

UNIFORM MEDIATION ACT *

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TENTH YEAR
WHITE SULPHUR SPRINGS, WEST VIRGINIA
AUGUST 10–17, 2001

WITHOUT PREFATORY NOTE AND COMMENTS

Copyright © 2001

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

* The following text is subject to revision by the Committee on Style of the National Conference of Commissioners on Uniform State Laws.

UNIFORM MEDIATION ACT

SECTION 1. TITLE. This [Act] may be cited as the Uniform Mediation Act.

SECTION 2. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 3. DEFINITIONS. In this [Act]:

(1) “Court” means [designate a court of competent jurisdiction in this State].

(2) “Mediation” means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(3) “Mediation communication” means a statement, whether oral, in a record, verbal, or nonverbal, that is made or occurs during a mediation or for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(4) “Mediator” means an individual who conducts a mediation.

(5) “Nonparty participant” means a person, other than a party or mediator, that participates in a mediation.

(6) “Party” means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(7) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(8) “Proceeding” means a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or a legislative hearing or similar process.

(9) “Record,” except in the phrase “record of proceeding,” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) “Sign” includes:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record;

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

SECTION 4. SCOPE.

(a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:

(1) the parties are required to mediate by statute or court or administrative agency rule or referred to mediate by a court, administrative agency, or arbitrator;

(2) the parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the parties utilize as a mediator a person that holds itself out as providing mediation services.

(b) This [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by the collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with a public agency or court;

(3) conducted under the auspices of a primary or secondary school where all the parties are students or under the auspices of a correctional institution for youths where all the parties are residents of that institution; or

(4) conducted by a judge who might make a ruling on the case.

(c) If the parties agree in advance that all or part of a mediation is not privileged, the privileges under Sections 5 through 7 do not apply to the mediation or part agreed upon. The agreement must be in a signed record or reflected in the record of a proceeding. However, Sections 5 through 7 apply to a mediation communication made by a person who has not received actual notice of the agreement before the communication is made.

**SECTION 5. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY;
DISCOVERY.**

(a) A mediation communication is privileged and is not subject to discovery or admissible in evidence in a proceeding.

(b) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

SECTION 6. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 5 may be waived in a record or orally during a proceeding, if it is expressly waived by all parties to the mediation, and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 5, to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity may not assert a privilege under Section 5.

SECTION 7. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 5 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under [open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a

party; but this exception does not apply where a [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates [, or a public agency participates in the [State to insert, for example, child or adult protection] mediation];

(6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or

(7) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, nonparty participant, or representative of a party based on conduct occurring during a mediation, except as otherwise provided in subsection (c).

(b) There is no privilege under Section 5 if a court, administrative agency, or arbitration panel finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation, except as otherwise provided in subsection (c).

(c) A mediator may not be compelled to provide evidence of a mediation communication referenced in subsection (a)(7) or (b)(2).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

SECTION 8. MEDIATOR REPORT, DISCLOSURE, AND BACKGROUND.

(a) A mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, agency, or other authority that may make a ruling on the dispute that is the subject of the mediation, but a mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under Section 7; or

(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(b) A communication made in violation of subsection (a) may not be considered by a court or other tribunal.

(c) Subsections (d), (e), [(f)], and (g) do not apply to an individual acting as a judge.

(d) Before accepting a mediation an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a party or foreseeable participant in the mediation; and

(2) disclose as soon as is practical before accepting a mediation any such fact known.

(e) If a mediator learns any fact described in subsection (d)(1) after accepting a mediation, the mediator shall disclose as soon as is practicable.

[(f) A mediator shall be impartial, unless after disclosure of the facts required in subsections (d) and (e), the parties agree otherwise.]

(g) A person who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute, if requested to do so by a party.

(h) A person that violates subsection (d), (e), or [(f)] is precluded by the violation from asserting a privilege under Section 5.

(i) Unless required by other law of this State, no special qualification by background or profession is necessary to be a mediator under this [Act].

SECTION 9. NONPARTY PARTICIPATION IN MEDIATION. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

SECTION 10. CONFIDENTIALITY. Unless subject to the [open meetings act/open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

SECTION 11. RELATION TO ELECTRONIC SIGNATURE IN GLOBAL AND NATIONAL COMMERCE ACT. This Act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001(c), except that nothing in this Act modifies, limits, or supersedes Section 101(c) of that Act nor authorizes electronic delivery of any of the notices described in Section 103(b) of that Act.

SECTION 12. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 13. EFFECTIVE DATE. This [Act] takes effect

SECTION 14. REPEALS. The following acts and parts of acts are hereby repealed:

(1)

(2)

(3)

**SECTION 15. APPLICATION TO EXISTING AGREEMENTS OR
REFERRALS.**

(a) This [Act] governs a mediation pursuant to a referral or an agreement to mediate made on or after [the effective date of this [Act]].

(b) On or after [a delayed date], this [Act] governs an agreement to mediate whenever made.