



## *The Judiciary, State of Hawaii*

### **Testimony to the House Committee on Judiciary**

Representative Karl Rhoads, Chair  
Representative Sharon E. Har, Vice Chair

Thursday, March 14, 2013, 2:00 p.m.  
State Capitol, Conference Room 325

by  
Elizabeth Kent  
Director  
Center for Alternative Dispute Resolution

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**Bill No. and Title:** Senate Bill No. 966, Relating to the Uniform Mediation Act.

**Purpose:** Adopts the Uniform Mediation Act of the National Conference of Commissioners on Uniform State Laws.

### **Judiciary's Position:**

The Judiciary takes no position on the merits of this bill which does not have a direct impact on the Judiciary. Whether to address protection of statements made in mediation by an evidentiary rule of admissibility (Rule 408 of the Hawaii Rules of Evidence, the current law) or to adopt a privilege for mediation parties and mediators is a policy decision.

The Uniform Mediation Act (UMA) was a joint project of the Alternative Dispute Resolution Section of the American Bar Association and the Uniform Law Commission. As a member of the UMA drafting committee, I am available to provide background and answer any questions about the UMA. The UMA commentary notes that the purpose of the UMA is to:

- promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests;
- encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties; and



Senate Bill No. 966, Relating to the Uniform Mediation Act  
House Committee on Judiciary  
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- advance the policy that the decision-making authority in the mediation process rests with the parties.

The Judiciary endeavored to inform the public and the mediation community about the UMA by collaborating to hold public forums and provide print information about the UMA.

Thank you for the opportunity to testify on Senate Bill No. 966.

**TESTIMONY OF THE  
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

**ON S.B. No. 966  
RELATING TO THE UNIFORM MEDIATION ACT.**

**BEFORE THE HOUSE COMMITTEE ON JUDICIARY**

**DATE:** Thursday, March 14, 2013, 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

<http://www.capitol.hawaii.gov/submittestimony.aspx>

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Chair Rhoads 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. 966.

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.

The Uniform Mediation Act (UMA), promulgated by the National Conference of Commissioners on Uniform State Laws in 2001, is an important new development in the law of mediation. Highlights of the act include:

**Certainty.** Current legal rules on mediation can be found in more than 2,500 state and federal statutes; more than 250 of these deal with issues of confidentiality and privileges alone. Complexity means uncertainty, inhibiting the use of mediation. The Act provides one comprehensive law for privileges and confidentiality in mediation.

**Privacy.** A central purpose of the Act is to provide a privilege that assures confidentiality. The act establishes a privilege of confidentiality for mediators and participants that prohibits what is said during mediation from being used in later legal proceedings.

**Exceptions to Privilege.** The Act provides exceptions to the privilege. These exceptions include threats made to inflict bodily harm or other violent crime, when parties attempt to use mediation to plan or commit a crime, when the information is needed to prove or disprove allegations of child abuse or neglect, or when the information is needed to prove or disprove a claim or complaint of professional misconduct by a mediator.

**Party Protection.** In addition to ensuring confidentiality in the mediation process, the act further promotes mediation by requiring the disclosure of known conflicts of interest by the mediator, as well as disclosure of the mediator's qualifications.

**Autonomy.** The Act promotes autonomy of the parties by leaving to them those matters that can be set by agreement.

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 Act does not apply to collective bargaining disputes, some judicial settlement conferences, or mediation involving parties who are all minors.

This Act is a product of the Uniform Law Commission, in collaboration with the American Bar Association's Section on Dispute Resolution.

The Act has been endorsed by the American Arbitration Association, the Judicial Arbitration and Mediation Service, CPR Institute for Dispute Resolution, and the National Arbitration Forum. It has also been approved by the American

Bar Association.

The UMA has been adopted by eleven jurisdictions (District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington). It is presently being considered for adoption in two other states (Massachusetts and New York). Attached is a brief summary of the UMA for your information.

We urge your support of this bill.





# Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws

Contact Us: 312.450.6600

## Mediation Act Summary

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 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 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.



THE HOUSE OF REPRESENTATIVES  
THE TWENTY-SEVENTH LEGISLATURE  
REGULAR SESSION OF 2013  
COMMITTEE ON JUDICIARY  
Representative Karl Rhoads, Chair  
Senator Sharon Har, Vice Chair  
Hearing Date: March 14, 2013  
Time: 2:00 p.m.  
Place: Conference Room 325  
State Capitol  
415 South Beretania Street

By: Jessi Hall in her capacity as the Chair of the Family Law Section  
of the Hawaii State Bar Association

Bill No. and Title: SB966, Relating to the Uniform Mediation Act  
SUBMITTED BY E-Mail: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

TO SENATOR KARL RHOADS, CHAIR, SENATOR SHARON HAR, VICE CHAIR AND MEMBERS  
OF THE COMMITTEE:

My name is Jessi Hall. I am writing to **oppose** the passage of Senate Bill 966 (SB966), which would adopt the Uniform Mediation Act (UMA) of the National Conference of Commissioners on Uniform State Laws.

Volunteer Mediators and Voluntary Settlement Masters (VSMs) are critical to the Family Court operations because they settle many cases before the cases reach trial. By preventing these cases from going to trial, mediation conserves the costly judicial resources of the Family Court. If the UMA is adopted, there would be a decrease in voluntary mediators, increased strain on the Family Court resources, and a sharp increase in costs for clients, mediators, attorneys, and the courts.

The practice of mediators is undefined in nature, unlike the practice of attorneys which is regulated by the Rules of Professional Conduct and defines misconduct and malpractice. There are general policies and parameters for the practice of mediation in Hawai'i; however, in a July 11, 2002 Resolution, the Supreme Court of the State of Hawai'i stated that these aspirational and voluntary "[g]uidelines are not promulgated as binding rules, and they are not intended to regulate the work of mediators."

Provision 6(a)(5) of the UMA states that:

There is no privilege under [Section 4: Privilege Against Disclosure; Admissibility, Discovery] for a mediation communication that is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.

The vague language of provision does not outline what it means to commit malpractice as a mediator. As such, mediators would not be willing to practice and open themselves to the risk of malpractice. This hazard would shrink the available pool of mediators throughout the state and kill the mediation projects such as the Mediation Center of the Pacific (MCP) on-site paternity mediation pilot program and the VSM program in Family Court.



The effect of ending these projects and fewer available mediators is a large obstacle for access to justice. The scarcity of practicing mediators will increase prices and squeeze out lower income litigants; in turn, causing court congestion by crowding the dockets and abusing court resources. The adoption of SB966 as it currently stands may only result in driving up costs for us all.

I respectfully propose that provision 6(a)(5) be stricken from SB966 in its current form, or in the alternative, SB966 be deferred until these issues are addressed.

Thank you for your consideration,

Jessi Hall  
Chair of the Family Law Section

HOUSE OF REPRESENTATIVES  
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, March 14, 2013

Time: 2:00 p.m.

Place: Conference Room 325

State Capitol

415 South Beretania Street

By: Tracey Wiltgen, Executive Director  
The Mediation Center of the Pacific, Inc.

Bill No. and Title: SB 966, Relating to the Uniform Mediation Act

**SUBMITTED BY E-MAIL: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)**

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

My name is Tracey Wiltgen, Executive Director of the Mediation Center of the Pacific (the Mediation Center) and **I am writing on behalf of the Mediation Center to support SB 966.**

The Mediation Center is a 501(c)(3) not for profit corporation that was founded in 1979 to provide Hawaii's people with peaceful approaches to working through conflict. Over the years, the Mediation Center has developed processes that help participants address a broad array of issues and meet the unique needs of Hawaii's culturally diverse populations. Parties in conflict are assisted in resolving their immediate dispute, as well as in improving communication and strengthening their relationships for the future.

Confidentiality is a key element in ensuring that mediation is a comfortable, productive process for the more than 3,500 people the Mediation Center assists annually. However, over the past ten years with the growth of Mediation, Hawaii courts are increasingly likely to compel mediators (especially at Community Mediation Centers like the Mediation Center), to testify in Court or deposition and to produce their mediation notes. This fact has a chilling effect on the mediators who generously donate their time to mediate for the Mediation Center and other community mediation centers throughout the State and dramatically changes the non adversarial nature of the mediation process.

The Mediation Center of the Pacific and other community mediation centers throughout the State are a critical resource for Hawaii's communities. With the assistance of more than 200 volunteer mediators, every day people are assisted in resolving their conflicts through the informal, confidential process of mediation. The work of the community mediation centers increases access to justice and reduces the caseload of Family and District Courts.

If confidentiality in mediation is not protected, community mediation centers will lose valued mediators and will no longer be able to offer affordable, quality mediation services for the low income and vulnerable populations of Hawaii.

To maintain the important work of the community mediation centers and preserve the essential element of confidentiality that helps make mediation successful, the Mediation Center strongly supports SB 966.

Respectfully,

A handwritten signature in black ink, appearing to read 'Tracey S. Wiltgen', with a small dot above the final letter.

Tracey S. Wiltgen, Executive Director  
The Mediation Center of the Pacific



# 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](mailto:mcp@mediatehawaii.org)

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

### **BOARD OF DIRECTORS**

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Bruce McEwan

Peter Robb

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Abelina Madrid Shaw

#### **EMERITUS**

#### **DIRECTORS**

Sidney Ayabe

Susan Lampe

Ruth Tschumy

#### **EXECUTIVE DIRECTOR**

Tracey S. Wiltgen

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.



HOUSE OF REPRESENTATIVES  
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, March 14, 2013

Time: 2:00 p.m.

Place: Conference Room 325

State Capitol

415 South Beretania Street

By: Bruce McEwan, Chair  
Mediation Centers of Hawaii

Bill No. and Title: SB 966, Relating to the Uniform Mediation Act

**SUBMITTED BY E-MAIL: [testimony@capitol.hawaii.gov](mailto: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 SB 966.**

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 SB 966 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,

A handwritten signature in black ink, appearing to read "Bruce", written in a cursive style.

Bruce McEwan, Chair  
Mediation Centers of Hawai'i



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*Bringing People Together to Talk and Resolve Their Differences*

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

### **BOARD OF DIRECTORS**

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**VICE PRESIDENT**  
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Peter Robb  
Jennifer Rose  
Abelina Madrid Shaw

**EMERITUS  
DIRECTORS**  
Sidney Ayabe  
Susan Lampe  
Ruth Tschumy

**EXECUTIVE DIRECTOR**  
Tracey S. Wiltgen

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.



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*Chief Executive Officer*  
Rochelle Lee Gregson

March 14, 2013

**The Honorable Karl Rhoads, Chair**

House Committee on Judiciary  
Hawaii State Capitol, Room 325  
Honolulu, HI 96813

**The Honorable Sharon E. Har, Vice Chair**

House Committee on Judiciary  
Hawaii State Capitol  
Honolulu, HI 96813

**RE: S.B. 966, Relating to the Uniform Mediation Act**

**HEARING: Thursday, March 14, 2013, 2:00 p.m., Conference Room 325**

Dear Chair Rhoads, Vice Chair Har, and Members of the Committee:

Thank you for the opportunity to submit testimony in support of Senate Bill 966, which if passed, would adopt the Uniform Mediation Act.

My name is Rochelle Lee Gregson, Chief Executive Officer, Honolulu Board of REALTORS®, an O'ahu trade Association representing over 5,000 licensed real estate agents who have voluntarily agreed to abide by a strict Code of Ethics of the National Association of REALTORS®. Only members of the National Association of REALTORS® carry the trademark REALTOR® designation. This year marks the 100<sup>th</sup> year that REALTORS® across the country have voluntarily subscribed to the Code of Ethics.

Real estate transactions represent one of the largest financial transactions most consumers will make in their lifetime. With over 7,000 transactions occurring each year, disputes are bound to arise.

One of the core services that the Honolulu Board of REALTORS® offers for consumers, be they buyers, sellers, or tenants, is the ability to resolve their dispute through mediation. We offer this mediation service at no charge to the consumer. Last year 67% of all mediations ended in successful agreement between the parties.



REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.

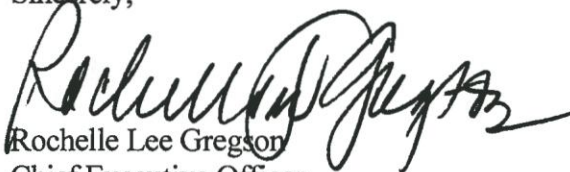


S.B. 966, Relating to the Uniform Mediation Act  
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The success of mediation is due in large part to the confidential nature of the proceedings. The parties feel comfortable to share information with the mediator that will help to resolve the dispute because they know it will be kept confidential. Through the information that is shared, the mediators are able to identify the underlying issues and help the parties come to a resolution that they can all agree upon.

We believe that Senate Bill 966 which adopts the Uniform Mediation Act, strengthens the confidentiality protections of the parties and the mediators who participate in mediation. This will help to encourage more people to utilize mediation as a valuable tool in resolving disputes amicably and cost effectively. For these reasons, the Honolulu Board of REALTORS® supports passage of SB 966.

Sincerely,

A handwritten signature in black ink, appearing to read "Rochelle Lee Gregson". The signature is fluid and cursive, with a large initial "R" and "L".

Rochelle Lee Gregson  
Chief Executive Officer  
Honolulu Board of REALTORS®

March 14, 2013

**The Honorable Karl Rhoads, Chair**

House Committee on Judiciary  
State Capitol, Room 325  
Honolulu, Hawaii 96813

**RE: S.B. 966, Relating to the Uniform Mediation Act**

**HEARING: Thursday, March 14, 2013 at 2:00 p.m.**

Aloha Chair Rhoads, Vice Chair Har, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® (“HAR”), the voice of real estate in Hawai'i, and its 8,000 members. HAR **supports** S.B. 966 which adopts the Uniform Mediation Act of the National Conference of Commissioners on Uniform State Laws.

REALTOR® Boards throughout the State offer consumers, buyers, sellers, or tenants the ability to resolve their dispute through mediation. As an example, the Honolulu Board of REALTORS® provides its mediation services at no cost to the consumer and 67% of its mediations have ended in successful agreements between the parties.

The success of mediation is due in large part to the confidential nature of the proceedings. The parties feel comfortable to share information with the mediators that will help to resolve the dispute because they know it will be kept confidential. Through the information that is shared, the mediators are able to identify the underlying issues and help the parties come to a resolution that they can all agree upon.

HAR believes that S.B. 966 strengthens the confidentiality protections of the parties and the mediators who participate in mediation. This may help to encourage more people to utilize mediation as a valuable tool in resolving disputes amicably and cost effectively.

Mahalo for the opportunity to testify.

THE HOUSE  
THE TWENTY-SEVENTH LEGISLATURE  
REGULAR SESSION OF 2013  
COMMITTEE ON JUDICIARY  
Representative Karl Rhoads, Chair

Hearing Date: Thursday March 14, 2013  
Time: 2 p.m.  
Place: Conference Room 325  
State Capitol  
415 South Beretania Street

By: James K. Hoenig, J.D., PhD.  
Mediator, Arbitrator  
Dispute Prevention & Resolution

Bill No. and Title: SB 966 Relating to the Uniform Mediation Act  
SUBMITTED BY E-Mail

TO REPRESENTATIVE KARL RHOADS, CHAIR, AND MEMBERS OF THE COMMITTEE:

My name is Jim Hoenig. I am a full-time professional mediator specializing in Family Law. I graduated first in my class from Stanford Law School, was President of the Law Review, and served as Law Clerk to the Chief Justice of the United States. I teach at Mediation Center of the Pacific (MCP); I was one of the founders of the Volunteer Settlement Master (VSM) program in Family Court; and I have personally established a scholarship at UH Law School to promote the use of mediation in family matters. I am writing to **oppose** passage of SB 966.

Volunteer mediators and VSMS are critical to the operation of Family Court as they settle many cases before valuable (and expensive) judicial resources are used for trials, and confidentiality is vital to the success of mediation. *However*, the proposed UMA is not necessary to protect confidentiality, and it has potentially serious negative consequences.

Many at various mediation centers in Hawai'i and throughout the mediation community became concerned when mediators were forced to testify in the ICA's February 23, 2012 case Aiona v. Aiona-Agra, and they have promoted the UMA as needed to "remedy" that situation. They are wrong. The ICA stated in its opinion (paragraph #9) that "neither Husband nor the Mediation Center relied on the Confidentiality Pledge signed by the parties...to prohibit testimony regarding the mediation," and, therefore, they could not raise that point on appeal. In short, a properly worded confidentiality agreement signed by the parties – and properly pled if necessary in Court – solves the problem. New legislation – with potential serious negative consequences – is not needed.

The UMA has potentially devastating consequences for MCP and programs which rely on volunteer mediators and VSMS. After providing a privilege for mediation communications, the UMA goes on to say that there is no privilege for a communication "sought or offered to prove or disprove a claim or complaint of

professional misconduct or malpractice filed against a mediator.” Attorneys in Hawai’i have the Rules of Professional Conduct to define misconduct/malpractice. Mediators have no such Rules. There are only “aspirational guidelines” which the Supreme Court has said “are not promulgated as binding rules, and they are not intended to regulate the work of mediators.” (July 11, 2002 Supreme Court Resolution). I was on the Committee which last revised the guidelines, and they were the subject of much argument and are self-contradictory, confusing, and incomplete (see, e.g., Section VI, 2 “responsibility to non-participants” and the reporter’s note thereto).

Here’s the problem: The UMA creates a situation in which mediators can be forced to testify and confidentiality breached simply by alleging misconduct or malpractice as a back door means of getting at otherwise confidential information. *Moreover*, the chilling effect on the ability of MCP (and other mediation centers throughout the state) to obtain volunteers and on Family Court’s ability to maintain the VSM program will become obvious only after the first volunteer or VSM is forced to defend against a claim of “misconduct” used by an attorney or mediation party to breach confidentiality.

Why, then, did mediation centers support passage of the UMA when the supposed confidentiality “problem” could be solved by a signed mediation agreement (and pleading it at trial if necessary)? I respectfully suggest that inadequate thought was given to the potential negative consequences of the UMA which has been promoted in part by the belief that any Uniform Law is a good law (whether needed in Hawai’I or not) and without sufficient discussion or consideration of the potentially serious negative consequences.

I respectfully suggest that further consideration of SB 966 and the UMA **be deferred until next session** so that there can be opportunity for more thorough discussion and better consensus among the volunteer agencies, the Judiciary, and the larger mediation community.

Thank you for your consideration,

Jim Hoenig