MEMORANDUM

To: WSBA Legislative Committee

From: UMA-RUAA Work Group

Date: 8 November 2004

Re: UMA and RUAA

At its meeting on Thursday, September 23, the WSBA Legislative Committee considered the UMA and the RUAA. The Committee raised several concerns at the meeting and afterward, as described below, and asked the UMA-RUAA Work Group to consider how those concerns might be addressed. This memo is the Work Group's response to that request. The memo supplements, but does not replace, the Work Group's August 5 Final Report on the UMA, a copy of which was provided to the Committee in advance of its September 23 meeting.

The references in this memo are based on the Code Reviser's draft of each act. Please note that the Code Reviser's numbering system is different from the numbering in the NCCUSL drafts of the acts. For example, section 9(a)(1) of the NCCUSL draft is section 9(1)(a) of the Code Reviser's draft. In addition, the Code Reviser's drafts include technical amendments to conform to Washington law and, in the case of the UMA, include the changes recommended by the Work Group (with one exception, at least in the most recent Code Reviser draft: the following phrase should be added at the beginning of UMA Section 8: "Unless subject to chapter 42.30 RCW, . . ."; this reference is to the open public meetings act; the Work Group intended to delete only the reference to chapter 42.17 RCW, which is the open public records act).

A. UMA

1. Section 9(1)(a): Disclosure by Mediator

a. Scope of Disclosure

UMA Section 9 requires mediators to disclose certain information to the mediation parties. The concern voiced by Committee members focused primarily on the last phrase of the section: "an existing or past relationship with a mediation party or foreseeable participant in the mediation." Some Committee members were concerned that a mediation party experiencing settler's remorse might dig up evidence of a tenuous relationship between the mediator and the other party (or someone participating on the party's behalf – for example, an expert witness) and use that evidence as the basis for either a lawsuit to set aside the mediated settlement agreement or a lawsuit for damages against the mediator, or both.

In response to this concern, it was pointed out at the Sept. 23 meeting: (1) that the only remedy explicitly provided by the UMA for breach of Section 9(1)(a) is loss of the mediator's privilege (see Section 9(4)), though one could not rule out the possibility of a party arguing for additional remedies, since they are not explicitly precluded; (2) that the only relationships that need to be disclosed are those that "a reasonable individual would consider likely to affect the impartiality of the mediator," though Section 9(1)(a) could be interpreted (with a great deal of effort) to mean that any relationship, no matter how tenuous, between the mediator and a party or participant, and any financial or personal interest, no matter how slight, is one that "a reasonable individual would consider likely to affect the impartiality of the mediator" and therefore must be disclosed; (3) that the disclosure requirement in Section 9(1)(a) is narrower than the one contained in the Model Standards of Conduct for Mediators, which require disclosure of "all actual or potential conflicts of interest" and define a "conflict of interest" as "a dealing or relationship that might create an impression of possible bias" (the Model Standards have been approved by the American Arbitration Association, the Litigation and Dispute Resolution Sections of the American Bar Association, and the former Society of Professionals in Dispute Resolution); and (4) that any substantive modification would make the Washington version of the UMA to that extent non-uniform.

In an email following the Sept. 23 Legislative Committee meeting, one committee member suggested that the reference to disclosure of "existing and past relationships" be limited to mediation parties—that is, that the reference to "foreseeable participants" be deleted from Section 9(1)(a). The problem with this approach is that it would allow a mediator to deliberately withhold from the parties information about a known, close relationship between the mediator and, for example, an expert witness or attorney who the mediator knows will be accompanying one of the parties to the mediation. This seems unacceptable.[1]

A slightly different way of addressing the same issue would be to change "foreseeable participants" in Section 9(1)(a) to "known participants." The mediator would still have an incentive to ask the parties in advance of the mediation session to identify the persons who will be attending the mediation, since otherwise the appearance of a person having a close relationship with the mediator might make it necessary for the mediator either to withdraw at the last moment (either on the mediator's own initiative or at the request of a party, following the mediator's disclosure of the relationship) or to postpone the mediation in order to perform a conflicts check, either of which would be disappointing for all concerned. But the mediator would not have to speculate about persons who conceivably might attend, but whom the parties have not identified as likely to attend.

[1] Most likely, the party who retained the expert or attorney would already know of the relationship—a disparity in knowledge between the parties that would make matters worse.

The Work Group makes the following recommendations, listed in order of preference:

1. Make the following changes in UMA Section 9(1)(a):

a. Add the following phrase at the end of Section 9(1)(a): "if a reasonable individual would consider such interest or relationship likely to affect the impartiality of the mediator." This seems consistent with the UMA drafters' intent (and therefore would not have a serious impact on uniformity) and to some extent addresses the concerns raised in the Legislative Committee by making clear that not every "financial or personal interest in the outcome of the mediation"[2] or every "existing or past relationship" with a mediation party or foreseeable participant[3] must be disclosed. To the extent that the proposed language is arguably redundant, it seems harmless and would not in substance make the Washington version of the act non-uniform.

b. Change "foreseeable participants" in Section 9(1)(a) to "known participants," for the reasons stated above. This would have the disadvantage of making the Washington UMA non-uniform to that extent, but if the change makes sense and would raise the comfort level of the mediation community, it might be warranted. This change could be made in addition to, or instead of, the change described in the preceding paragraph.

2. If the preceding recommendation is disapproved, delete from Section 9(1)(a) the entire clause that begins "including . . . ." This would leave intact the basic standard of disclosure—namely, "facts that are likely to affect the impartiality of the mediator"—though it would deprive practitioners of the guidance that the examples would otherwise provide. It seems unlikely that an effective argument could be made that the deletion of the "including" clause was intended to affect the scope of the basic standard, one way or the other.

3. If neither of the preceding recommendation is approved, delete the phrase "and an existing or past relationship with a mediation party or foreseeable participant in the mediation" from the end of Section 9(1)(a). A disadvantage of this approach is that it would invite an argument that there is a qualitative difference, for purposes of determining the scope of a mediator's duty of disclosure, between a "financial or personal interest in the outcome of the mediation" and an "existing or past relationship" between the mediator and the mediation parties and participants. Such a distinction seems inconsistent with the intent of the UMA drafters and difficult to support on policy grounds.

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[2] For example, ownership of one share of a mutual fund holding shares of Microsoft stock might not be "likely to affect the impartiality of the mediator" in a mediation to which Microsoft is a party.

[3] For example, the mediator's former employment by a large company that employed one of the parties during the same time period might not be "likely to affect the impartiality of the mediator."

b. Distinction Between Represented and Unrepresented Parties

There was a suggestion by some Committee members that there should be a less strict standard of disclosure if the mediation parties are represented by counsel. In support of this position, some Committee members indicated that when they are representing parties in cases that are headed for mediation, they routinely invite the opposing party to propose possible mediators, because the opposing party is more likely to be influenced toward settlement by a mediator whom the opposing party views favorably. As long as one of the proposed mediators seems acceptable, the members said they will agree to use that mediator.

This practice, however, assumes (1) that one of the proposed mediators is well-known to the Committee member and (2) that the Committee member has a basis for believing that the mediator in question will not act partially toward the other party in the mediation (for example, by putting pressure on the Committee member's client to settle, while putting no pressure, or less pressure, on the other party). But this simply assumes out of existence the need for disclosure by the mediator. It does not justify making a distinction between represented and unrepresented parties in defining the scope of disclosure required of a mediator. In cases where the parties are represented by counsel, but counsel is not already familiar with the proposed mediators, it seems unlikely that counsel would want to accept a mediator without knowing the information that Section 9(1)(a) requires a mediator to disclose.

In addition, any distinction between represented and unrepresented parties in defining the scope of mediator disclosure would make the Washington UMA to that extent non-uniform.

Work Group recommendation to the Committee:

Do not revise the UMA to make a distinction between represented and unrepresented parties in defining the scope of required mediator disclosure.

c. Mediator Immunity from Liability for Breach of Duty of Disclosure

At least one Committee member suggested that mediators be given immunity from liability for breach of the Section 9(1)(a) duty of disclosure, especially in view of the immunity that is given to arbitrators under the Revised Uniform Arbitration Act (RUAA Section 14(3) [Code Reviser's numbering]) for breach of their duty of disclosure under RUAA Section 12.[4]

Although the UMA drafters chose to make loss of the mediator's privilege the only explicit consequence of a mediator's breach of the duty of disclosure under Section 9(1)(a) (see Section 9(4)), the drafters did not seem concerned about the possibility that individual states might take a different position. The drafters' Comment 3 to Section 9

[4] More specifically, RUAA Section 14(3) provides that an arbitrator's violation of the Section 12 duty of disclosure does not cause the arbitrator to lose the general immunity provided under Section 14(1).

states in part: "States that . . . prefer other remedies for violations of the duties prescribed in Sections 9([1]) and ([2]) . . . , such as roster delisting, civil, criminal, or other sanctions, would simply delete the current language of 9([4]), and insert as the new 9([4]) appropriate reference to such preferred alternative remedy." Thus, the UMA drafters did not seem concerned about uniformity among the states on this issue, though they apparently had in mind the possibility of stiffer sanctions, not immunity, for breach of the duty of disclosure.

According to NCCUSL Legislative Director and Legal Counsel John M. McCabe, however, the UMA drafters were strongly opposed to including mediator immunity provisions in the UMA:

> The issue of professional standards, qualifications of mediators and malpractice liability are not addressed in the Uniform Act. Immunity of mediators in any context, therefore, is well outside the scope of the Uniform Act and should not be addressed under Section 9. The Drafting Committee considered the issue of immunity at length and strongly rejected immunity from liability provisions in the Uniform Act. If at all, liability issues should be addressed in the larger context of mediator qualifications.[5]

In addition, with regard to the merits of the immunity issue, it seems possible for a provision granting mediators immunity for breach of the duty of disclosure to be used to protect an unscrupulous mediator who conspired with one mediation party to pressure the other party into accepting an unfair settlement. Immunity could also prevent remedies such as roster de-listing, which might otherwise be appropriate for a particularly flagrant failure to disclose. Given these undesirable consequences and what seems to be a small probability that a lawsuit would be filed against a mediator for a minor failure to disclose (due in part to the difficulty of proving causation and substantial damages resulting from such a breach), granting mediators immunity for breach of the duty to disclose seems undesirable.

If it were decided that mediators should be given some degree of immunity from civil liability for breach of the Section 9(1)(a) duty of disclosure, the immunity should not be so broad that it gives a non-complying mediator greater protection from civil liability than one who complies with the duty of disclosure. With that in mind, UMA Section 9(4) could be amended by adding language to that effect, so that the entire section would read: "A person that violates subsection (1) or (2) of this section is precluded by the violation from asserting a privilege under section 4 of this act, but such a violation does not constitute a basis for a civil cause of action in favor of any party to the mediation."

[5] *See* attached, undated memo from Mr. McCabe to Marlin J. Appelwick.

Work Group recommendation to the Committee:

Do not change the UMA to create mediator immunity for breach of the duty of disclosure. If the Legislative Committee considers a change to be necessary, recommend that it consider the change suggested in the preceding paragraph.

2. Section 6(2)(a): Admissibility of Mediation Communications in a "Court Proceeding Involving a Felony"

A Legislative Committee member suggested that the language of Section 6(2)(a) be revised to make clear that it is intended to apply only to criminal proceedings—not, for example, to civil proceedings that might in some sense "involve a felony" (such as a civil claim for damages for injuries inflicted in a felonious assault). This would allow the privilege to be overridden, if the requirements stated in UMA Section 6(2) were met, in criminal felony prosecutions and in preliminary hearings and grand jury proceedings involving felonies. This seems entirely consistent with the UMA drafters' intent, as manifested in the applicable UMA comments, and would make the section clearer.

Work Group recommendation to the Committee:

Replace "Court proceeding involving a felony" with "Criminal court proceeding involving a felony".

3. Sections 5(3) and 6(1)(d): Expand Scope to Cover Completed Crimes as Well as Ongoing and Future Crimes

A Legislative Committee member suggested that the scope of Sections 5(3) and 6(1)(d) be expanded. Section 5(3) provides that a person who "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 4" of the UMA. Similarly, Section 6(1)(d) provides that there is no privilege under UMA Section 4 for a mediation communication that is "[i]ntentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity." The proposal is to expand the scope of these provisions to include admissions of past crimes.

The UMA drafters considered this issue and addressed it in the UMA comments, which are worth quoting at length:

> Significantly, this exception does not cover mediation communications constituting admissions of past crimes, or past potential crimes, which remain privileged. Thus, for example, discussions of past aggressive positions with regard to taxation or other matters of regulatory compliance in commercial mediations remain privileged against possible use in subsequent or simultaneous civil proceedings. The Drafting Committees discussed the possibility of creating an exception for the related circumstance in which a party makes an admission of past conduct that portends future bad conduct. However, they decided against such an

expansion of this exception because such past conduct can already be disclosed in other important ways. The other parties can warn others, because parties are not prohibited from disclosing by the Act. The Act permits the mediator to disclose if required by law to disclose felonies or if public policy requires.

It is important to emphasize that the Act's limited focus as an evidentiary and discovery privilege, rather than a broader rule of confidentiality means that this privilege provision would not prevent a party from calling the police, or warning someone in danger.

Finally, it should be noted that this exception is intended to prevent the abuse of the privilege as a shield to evidence that might be necessary to prosecute or defend a crime. The Drafters recognize that it is possible that the exception itself could be abused. Such unethical or bad faith conduct would continue to be subject to traditional sanction standards.

Work Group recommendation to the Committee:

For the above-quoted reasons given by the UMA drafters, and because this is an issue where uniformity seems important, do not expand the scope of Sections 5(3) and 6(1)(d).

4. Sections 6(1)(e) and 6(1)(f): Expand Scope to Include Criminal Conduct in Mediation

A Legislative Committee member has suggested:

I think the crime other than threats or assault most likely to arise from mediation is commercial bribery, an allegation that one of the parties bribed the mediator. The privilege should not be available in that case. I question whether Sec. 6(1)(e) and (f) cover this. Certainly an allegation of bribery is a claim or complaint of professional misconduct or malpractice, but the language of those two subsections is the language of civil suits and civil causes of action. I would feel much more comfortable if you could add something like "sought or offered to prove or disprove a complaint or charge of criminal conduct committed during or in connection with a mediation."

Read together, Sections 5(3) ("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 4 of this act"), 6(1)(d) (no privilege for mediation communication that is "[i]ntentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity"), 6(1)(e) (no privilege for mediation communication that is "[s]ought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator"), and 6(1)(f) (no privilege for mediation

communication that is "[e]xcept as otherwise provided in subsection (3) of this section, 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") seem broad enough in their current form, and this is an issue where uniformity seems important.

Work Group recommendation to the Committee:

Do not expand the scope of Sections 6(1)(e) and 6(1)(f).

5. Section 6(3): Add "except in a criminal investigation or prosecution."

A Legislative Committee member has suggested:

> Change Sec. 6(3) by adding at the end ", except in a criminal investigation or prosecution." I understand insulating the mediator from civil litigation arising from the mediation, but I don't think it's appropriate to say the mediator doesn't have to testify in a criminal case, especially when the mediator may be the only neutral fact witness.

Section 6(3) already includes this limitation insofar as felonies are concerned, since Section 6(3) does not contain a reference to Section 6(2)(b), which is the section that allows the mediation privilege to be overcome (upon a proper showing of need) in criminal proceedings involving felonies. The Work Group supports the limitation of the Section 6(2)(b) exception to felonies.

Work Group recommendation to the Committee:

Do not make the proposed change.

6. Section 7(2)(a): Make clear that "conduct" may be disclosed.

A Legislative Committee member suggested that the UMA should make clear that the mediator is permitted to report on conduct of a party or non-party participant occurring during a mediation. The scope of the mediation privilege is already clearly limited, under the UMA, to "mediation communications." Conduct is not privileged unless it constitutes a non-verbal "statement" (*see* Section UMA 2(2)). Moreover, a "threat or statement of a plan to inflict bodily injury or commit a crime of violence," even without conduct, is non-privileged (*see* UMA Section 6(1)(c)).

Work Group recommendation to the Committee:

Do not make the proposed change. If a change were made, it could be in the form of an additional section 7(2)(d): "Conduct of a party or non-party participant that does not constitute a 'mediation communication' under Section 2(2) of this act."

7. Section 7(2)(c): Expand to allow disclosure of all crimes occurring or revealed during the mediation.

A Legislative Committee member has suggested that the scope of Section 7(2)(c) be expanded to allow the mediator to disclose to "the police and prosecutor" "all the crimes that might occur or be revealed during mediation" and to make "reports of possible criminal activity." As discussed in section A(3) of this memo, however, there already is an exception in Section 6 of the UMA for mediation communications regarding ongoing or future crimes, and a policy decision has been made against including past crimes in that exception. Section 7(2)(b) specifically allows disclosure of mediation communications "as permitted under Section 6." Thus, no changes in Section 7(2)(c) seem necessary or appropriate.

Work Group recommendation to the Committee:

Do not make the proposed change.

8. RCW 26.09.015(3): Modify proposed revision.

As discussed in section B(2)(m)(3) of the Work Group's report to the Legislative Committee, the immediate past chair of the WSBA Family Law Section (who was the chair until October of this year and was also a member of the Work Group) opposed the Work Group's proposed amendment of RCW 26.09.015(3) to make the UMA applicable to post-decree mediations required pursuant to a parenting plan. Following the Sept. 23 meeting of the Legislative Committee, a conference between the immediate past chair of the WSBA Family Law Section and other Work Group members has produced the compromise recommendation described below. This approach would preserve the existing special statutory treatment of "postdecree mediations required pursuant to a parenting plan," while bringing other family law mediations within the scope of the UMA. The Family Law Section (perhaps in conjunction with the Dispute Resolution Section) may wish to consider whether to recommend future consideration of a separate or supplemental statute addressing the particular needs of mediation parties in the family law context.

Work Group recommendation to the Committee:

Revise RCW 26.09.015(3) to read: "Mediation proceedings under this chapter shall be governed in all respects by chapter 7.-- RCW (sections 1 through 12 and 19 through 22 of this act). This subsection shall not apply to post-decree mediations required pursuant to a parenting plan." This would preserve the existing third sentence of RCW 26.09.015(3), which leaves "post-decree mediations required pursuant to a parenting plan" outside the scope of the UMA, while making clear that all other mediations under RCW Chapter 26.09 are governed by the UMA.

B. RUAA

1. Section 3: Make Clear that the RUAA Is Inapplicable to Mandatory Arbitrations Under RCW Chapter 7.06

The Legislative Committee suggested that language be added to the RUAA making clear that it does not apply to arbitrations that are governed by RCW Chapter 7.06 (the mandatory arbitration statute). *Cf. Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 525-26 (2003), *modified*, 2004 Wash. LEXIS 200 (2004) (holding that the superior court mandatory arbitration rules under RCW Chapter 7.06 are inapplicable to private arbitrations governed by RCW Chapter 7.04).

Work Group recommendation to the Committee:

Add a new RUAA Section 3(3), providing: "This chapter shall have no application to arbitrations governed by chapter 7.06 RCW."

2. Section 12 (Required Disclosure By Arbitrator): Revise in Same Manner as UMA Section 9 (Required Disclosure By Mediator)

The Legislative Committee suggested that RUAA Section 12 (required disclosure by arbitrator) be revised in the same manner as UMA Section 9 (required disclosure by mediator). *See* discussion of proposed responses regarding UMA Section 9(1) (section A(1)(a) of this memo, above).

Work Group recommendations to the Committee, listed in order of preference:

1. Add the following phrase at the end of subsection (a) of RUAA Section 12(1): "if a reasonable person would consider such interest likely to affect the impartiality of the arbitrator." Add the following phrase at the end of subsection (b): "if a reasonable person would consider such relationship likely to affect the impartiality of the arbitrator." Note that, in order to conform to the language of the original UMA and RUAA, the UMA refers to "a reasonable individual," whereas the RUAA refers to "a reasonable person." No difference in meaning seems to be intended.

2. If the preceding proposal is disapproved, delete from Section 12(1) the entire clause that begins "including . . . ." This would leave intact the basic standard of disclosure—namely, "known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator"—though it would deprive practitioners of the guidance that the examples would otherwise provide. It seems unlikely that an effective argument could be made that the deletion of the "including" clause was intended to affect the scope of the basic standard, one way or the other.

3. If neither of the preceding proposals is approved, delete subsection 12(1)(b) ("An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, witnesses, or the other arbitrators") from the end of Section 12(1). A disadvantage of this approach is that it would invite an argument that there is a qualitative difference, for purposes of determining the scope of an arbitrator's duty of disclosure, between a "financial or personal interest in the outcome of the arbitration proceeding" and an "existing or past relationship" between the arbitrator and "any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, witnesses, or the other arbitrators." Such a distinction seems inconsistent with the intent of the RUAA drafters and difficult to support on policy grounds.

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Memo to: Marlin J. Appelwick
Washington Uniform Law Commission

Subject: Proposed Amendments to Uniform Arbitration Act and Uniform Mediation Act

I have reviewed the messages you sent to me on the Arbitration and Mediation Acts. I circulated the messages and particularly the memorandum from Nick Wagner to Richard Reuben, the Co-Reporter for the Uniform Mediation Act for his comments. This memorandum incorporates his comments both in an e-mail to me and a subsequent discussion we had by phone. I have addressed proposed amendments only. We obviously approve decisions to remain with Uniform Act language. Let me address the proposed Mediation Act amendments first.

Uniform Mediation Act

There are proposed alternatives for Section 9. Our sense is that the first one would be the most desirable. As Mr. Wagner's memorandum notes, it does the least violence to uniformity of the provision and acts to clarify the issue. Both Richard and I strongly oppose the elimination of Section 9 entirely. That would clearly defeat uniformity and insert more uncertainty into Washington's law.

Section 9 is the only section that deals (tangentially) with the qualifications of a mediator. The issue of professional standards, qualifications of mediators and malpractice liability are not addressed in the Uniform Act. Immunity of mediators in any context, therefore, is well outside the scope of the Uniform Act and should not be addressed under Section 9. The Drafting Committee considered the issue of immunity at length and strongly rejected immunity from liability provisions in the Uniform Act. If at all, liability issues should be addressed in the larger context of mediator qualifications.

The proposed amendment for Section 6(2)(a) does not seem to raise any significant problems for uniformity. Acts are often amended to accept a state's particular court system and terminology. This amendment would seem to fall into that category of amendment.

Uniform Arbitration Act

I don't find either of the proposed amendments to the Uniform Arbitation Act to be a problem. The amendment to Section 3 reflects local law issues. The proposed amendment to Section 12 appears to me to be as good an approach as possible and does no violence to uniformity. Those provisions in the 2000 UAA that go further to insure impartiality of an arbitrator than was the case under the 1956 Uniform Act are probably the most important advances in the revision. Given some of the criticism to which arbitration is being subjected, support for fair proceedings is particularly important.