

Mediation Act Campaign in Massachusetts Applauded by Drafters

By ADRWorld.com Staff Reporters

(8.15.2006) A new effort in Massachusetts to tailor the Uniform Mediation Act to the needs of the state in advance of planned legislative action this fall is being applauded as a move that that could help spur passage of the act in others that already have mediation confidentiality laws in place.

Massachusetts already has stringent mediation confidentiality protections on the books, and a group of leading mediators is inviting ADR organizations and practitioners to debate how the UMA can be adapted to benefit the state. The interaction between the uniform act and the state's existing laws will be a key topic at the first meeting of the newly formed UMA Working Group, according to Ericka Gray, a member of the Trial Court Standing Committee on Dispute Resolution and an adjunct professor at Boston College Law School.

Gray said the group views the UMA as a "working document to begin from" and believes that it will need to be revised to take into account existing practices and rules in the state. The group will kick off its discussions at a meeting set for September 8 at Suffolk Law School, and Gray said its work could enable the ADR community to support legislation to enact a new confidentiality statute.

Although the UMA is designed to create uniform state mediation laws nationwide, the move to customize the act in Massachusetts is winning praise from those who led its drafting under the auspices of the National Conference of Commissioners on Uniform State Laws (NCCUSL) several years ago.

Judge Michael B. Getty (Ret.), chair of the UMA drafting committee, said "this effort is definitely a step in the right direction."

"I would love to see this push the UMA on a national level" by leading other states with existing mediation confidentiality statutes to investigate whether adopting the UMA could be to their benefit, he said.

Richard C. Reuben, a professor at the University of Missouri-Columbia School of Law and reporter for the UMA, said this is "exactly what the states should be doing with respect to the UMA."

Reuben said states "need to take a hard look at their own law and what the UMA provides, and when they do, I believe that they will generally find that the UMA offers mediation in their states a great deal more protection and certainty than their current state law," he said.

According to Reuben, the UMA "was meant to be a floor, not a ceiling, and it is important for this process to identify aspects of their current law that they would like to retain, and that is quite appropriate."

In Massachusetts for example, practitioners want to keep the state's 30-hour training requirement in any new mediation confidentiality statute. According to Gray, the UMA does not contain any training requirement before a person may call himself or herself a mediator, which allows "anybody to hide behind the protections of the UMA."

Getty said this "is an area the UMA specifically did not address, which is in line with NCCUSL not legislating" in an area where states have licensure or certification requirements for mediators. "Whatever they do that is regulatory" should not impact the uniformity of the law, he said, adding that "it is good for Massachusetts to decide what to do."

However, "how it's done is important because the state wouldn't want to create unintended problems, but the act leaves plenty of room for state flexibility in such areas," he suggested.

Getty said NCCUSL is still treating the UMA as a "targeted bill" and pushing for its passage. "We hope to get more introductions in the states within the year," he said, adding there is an effort underway in Hawaii to win introduction and passage.

The invite letter from the UMA Working Group says, "Our hope is that the mediation community in Massachusetts, through a collaborative process, can support a statute with a united voice in the Massachusetts legislature." A bill, HB 19, was introduced in the 2006 legislative session but went nowhere.

The UMA contains a privilege for participants in mediation to refuse to disclose and prevent others from disclosing communications in subsequent legal proceedings. It contains exceptions for mandatory reporting requirements, open record laws, threats of violence, and where a court determines based on a balancing test that the need for the information outweighs the interest in protecting confidentiality.

According to Gray, the working group will "need to work through whether mediators should be reporting misdemeanors or judging what constitutes a felony."

The discussions also will address whether there is a need to create an exception for mediations conducted by government agencies and the group should "take a look at the impartiality provision" in the UMA, she said. The first step would be to determine "how to define impartiality," she suggested.

Members of the UMA Working Group include David Hoffman and Israela Brill-Cass, neutrals with Boston Law Collaborative, and Charles Doran of Mediation Works Incorporated.

The group hopes to have two representatives from each ADR organization and other interested practitioners attend the first meeting with an eye toward establishing a task force or larger working group to develop a draft proposal based on the UMA, Gray said.