

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

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NATIONAL CONFERENCE OF COMMISSIONERS
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UNIFORM MEDIATION ACT

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1 (A) a judicial, administrative, arbitral, or other adjudicative process, including
2 related pre-hearing and post-hearing motions, conferences, and discovery; or

3 (B) a legislative hearing or similar process.

4 (8) “Record” means information that is inscribed on a tangible medium or that is
5 stored in an electronic or other medium and is retrievable in perceivable form.

6 (9) “Sign” means:

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

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

11
12 **SECTION 3. SCOPE.**

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

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

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

21 (3) the mediation parties use as a mediator an individual who holds himself or
22 herself out as a mediator, or the mediation is provided by a person that holds itself out as
23 providing mediation.

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

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

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

8 (3) conducted by a judge who might make a ruling on the case; or

9 (4) conducted under the auspices of:

10 (A) a primary or secondary school if all the parties are students or

11 (B) a correctional institution for youths if all the parties are residents that
12 institution.

13 (c) If the parties agree in advance in a signed record, or a record of proceeding
14 reflects agreement by the parties, that all or part of a mediation is not privileged, the
15 privileges under Sections 4 through 6 do not apply to the mediation or part agreed upon.
16 However, Sections 4 through 6 apply to a mediation communication made by a person
17 that has not received actual notice of the agreement before the communication is made.
18

19 **SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY;**
20 **DISCOVERY.**

21 (a) Except as otherwise provided in Section 6, a mediation communication is
22 privileged as provided in subsection (b) and is not subject to discovery or admissible in
23 evidence in a proceeding unless waived or precluded as provided by Section 5.

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

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

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

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

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

12
13 **SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.**

14 (a) A privilege under Section 4 may be waived in a record or orally during a
15 proceeding if it is expressly waived by all parties to the mediation and:

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

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

20 (b) A person that discloses or makes a representation about a mediation
21 communication which prejudices another person in a proceeding is precluded from
22 asserting a privilege under Section 4, but only to the extent necessary for the person
23 prejudiced to respond to the representation or disclosure.

1 (c) A person that intentionally uses a mediation to plan, attempt to commit or
2 commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded
3 from asserting a privilege under Section 4.
4

5 **SECTION 6. EXCEPTIONS TO PRIVILEGE.**

6 (a) There is no privilege under Section 4 for a mediation communication that is:

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

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

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

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

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

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

22 (7) sought or offered to prove or disprove abuse, neglect, abandonment, or

1 exploitation in a proceeding in which a child or adult protective services agency is a
2 party, unless the

3 [Alternative A: [State to insert, for example, child or adult protection] case
4 is referred by a court to mediation and a public agency participates.]

5 [Alternative B: public agency participates in the [State to insert, for
6 example, child or adult protection] mediation].

7 (b) There is no privilege under Section 4 if a court, administrative agency, or
8 arbitrator finds, after a hearing in camera, that the party seeking discovery or the
9 proponent of the evidence has shown that the evidence is not otherwise available, that
10 there is a need for the evidence that substantially outweighs the interest in protecting
11 confidentiality, and that the mediation communication is sought or offered in:

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

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

16 (c) A mediator may not be compelled to provide evidence of a mediation
17 communication referred to in subsection (a)(6) or (b)(2).

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

1 **SECTION 7. PROHIBITED MEDIATOR REPORTS.**

2 (a) Except as required in subsection (b), a mediator may not make a report,
3 assessment, evaluation, recommendation, finding, or other communication regarding a
4 mediation to a court, administrative agency, or other authority that may make a ruling on
5 the dispute that is the subject of the mediation.

6 (b) A mediator may disclose:

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

9 (2) a mediation communication as permitted under Section 6; or

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

13 (c) A communication made in violation of subsection (a) may not be considered
14 by a court, administrative agency, or arbitrator.

15
16 **SECTION 8. CONFIDENTIALITY.** Unless subject to the [insert statutory
17 references to open meetings act and open records act], mediation communications are
18 confidential to the extent agreed by the parties or provided by other law or rule of this
19 State.

20
21 **SECTION 9. MEDIATOR'S DISCLOSURE OF CONFLICTS OF INTEREST;**
22 **BACKGROUND.**

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

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

8 (2) disclose any such known fact to the mediation parties as soon as is
9 practical before accepting a mediation.

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

12 (c) At the request of a mediation party, an individual who is requested to serve as
13 a mediator shall disclose the mediator's qualifications to mediate a dispute.

14 (d) A person that violates subsection [(a) or (b)][(a), (b), or (g)] is precluded by
15 the violation from asserting a privilege under Section 4.

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

18 (f) This [Act] does not require that a mediator have a special qualification by
19 background or profession.

20 [(g) A mediator must be impartial, unless after disclosure of the facts required in
21 subsections (a) and (b) to be disclosed, the parties agree otherwise.]

1 **SECTION 10. PARTICIPATION IN MEDIATION.** An attorney or other
2 individual designated by a party may accompany the party to and participate in a
3 mediation. A waiver of participation given before the mediation may be rescinded.
4

5 **SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
6 **AND NATIONAL COMMERCE ACT.** This [Act] modifies, limits, or supersedes the
7 federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section
8 7001 et seq., but this [Act] does not modify, limit, or supersede Section 101(c) of that
9 Act or authorize electronic delivery of any of the notices described in Section 103(b) of
10 that Act.
11

12 **SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
13 applying and construing this [Act], consideration must be given to the need to promote
14 uniformity of the law with respect to its subject matter among States that enact it.
15

16 **SECTION 13. SEVERABILITY CLAUSE.** If any provision of this [Act] or its
17 application to any person or circumstance is held invalid, the invalidity does not affect
18 other provisions or applications of this [Act] which can be given effect without the
19 invalid provision or application, and to this end the provisions of this [Act] are severable.
20

21 **SECTION 14. EFFECTIVE DATE.** This [Act] takes effect
22

1 **SECTION 15. REPEALS.** The following acts and parts of acts are hereby
2 repealed:

3 (1)

4 (2)

5 (3)

6
7 **SECTION 16. APPLICATION TO EXISTING AGREEMENTS OR**
8 **REFERRALS.**

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

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