

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Faculty Scholarship

---

2001

### The Uniform State Law Process: Will the UMA and RUAA be adopted by the states?

James J. Brudney

*Fordham University School of Law*, [jbrudney@law.fordham.edu](mailto:jbrudney@law.fordham.edu)

Follow this and additional works at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship](https://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Legislation Commons](#)

---

#### Recommended Citation

James J. Brudney, *The Uniform State Law Process: Will the UMA and RUAA be adopted by the states?*, 8 *Disp. Resol. Mag.* 3 (2001-2002)

Available at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship/140](https://ir.lawnet.fordham.edu/faculty_scholarship/140)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# The Uniform State Law Process

## *Will the UMA and RUAA be adopted by the states?*

By James J. Brudney



Most practicing attorneys and legal academics first become aware of uniform statutes when studying the Uniform Commercial Code (UCC) in law school. Yet the UCC's widespread

### ADR & Uniform Law

acceptance and periodic renewal are not the legacy that generally attends uniform law ventures.<sup>1</sup> This overview of the uniform statutory process offers some perspective for proponents of the recently approved Uniform Mediation Act (UMA) and Revised Uniform Arbitration Act (RUAA) as they attempt to secure enactment in multiple state legislatures.

### Why Have Uniform Laws?

#### History of NCCUSL

The primary originator of uniform statutory efforts in this country is the National Conference of Commissioners on Uniform State Laws (NCCUSL). Formed in 1892, NCCUSL's stated purpose is to "promote uniformity in the law among the several states on subjects as to which uniformity is desirable and practicable."<sup>2</sup> NCCUSL has a close connection to the American Bar Association (ABA); it grew out of an

*James J. Brudney is Newton D. Baker-Baker & Hosteller Chair in Law, The Ohio State University Moritz College of Law. This article draws on a more detailed analysis of the uniform law process by Professor Brudney, Mediation and Some Lessons From the Uniform State Law Experience, 13 OHIO ST. J. ON DISP. RES. 795 (1998). He can be reached at brudney.1@osu.edu.*



*The National Conference of Commissioners on Uniform State Laws meets annually as a legislature to consider potential new uniform laws, as well as revisions to uniform laws already in effect. The 2002 Annual Meeting, pictured above, was in Tuscon, Ariz. Photo courtesy of Maurice Kato.*

ABA decision in 1889 to work for uniformity of the laws through voluntary state action.<sup>3</sup> NCCUSL's constitution requires its drafting committees to consult with the ABA – the only public or private entity so favored – and to submit uniform acts to the ABA for its review.<sup>4</sup>

NCCUSL has long maintained that its close relationship with the ABA and with state and local bar associations offers otherwise unattainable access to and acceptance from both state legislatures and the public at large. In recent decades, NCCUSL products that have encountered

disapproval or even substantial opposition within the ABA House of Delegates have been starkly unsuccessful in state legislatures.<sup>5</sup> While widespread ABA support is not sufficient to ensure broad enactment by state legislatures, it may well be a necessary first step. Both UMA and RUAA supporters have navigated this initial stage by securing strong approval from the House of Delegates shortly after obtaining enactment by NCCUSL.<sup>6</sup>

#### Public rationales for uniform laws

It is useful to think of the

Commissioners as overseeing a private legislative operation, analogous to the public legislative operation in Congress or a state legislature. Like federal laws, NCCUSL statutes can be viewed as furthering certain public goals or broad societal interests. Several distinct but overlapping public rationales support the uniform law movement.

One such rationale is a desire to enhance commercial and business development in what has become an interstate or national economic system. This enhancement could mean contributing to more efficient interstate transactions or establishing minimum business standards that prevent a race to the bottom among state legislatures.

A second public purpose is the

**The uniform law movement attempts to further the public goals of enhancing commercial development, promoting states' rights and encouraging progressive legislative responses to social, economic or legal problems. Both the UMA and the RUAA can be viewed as furthering these objectives.**

reaffirmation and promotion of states' rights. When states frame uniform solutions for matters affecting their common interests, they are strengthening state sovereignty and removing any excuse for the federal government to absorb new powers. Moreover, a uniform state law approach may offer more stability than a federal regulatory solution. Federal agencies can revisit or change their rules after notice and minimal discussion, whereas a widely adopted uniform law can be modified only by the acts of many state legislatures.

A third public rationale might be called good government or best practices responsiveness. When substantial social, economic or legal problems arise, a timely and progressive legislative response is what one hopes for from government. Individual states may generate such responses on their own, but the uniform law approach offers special advantages. These include a more detached and nonpartisan drafting process, a regular willingness to rely on experts, and greater patience in setting

the legislative calendar. That the problem is complex or evokes strong views only strengthens the case for a thoughtful approach to keep emergent state laws pointed in a single, sensible direction.

#### **The UMA**

The UMA can be viewed as furthering some if not all of these public-regarding objectives. Most prominent, perhaps, is the good government rationale. With respect to the challenging issues of confidentiality, privilege and admissibility, the UMA encourages rational and consistent treatment through its articulation of uniform standards.<sup>7</sup> Cooperation between states in the administration of

justice will also be served if mediation of family disputes or inheritance-related disagreements must satisfy certain general principles. In addition, a set of guidelines for mediating private commercial disputes should promote business efficiency and facilitate economic growth.

#### **The RUAA**

The RUAA likewise can be seen as promoting the three public rationales discussed above. Several sections of the RUAA allow for arbitration agreements, hearings and awards to be conducted or secured through electronic or other technologically advanced means, thereby encouraging more efficient commercial use of arbitration.<sup>8</sup> New provisions relating to arbitral immunity and disclosure of potential conflicts of interest should contribute to consistency and stability of arbitration practices across state lines.<sup>9</sup> Further, discussion of special concerns with regard to adhesion contracts and unconscionability may promote more responsible

"best practices" on these matters.<sup>10</sup>

### **How to Measure Success?**

#### **Counting adoptions**

The attempt to measure a uniform act's success in terms of how many states have adopted it gives rise to various areas of concern. Preliminarily, there is the difficulty of determining whether a jurisdiction has enacted enough major or minor provisions of an act's approved text to be deemed a substantial adoption. In the past, observers have disagreed as to what qualifies as substantial adoption for particular uniform laws.<sup>11</sup>

A more serious concern involves the small proportion of NCCUSL products that actually garner widespread acceptance. Only one in six uniform acts currently recommended to state legislatures has been adopted in 40 or more jurisdictions. Further, rates of adoption in the past two decades have not been overly encouraging. Of the 80 uniform acts approved since 1980, fewer than one-third have been enacted in 20 jurisdictions, only 13 have been adopted in 40 or more jurisdictions, and six of those 13 involve revisions of various articles of the UCC.<sup>12</sup>

In recent times, the outlook has been especially bleak for uniform laws addressed to civil actions and procedures. NCCUSL has classified 20 of its approved laws as falling into this subject matter area, including the UMA and RUAA.<sup>13</sup> Fourteen of these laws were approved between 1979 and 1999. Of the 14, only one has been adopted in as many as 20 jurisdictions, while nine others have secured either a single state's approval or no approvals at all.<sup>14</sup>

#### **Other Indicia of Influence**

Given that "enactability" is at times difficult to measure and in general difficult to achieve in widespread terms, it is important to consider additional or even alternative ways of identifying success for uniform acts. These laws may promote uniformity indirectly through a number of channels. States may borrow certain provisions to address part of the identified need, or they may adopt in principle the act's basic approach, or they may even be prompted to avoid unwise

legislative policies they might otherwise have pursued.<sup>15</sup>

A uniform act may also lead to legislative adoption by local jurisdictions; on some issues local adoptions may be as meaningful or effective as statewide enactment.<sup>16</sup> Further, uniform acts may shape the development of state law because they influence how judges approach certain kinds of cases, or because law professors' promotion of the legislative approach in their scholarship and teaching is absorbed by a new generation of practitioners. NCCUSL itself has recognized that there are indicia of influence besides widespread enactment, and it has encouraged discussion (though not pursuit) of additional avenues to success.<sup>17</sup>

### **Strategic Choices**

#### **Issues that influence adoption**

What separates the uniform laws that garner widespread approval from those that gather dust on the "Introduced - No Action" shelves of state legislative libraries? The literature on uniform laws does not include a manual for how to draft and secure enactment across 50 states. Moreover, in seeking to derive from other uniform law experiences lessons that might apply to the mediation or arbitration settings, one must be mindful of subject matter specifics that distinguish those experiences from the practical realities presented here. Nonetheless, there are certain key issues that tend to arise in many uniform statutory efforts.

#### **Benefits, costs of uniformity**

One such issue involves the tensions between uniformity and diversity. In the UMA setting, uniformity may well yield certain good government benefits, such as a reduction in complexity that should enable people to have easier access to mediation. Uniformity also provides for greater certainty on covered issues, thereby allowing people to make better informed choices when deciding whether to enter into mediation agreements. Uniformity can save money as well - for governments by avoiding duplication of

effort in various problem-solving contexts and for individuals who will find it less costly to participate on their own or with representation from non-lawyers.

Yet a broad uniform statutory plan for mediation may also bring costs. There is considerable variation in the way that parties to mediation come together and interact. They may be court-directed or privately initiated. Mediation may be part of an isolated transaction or a long term relationship. The parties may be relatively equal in their bargaining sophistication - both one-shot or both repeat players - and in their economic resources, or they may be starkly unequal in these respects. While a statute might be expansive and detailed enough to address these variations, such a comprehensively generic approach could result in overproceduralization for some kinds of disputes and underproceduralization for others. In addition, too much reliance on uniformity may frustrate the potential for state-by-state innovation and experimentation.

**Even when uniform laws are not widely enacted by the states, they may promote uniformity indirectly through a number of channels, such as influencing judicial approaches to certain types of cases, as well as through teaching and scholarship.**

#### **Uniformity, diversity in the UMA**

The UMA reflects a decision to combine elements of uniformity and diversity. Provisions establishing confidentiality for mediation constitute the core of the uniform statutory response. A broad and clearly defined respect for confidentiality was deemed essential in order to encourage the effective use of mediation. As recognized by the UMA drafters, the privilege accorded to mediation exists to promote frank and informal exchanges, thereby enabling the parties to consider creative solutions to their differences.<sup>18</sup> This type of candor cannot occur if participants worry that what they say in a mediation may be used in a subsequent court proceeding, or if communications thought to be privileged are subject to subpoena in another jurisdiction.

Other aspects of the mediation process were left unaddressed by the UMA because they seemed more suited to a flexible approach. Provisions addressing mediator qualifications are illustrative in this regard. Although mediators operating in court-annexed programs or in the shadow of the legal regime may instill more confidence in judges, parties and the public if they are law school graduates, requiring a law degree could become a barrier to entry for neighborhood and community-based mediators. More generally, advanced degree requirements for mediators may be viewed as hindering innovation in what is a problem-solving profession, and as frustrating efforts at decentralizing the power to resolve disputes. Accordingly, the issue of mediator qualifications has been left open to varied approaches based on the type of mediation setting and also on the differing values that mediators and parties ascribe to professional education, apprenticeship and certified training.

#### **Exemptions from coverage**

A second strategic issue involves the possible exemption from statutory coverage of certain types of mediation activity or particular subject matter areas. Past experience suggests that at the state legislative level, if not sooner, interested groups or entities will likely try to make a case for exclusion.<sup>19</sup> Exempting certain affected groups from coverage may be important in order to neutralize potentially influential opposition. On the other hand, exempting too many groups under this kind of rationale risks undermining the very concept of a broadly applicable uniform law.

UMA drafters decided to exclude several types of mediation from the scope of the Act. Perhaps most notable is the exemption for mediations that arise in the context of collective bargaining

agreements or relationships.<sup>20</sup> There is a well-established tradition of labor-management mediation rules and practices, many of them sanctioned under federal or state labor relations statutes. Both union and employer representatives expressed a strong preference for maintaining that tradition intact.<sup>21</sup> In addition, the UMA does not apply to mediations involving minors that occur under the auspices of a school or a youth correctional institution.<sup>22</sup> Here, the drafters concluded that the supervisory responsibilities of schools and correctional institutions might not be consistent with the Act's provisions regarding confidentiality.<sup>23</sup>

### No yellow brick road

After more than a century of uniform state law activity, it seems safe to observe that there is no yellow brick road to widespread enactment. Supporters of these two ADR statutes are gearing up for the marathon state legislative effort that lies ahead. The RUAA has already been adopted by Hawaii, Nevada, New Mexico and Utah, and has been introduced in 13 other states.<sup>24</sup> The freshly minted UMA was promptly introduced in New York, Nebraska, Oklahoma, South Carolina and Vermont,<sup>25</sup> and more introductions are likely to follow soon.

As noted earlier, however, apart from the challenges of securing widespread approval in the state legislative setting, proponents should consider defining success in broader terms as well. Wholesale approval of the RUAA and UMA by state legislatures will surely be welcome. At the same time, partial enactments and evolving acceptance through law schools and courts are also worthy objectives.

### Endnotes

<sup>1</sup> Unless otherwise noted, I use the term "uniform" to refer both to uniform and model laws.

<sup>2</sup> HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-EIGHTH YEAR 399 (1994) [hereinafter 1989 HANDBOOK]. The 1995 Handbook is slated for publication later this

year.

<sup>3</sup> See WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 18 (1991). The Conference was founded at a meeting of representatives from seven states held in conjunction with the 1892 ABA Annual Meeting. See *id.* at 11. The ABA contributes financial support to the conference on an annual basis. See Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 89 (1993).

<sup>4</sup> See 1989 HANDBOOK, *supra* note 2, at 401, 404, 413.

<sup>5</sup> See ARMSTRONG, *supra* note 3, at 104-105 (reporting that 1972 Uniform Motor Vehicle Accident Reparations Act drafted by NCCUSL but disapproved by the ABA has never been adopted in any state); *id.* at 111-112 (reporting on narrow ABA approval of Uniform Land Transactions Act and Uniform Simplification of Land Transfers Act, neither of which has been enacted by a single state).

<sup>6</sup> The ABA House of Delegates unanimously approved the UMA in February 2002, just six months after NCCUSL adopted it by an overwhelming margin in August 2001. The RUAA was adopted by NCCUSL in August of 2000 and endorsed by the ABA House of Delegates in early 2001, in each instance enjoying broad support.

<sup>7</sup> See UMA §§ 5-8, 10.

<sup>8</sup> See, e.g., RUAA § 1(6) ("record" defined to include information stored and retrievable in electronic and other forms); § 6(a) (arbitration agreement can be e-record); § 15(a) (arbitration hearing can use videotaping or teleconferencing); § 19(a) (arbitration award document can be e-document).

<sup>9</sup> See RUAA § 14 (arbitral immunity); § 12 (disclosure of conflicts).

<sup>10</sup> See Reporter's Notes to RUAA § 6, ¶ 6. Issues related to unequal bargaining power were not, however, addressed in the RUAA text; this may reflect concern over the preemptive impact of the Federal Arbitration Act. See Sarah Rudolph Cole, *The Revised Uniform Arbitration Act: The Wrong Cure?*, 8 DISP. RESOL. MAG., Summer 2002, at 10.

<sup>11</sup> See James J. Brudney, *Mediation and Some Lessons From the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RES. 795, 810 (1998) (describing expert commentators and NCCUSL in

disagreement as to whether Model State Administrative Procedure Act had been substantially adopted by one, three, or six states by mid-1990s).

<sup>12</sup> See A GUIDE TO UNIFORM AND MODEL ACTS 6-20 (2001) [hereinafter NCCUSL GUIDE] (listing and providing adoption-related information about the 99 laws currently recommended for enactment by NCCUSL).

<sup>13</sup> Other major NCCUSL subject matter categories (with the number of currently approved laws in parenthesis) include business laws (23), consumer and individual protection laws (13), criminal laws (6), family laws (10), real estate laws (13), tort laws (6), and trust and estate laws (22). See NCCUSL GUIDE, *supra* note 12, at 21-23. Some NCCUSL laws fall into more than one category.

<sup>14</sup> See NCCUSL GUIDE, *supra* note 12.

<sup>15</sup> See ARMSTRONG, *supra* note 3, at 109-110.

<sup>16</sup> See F. Trowbridge Vom Baur, *A Personal History of the Model Procurement Code*, 25 PUB. CONT. L.J. 149, 172 (1996) (discussing local jurisdictions' adoption of model government procurement code).

<sup>17</sup> See 1989 HANDBOOK, *supra* note 2, at 440 (suggesting that Conference acts may promote uniformity indirectly through adoptions in principle, adoptions of particular sections or parts, and impact on case law and teaching practices.)

<sup>18</sup> See Prefatory Note to UMA ¶ 1.

<sup>19</sup> Cf. Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L.J. 297, 304-307 (1996) (recounting efforts by two state agencies to be excluded from coverage under newly enacted California Administrative Procedure Act).

<sup>20</sup> See UMA § 4(b)(1), (2).

<sup>21</sup> See Reporter's Notes to UMA § 4, ¶ 3.

<sup>22</sup> See UMA § 4(b)(3). Finally, the UMA § 4(b)(4) excludes mediations conducted by a judge "who might make a ruling on the case."

<sup>23</sup> See Reporter's Notes to UMA § 4, ¶¶ 5-6.

<sup>24</sup> See NCCUSL website, [www.nccusl.org/nccusl/pubndrafts.asp](http://www.nccusl.org/nccusl/pubndrafts.asp) (last checked June 14, 2002).

<sup>25</sup> See *id.*