

# What Advocates Should Know About the Uniform Mediation Act

By Thomas Repicky



It has been nearly two and one half years since Ohio passed the Uniform Mediation Act (UMA). Surprisingly, some attorneys who represent litigants in mediations have yet to familiarize themselves with the provisions of the UMA. This article will

briefly summarize the key portions of the UMA relating to the mediation of civil lawsuits so litigants have a better understanding of how the UMA affects their mediations.

## Introduction

Ohio adopted the UMA on October 29, 2005 and it is codified in Ohio Revised Code Sections 2710.01 to 2710.10. The entire mediation statute itself is short consisting of only four and a half pages. The purpose of the UMA is to provide a set of uniform laws to govern the expanding use of mediation and hopefully increase its effectiveness as a means of resolving disputes. Since the goal of mediation is to help the parties resolve disputes through a voluntary settlement, mediation is an alternative to a trial as a means of resolving a lawsuit. In an effort to promote uniformity in mediation, the UMA specifically provides for separate privileges for all mediation attendees protecting mediation communication and allows the parties to determine the confidentiality of their mediations.

The Act hopes to promote candor by all participants in mediation proceedings and further aspires to ensure mediator neutrality. Furthermore, the UMA recognizes and highly values the parties' right to self determination of the dispute and their participation at mediation while providing them reliable protection from disclosures of any of the mediation discussions.

## Mediations of Lawsuits Subject to UMA

Initially it should be noted that the UMA applies to all mediations of lawsuits conducted by either a court or private mediator. However, the act does not apply to settlement conferences conducted by a judge assigned to the lawsuit.

Ohio Revised Code Sections 2710.02 (A) and (B) specifically list other mediations covered and not covered by the UMA. Interestingly, the Act further codifies under Section 2710.09, a party's right to have an attorney or other representative accompany them to the mediation. Although a party may waive the right to a representative at the mediation, the waiver of participation can also be rescinded. Also, under Section 2710.09, the mediator has an absolute right to withdraw from the mediation at any time.

## Privileges Under the UMA

One of the more important provisions in the UMA is the privileges contained in Section 2710.03. The privileges, with certain exceptions, apply to all mediation communications and effectively prevent the use of mediation communications in discovery or their admissibility in evidence at a court proceeding. Separate privileges apply to the parties to a mediation (section (B)(1)); to the mediator (section (B)(2)); and to all non-party participants (section (B)(3)). Each privilege allows its holder to refuse to disclose their mediation communication and prevent anyone else from disclosing their communication. Interestingly only a party may prevent any disclosure of a mediation communication from being made by anyone else present at the mediation. Section 2710.03 (B)(1). However, evidence that is otherwise admissible or subject to discovery does not become privileged solely by reason of its use or disclosure in mediation.

The parties' privilege under the UMA is waived only if expressly waived by all the mediation parties. The separate mediator or nonparty participant privileges can be waived only where all parties have expressly waived privilege and the respective mediator or nonparty participant have also waived their own privilege. (Section 2710.04 A (1) and (2)). Thus, the mediator and non party participant cannot waive their privilege without the consent of the parties. In addition, any disclosure of a mediation communication by a person that prejudices another person results in a partial waiver of the privilege of the person who made the prejudicial

disclosure. Such privilege is waived only to the extent necessary for the prejudiced person to respond to the disclosure. Finally, any person who plans or attempts to commit or conceal a crime in mediation is precluded from asserting any mediation privilege under the UMA.

## Communications Not Subject to Mediation Privileges Under the UMA

Section 2710.05(A) (1) through (9) lists the various situations where no privilege applies to certain mediation communications under the UMA. For purposes of this article, only situations more common to the mediation of civil lawsuits where no privilege exists are discussed. However, an advocate should review the statute to familiarize themselves with some of the less common situations where no privilege exists.

Mediation communications are not privileged where: (1) the communication is in a written agreement signed by all parties; (2) the communication is sought to prove a claim of professional misconduct or malpractice filed against a mediator, mediation party, nonparty participant or representative of a party for conduct occurring during a mediation; (3) the communication involves a threat to commit bodily injury, certain criminal proceedings or situations involving child or elder abuse or neglect; and (4) proceedings involving a contract (i.e. settlement agreement) arising out of a mediation.

Therefore, privilege does not apply in a subsequent court proceeding involving the enforceability of a settlement agreement reached at a mediation or to malpractice claims. However, a mediator may not be compelled to provide evidence of a communication involving a malpractice claim arising out of the mediation or any claim involving a contract arising out of the mediation.

## Confidentiality Under the UMA

Interestingly under Section 2710.07, mediation communications are confidential only to the extent agreed by the parties. The term “confidentiality” is not even defined in the UMA. Clearly, the parties to the mediation ultimately control whether the mediation communications are to be kept confidential.. Arguably, confidentiality should increase the candor of conversations that take place in the mediation. Nevertheless, mediation communications are not automatically confidential under the UMA.

Obviously, the mediation privileges previously discussed herein would prevent or limit disclosure of mediation communications in any court proceeding by any party, nonparty participant or the mediator. Furthermore, a mediator is specifically limited as to communications regarding a mediation that can be made to the court. Specifically, Section 2710.06 allows a mediator to disclose to the court only whether a mediation occurred, has terminated, settled, and who was in attendance. However, a mediator may also disclose mediation communications that are not confidential as permitted under Section 2710.07 as well as those involving neglect or abuse of an individual.

Any disclosures by a mediator that violate these restrictions may not be considered by a court. These disclosure limitations apply to both private and court mediators. The intent of the UMA is to both limit mediation communications that the mediator could disclose and protect the mediator from being forced to disclose mediation communications.

## The Mediator’s Duties Under the UMA

Under Section 2710.08, a mediator is required to both make a reasonable inquiry to determine whether circumstances exist that would affect the impartiality of the mediator and to disclose to the mediation parties any such known facts. Circumstances requiring disclosure include a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation. Both duties of the mediator continue throughout the mediation.

Although a mediator does not have to have special qualifications by background or profession to mediate, the mediator is required to disclose their qualifications at the request of a mediation party. A mediator is also required to be impartial under this section, although such requirement can be waived after full disclosure by the mediator. Any mediator who fails to comply with the duties imposed under this section is precluded from asserting any privilege under Section 2710.03. Interestingly, the mediator disclosure requirements do not apply when the mediation is conducted by a judge who might make a ruling on the case.

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## Conclusion

As a result of Ohio's adoption of the Uniform Mediation Act, some important changes have occurred in the requirements applicable to the mediation of lawsuits. Counsel representing parties at the mediation of lawsuits need to understand these requirements so that they can provide competent representation of their client in the entire mediation process. By combining their knowledge of the UMA with effective mediation advocacy, counsel can utilize mediation more effectively to resolve their client's disputes.

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