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United States of America

Standardising mediation confidentiality

Richard Birke

Mediation in the United States has changed dramatically over the past 50 years. Mediators have proliferated and mediation is provided by large private organisations, court systems and by a vast array of private providers. The process is used to resolve tax disputes, criminal disputes, civil disputes, family law disputes, and corporate disputes, among others. The population of mediators and the use of mediation in new areas is growing, as are the variations in approach and the urge to regulate the field. Of particular importance is the variation in approaches to mediation confidentiality.

In this short piece, I chronicle and critique a national attempt to standardise confidentiality within these varied mediation practices – the recently

minted Uniform Mediation Act (UMA). I begin with a sweeping history of recent developments in the field, and then turn to the UMA. In my conclusion, I offer a cautious pessimism that mediation is not a field that is amenable to effective standardisation.

The growth of mediation

Prior to 1960 mediation was a part of the dispute resolution landscape in the United States, but its use was not widespread. Starting in the mid 1960s, mediation began a period of unfaltering expansion. Courts and legislatures, desperate to deal with growing backlogs, started mediation programs for domestic relations cases and small claims cases (neighbourhood level cases).

Starting sometime in the 1970s and

continuing through the 1980s, mediation advocates persuaded legislators and court administrators that mediation was faster, cheaper and more satisfying than court proceedings. They financed a plethora of state and federal programs. This period bore witness to an expansion of the use of mediation into most areas of legal practice. The corporate world learned that in-house use of mediation was a valuable way to lessen or avoid the costs of litigation or contested cases. Public policy disputes came to be seen as being particularly well-suited to mediation. Mediation programs were used to resolve disputes in the health care industry, for cases pending appeal, and by public schools systems in the form of peer mediation programs.

There were two significant federal laws passed in 1990 and they ensured that mediation was a national enterprise. Congress passed the *Civil Justice Reform Act* (CJRA)¹ and the first *Administrative Dispute Resolution Act* (ADRA).² The CJRA required all 94 federal districts to create and implement plans that would reduce expense and delay. Congress expressed a desire for 'just, speedy and inexpensive resolutions' in civil cases.³ The program began with 10 pilot courts, 10 courts acting as a control group, and five more courts that would each try a different experimental effort.

While the CJRA treated all ADR equally, mediation became the dominant form. As of 1996, more than half of all federal courts had some form of mediation program.⁴ The *Dispute Resolution Act 1998* went one step further, requiring that every federal court consider mediation specifically.⁵ The ADRA mandated that every agency 'encourage the use of alternative means of dispute resolution.'⁶ The first statute had a five year sunset provision.⁷ After five years it became temporarily dormant, but in 1996 a more potent version of the law was re-enacted, this time with no sunset date.

Inconsistency regarding confidentiality

The development of institutional protection for mediation confidentiality has been anything but uniform. Some states offer a mediation privilege that is held by the parties, and other jurisdictions vest a separate right in the mediator. Some states have clear rules about mandatory reporting (of offences like child abuse) while others have more opaque rules or none at all.⁸ State laws vary with regard to whether the government can participate in a confidential process at all.

In addition to inconsistency in legislation, a recent line of case law emerging out of the state and federal courts in California has added to the confusion around the future of mediation confidentiality. The debate in California is a microcosm of the national debate and therefore merits a closer examination. The cases, *Foxgate Homeowners' Association v Bramalea California Inc.*,⁹ *Olam v Congress*

Mortgage Company,¹⁰ *Rojas v Superior Court*,¹¹ and *Rinaker v Superior Court*¹² redrew the relationship between mediators and the courts.

In *Foxgate*, the court ordered mediation and the parties stipulated that the mediation would be a procedure in which experts would debate the merits of the claim. The plaintiff brought nine experts and the defendant showed up late and brought none. The mediation ended early with no progress made. The mediator filed a report with the court indicating the defendant had shown bad faith and should be sanctioned. The trial court acknowledged the mediator's report, and awarded approximately \$30,000 in damages. The defendant appealed and the appellate court ruled that the mediator's report could be considered in a case involving sanctions without infringing unduly on mediation confidentiality.¹³ The California Supreme Court reversed the court below, holding that confidentiality was to be respected even in a sanctions case.¹⁴

In *Olam*, Federal Magistrate Wayne Brazil ordered a mediator to testify about whether an agreement signed in mediation was the product of duress or free will.¹⁵ The parties asked that the mediator testify and Brazil ruled that, even over objection, the mediation privilege was subordinate to the orderly administration of justice.¹⁶

In *Rojas*, the court found that photographs and other raw material prepared specifically for a mediation was discoverable, as the mediation privilege did not cover expert reports, factual analysis, or other evidence that had the quality of data, rather than of case strategy.

In *Rinaker*, a juvenile accused of a crime had participated in an earlier mediation during which the juvenile allegedly made statements that would contradict critical testimony he offered at his juvenile proceeding.¹⁷ The California Court of Appeals held that mediation confidentiality was subordinate to the 'constitutional right to effective impeachment.'¹⁸

These cases show that even within a unified statutory scheme, inconsistent results are the norm. While much work has been done to promote certainty

with respect to mediation confidentiality, much uncertainty remains, and the rules and rubrics vary from jurisdiction to jurisdiction. Prominent mediation academic Nancy Rogers has been quoted as saying there are over 300 different confidentiality statutes in the US.¹⁹

Can this varied field become uniform?

In 1998 the National Conference of Commissioners for Uniform State Laws (NCCUSL) established a drafting committee for a Uniform Mediation Act. The final draft was approved and promulgated in May of 2001.

The Act consists of a fairly lengthy prefatory note and 15 sections. Many of the sections are purely ministerial, while others are so controversial that the drafting committee released the provisions at the behest of the Conference but recommend against their adoption.²⁰

Sections 5-8 deal with confidentiality. The UMA grants broad privileges to everyone involved in the process, and sets up a confidentiality regime that is among the strictest ever proposed in any law or regulation. The Act grants a mediation privilege to parties and to the mediator, and each party has the right to refuse to disclose in a court (or court-like) proceeding anything anyone said in mediation, and additionally, each party has the right to prevent any other person from disclosing anything they said in mediation. Thus, a party who wishes to testify about something the mediator said can be blocked by the mediator. If the parties want the mediator to testify, the mediator can refuse despite the parties' desire. Finally, a non-party participant in the mediation may refuse to disclose anything they added to the mediation, and they may prevent any other person from so disclosing.

The approach to waiver issues is standard. The privilege may be waived expressly by all parties, and in the case of the mediator or a non-party participant, by the mediator or non-party participant. Privilege may not be asserted to conceal a crime planned during mediation or any ongoing criminal activity discussed in mediation, nor may a party assert a privilege to



prevent another party from responding to a prejudicial allegation based on a mediation communication.

Exceptions to privilege are many. Threats, crimes, and public records are not privileged. Mediation communications used to prove or disprove child abuse are not privileged, unless the underlying case is one involving child protection and the mediation is court-ordered or attended by the child protection agency. As is the case with the attorney-client privilege, the mediator can break privilege to defend against a malpractice or professional misconduct claim. This protection is extended under the Act to parties, non-party participants and representatives.

One subsection of the exceptions section merits additional discussion. Subsection (b) states that there is no privilege if a presiding official determines, after an in camera hearing, that a party seeking discovery of information discussed in mediation has no other way to obtain the information, that the need for the evidence outweighs the interest in protecting confidentiality, and the information is used to prove a felony, to reform a mediation agreement, or to avoid liability based on a mediation contract. While the purposes of this subsection are strictly limited, the section acts as an invitation for judges, administrative officers and arbitrators to examine mediation communications and to perform balancing tests.

Mediators are precluded from making reports to any agency or person with authority to make a ruling on the case, but they may disclose that a mediation occurred, whether the case settled or

not, and who attended. They may disclose any instance of abuse or neglect, but only to the appropriate government agency. Courts may not consider information obtained in violation of this section.

A mediator must make disclosures that relate to the mediator's impartiality. Included in this mandatory disclosure are mediator qualifications, prior relationships with parties or attorneys, and personal or financial interest in the matter being mediated. There is nothing in the Act that specifies penalties for violation of any of the disclosure rules.

Conclusion

It remains an open question whether the UMA will have any significant impact. Many states have tautly crafted, highly detailed mediation statutes, and the people who crafted them, who live by them, and who support them may not take kindly to a national effort to displace their local standards. However, the NCCUSL commissioners have pledged to try to gather support for the UMA, and in some states with less developed statutory frameworks, the UMA may be adopted.

With each adoption, the pressure will build on neighboring states to adopt the UMA. While it is reasonable to expect some consistency when participating in mediation, let me add a voice to those already out there who suggest that mediation has to adapt to the needs of the parties and the parameters of the problem being mediated. Mediation flourished as a result of diversity and adaptability, and these qualities are inconsistent with uniform laws.

The cure for product differentiation is consumer education, not elimination of choice. ●

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Endnotes

1. 28 USC s 471 (1990).
2. Hereinafter 'ADRA' Public Law 101-552, 104 Stat 2736, 5 USC 581 et seq (1991).
3. 28 USC 471 (1990).
4. The Paths of Civil Litigation, 113 *Harvard Law Review* 1851, 1857 (2000)
5. 28 USCA 651.
6. Id note 5 at Congressional Findings (1).
7. Id at Public Law 101-552, section 11.
8. See *Deason*, supra, citations at footnote 47 of the case.
9. 26 Cal 4th 1, 25 P 3d 1117, 108 Cal Rptr 2d 642 (2001).
10. 68 F Supp 2d 1110 (N D Cal 1999).
11. 102 Cal App 4th 1062 (2002).
12. 62 Cal App 4th 155 (1998).
13. 78 Cal App 4th 653 (2000).
14. 26 Cal 4th 1 at 17.
15. *Olam*, supra, at 1113-19.
16. Id at 1132.
17. *Rinaker*, supra, at 161.
18. Id at 164.
19. Jennifer L Reichert 'Bar Organisations Urge Uniformity in Mediation Law', 35 *Trial* 104, 105 (1999).
20. The controversial section is section 11.

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