LATE

THE SENATE
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2013

COMMITTEE ON JUDICIARY AND LABOR
Rep. Karl Rhoads, Chair
Rep. Sharon E. Har, Vice Chair

Hearing Date: Thursday, February 28, 2013
Time: 3:00 p.m.
Place: Conference Room 325
State Capitol
415 South Beretania Street

By: Bruce McEwan, Chair
Mediation Centers of Hawaii

Bill No. and Title: HB 418, Relating to the Uniform Mediation Act

SUBMITTED BY E-MAIL: testimony@capitol.hawaii.gov

TO REPRESENTATIVE KARL RHOADS, CHAIR, REPRESENTATIVE SHARON E. HAR, VICE CHAIR AND MEMBERS OF THE COMMITTEE:

My name is Bruce McEwan, Chair of Mediation Centers of Hawaii (MCH) and **I am writing on behalf of the MCH to support HB 418**.

MCH is a 501(c)3 non-profit corporation comprised of the five community mediation centers located throughout the state including: Ku`ikahi Mediation Center, West Hawaii Mediation Center, Kauai Economic Mediation Center, Mediation Services of Maui and the Mediation Center of the Pacific. Together these five organizations help thousands of people, more than half of whom are in the low income population, settle their disputes through mediation each year. In FY 2011-2012, MCH conducted 2,143 mediations involving 7,123 people. 53% of the cases resulted in written agreements, thereby increasing access to justice and reducing the huge strain on Hawaii's overburdened court system.

The successful work of the community mediation centers is contingent on the generosity of the mediators who volunteer their time and the confidential nature of the mediation process that enables people from all backgrounds to talk freely with the assistance of the mediators. If confidentiality in mediation is not preserved by adopting the Uniform Mediation Act, then many people who are currently served by the community mediation centers will not trust the process and mediators will be less likely to volunteer their services.

Historically, Rule 408 Hawai`i Rules of Evidence helped to preserve confidentiality in mediation. However, with the growth of mediation over the past fifteen years, there have been an increasing number of instances in which confidentiality has been challenged. As a result, Hawaii courts are increasingly likely to compel mediators to testify in Court or deposition and to produce their mediation notes. For example, in 2009 the Family Court of the Third Circuit

compelled volunteer mediators from Ku'ikahi Mediation Center's (KMC) to testify about statements allegedly made during mediation sessions, and to force KMC to produce documents relating to the parties' mediation sessions. As a result of this ruling, the mediators who were forced to testify no longer volunteer for KMC and other mediators have raised concerns about continuing as volunteers if the confidential nature of mediation cannot be preserved.

The Uniform Mediation Act has been adopted in 11 jurisdictions. As a result, those jurisdictions have seen a reduction in litigation about confidentiality in courts. MCH urges you to support HB 418 and adopt the UMA in Hawaii. Without this protection, confidentiality in mediation will continue to be challenged and the community mediation centers in Hawaii will no longer be able to sustain the critical services they currently provide.

Respectfully,

Bruce McEwan, Chair
Mediation Centers of Hawai`i

THE MEDIATION CENTER OF THE PACIFIC, INC.

Bringing People Together to Talk and Resolve Their Differences

245 N. Kukui St. # 206, Honolulu, HI 96817 Tel: 521-6767 Fax: 538-1454 Email: mcp@mediatehawaii.org

LATE

The Mediation Center of the Pacific, Inc. Board of Directors' Resolution Supporting Confidentiality in Mediation Legislation (The Uniform Mediation Act or alternative)

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Be it RESOLVED, that on January 23, 2013

The Directors of the Board of the Mediation Center of the Pacific (MCP) declare our policy to support House Bill 418 in the 2013 term of the Hawaii Legislature, specifically based upon the Uniform Mediation Act, or other similar bills for the purpose of strengthening the legal protections for confidentiality in mediation, covering all communications in the mediation process, including the initial contacts with staff arranging and scheduling the mediation session(s), through the interaction of mediators with parties, co-mediators, staff and other non-party participants in the process, and to the final stages of agreement writing and following feedback through surveys of the participants.

Be it FURTHER RESOLVED, that The MCP Board of Directors hereby authorizes the Executive Director, Officers and Committee Chairs of the Board's Program & Quality Assurance Committee and Business Development Committee to represent the Board's above stated policy, at public appearances, including before legislative committees and in private discussions with legislators and/or other persons concerned with House Bill 418 or such similar bills.

Aloha Sirs: this bill was given VERY short notice for testimony and I only received this email last night at 9:30. Please accept this on behalf of a much-needed bill, Catherine

House Judiciary Committee

Attn.: Chair Karl Rhoads

Re. HB 418 (Uniform Mediation Act); Hearing on February 28, 2013, 3:00 p.m.

I am writing to support HB 418. I write as an individual, who serves as a mediator in private practice, as well as a volunteer for community mediations, through KuIkahi Mediation Center in Hilo. I am a past Executive Director and have also served on the board.

WHY WE NEED A MEDIATION PRIVILEGE STATUTE IN HAWAII.

Because of gaps in coverage of existing Court rules/guidelines and in the absence of any statutes regulating mediation, the participants in mediations (parties, legal counsel, mediators and non-party participants) cannot count on confidentiality of their communications during mediation. Without confidentiality, mediations are doomed to fail or worse, likely to create more problems, because there will not be the essential trust for open dialogue to resolve any dispute. Recent experiences of mediators being compelled to testify and produce their mediation notes highlight the need for this legislation.

WHAT DO WE HAVE NOW IN HAWAII?

Rule 408, Hawaii Rules of Evidence provides:

> "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, or (3) mediation or attempts to mediate a claim which was disputed, is <u>not admissible to prove liability for or invalidity of the claim or its amount.</u> Evidence of conduct or statements made in compromise negotiations or mediation proceedings . . . likewise . . . This rule does not require exclusion . . . when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 12.2(f), Rules of the Circuit Court of the State of Hawaii provides:

> Unless the parties otherwise agree in writing, the neutral, counsel, the parties, and other participants in any mediation, shall not communicate with the civil court adjudicating the merits of the mediated matter (including the settlement or trial judge) about the substance of any position, offer, or other matter related to mediation, nor shall a court request or order disclosure of such information unless such disclosure is required to enforce a settlement agreement, adjudicate a dispute over mediator fees, or provide evidence in any

attorney disciplinary proceeding, and then only to the extent required to accomplish such purpose.

Note: These are rules for excluding evidence from the judge or jury's consideration during a court proceeding; they do not establish a privilege of confidentiality for mediation communications.

WHAT'S WRONG WITH HRE RULE 408 AND CIRCUIT CT. RULE 12.2? DON'T THEY DO THE JOB?

While I was serving as Executive Director in 2009, a contentious divorce case file we mediated was subpoenaed by Judge Bartholomew in the Third Circuit Family Court. The mediators and I testified about our knowledge of the case, then many months old. This action sent a shiver through our entire mediator pool as well as mediators in the other six centers (now five) and also with the Judiciary staff in Honolulu. Rule 408 did not protect us. Judges are inclined to enforce the subpoenae with an order to compel, because:

A. HRE 408 does not apply, where the purpose of a party seeking the info is arguably other than to "prove liability for or invalidity of the claim or its amount". (This line of reasoning has been used by judges locally, to compel production of records and to compel testimony of mediators.)
B. The rules do not bar parties from seeking discovery of mediation communications, by means of a subpoena to produce documents at a custodial deposition or a subpoena to compel testimony of a mediator at a deposition.
C. Rule 12.2 does not cover cases pending in Circuit Court, where the parties agree to private mediation without a court order appointing the mediator (ambiguity and maybe a loophole in Rule 12.2).

Moreover, the evidentiary rules do not cover other disputes, such as:

D. Disputes not yet in any court, such as preliminary administrative proceedings like Hawaii
Civil Rights Commission or a dispute about elder care, referred by a care home or the Alzheimer's Assn., or a similar dispute over control of a vulnerable elders money and property, when incapacity and undue influence are at issue.
E. Rule 12.2 does not cover all pending cases, such as
    1.) District Court proceedings (small claims, landlord-tenant, etc.); or
    2.) Family Court; or
    3.) Probate Court; or
    4.) Criminal Court, such as an assault case following a mandatory mediation, ordered by a District Judge.

In such an environment of uncertainty, the risk and burden of litigating the uncertain and limited rules do and will continue to fall heavier on the weakest parties to mediation. If the litigants in the next case to test mediation confidentiality happen to be poor or if their counsel happens to not know about the strong policy and developing law (in other jurisdictions)

protecting the confidentiality of mediation, then the litigation probably will not raise the best arguments for recognition of the privilege, protection of the confidentiality of mediation and protection of the mediators from compulsion to testify and disclose notes.

There is a growing consensus among a majority of mediators, that a legislative solution is needed now. Recently, at a Hawaii State Bar Assn., ADR Section meeting, a strong majority of participants (19 of 22) expressed their opinion that the state of Hawaii law should be changed to give greater protection to confidentiality in mediation; afterwards, a written survey showed five more votes for same. That's a total of 24 out of 27. The 3 others were abstentions from the vote, not opponents.

Four mediation organizations' boards of directors recently resolved to back legislation to pass the Uniform Mediation Act this term, to give protection to mediation confidentiality. (Mediation Center of the Pacific; Kuikahi Mediation Ctr., Hilo; Mediation Services of Maui; and the Assn. for Conflict Resolution – Hawaii Chapter)

HB 418 (UNIFORM MEDIATION ACT) IS A GOOD SOLUTION.

I strongly believe that UMA is the best solution to the problem. First, the UMA explicitly establishes a privilege, protecting the confidentiality of mediation communications. Then, the UMA recognizes certain exceptions to the privilege, when there are countervailing needs and policies. When issues arise, the method of solving them sets up an in camera hearing (exclusion of all but the parties and participants with a stake in the issue of confidentiality), for the judge to preliminarily resolve whether to compel testimony, only if the information is not otherwise available and only if there's a legitimate issue such as protecting the well-being and safety of a child or vulnerable adult, or similar strong policy, already recognized in the law.

UMA key provisions establish a balanced, fair approach to the complex of issues, policies and legitimate interests of all concerned:

Sec. 4. PRIVILEGE AGAINST DISOVERY

(a) Except as otherwise provided in Sec. 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Sec. 5.

(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, and 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 non-arty participant. . . .

Sec. 6 Exceptions to Privilege

(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public . . .

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional malpractice or

malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a

claim or complaint of professional misconduct . . . based on conduct occurring during a mediation; or

(7) 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 [2 alternatives].

(b) There is no privilege . . . if a court . . . 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 there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and . . . the mediation communication is sought or offered in:

(1) a court proceeding involving a felony; or

(2) except . . . in subsection (c), 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 subsection (a)(6) or (b)(2).

(d) If a mediation communication is not privileged . . .[as above], only the portion . . . necessary for the application of the exception from nondisclosure may be admitted.

Admission of evidence under . . . [above] does not render the evidence, or any other mediation communication, discoverable or admissible . . .

Sec. 8. CONFIDENTIALITY. Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

Which other jurisdictions have passed the UMA?

Ten states plus the District of Columbia, including Ohio, Illinois and New Jersey (3 "big" states) have past the UMA, since 2005.

Most states which have not passed the UMA have privilege statutes of their own, usually predating the UMA. (e.g. Texas has a very broad protection statute, establishing the privilege with one exception for "manifest injustice", patterned after a federal statute; and California has an absolute privilege statute, which covers all written mediated agreements and oral ones, with an electronic record of same)

What's so good about the UMA?

1. The UMA is a balanced and harmonious set of policy judgments made by the foremost thinkers in the field of dispute resolution (including practicing mediators and mediation services (American Arbitration Assn., JAMS and CPR)- both lawyers and non-lawyers, such as psychologists, family dispute practitioners – including lawyers and judges, litigators, transactional lawyers and legal scholars participated in two years of drafting).

    a. Participation in this amazing example of "private legislation" was open and quite impressive, with a process that took all points of view into consideration.
    b. The judgments of the Commissioners of the National Conference for Uniform State Laws are fair, balanced and nuanced, resulting in near unanimous approval by participants in the process.

    Source: Many articles in law reviews, especially: Reuben, R., "The Sound of Dust Settling: A Response to Criticisms of the UMA," 2003 Journal of Dispute Resolution 99. (Author - a law prof., who served as Assoc. Reporter to the Drafting Committees, NCUSL)

2. The passage of the UMA in 11 jurisdictions has significantly reduced litigation about confidentiality in courts of those jurisdictions. Source: MEDIATION: Law Policy & Practice, by Professors Sarah R. Cole, Craig A. McEwen, Nancy Rogers, James R. Coben and Peter N. Thompson (West 2011), Sec. 8:15, "UMA in the Courts", pp. 295-301 ("One remarkable success of the UMA to date is the relative lack of litigation about its terms. . . . fewer than 30 federal and state cases published on Westlaw [in all 11 jurisdictions, since passage].")

3. Some states in which the UMA was proposed have used its principles to craft a statute, which fits specific conditions in that state. (e.g. Florida)

4. One other state's experience with an absolute and unique statute has generated a large increase in the number of cases litigated, over issues of confidentiality: California – over 60% of all litigation nationally, about confidentiality, where the Cal. Supreme Court is deferential to the legislature's absolute protection and has refused to allow any exceptions, even a very recent case denying access to information during mediation to a party who later sued his attorney for malpractice or unconscionable behavior during the mediation process.

ONE AMENDMENT NEEDED

I believe it would be wise to explicitly add language to the scope article or the definition of mediation, which makes clear the UMA is not intended to govern dispute resolution practices under traditional, customary practices of Hawaiians (ho'oponopono) or other such ethnic communities, e.g., ifoga in the Samoan community.

The UMA drafters included such a caveat in their official commentary. I believe it's better to make that an explicit boundary of the new law.

CONCLUSION

I want to emphasize that these are my personal views. I am willing to provide any further information should the Senate Committee desire.

Mahalo for your time and attention,

Catherine Lampton

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2-28-2013