

The Uniform Mediation Act:
A Quick Reference for Judges

Consider this situation: you check your docket and see a motion hearing is scheduled on an expedited basis. The facts pattern is as follows: An Ohio-based distributor of farm machinery has been sued in your court by a Nebraska agri-business for selling allegedly defective soybean harvesters manufactured in New Jersey by a co-defendant. The parties and counsel retained the services of a noted Chicago mediator, who tried unsuccessfully to settle the case pre-suit in a conference call with everyone participating. Nebraska counsel has noticed the mediator for a deposition in three days and intends to ask questions about statements made by the party representatives in the conference call. Ohio counsel objects, has moved for a protective order, and obtained this expedited hearing. Is there a conflict of laws question? Which state's law regarding mediation applies? Can the mediator object and refuse to be deposed? Where do you turn for authority?

While this hypo may be a bit farfetched, there will soon be a statute in effect which deals with these issues and was passed in some measure to cover this type of fact pattern. As of this writing Ohio, New Jersey, Nebraska, and Illinois have adopted a statute that covers this particular hypothetical.

Effective October 29, 2005, issues of mediation confidentiality and privilege will be governed in Ohio by the Uniform Mediation Act or UMA. Just like the more famous Uniform Commercial Code, the UMA establishes a level and standardized playing field in several states for the practice of mediation and specifically the issue of what is and is not confidential in mediation. Codified as RC Section 2710.01 et seq, the UMA defines mediation, indicates what types of mediation are and are not covered by its

terms, creates a mediation privilege, and states who may exercise the privilege.

To borrow freely from the journalism profession and use an organizing principle for completeness and comprehension, we can dissect the new statute with the Five W's and an H. For those of you unfamiliar with journalism, those letters stand for—Who, What, Where, When, Why, and How. So here are the 5 W's and an H of the UMA. For convenience, the W's have been arranged in a slightly different order.

1. WHAT? What is mediation? The UMA in RC 2710.01(A) defines mediation as: “any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute”. This will cover most private and court annexed mediations in Ohio. It does not cover arbitration or adjudication.

Also important as a “W” is **What is Not** covered by the UMA. RC 2710.02(B) provides that the statute does not cover collective bargaining in the labor field, labor dispute mediations, school peer mediations, court settlement conferences conducted by a judicial officer (judge or magistrate) who might make a ruling in the case, or mediations in a correctional institution for youths.

The key provision of the UMA is the creation of a privilege against the disclosure of mediation communications, RC 2710.03. **What** is a mediation communication? This is defined in RC 2710.01(B) as “a statement, whether oral, in a record, 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”. This is a broad definition as it encompasses communications

even before and after the formal, sit-down talks begin through the “considering, . . . participating in, initiating, continuing, or reconvening a mediation or retaining a mediator” language. Preliminary talks about mediating and selecting a mediator would be covered.

The central provision of the UMA covers the mediation privilege and answers the question “**What is privileged?**” and the closely linked consideration of “**Who holds the privileges?**” thus created by the UMA? R.C. 2710.03 provides:

(A) Except as otherwise provided in section 2710.05 of the Revised Code, a mediation communication is privileged as provided in division (B) of this section and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided in section 2710.04 of the Revised Code.

(B) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication. A mediator may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(C) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

A participant in the mediation (a party who decision is necessary to an agreement) has a privilege under RC 2710.03(B)(1) against disclosure of his or her mediation communications, and may prevent any other person from disclosing a mediation communication. Under RC 2710.03(B)(2), the mediator holds a privilege against disclosure of a mediation communication, and may prevent another person from disclosing the mediator's mediation communications. A nonparty participant (usually an attorney in a litigated case, but also a family member, expert, or other support person) may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of that nonparty participant.

An equally important “W” is “**What is not privileged?**” Under RC 2711.05 (A), these items are not privileged:

- (1) The mediation communication is contained in a written agreement evidenced by a record signed by all parties to the agreement. [In other words, a signed settlement agreement at the end of the process is not privileged and is subject to disclosure]
- (2) The mediation communication is available to the public under section 149.43 of the Revised Code or made during a session of a mediation that is open, or is required by law to be open, to the public. [This is a public records exception].
- (3) The mediation communication is an imminent threat or statement of a plan to inflict bodily injury or commit a crime of violence.
- (4) The mediation communication is intentionally used to plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity.
- (5) The mediation communication is 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 division (C) of this section, the mediation communication is 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.

(7) Except as provided in sections 2317.02 and 3109.052 of the Revised Code, the mediation communication is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the case is referred by a court to mediation and a public agency participates.

(8) The mediation communication is required to be disclosed pursuant to section 2921.22 of the Revised Code. [Statutory duty to report a felony, a dead body, or a burn injury].

(9) The mediation communication is sought in connection with or offered in any criminal proceeding involving a felony, a delinquent child proceeding based on what would be a felony if committed by an adult, or a proceeding initiated by the state or a child protection agency in which it is alleged that a child is an abused, neglected, or dependent child.

A “W” not covered by the journalism maxim, but important for attorneys and parties is **Waiver**. Under the UMA in RC 2710.04, a participant can waive the privilege. That section provides:

A privilege under section 2710.03 of the Revised Code may be waived in a record or orally during a proceeding if it is expressly waived by all mediation parties and by whichever of the following is applicable:

- (1) In the case of the privilege of a mediator, it is expressly waived by the mediator.
- (2) In the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(B) A person that discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 2710.03 of the Revised Code, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(C) A person that intentionally uses a mediation to plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 2710.03 of the Revised Code.

2. **WHO?** Who is a mediator? Under RC 2710.01(C) a mediator is “an individual who conducts a mediation”, a circular but practical definition. Who is not? Certainly an arbitrator, a judge, a magistrate, or a court investigator would not be.

The mediator also has some separate responsibilities to keep mediation communications private. Under RC 2710.06(A), the mediator:

Except as provided in division (B) of this section and section 3109.052 of the Revised Code, a mediator shall not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, department, agency, or officer of this state or its political subdivisions that may make a ruling on the dispute that is the subject of the mediation.

However, under subsection (B), a mediator may disclose any of the following:

- (1) Whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;
- (2) A mediation communication as permitted by section 2710.07 of the Revised Code;
- (3) A mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against abuse, neglect, abandonment, or exploitation.

RC 2710.06(C) provides that “A communication made in violation of division (A) of this section shall not be considered by a court, administrative agency, or arbitrator.” In summary, RC 2710.06 limits a judge to learning from a mediator the start or completion of a mediation, whether a settlement was reached, who attended the conference, and nothing more, unless another statutory section permits or requires disclosure. There is no specified sanction or remedy for a violation of this section.

Another **Who** covered by the UMA is who may attend a mediation. RC 2710.09 states that a party may have a support person (attorney, family member, etc.) present and participating at the mediation. A waiver of this attendance may be withdrawn at any time, so a participant can change his or her mind during a mediation about having someone else present.

3. **WHERE?** Where and under what circumstances does the UMA apply? As of this writing, Ohio, New Jersey, Nebraska, and Illinois have passed the UMA. The UMA applies in telephone, e-mail, Internet, etc. based mediations as well as in-person conferences.

4. **WHEN?** The UMA becomes effective in Ohio on October 29, 2005. Section 4 of the UMA specifies that it applies to a mediation pursuant to a referral or an agreement made on or after the effective date.

When does mediation start for UMA purposes? RC 2710.01(B) specifies that a mediation communication begins at the first communication considering initiating a mediation or retaining a mediator. The statute does not provide for an ending or expiration date for the privilege once it is created.

5. **HOW?** How can the privilege be enforced? How can it be challenged?

The only section of the UMA that refers to a court challenge is RC

2710.05(B), which states:

There is no privilege under section 2710.03 of the Revised Code if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that the disclosure is necessary in the particular case to prevent a manifest injustice, and that the mediation communication is sought or offered in either of the following:

- (1) A court proceeding involving a misdemeanor;
- (2) Except as otherwise provided in division (C) of this section, a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(C) A mediator may not be compelled to provide evidence of a mediation communication referred to in division (A)(6) or (B)(2) of this section.

RC 2710.05(D) limits what is disclosed pursuant to a challenge under sub-section (B) to just the material necessary to apply the exception, not the entirety of the mediation communications. That sub-section states:

If a mediation communication is not privileged under division (A) or (B) of this section, only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under division (A) or (B) of this section does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

6. **WHY?** The public policy behind the mediation privilege is to create and preserve the confidentiality needed to allow parties and their attorneys to candidly discuss their interests, concerns, negotiation flexibility, and all other factors necessary to find a mutually agreeable settlement. Prior Ohio case law in *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, construing the prior statute RC 2317.023 stresses the importance of preserving the private natures of mediation discussions. RC 2317.023 has been repealed by the UMA in Section 2 of the act, but the same public policy concerning the benefits of mediation confidentiality would apply to future cases.

KEY POINTS FOR JUDGES

- Settlement conferences with a judge or a magistrate who would later make a ruling in a case are NOT subject to the UMA, and therefore do NOT create any mediation privilege. RC Section 2710.02(B)(3)
- Judges may NOT get reports from mediators about the substance of the talks, only on attendance, occurrence, termination, or settlement at the mediation. RC section 2710.06(A) and (B).
- Information disclosed in a mediation may still be admissible under RC section 2710.03(C) if it is otherwise admissible or subject to discovery.
- Pre- and post-conference communications are covered by the UMA to the same extent as mediation communications at the conference table.
- Written settlement agreements that arise from a mediation are NOT privileged, so you may wish to consider a local practice or rule that requires mediators working in court-annexed programs to reduce every settlement agreement to writing.