Uniform Mediation Law: Do We Really Want Harmony?

By Christian Duve

Is it time for a Uniform Mediation Act?

A particularly interesting presentation at the American Bar Association's annual meeting in San Francisco attempted to answer this question. Nancy Rogers, associate dean for academic affairs and a professor at Ohio State University School of Law in Columbus, Ohio, and Prof. Joseph Stulberg, of the University of Missouri-Columbia School of Law, addressed the question from different views. The professors were introduced as chairs of a collaborative center that is exploring the question of adopting a Uniform Mediation Act and, if so, what the act should look like.

Since the National Conference of Uniform Commissioners on Uniform State Laws, the Chicago-based group of state uniform law commissions, also has established a committee to consider a Uniform Mediation Act, a draft of a uniform law has become more than a remote possibility.

At the August ABA meeting, it wasn't clear whether Rogers and Stulberg already decided whether they were focusing on a uniform law or on a model law. During the meeting, references were made interchangeably to both approaches. Since any draft will have to consider carefully all the major issues that would have to be included in a statute regardless of the approach, and despite substantive differences, this article refers only to a uniform law.

Christian Duve, a German lawyer, recently graduated with a master of public administration degree from Harvard University's John F. Kennedy School of Government and is CPR's European Fellow. He will join the Frankfurt office of the German law firm Bruckhaus Westrick Stegemann later this fall.

Rogers and Stulberg divided their program into two parts, with Rogers advocating a uniform act and Stulberg cautioning against such an approach. Rogers offered three reasons supporting a uniform act. First, an act would present an opportunity to establish a level playing field.

Second, it might increase the predictability and reliability of how states would deal with certain legal questions, such as confidentiality issues. Rogers illustrated this point by noting that if a California mediation was followed by a trial in Utah, it would be difficult to figure out whether privileges would be respected or not. A uniform confidentiality provision might avoid such an uncertainty.

Third, Rogers suggested, since many states have not examined statutory solutions, a uniform statute might provide for more thoughtful solutions. Rogers said that the project was feasible, noting that the experience and information gained from already existing statutes might assist in the development of a uniform law. Rogers added

(continued on page 136)

Alternatives
to the High Costs of Litigation

Publisher **James F. Henry**
Editor **Russ Bleemer**

Staff Editors
Catherine Cronin-Harris
Elizabeth S. Plapinger

Alternatives to the High Costs of Litigation (ISSN 0736-3613) is published monthly, except for a combined July-August issue, by the CPR Institute for Dispute Resolution. Editorial and Business Offices: 366 Madison Avenue, New York, NY 10017-3122. Tel: (212) 949-6490. E-mail address: <Alternatives@cpradr.org>. Internet: www.cpradr.org

Uniform Mediation Law: Do We Want Harmony?

(continued from page 126)

that the passage of generic legislation demonstrated the capacity to draft a uniform statute. She mentioned that several states had already undertaken efforts to align provisions in their statutes. Kansas, for example, amended every privilege law in order to establish identical provisions. Finally, Rogers said she felt encouraged by the support she obtained from the Hewlett Foundation, which provides grants that have established conflict resolution theory centers and has funded the collaborative center studying a uniform rule.

Variety May Be Useful

Stulberg, on the other hand, argued that variety may be useful. He preferred diversity to uniformity, and a patchwork of solutions over a single solution. He also expressed concerns as to the project's feasibility.

In Stulberg's view, there are two fundamental problems with a proposed uniform statute. First, the statute would have to take positions. For Stulberg, there is an inherent danger that these positions will be wrong. Second, there are many questions to be addressed and a statute probably only would be able to address a part of them. Taking a position on a Uniform Mediation Statute might be complicated by the broad variety of fields where mediation is applied, reaching from domestic relations to agricultural debts. This diversity might make it impossible to come up with a common purpose clause that would broadly cover all areas.

Stulberg questioned whether it would be possible to agree on a uniform concept of bargaining and the definition of mediation. Many questions would depend on the context, he suggested, so it might be better to let the state legislators decide statute by statute on the right approach.

A program participant added that there is another difficulty in drafting a uniform act: Intensive lobbying and compromise would be unavoidable. Another participant raised the question how the matter of qualifications should be addressed. Rogers and Stulberg said that a qualifications section is a major challenge for any draft. Stulberg stressed that if the statute does not address the question, one might wonder what message the statute was sending. He said tentatively that some kind of provision—"meaningful, but little"—might be appropriate.

Another audience member made an interesting observation in this context: the Uniform Arbitration Act had not regulated qualifications either. Given the arbitrator's decision making authority, it is odd that there is such a heated debate about mediator qualifications, while arbitrator qualifications rarely have been debated in a similar way.

It is unlikely that mediation styles could be captured under a uniform law. But some areas of the mediation process are conducive to making an attempt.

The Author's View: Chances and Risks of a Uniform Law

A uniform law almost certainly will encounter serious drafting and practical problems. The key question to be examined is whether, if completed, a uniform law would improve the overall effectiveness of mediation.

There is little likelihood that the various approaches to mediation and the different styles could be captured under a uniform law. Party autonomy would be limited for no good reason if a statute provided for certain standard techniques or features. A more unified regulatory system might, however, provide for increased understanding of the mediation process if the most fundamental and generally accepted principles of mediation could be spelled out. Such a catalogue of principles might be useful to clarify the purpose of the mediation process and to distinguish it from other dispute resolution, such as arbitration. The most basic mediation principles might tentatively be defined as follows:

1. Mediation is assisted negotiation.
2. The parties have the responsibility to resolve their dispute.
3. The mediator assists the parties in their efforts to reach an agreement.
4. The mediator has no right to impose any solution on the parties.
5. The mediator has to be impartial.

Enhancing Predictability

A uniform law might enhance the predictability of how legal issues arising in mediation will be addressed. In specific circumstances where, for example, disclosure or liability is at issue, a uniform regulation might help prevent forum shopping.

Another important legal issue that might deserve to be regulated is the confidentiality of the process. An assurance of confidentiality encourages the parties' full and open engagement and protects the mediator against being required to testify in the future. Therefore, a confidentiality provision would strengthen the parties' trust in the process. Such regulation, however, would have to be balanced against statutory provisions regarding privilege, the govern-

(continued on following page)

Uniform Law

(continued from previous page)

ment's principles of accountability and third-party interests requiring publicity.

Since one of the biggest impediments to mediation success is the absence of settlement authority on one or several sides, a provision requiring the presence of parties with settlement authority also might be an appropriate regulatory subject.

The biggest battleground may be qualifications, where the payoff—predictability and reliability—may be highest. To be sure, it appears to be particularly difficult to reach agreement on a regulatory approach. As already pointed out by a 1989 Society of Professionals in Dispute Resolution report on qualifications, the challenge is to maintain the field's diversity, while, at the same time, ensuring its quality.

An attempt to achieve this goal may be made, for example, by the following twofold approach: In the first place, regulation might provide for a minimum training requirement of 30 to 40 hours in order to ensure that every practitioner has basic skills training. A second, less-discussed approach might consist of establishing a duty for the mediator to inform parties about his or her background in conflict resolution so that the parties can make an informed decision about whether they want to work with the individual.

In many cases, clients will obtain this information anyway. But the duty to inform the parties about the mediator's experience level may lead toward minimum quality assurance. Rules on conflict of interests, fee disclosure and liability also potentially are useful regulatory subjects.

Preserving Party Autonomy

Nevertheless, regulation bears the inherent risk of over-formalizing a process that attracts people because of its flexibility. The biggest danger of any regulation is that the autonomy that parties seek to achieve by choosing a mediation will be limited.

Developments in arbitration over the past decade demonstrate how an originally alternative process has become increasingly similar to litigation. The arbitration example should serve as a caution sign. The uniform law drafters, therefore, have to manage the tension between the potential benefit of improving the mediation framework and the risk of over formalizing the process.

Still another important question is whether mediation should be singled out, or whether related forms of dispute resolution, such as an early neutral evaluation or the minitrial, should be covered by the regulatory approach. If dispute resolution is regarded as a "continuum," then does it make sense to single out mediation? Should parties have the freedom to escape certain provisions simply by coining a different name for the process and, perhaps, slightly modifying certain elements?

The project seems to be gargantuan. Many questions remain. An audience participant, Frank G. Evans, former chief justice of the First District Court of Appeals in Houston, may have grasped the challenge best when he commended Stulberg and Rogers on their efforts, but added: "Take up religion next." 🏛

Florida Firm Changes ADR Structure

(continued from page 131)

matter of policy, we do not want and will not and have not accepted legal work," he said, adding that the firm's professional liability insurance is limited to a special neutrals' policy.

Cobb Cole partner Jonathan D. Kaney says that the firm is satisfied that it wasn't disqualified in the litigation matter, and that the original arrangement withstood the court's scrutiny, even if it didn't last. The court "found for us and concluded as a matter of law there was no attorney-client relationship" created by the mediations, says Kaney, adding that the court also found that the firm and ADR companies "perfected the division."

Adds Cobb Cole managing partner Samuel P. Bell III, the case "merely confirmed the thinking that brought about the initial separation. ... The basic issue is this need for separation. I think it has been confirmed and I believe it will be the future for everyone. I don't think there is any way people will be able to [have] an ADR operation inside a law firm."

In his July 17 opinion, Indian River County Circuit Judge Charles E. Smith found that the former Cobb Cole "mediation counsel," John S. Neely Jr., had followed Florida's professional conduct standard rule 10.80 on mediator confidentiality with regard to the Vero Beach cases he had handled. Smith also concluded that Neely and C. Welborn Daniel, another former Cobb Cole mediation counsel, were not a part of Cobb Cole after the Jan.1 reorganization.

Furthermore, Smith concluded that even if it was assumed that Vero Beach was a Cobb Cole client, there was no violation of conduct rules because the new litigation matter wasn't the same or substantially related to the mediation cases, and no lawyer remained in Cobb Cole that had material information from those matters. (*Zorc v. City of Vero Beach*, Case No. 95-0250 CA 16 (Indian River County Ct. July 17, 1997).

On Aug. 28, Florida's Fourth District Court of Appeals affirmed Smith's ruling without an opinion. *Zorc v. City of Vero Beach*, Case No. 97-00465 (Fla. 4th Dist. Ct. App. Aug. 28, 1997).

Neither decision is published. Kaney said that Cobb Cole would put Smith's eight-page opinion on the firm's Internet site at www.ccb.com. 🏛