDIX

Cases Citing the Uniform Mediation Act

Iowa (IOWA CODE ANN. §§ 679C.101 to 679C.115)

- *City of Clinton v. Hopkins & Huebner, P.C.*, No. LACV39049, 2013 WL 6222092 (Iowa Dist. Ct. Sept. 4, 2013)

Illinois (710 ILL. COMP. STAT. ANN. 35/1 to 35/99)

- *Mustafa v. Mac's Convenience Stores, LLC*, No. 13 CV 2951, 2014 WL 1088991 (N.D. Ill. Mar. 18, 2014)
- *United States Sur. Co. v. Stevens Family Ltd. P'ship*, No. 11 C 7480, 2014 WL 902893 (N.D. Ill. Mar. 7, 2014)

New Jersey (N.J. STAT. ANN. 2A:23C-1 to 2A:23C-13)

- *In re Jacobson*, No. L-645-12, 2013 WL 6857998 (N.J. Super Ct. Dec. 30, 2013)
- *Minkowitz v. Israeli*, 77 A.3d 1189 (N.J. Super. Ct. App. Dec. 2013)
- *Willingboro Mall, Ltd. V. 240/242 Franklin Ave., LLC*, 71 A.3d 888 (N.J. 2013)
- *Rutigliano v. Rutigliano*, No. L-3822-102012, WL 4855864 (N.J. Super. Ct. App. Dev. Oct 15, 2012)
- *N.H. v. H.H.*, 13 A.3d 399 (N.J. Super. Ct. App. Dev. 2011)
- *New Jersey Mfrs. Ins. Co. v. Nat'l Cas. Co.*, 992 A.2d 837 (N.J. Super. Ct. App. Dev. 2010)
- *Morrison v. Palm*, FD-20-1294-06M, 2009 WL 62963 (N.J. Super. Ct. App. Dev. Jan. 13, 2009)

Ohio (OHIO REV. CODE ANN. §§ 2710.01 to 2710.10)

- *FCDB LBPL 2008-1 Trust v. Remely*, No. 2012-G-3098, 2013 WL 6019594 (Ohio Ct. App. 2013)
- *BAC Home Loans Servicing, L.P. v. Testa*, No. 2011-P-0045, 2012 WL 5844892 (Ohio Ct. App. Nov. 19, 2012)
- *JPMorgan Chase Bank, N.A. v. Hunter*, No. 2011-P-0063, 2012 WL 5499835 (Ohio Ct. App. Nov. 13, 2012)
- *Nachar v. PNC Bank, Nat. Ass'n*, 901 F.Supp.2d 1012 (N.D. Ohio 2012)
- *Kuhn v. 21st Century Ins. Co.*, No. 2011 CA 00232, 2012 WL 2115524 (Ohio Ct. App. June 11, 2012)
- *Hopes v. Barry*, No. 2010-A-0042, 2011 WL 6881790 (Ohio Ct. App. Dec. 27, 2011)
- *In re Contempt of Feng*, No. 95749, 2011 WL 4389545 (Ohio Ct. App. Sept. 22, 2011)
- *Allied Erecting & Dismantling Co., Inc. v. Qwest Communications Int'l, Inc.*, No. 08 MA 212, 2010 WL 4927617 (Ohio Ct. App. Dec. 2, 2010)

- Akron v. Carter, 190 Ohio App.3d 420 (Ohio Ct. App. 2010)
- Zep Inc. v. Midwest Motor Supply Co., No. 2:09-cv-760, 2010 WL 2105365 (S.D. Ohio May 25, 2010)
- Anthony v. Andrews, No. 2008-P-0091, 2009 WL 4547605 (Ohio Ct. App. 2009)
- A & H Management Services, Inc. v. Chafflose Corp., No. 08-3809, 2009 WL 232987 (6th Cir. Feb. 3, 2009)
- Thompson v. Germantown Cemetery, No. 3:07CV439, 2008 WL 2872288 (S.D. Ohio July 3, 2008)
- Soc’y of Lloyd’s v. Moore, No. 1:06-CV-286, 2006 WL 3167735 (S.D. Ohio Nov. 1, 2006)

Washington (WASH. REV. CODE ANN. §§ 7.07.010 to 7.07.904)

- *In re* Marriage of Mayo, Nos. 66615-1-I, 66910-9-I, 2012 WL 1501474 (Wash. Ct. App. Apr. 30, 2012)
- *In re* Alden, No. 28638-0-III, 2010 WL 5298828 (Wash. Ct. App. Dec. 28, 2010)
- Western & Clay, LLC v. Landmark American Ins. Co., No. C09-1423 MJP, 2010 WL 1881880 (Wash. Ct. App. May 10, 2010)
- Bird v. Best Plumbing Grp., LLC, No. 07-2-14723-3 SEA, 2009 WL 8058784 (Wash. Super. Apr. 23, 2009)
- Mut. of Enumclaw v. Cornhusker Cas. Ins. Co., No. CV-07-3101-FVS, 2008 WL 4330313 (E.D. Wash. Sept. 16, 2008)
- Pryde v. Bjorn, No. 58333-6-I, 2007 WL 3348297 (Wash. Ct. App. Nov. 13, 2007)

Vermont (VT. STAT ANN. tit.12, §§ 5711 to 5723)

- *In re* Simonds, No. 51-1-13 Wrcv., 2012 WL 7017647 (Vt. Super. Ct. Jan. 23, 2012)
- *In re* Smith 4-Lot Subdivision Final Plat, No. 244-12-09 Vtec., 2011 WL 4852931 (Vt. Super. Ct. Sept. 27, 2011)
- Schmitt v. Force, No. 357-7-10 Wmcev., 2011 WL 8472900 (Vt. Super. Ct. Mar. 10, 2011)
- *In re* Centre/Hannaford Plaza Pud Modification, No. 240-10-08 Vtec., 2009 WL 4623426 (Vt. Env’tl. Ct. Mar. 31, 2009)
- Lord v. Viscido, No. 114-5-06 Ancv, 2007 WL 5313953 (Vt. Super. Ct. July 6, 2007)

Utah (UTAH CODE ANN. §§ 78B-10-101 to 78B-10-114)

- Miller v. Basic Research, LLC, No. 2:07-CV-871 TS, 2013 WL 1194721 (D. Utah Mar. 22, 2013)
- Nat’l Indem. Co. v. Nelson, Chipman & Burt, No. 2:07-CV-996 TS, 2013 WL 243723 (D. Utah Jan. 22, 2013)
- Moss v. Parr Waddoups Brown Gee & Loveless, 197 P.3d 659 (Utah Ct. App. 2008)

Cases Citing a Pre-UMA Statute

Ohio (OHIO REV. CODE ANN. § 2317.023)

- Cambodian Buddhist Soc’y, Inc. v. Ke, Nos. 01AP-731, 01AP-732, 2002 WL 1066927 (Ohio Ct. App. May 30, 2007)
- Soc’y of Lloyds v. Ward, No. 1:05-CV-32, 2006 WL 13221 (S.D. Ohio Jan. 3 2006)

- O'Donnell Const. Co. v. Mannen, No. 88717, 2006 WL 3635350 (Ohio Ct. App. Dec. 13, 2006)
- O'Donnell Const. Co. v. Stewart, No. 86576, 2006 WL 951456 (Ohio Ct. App. Apr. 13, 2006)
- Scibelli v. Pannunzio, No. 05 MA 150, 2006 WL 3059876 (Ohio Ct. App. Oct. 26, 2006)
- *In re* 3710 Henricks Rd. Corp., 331 B.R. 757 (Bankr. N.D. Ohio 2005)
- Brooks-Lee v. Lee, No. 03AP-1149, 2005 WL 1109755 (Ohio Ct. App. May 10, 2005)
- Reason v. Wilson Concrete Prods., Inc., No. 19999, 2004 WL 1178759 (Ohio Ct. App. May 28, 2004)
- State ex rel. WBNS TV, Inc. v. Dues, 805 N.E.2d 1116 (Ohio 2004)
- Spickler v. Spickler, No. 01 CO 52, 2003 WL 21518732 (Ohio Ct. App. June 30, 2003)
- Bowden v. Weickert, No. S-02-017, 2003 WL 21419175 (Ohio Ct. App. June 20, 2003)
- DeRolph v. State, 758 N.E.2d 1113 (Ohio 2001)
- Forsyiaak v. Laird Marine and Mfg., No. OT-00-049, 2001 WL 1256402, (Ohio Ct. App. Oct. 19, 2001)
- Schumacker v. Zoll, 2001 WL 1198641, No. L-00-1199 (Ohio Ct. App. Oct. 5, 2001)
- Howard v. Ramsey No. C-000503, 2001 WL 228015 (Ohio Ct. App. Mar. 9, 2001)
- Duncan v. Vernon Twp. Trs., No. CA2000-05-015, 2001 WL 32806 (Jan 16, 2001)
- Carver v. Deerfield Twp., 742 N.E.2d 1182 (Ohio Ct. App. 2000)
- Shimko v. Kobe, No. 99CVH-04-2793, 2000 WL 35486973 (Ohio Com. Pl. Sept. 13, 2000)
- State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062(Ohio 1999)
- State ex rel. Schneider v. Kreiner, 699 N.E.2d 83 (Ohio 1998)

Washington (WASH. REV. CODE ANN. § 5.60.070)

- Hogle v. Meeks, 170 P.3d 37 (Wash. Ct. App. 2007)
- Sharbono v. Universal Underwriters Ins. Co., No. 33379-1-II, 161 P.3d 406 (Wash. Ct. App. June 26, 2007)
- Ladiser v. Huff, No. 52858-1-I, 2004 WL 1057852 (Wash. Ct. App. May 10, 2004)
- Vonasek v. Vonasek, No. 28216-6-II, 2003 WL 1522001 (Wash. Ct. App. Mar. 25, 2003)

Utah (UTAH CODE ANN. § 78B-6-208)

- Reese v. Tingey Const., 177 P.3d 605 (Utah 2008)

ACKNOWLEDGEMENTS

I would like to thank Marjorie Aaron, Erin Archerd, Alan Kirtley, Bea Larson, Larry Mills, Eileen Pruett, Nancy Rogers, and Jerome Weiss for taking the time to share their insights and experiences with me. I would also like to thank Professor David Hoffman for his invaluable mentorship and guidance.