karamatsu3-Leanne

From: James Burns [jsb808@hawaii.rr.com]
Sent: Sunday, March 15, 2009 3:00 PM
To: JUDtestimony
Cc: karamatsu6-James N.; Ken Takayama

WRITTEN TESTIMONY OF JAMES S. BURNS

ON S.B. No. 120, S.D.1
RELATING TO THE UNIFORM MEDIATION ACT

BEFORE THE HOUSE COMMITTEE ON JUDICIARY

DATE AND TIME: Tuesday, March 17, 2009 AT 2:00 p.m.
LOCATION: Conference Room 325, State Capitol,

Chair Karamatsu and Members of the House Committee on Judiciary:

I am James S. Burns, retired Chief Judge. I urge the Committee on Judiciary, House of Representatives, not to approve S.B. No. 120, S. D. 1, relating to the Uniform Mediation Act (UMA).

The UMA was has been in existence since 2001. Hawaii's Commission To Promote Uniform Legislation has reported that only ten states and the District of Columbia have adopted the UMA. This fact is evidence that (a) the UMA will not be a national uniform law, and (b) there are better ways to address the problem than by enacting the UMA.

The National Conference of Commissioners on Uniform State Laws Summary of the UMA states in part that the complexity of mediation law and rules across the country "is especially troublesome when it undermines one of the most important factors promoting mediation as a means of dispute resolution, namely the parties' ability to depend on the confidentiality of the proceeding, and their power to walk away without prejudice if an agreement cannot be voluntarily reached.." I agree that we should do everything we can to protect "the parties' ability to depend on the confidentiality of the proceeding, and their power to walk away without prejudice if an agreement cannot be voluntarily reached." I oppose the UMA because it will not accomplish these objectives.

One example of the UMA's many shortcomings is section "-8 Confidentiality." It says: "Unless subject to disclosure pursuant to part I of chapter 92 or chapter 92F, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State." Translation: Mediation communications are not confidential unless (1) agreed by the parties, or (2) provided by other law or rule of this State.

Another example of the UMA's many shortcomings is section "-10 Participation in mediation". It says that "An attorney or other individual designated by a party may accompany the party to and participate in a mediation." The word "or" means one or the other but only one. This means that a party who is covered by

insurance and has (a) an attorney and (b) an insurance adjustor is permitted to have one or the other but not both participate in the mediation.

I also oppose the UMA because it implies that no other protections are necessary. I understand the view that the UMA is better than nothing but I disagree with it.

In 1996, the Hawaii Supreme Court promulgated (a) Mediation Rules for Probate, Trust, Conservatorship and Guardianship, and (2) Guidelines for Hawaii Mediators. It has not promulgated mediation rules applicable to any other cases ordered or referred to mediation by a court. Rather than approve the UMA, the legislature should encourage and urge the Hawaii Supreme Court to adopt comprehensive Mediation Rules that (a) are applicable to all cases ordered or referred to mediation by a court, and (b) protect "the parties' ability to depend on the confidentiality of the proceeding, and their power to walk away without prejudice if an agreement cannot be voluntarily reached."

I urge you not to support this bill.

TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION

ON S.B. No. 120, S.D. 1
RELATING TO THE UNIFORM MEDIATION ACT.

BEFORE THE HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 17, 2009, at 2:00 p.m.
LOCATION: Conference Room 325, State Capitol

PERSON(S) TESTIFYING: KEVIN P. H. SUMIDA or KEN TAKAYAMA
Commission to Promote Uniform Legislation

E-MAIL to JUDTestimony@Capitol.hawaii.gov

Chair Karamatsu and Members of the House Committee on Judiciary:

My name is Kevin Sumida and I am one of Hawaii's Uniform Law Commissioners. Hawaii's uniform law commissioners support the passage of S.B. No. 120, S.D.1. This is a version of the Uniform Mediation Act that includes some modifications that address concerns raised by mediators and people who use mediation in Hawaii.

Mediation is a process in which the parties decide the resolution of their dispute themselves with the help of a mediator, rather than having a ruling imposed on them. The parties' participation in mediation allows them to reach results that are tailored to their interests and needs. In recent decades there has been enormous growth in mediation in many different types of disputes.

This bill would establish an evidentiary privilege for mediators and participants in mediation that applies in later proceedings. Currently mediation communications are covered by the Hawaii Rules of Evidence, Rule 408. The privilege in this bill provides significantly more protection for mediation communications.

The UMA has been adopted by ten states and the District of Columbia. It has been endorsed by the American Arbitration Association, the Judicial Arbitration and Mediation Service, the CPR Institute for Dispute Resolution, and the National Arbitration Forum. It has been approved by the American Bar Association. Attached is a brief summary of the UMA for your information.

We urge your support of this bill.

Uniform Law Commissioners
The National Conference of Commissioners on Uniform State Laws

SUMMARY

Uniform Mediation Act (2001)

Mediation is a process by which a third party facilitates communication and negotiation between parties to a dispute to assist them in reaching a voluntary agreement resolving that dispute. Because it is a voluntary process, and because of the relatively low costs associated with mediation versus a more formal legal proceeding or even an arbitration, mediation has become one of the most ubiquitous forms of dispute resolution in America today. Mediation is available in a wide variety of contexts, and state law has adopted various situation-specific rules to cope with the growth in the use of mediation. The widespread success of mediation as a form of dispute resolution has led to some problems, however, in that over 2500 separate state statutes affect mediation proceedings in some manner. In many cases, mediating parties cannot be sure which laws might apply to their efforts (especially in a multi-state context). This complexity is especially troublesome when it undermines one of the most important factors promoting mediation as a means of dispute resolution, namely the parties' ability to depend on the confidentiality of the proceeding, and their power to walk away without prejudice if an agreement cannot be voluntarily reached.

Promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2001, the Uniform Mediation Act (UMA) is intended to address this core concern about the confidentiality of mediation proceedings. The result of a unique joint drafting effort between NCCUSL and the American Bar Association through its Dispute Resolution Section, the UMA is intended as a statute of general applicability that will apply to almost all mediations, except those involving collective bargaining, minors in a primary or secondary school peer review context, prison inmate mediation, and proceedings conducted by judicial officers who might rule in a dispute or who are not prohibited by court rule from disclosing mediation communications with a court, agency, or other authority.

The UMA's prime concern is keeping mediation communications confidential. Parties engaged in a mediation, as well as non-party participants, must be able to speak with full candor for a mediation to be successful and for a settlement to be voluntary. For this reason, the central rule of the UMA is that a mediation communication is confidential, and if privileged, is not subject to discovery or admission into evidence in a formal proceeding [see Sec. 5(a)]. In proceedings following a mediation, a party may refuse to disclose, and prevent any other person from disclosing, a mediation communication. Mediators and non-party participants may refuse to disclose their own statements made during mediation, and may prevent others from disclosing them, as well. Thus, for a person's own mediation communication to be disclosed in a subsequent hearing, that person must agree and so must the parties to the mediation. Waiver of these privileges must be in a record or made orally during a proceeding to be effective. There is no waiver by conduct.

As is the case with all general rules, there are exceptions. First, it should be noted that the privilege extends only to mediation communications, and not the underlying facts of the dispute. Evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its use in a mediation. A party that discloses a mediation

communication and thereby prejudices another person in a proceeding is precluded from asserting the privilege to the extent necessary for the prejudiced person to respond. A person who intentionally uses a mediation to plan or attempt to commit a crime, or to conceal an ongoing crime, cannot assert the privilege.

Also, there is no assertable privilege against disclosure of a communication made during a mediation session that is open to the public, that contains a threat to inflict bodily injury, that is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding where a child or adult protective agency is a party, that would prove or disprove a claim of professional misconduct filed against a mediator, or against a party, party representative, or non-party participant based on conduct during a mediation. If a court, administrative agency, or arbitration panel finds that the need for the information outweighs the interest in confidentiality in a felony proceeding, or a proceeding to prove a claim of defense to reform or avoid liability on a contract arising out of the mediation, there is no privilege.

The Uniform Mediation Act is meant to have broad application, while at the same time preserving party autonomy. While a mediation proceeding subject to the Act can result from an agreement of the parties, or be required by statute, a government entity, or as part of an arbitration, the Act allows parties to opt out of the confidentiality and privilege rules described above. Also, the Act does not prescribe qualifications or other professional standards for mediators, allowing parties (and potentially states) to make that determination. The Act generally prohibits a mediator, other than a judicial officer, from submitting a report, assessment, evaluation, finding, or other communication to a court agency, or other authority that may make a ruling on the dispute that is the subject of the mediation. The mediator may report the bare facts that a mediation is ongoing or has concluded, who participated, and, mediation communications evidencing abuse, neglect, or abandonment, or, other non-privileged mediation matters. The Act also contains model provisions calling for a mediator to disclose conflicts of interest before accepting a mediation (or as soon as practicable after discovery). His or her qualifications as a mediator must be disclosed to any requesting party to the dispute.

The Uniform Mediation Act will further the goals of alternative dispute resolution by promoting candor of the parties by fostering prompt, economical, and amicable resolution of disputes, by retaining decision-making authority with the parties, and by promoting predictability with regard to the process and the level of confidentiality that can be expected by participants.

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