Read more at https://www.lynchowens.com/blog/

Congress Should Pass The National Mediation Policy Act (NMPA)

November 12, 2019 | Kimberley Keyes

Categories: Kimberley Keyes ***| Mediation Coaching / Mediation***

Massachusetts mediator Kimberley Keyes explains the importance of the National Mediation Policy Act (NMPA).

In the roughly 40 since it become mainstream across the United States, divorce mediation has grown into the option of first report for many spouses seek a divorce without stress, cost and negativity of litigation. Today, divorce judges across the country urge divorcing couples to mediate their disputes before taking their arguments to court. A few states, like California, even require mediation for divorcing couples with minor children. Despite the slow growth of mediation at the local level, legislation advancing mediation over litigation at the state and federal level has lagged across the

nation, with many states (including Massachusetts) continuing to treat mediation as a form of "alternative dispute resolution", rather than as a primary means of resolving legal disputes. Today, mediation organizations are pushing for legislation that would identify mediation as a primary dispute resolution process, rather than an alternative one, at a time when our nation's social and political divide grows ever more pronounced. Several of these organizations, led by Mediate.com, have signed on to advocate for a National Mediation Policy Act (NMPA) that would officially urge the parties in dispute to mediate their differences, rather than litigate them. South Shore Divorce Mediation supports the passage of the NMPA as an important step towards making mediation a preferred form of legal dispute resolution in Massachusetts and across the United States.

The Proposed National Mediation Policy Act

The NMPA is a non-binding law that mediation agencies want to see proposed in the U.S. Congress. While the text of the law is still being sorted out, the policy statement is short and simple:

It is the policy of the United States that, when two or more individuals or entities are in protracted dispute, it is preferable that such disputants actively take part in solution-seeking mediation, rather than allowing the dispute to remain unresolved or result in unnecessary and costly litigation, continued conflict, and elevated risk of violence.

The goal of the Act, according to Mediate.com, is "to express a social preference that it is better for citizens and for America that disputants have the early opportunity to reach agreement in mediation" before tackling their disputes through litigation. An important part of the initiative is to give everyone "available quality opportunities for mediation,' according to Mediate.com's CEO Jim Melamed.

Mediation Organizations Pushing for NMPA in Congress

Several advocacy organizations for mediation have pushed for the National Mediation Policy Act by asking 2020 presidential candidates to support it, including:

- *Academy of Professional Family Mediators (APFM)*
- *Association for Conflict Resolution (ACR) and*
- *National Association for Community Mediation (NAFCM)*

South Shore Divorce Mediation joins these organizations in advocating for passage of the NMPA.

What Can a Policy Initiative Like NMPA Accomplish?

A key aspect of the proposed NMPA is that – consistent with mediation's underlying principle of voluntary participation – it is not a binding law. Courts and divorce judges are not bound to "uphold" the Act by forcing divorcing spouses to exhaust the mediation process before stepping into the courtroom. Instead, the Act would promote the policy that it is in the best interests of everyone – spouses, families and even the court system – to first attempt mediation to solve their disputes. Spouses who know that their differences are irreconcilable and are intent on litigating their divorces are still free to do so. The Act, if passed, would just promote the idea that mediation should be the first option – one that, even if ultimately unsuccessful, can work to narrow down the issues that still need to be litigated. On a practical level, the Act would help fill a legal and statutory void that we see around the country in the context of mediation. Only a few states have comprehensive laws surrounding mediation, making it difficult for courts and individuals to turn to mediation as a truly reliable alternative to litigation. If passed, the Act would function as a touchstone for legislatures and courts that often struggle to prioritize mediation within state and local legal schemes. By articulating in simple terms that is the policy of the United States to prioritize mediation over litigation wherever possible, the Act provides a firm

rationale for legislatures and judicial decision-makers to elevate and prioritize mediation at every level of the court system.

NMPA Comes in Wake of Previous National Mediation Efforts

The NMPA is not the first effort to create a national mediation policy. In the early 2000's, there was a strong nationwide push for states to adopt the Uniform Mediation Act (UMA), which provided a more comprehensive set of mediation laws for states to follow. Unlike the NMPA, which would become federal law upon passage, the Uniform Mediation Act was a so-called "uniform law", which is passed by individual states. (Such uniform acts are common. For example, Massachusetts passed the Uniform Trust Code in 2012, making it one of the last states in the nation to enact the UTC. Massachusetts is notoriously slow when it comes to adopting uniform laws that have been enacted in every other state.) The Uniform Mediation Act of the early 2000's was modeled on rules created by private mediation groups, not unlike the Massachusetts Counsel on Family Mediation (MCFM), which promulgates its own confidentiality and ethical rules to which MCFM members agree to be bound. After years of pushing by activists, however, the UMA was ultimately only adopted by 12 states (Massachusetts was not among them). Despite the low adoption rate, the UMA remains an important reference point for courts across the country who are forced to decide legal issues relating to mediation. Simply put, the UMA represents one of the few clear reference points in states like Massachusetts, which lack a comprehensive statutory scheme, and even states that did not adopt the UMA, judges frequently find themselves citing the provisions of the UMA as strong reference points under the law. To be clear, it would be fantastic if Massachusetts – and every other state in the country – took the ambitious step of adopting the Uniform Mediation Act. In the meantime, however, the NMPA represents an important parallel effort to spark a national dialogue on mediation's place within the legal system.

What is the Law on Mediation in Massachusetts?

Massachusetts is among the states with the fewest laws regulating mediation. The Massachusetts mediation statute, GL c. 233, § 23C, is incredibly brief and focuses almost exclusively on confidentiality, providing in full:

All memorandum, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

For the purposes of this section a ''mediator'' shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body. The Massachusetts statute is widely regarded as unusual robust when it comes to protecting the confidentiality of mediation. Unfortunately, the state has taken no additional steps to codify mediation beyond these confidentiality provisions. Beyond the lonely mediation statute, Massachusetts has a thin patchwork of rules Massachusetts affecting mediation. For example, another statutory section, Chapter 150, address mediation in the context of labor disputes, but does not apply to non-labor cases. Similarly, the Supreme Judicial Court Uniform Rules on Dispute Resolution provide a comprehensive framework of rules for mediators, but only apply to "court-connected dispute resolution" that administered directly through the Court. No such rules apply to private mediators.

Interestingly, Massachusetts mediation statute does require that mediators with less than four years of professional experience must be "accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body." Membership at an organization such as MCFM satisfies the statute's accountability requirement, where MCFM members agree to comply with the organization's rules. However, a mediator's agreement to comply with a private organization's ethical rules is quite different from having to comply with a set of laws, such as those followed by states who have adopted the Uniform Mediation Act. A search of Google Scholar for Massachusetts appellate court decisions referencing GL c. 233, § 23C reveals that Massachusetts case law affecting mediators is nearly as thin as the statutory law. For lawyers who also practice as mediators, the lack of regulation surrounding mediation often comes as a shock. After all, attorneys face some of the strictest professional regulations outside of the military, which subject to lawyers to detailed rules on confidentiality, conflicts of interests and myriad other professional behaviors. The almost total lack of professional licensing and/or rules of conduct for private mediators in Massachusetts can be a little jarring. Perhaps more importantly, the lack of coherent set of "rules of the road" for private mediation forces both mediators and clients to navigate ethical and professional dilemmas without a clear roadmap. To be clear, the need for a clearer legal framework for mediation in Massachusetts is not about making mediation a more "exclusive" profession, such that mediators suddenly need advanced degrees or expensive training. Rather, mediators need clear rules of the road for prioritizing and deciding ethical dilemmas and resolving concerns such as whether the communications and work product of non-party mediation participants (such as attorneys, financial experts, etc.) is clearly confidential, as the Uniform Mediation Act clearly provides. Moreover, if mediation ever hopes to transcend the "alternative" label that currently prioritizes mediation below litigation in the conflict resolution context, the practice of mediation must operate under a set of procedural and ethical rules that are as reliable as the rules

dictating litigation. Passage of the NMPA would hardly presents a blueprint for everyday mediation practice, but merely passing the Act would elevate the standing of the mediation profession and hopefully lead to greater guidance from courts and legislatures in Massachusetts and other states in the future.

A Long Path Ahead for Passage of the NMPA

Passage of the National Mediation Policy Act is still in its very early stages. Even if the Act gains traction among presidential candidates, it must still be proposed as an official bill in the House of Representatives or Senate, obtain approved by both houses, and be signed into law by the president. It is easy to be pessimistic about the passage of any bill in the sharply divided Congress. However, precisely because the National Mediation Policy Act is non-binding and is just a non-controversial policy initiative, the Act stands a better chance of passage than bills proposing substantive changes in the law. Passage of the National Mediation Policy Act could be a valuable vehicle for communicating the value of mediation to American courts, legislatures and citizens while making mediation more accessible to all of those who would benefit from the mediation process.

Kim is a divorce mediator for South Shore Divorce Mediation, located in Hingham, Massachusetts and East Sandwich, Massachusetts. She is also a Senior Associate Attorney for Lynch & Owens, P.C., where she specializes in divorce and family law issues. Kim is a statutory mediator under M.G.L. Ch. 233, s. 23Cand a proud

member of the Massachusetts Council on Family Mediation. To read more from Kim Keyes, check out her content on the Lynch & Owens Blog. Disclaimer*: The information you obtain at this site is not, nor is it intended to be, legal advice. You should meet with an attorney for advice regarding your individual situation. You are invited to contact our office. Contacting the office does not create an attorney-client or mediator-client relationship. Please do not send any confidential information to the office until such time as an attorney-client or mediator-client relationship has been established. This blog is considered an advertisement for the Law Office of Lynch & Owens, P.C. d/b/a South Shore Divorce Mediation. The Massachusetts Rules of Professional Conduct broadly govern all advertisements and communications made by attorneys and law firms in the Commonwealth. Generally, legal websites and any other content published on the internet by lawyers are considered a type of communication and an advertisement, according to the Comments to Rule 7.2.*