

**EXECUTIVE SUMMARY OF
REPORT UNANIMOUSLY APPROVED BY THE PENNSYLVANIA BAR ASSOCIATION
THE DISPUTE RESOLUTION COMMITTEE ON THE UNIFORM MEDIATION ACT
PASSED ON NOVEMBER 29, 2001**

**THIS IS NOT AN OFFICIAL POSITION OF THE PBA UNLESS IT IS FORMALLY ADOPTED BY THE PBA
BOARD OF GOVERNORS OR HOUSE OF DELEGATES**

RESOLUTION OF PBA DISPUTE RESOLUTION COMMITTEE

Resolved that the Pennsylvania Bar Association oppose adoption of the UMA in its present form and further recommends to the Delegates from Pennsylvania to the American Bar Association House of Delegates that they vote against the Uniform Mediation Act (UMA).

Recommendations to Effectuate the Resolution:

The Dispute Resolution Section and Pennsylvania Bar Association should take the following actions:

- 1) Communicate the PBA position and views to the NCCUSL commissioners from Pennsylvania and NCCUSL leadership, request that they reconsider their August, 2001 draft as approved and that NCCUSL voluntarily removes it from the ABA agenda. Any future drafts should be modeled after existing legislation in states such as Texas, California, Florida and Pennsylvania.
- 2) Express the PBA position and views to the Pennsylvania members of the ABA House of Delegates and ask that they vote against the adoption of the UMA by the ABA House of Delegates. This Report should be submitted to each Delegate.
- 3) If the UMA should be passed the ABA House of Delegates, undertake to serve as a resource of information nationally by offering to consult with other states that may be considering the adoption of the UMA and by creating an informational location on the PBA website.
- 4) Vigorously oppose the UMA's adoption in Pennsylvania if it is submitted to the Pennsylvania General Assembly and make it known at this time to all concerned that this is the action intended to be taken.
- 5) Create coalitions with other dispute resolution organizations and programs in Pennsylvania to defeat the August, 2001 UMA draft should it proceed further without modification.

SUBCOMMITTEE MEMBERS

Robert A. Creo, UMA Chair, and Vice Co-Chair of PBA DR Committee, Pittsburgh, Pennsylvania
Robert Ackerman, Dickinson School of Law, Pennsylvania State University, Carlisle, Pennsylvania
Ann Lee Begler, Pittsburgh, Pennsylvania
B. Christopher Lee, Jacoby Donner, P.C., Philadelphia, Pennsylvania
Judith Meyer, Philadelphia, Pennsylvania
G. Thomas Miller, Miller and Miller, Harrisburg, Pennsylvania

EXECUTIVE SUMMARY OF PBA DISPUTE RESOLUTION COMMITTEE UMA POSITION

1. In August, 2001, NCCUSL approved the UMA. Commissioners from Pennsylvania voted in favor of the UMA. UMA is Attachment No. 1, list of Pennsylvania Commissioners is Attachment No. 2 and August 2, 2001 letter is attachment No. 3. Once a uniform act is approved, it goes to the ABA House of Delegates for approval. The UMA is scheduled for a vote at the ABA mid-year meeting in February in Philadelphia.
2. The Pennsylvania privilege law was an amendment to Title 42, Section 5949, Judiciary and Judicial Procedure was enacted in 1996 as a result of efforts of the PBA Dispute Resolution Committee. Attachment No. 4. There have been very few reported court decisions interpreting Section 5949. No organization or individuals have called for reform or amendment to Section 5949.
3. About one-half of the states now have some form of mediation privilege legislation while most others have provided for confidentiality and privilege in mediation via court rules. Despite the existing legislation in many jurisdictions, including the Texas provision which was enacted in 1987 and mature legislation in California, Florida and other states, the UMA Drafting Committee elected not to model the UMA after any existing legislation. A copy of the Texas and other legislation

is also attached as Attachment No. 5.

4. At the NCCUSL “reading” in August, 2001, modifications were made, especially the addition of new provisions to Section 9 which radically change existing law or court rule in all jurisdictions. The UMA links a violation of concepts of disclosure of conflicts/qualifications to the evidentiary privilege in the underlying dispute between the parties. The UMA voids the privilege for violation of Section 9.

5. In addition to Section 9 of the UMA, other UMA provisions are either in conflict with the Pennsylvania Section 5949 or are inferior to existing law in Pennsylvania. Specifically, these items are:

- (a) UMA definition of mediation communication.
- (b) Exceptions for abuse, criminal law proceedings.
- (c) Right to representation by lawyer or non-lawyer in mediation.
- (d) Confusing language and balancing tests in numerous sections of the UMA.

6. Other express provisions of the UMA may be deemed clarifications or arguable improvements over existing legislation but may be unnecessary since contract law or the common law application or court interpretation of Section 5949 is more than adequate. These provisions are:

- (a) Exception for professional complaints. (clear common law on privilege)
- (b) Exception for open meetings. (contract, common law or common sense)
- (c) Confidentiality of process outside of legal proceedings. (contractual ability in parties to provide)
- (d) Prohibited mediator reports (not an issue under Pa. approach nor a problem in actual Pa. practice)
- (e) Waiver (common law, contract law, common sense and does not seem to be an issue in Pa. practice)

CONCLUSION AND RECOMMENDATION FOR PBA ON UMA

The purpose of legislation is to create more certainty and not vast uncertainty. Section 9 of the UMA is unacceptable as written and should be vigorously opposed. Section 10 should be vigorously opposed in a public manner. The existing Pennsylvania law should remain in place and the UMA should not be substituted for it. The UMA should be vigorously opposed at all stages, including before the ABA House of Delegates at its February meeting in Philadelphia. This position is consistent with those of other organizations, such as the International Academy of Mediators, the Mediation Council of Western Pennsylvania and bar associations DR committees such as Texas. Attachments No. 5, 6 and No. 7.