

BACKGROUND OF THE UMA 25-2930 to 2942

The primary intent of the drafters of the UMA was to assure that the reasonable expectations of mediation participants regarding confidentiality and privilege within the mediation process are met. The UMA further intends to promote the integrity of mediation by encouraging disclosure of known conflicts of interests as well as to provide information about the mediator's qualifications.

The UMA contains five sections:

- 1) Definitions
- 2) Confidentiality
- 3) What's Prohibited From Disclosure
- 4) Liability
- 5) Enforcement of Agreements to Mediate.

Nebraska became the first state to adopt the Uniform Mediation Act to establish confidentiality and privilege for mediation communications. The bill LB 255 was signed by Gov. Mike Johanns in May of 2003.

Nebraska's UMA closely tracks the uniform act approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association, but it departs from them in the following ways. It provides that the new law does not diminish other requirements for mediation under Nebraska statutes. This is important because of the many Nebraska statutes providing for mediation including the Parenting Act and the Dispute Resolution Act which preceded the UMA. In addition, it broadens the original Uniform Mediation Act's provision authorizing a party to a mediation to bring a lawyer or other representative to the proceedings. It also contains a bracketed, or

optional, provision establishing that mediators must be impartial in their conduct.

The UMA as adopted in Nebraska consists of thirteen sections, each with a different topic or subject. While you should see the Act as a unified whole and appreciate the cross-references between sections, knowing the basic structure will help you locate the exact provisions you need to review.

25-2931 provides the UMA definitions. Central to the UMA are the broad definitions of "mediator" and "mediation communications." A mediator is one who mediates (admittedly a circular definition). A mediation communication covers discussions at the mediation table, but also applies to discussions before and after the mediation, an enlargement of the statutory coverage over common definitions.

25-2932 provides the scope of the UMA, which applies to most court annexed and party-initiated mediations, including parties required to mediate by statute, court, or administrative agency, as well as private agreements to mediate where the parties and a person who holds himself out to be a mediator agree to an expectation that communications in mediation will be privileged. This requires a record, which seems to mean something in writing. The Act does not cover mediations in the labor area, school or youth correctional mediations, or to settlement conferences with judges who might later make rulings in the case.

25-2933 establishes a mediation privilege for the mediator, parties, support people such as attorneys, counselors, domestic violence advocates, experts, and family members who participate. Privilege is different from confidentiality and everyone at the table has a slightly different

scope of privilege, so this section is an essential one to read. 2934 provides that the privilege may be waived by a record or orally during a proceeding, or may be lost by a participant who has made a disclosure or a representation about a mediation communication, which prejudices another person. 2935 establishes eleven exceptions to the privilege.

25-2934 deals with the all-important question of waiver of privilege, and how each privilege holder can give up that protection.

25-2935 lists eleven statutory exceptions to the privilege. These proscribed topics:

1. signed agreements;
2. public records;
- 3/4. threats or plan to inflict bodily injury or commit a crime of violence, or conceal on going crime;
- 5/6. offers to prove or disprove professional malpractice or other misconduct;
7. statements showing child and elder abuse and neglect where child or adult protective services is a party;
- 8/9. in camera hearing shows:
 - (a) evidence is not otherwise available;
 - (b) there is a need of disclosure that substantially outweighs the value of keeping mediation discussions private, and
 - (c) the proceeding involves a felony or a claim to rescind, reform, or avoid liability on a contract from the mediation;
10. a mediator can not be compelled to provide information about professional misconduct or a claim to rescind, reform,

or avoid liability on a contract from the mediation;

11. when privilege does not apply, only that portion not privileged maybe admitted and the admitted portion may not be used for any other purpose.

25-2936 deals with the important topic of what a mediator can report to a judge, tribunal, or agency. The short answer is "not much." A mediator may only report on whether or not the mediation occurred or has been terminated, whether settlement was reached, who attended, a party's communication of abuse may be made to a public agency, and nothing else. A mediator will not be able under the UMA to report, for instance, how close the parties are to settling, whether additional talks would help, or whether one side or the other was acting in bad faith. If a prohibited communication is made the court may not consider it.

25-2937 provides that parties can make their own agreements about confidentiality. Confidential, as distinguished from privileged under the UMA, refers to matters that cannot be disclosed outside of court.

25-2938 establishes obligations of the mediator to make certain inquiries and disclosures prior to accepting a mediation to avoid conflicts of interest and to establish the mediator is qualified for the specific mediation. It also requires a mediator to be impartial unless the parties agree otherwise.

25-2939 allows for parties to have other individuals accompany them to and participate in a mediation, including an attorney. This section allows parties to bring "support people" to the table, which could be attorneys, but can also

include family, counselors, translators, accountants, or other experts.

25-2940 covers the use of electronic signatures under 15 United States Code Section 7001 et seq.

25-2941 states that uniformity of application among the states is to be considered in construing the act.

25-2942 establishes the effective date of for agreements to mediate as January 1, 2004.