The TLA Transporation ADR Council Moves Forward: A Look at Transporation Mediation

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The Transportation ADR Council (TAC) of the Transportation Lawyers Association is developing a facility for the mediation and arbitration of transportation-related legal disputes. This endeavor will have the advantage that disputes can be resolved with the help of fellow transportation lawyers who do not need to be further schooled in our specialty. Disputes that c`ross state lines, or even international borders, and involving multiple parties, can be accommodated by the same mediator or arbitration panel, because of the commonality of substantive law of international conventions, under federal statutes and regulations, and such uniform state laws as the Uniform Commercial Code. Needing to be addressed is the procedure to be followed in TLA-assisted transportation mediation and arbitration. The TAC Administrative Rules mediation procedures vary under the laws of the several states despite the advent of the Uniform Mediation Act.

Transportation lawyers and their clients deal, as they must, with transactions in interstate and international commerce. A mediation based in Chicago could involve a containerized shipment of machinery that travels to San Francisco on a vessel owned by a foreign ocean carrier with a general agent in New York, by train through Chicago, to a New York rail terminal by a Florida-based rail carrier, and trucked inland to a New Jersey warehouse where some of the machinery is found greatly damaged. Litigation ensues in New Jersey among the consignee, the seller, shipper, the three carriers and the warehouse. After discovery the parties seek private mediation with a mediator in Chicago, with the approval of the New Jersey court. The mediator and the parties can navigate the transportation issues over the three modes, and the product liability and warehouse legal issues. But which state's law governs the crucial mediation issues of confidentiality of mediation communications and evidentiary privileges following a mediation?

Illinois and New Jersey have enacted the Uniform Mediation Act, while California and Florida have their own regimes which, in some ways, provide for stronger rules of confidentiality and non-waiver of the privileges. The UMA has been introduced this year in the New York Senate after years of study and comparison with New York's wide-ranging collection of privilege laws. But the UMA is far from enactment in New York.

The TAC Administrative Rules for Mediation

The proposed TAC Administrative Rules for mediation cover mediator qualifications and selection, mediation procedures, disclosure of facts, which may call into question the neutrality or impartiality of a mediator, and confidentiality of statements or disclosures made during the mediation. For the most part, the state statutes discussed below, including the Uniform Mediation Act, focus primarily on confidentiality of mediation statements. The TAC Rules also provide clarity in areas not addressed in these state acts.

TAC will maintain a roster of qualified mediators, who must be members of TLA or CTLA, have been engaged in transportation law practice for a minimum of 10 years, have agreed to abide by the TAC Administrative Rules for mediation and have undergone a minimum of 40 hours of mediation training. Provision is made for a TLA member to request that the training requirement be waived. A mediator selected to mediate a TLA-related dispute has a duty to disclose to the TAC administrator any facts which may present a conflict, including any past, present or prospective relationship between the mediator and the parties.

The format of the mediation is left to the mediator's determination. The proposed TAC Rules provide that no participant or person in the mediation may later testify or seek to compel another to testify in any proceeding as to statements made or omitted "in connection with the mediation session" or any event or occurrence during the mediation. Nor shall any such statement be subject to discovery.

The parties shall not subpoena the mediator, TAC or the ADR administrator to give testimony or produce records, notes or work product in any proceeding. The sole exception is

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made for the mediator to testify in an action to enforce a mediation settlement. A court is empowered to award fees and travel costs to the mediator in such a case.

The TAC Rules complement state mediation statutes on confidentiality, privilege and procedures. We compare these Rules to existing laws in some of the states, including the Uniform Mediation Act.

The mediator in Chicago will feel bound by the UMA, which has no provision allowing the parties to opt-out of the UMA in its entirety. In the retainer agreement, the mediator may have the parties agree to the application of the UMA as enacted in Illinois. So, what is the UMA, and what does it do?

The UMA and Other State Acts

There is disparity among the states in regard to mediation, especially as to confidentiality and mediation privilege. For example, some states, such as California and Florida, have created highly developed mediation acts. Others, like New York, continue to rely on existing wide-spread statutes and court rules without a comprehensive plan. This situation led to the promulgation of the Uniform Mediation Act.

The UMA

The Uniform Mediation Act was promulgated by the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) in 2001 and revised in 2003. The revised version has been enacted in 11 states[1] and the District of Columbia and has been introduced this year in New York[2] and Massachusetts[3]. In its 14 sections, the Act concentrates on confidentiality and privileges, leaving to the individual states the selection, training and qualifications of mediators, and to the mediators themselves the development of their individual styles of conflict resolution and mediation process.

The drafters intend the Act to be applied and construed to promote uniformity, as well as to promote candor of the parties through confidentiality, encourage prompt, economical and amicable resolution of disputes, and advance the policy that the decision-making authority rests with the parties.[4]

The UMA applies broadly to mediations required by statute, court rule or administrative agency rule, and to referrals made by a court or agency and also a mediation agreed to by the disputing parties. Thus, if parties to a dispute wish to engage in mediation before filing of suit, the UMA will govern that mediation.[5] Not included are processes under public employment laws or collective bargaining agreements.[6]

Notably, the Act does not apply to a settlement conference conducted by a judge who may make a ruling on the case.[7]

The Act provides uniform definitions. Mediation is "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[8] A "mediation communication" – the subject ["the stuff"] whose confidentiality the Act seeks to protect – is broadly defined as

> The statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, convening, or reconvening a mediation or retaining a mediator.[9]

A mediator is an individual who conducts a mediation.[10] The Act does not require a mediator to have a special qualification by background or profession.[11] It does require the mediator to disclose his or her qualifications to mediate a dispute, if requested by a "mediation party,"[12] and to determine whether there are, and to disclose, any known facts which might affect the mediator's impartiality. These include financial or personal interest in the outcome of the mediation, and an existing or past relationship with a mediation party or foreseeable participant in the mediation.[13] Notwithstanding, the mediator shall be impartial.[14]

A "mediation party" is a person who participates in a mediation and whose agreement is necessary to resolve the dispute,[15] and a "nonparty participant" is one, other than a party or mediator, who participates in a mediation.[16]

Confidentiality is of importance in mediation for two cogent reasons. It prevents use of mediation communications in subsequent litigation. Moreover, the promise of confidentiality encourages candor from the parties, essential to a successful resolution of their dispute. But who has standing to enforce the confidentiality privilege, the mediator, the parties, or both? And how is the privilege enforced? Here, a look at the UMA, and existing programs in California and Florida, will illustrate the differences among the states. A common thread running through the UMA and the California and Florida statutes, however, is that any evidence otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure in mediation.

Section 4 of the UMA describes the privilege against disclosure, admissibility and discovery. A mediation communication, as defined in Section 2(2), is privileged and "shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded" as provided in Section 5.

A mediation party is granted a broad power to refuse to disclose, and prevent any other person from disclosing *any* mediation communication.[17]

The mediator has the power to refuse to disclose a mediation communication from any source, but his or her power to prevent another person from making a disclosure is limited to a mediation communication of the mediator.[18] A nonparty participant may refuse to disclose, and may prevent disclosure of, his or her own mediation disclosures.[19]

A privilege may be waived in a record or orally in a proceeding if it is expressly waived by all parties to the mediation. In addition, waiver of a mediator's privilege requires an express waiver by the mediator, and that of a non-party participant's privilege requires that participant's express waiver.[20] A number of specific exceptions are provided. The most useful – and probably the most used – is that for an agreement evidenced in a record signed by all parties to the agreement. Settlement agreements resulting from a mediation are not privileged.[21] Nor are communications used to plan or commit a crime.[22] There is no privilege for a mediation communication sought or offered to prove a claim of professional misconduct or malpractice filed against a mediator.[23]

Also not privileged is a mediation communication sought or offered to prove or disprove a claim of professional misconduct or malpractice filed against a party, a nonparty participant or a representative of a party based on conduct occurring during a mediation.[24] There is also no privilege against disclosure or use of a mediation communication in a proceeding to prove a claim to rescind or reform, or a defense to avoid liability, on a contract arising out of a mediation.[25] It is important to note that a mediator may not be compelled to provide evidence of a mediation communication described in either of these two exemptions.[26]

Although a written and signed settlement agreement is authorized by the UMA, the Act does not mandate that a settlement be reduced to writing.[27] A mediator may not issue a report, assessment, evaluation, recommendation, or finding of any nature to a court, administrative agency or other authority that may make a ruling on the dispute that is the subject of the mediation,[28] but may disclose whether the mediation occurred or has terminated, whether settlement was reached and the attendance.[29]

As noted, the UMA leaves to the states the promulgation of statutes and court rules regarding mediator qualifications and training, selection of mediators by the parties and references to mediation in court-annexed programs.[30]

A look at the regimes in California and Florida, both non-UMA states, many be worthwhile.

California

California's mediation law, enacted and effective on January 1, 1998, is found in Evidence Code Sections 1115-1128. Section 1115(a) defines "mediation" as a "process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement." Like the UMA, the California law is not restricted to court-referred mediation. Also like the UMA, it does not apply to a court settlement conference (§ 1117(2)).

The Code, at Section 1115(c), defines a "mediation consultation" as a "communication between a person and a mediator for the purposes of initiating, considering, or reconvening a mediation or retaining the mediator."

The mediation confidentiality regime of Section 1119 is distinctively different from the UMA. No evidence of anything said or any admission made, or any writing prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of such evidence shall not be compelled, in any arbitration, administrative adjudication, civil action or noncriminal proceeding. All communications, negotiations or settlement discussions by and between the participants in the course of a mediation or mediation consultation "shall remain confidential."[31]

Under section 1123, a settlement agreement reached at mediation is not inadmissible if it is signed by the settling parties and provides that it is admissible or discoverable, or is enforceable or binding. A signed agreement is also not inadmissible if it is used to show fraud, duress or illegality that is relevant to an issue in dispute.

Beyond those exceptions, the California mediation confidentiality rule is virtually unshakeable. The Supreme Court of California made that clear, in *Cassel v. Superior Court of Los Angeles County*,[32] in which the court ruled that a private mediation communication between the client and his or her attorney is inadmissible in a later malpractice action, even though it was made away from the mediator and other parties, and even though the attorney-client privilege would not bar its disclosure or admissibility in a malpractice action. "Plainly, such [privileged] communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants."[33]

In UMA states, such as Illinois and New Jersey, it is just as plain that the attorney-client discussion in *Cassel* would have been non-privileged and admissible in a post-mediation malpractice action.

Florida

Chapter 44 of the Florida statutes contains that state's mediation code, which combines its own strictures and directives with some of the attributes of the UMA. There are provisions for court-ordered mediation and for mediation by express agreement of the parties.

Section 44.106 directs the Supreme Court of Florida to set the standards, qualifications, discipline and training for mediators and arbitrators. Section 44.107(1) provides judicial immunity for mediators certified by the Supreme Court to serve in court-ordered mediations. Section 44.107(2) grants immunity to a person serving as mediator in any non-court-ordered mediation from liability arising from the performance of the mediator's duties, if the mediation is required by statute or agency rule or order or is conducted under Sections 44.401 through 44.406 by express agreement of the mediation parties.

The immunities granted to the mediator in the Florida Statutes are not found in the Uniform Mediation Act.

The Mediation Practice Act, having some aspects similar to the UMA, was enacted in 2004 and codified in Sections 44.401 to 44.406. This Act applies to court-ordered mediations and those conducted by the express agreement of the parties.[34]

The "mediator" is defined as "a neutral, impartial third party" who assists the parties to resolve their differences.[35] This is the only provision calling for the mediator to be impartial. Unlike the UMA, there is no directive that the mediator disclose possible conflicts or his or her qualifications as a mediator.

With certain exceptions, all mediation communications shall be confidential and shall not be disclosed except to another mediation participant.[36] A violation could subject a participant to court sanctions in the case of a court-ordered mediation[37] and to civil and equitable remedies in all mediations.[38]

A mediation party may refuse to testify, and may prevent any other person from testifying, in a subsequent proceeding regarding mediation communications.[39] This privilege does not expressly extend to the mediator or the parties' attorneys. Exceptions to confidentiality and privilege include a mediation communication that is a signed written settlement agreement, any communication for which confidentiality or privilege has been expressly waived by the parties, a communication that is willfully used to plan or commit a crime, or one sought to prove or disprove professional misconduct or malpractice occurring during this mediation.[40]

CONCLUSION

There are differences, some of them significant, between the regimes in the several states. It will be important for the mediator working with parties from more than one state to clarify that the mediation will be governed by the mediation law of the mediation-forum state. This may be particularly true if some or all mediation participants are participating via telephone or videoconference.

The proposed TAC Administrative Rules for Mediation present a comprehensive plan for mediation of transportation disputes before fellow TLA members knowledgeable in the subject matter and qualified as professional mediators. The plan provides for confidentiality and privilege rules not inconsistent with most states' mediation acts, and which can be augmented where necessary by the particular rules of the individual states.

Endnotes

1. The states that have adopted the UMA are Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.
2. S 4026.
3. H 38.
4. Uniform Mediation Act and Official Comments, 2003 J. Disp. Resol. (2003).
5. UMA§ 3(a).
6. UMA§ 3(b).
7. UMA§ 3(b)(3).
8. UMA§ 2(1). The official comment to this section states that the emphasis on negotiation is intended to exclude adjudicative processes such as arbitration and fact-finding, as well as counseling.
9. UMA§ 2(2).
10. UMA§ 2(3).
11. UMA§ 9(f).
12. UMA§ 9(c).
13. UMA§ 9(a)(1), (a)(2); § 9(b).
14. UMA§ 9(g). This provision is suggested but not required by the ULC. It is included in the New Jersey (NJSA 2A:23C-9(g)) and Illinois (710 ILCS § 35/9) UMAs, among others.
15. UMA§ 2(5).
16. UMA§ 2(4).
17. UMA§ 4(b)(1).
18. UMA§ 4(b)(2).
19. UMA§ 4(b)(3).

20. UMA§ 5(a).
21. UMA§ 6(a)(1).
22. UMA § 6(a)(3), (4).
23. UMA§ 6(a)(5).
24. UMA§ 6(a)(6).
25. UMA§ 6(b)(2).
26. UMA§ 6(c).
27. The Supreme Court of New Jersey has expressly ruled in *Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, L.L.C.*, 215 N.J. 242, 263, 71 A.3d 888 (2013), that, "going forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable." The Supreme Court acknowledged that neither the New Jersey UMA nor the New Jersey Rules of Court governing mediation require such a signed written statement. This is a court-made adjunct to the New Jersey UMA and to the Supreme Court's own Rules of Court.
28. UMA§ 7(a).
29. UMA§ 7(b)(1).
30. For example, New Jersey Rule of Court 1:40-1 (Complementary Dispute Resolution Programs), et seq. Rule 1:40-12(b) requires 40 hours of mediation skills training for qualification for court-annexed mediation.
31. Cal.Evid. Code § 1119(a), (b), (c).
32. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).
33. Id., 51 Cal 4th at 128, 244 P.3d at 1091, 199 Cal. Rptr. 3d at 449.
34. Fla. Sta. § 44.402.
35. Fla. Sta. § 44.403.
36. Fla. Sta. § 44.405(1).
37. *Id.*
38. Fla. Sta. § 44.406.
39. Fla. Sta. § 44.405(2).
40. Fla. Sta. § 44.405(4).