

1 **DRAFT**

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3 **FOR DISCUSSION ONLY**

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7 **UNIFORM MEDIATION ACT**

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11 **NATIONAL CONFERENCE OF COMMISSIONERS**
12 **ON UNIFORM STATE LAWS**

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18 **INTERIM DRAFT**
19 **DECEMBER 2000**

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23 **UNIFORM MEDIATION ACT**

24 *Without Prefatory Note and Reporter's Notes*

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Uniform Mediation Act

Section 1. Title

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2
3 **UNIFORM MEDIATION ACT**
4 **Interim Draft (December 2000)**
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7 **SECTION 1. TITLE.** This [Act] shall be cited as the Uniform Mediation Act.
8

9 **PART 1. APPLICATION, CONSTRUCTION, DEFINITIONS, SCOPE**
10

11 **SECTION 2. APPLICATION AND CONSTRUCTION.**

12 **In applying and construing this [Act], consideration must be given to:**

13 **(1) the policy of fostering prompt, economical, and amicable resolution of**
14 **disputes in accordance with principles of integrity of the mediation process and**
15 **informed self-determination by the parties;**

16 **(2) the need to promote candor of parties and mediators through**
17 **confidentiality, subject only to the need for disclosure to accommodate specific and**
18 **compelling societal purposes;**

19 **(3) the need to promote uniformity of the law with respect to its subject**
20 **matter among States; and**

21 **(4) the policy that the decision making authority in the mediation process**
22 **rests with the parties.**
23
24

SECTION 3. DEFINITIONS. In this [Act]:

(1) “Court” means [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 an oral assertion, a record of an assertion or nonverbal conduct of an individual who intends it as an assertion that is made during a mediation or for purposes of considering, initiating, continuing, or reconvening a mediation or retaining a mediator.

(4) “Mediator” means an individual, of any profession or background, who is appointed by a court or government entity, or is engaged by parties under an agreement evidenced by a record to conduct a mediation.

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

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

(6) “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.

(7) “Record” 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.

1 **(8) “State” means a State of the United States, the District of Columbia,**
2 **Puerto Rico, the United States Virgin Islands, or any territory or insular possession**
3 **subject to the jurisdiction of the United States.**

4 **(9) “Signed” means executed and includes electronic signatures as defined in**
5 **the Electronic Signatures in Global and National Commerce Act (___ U.S.C. ___).**
6

7 **SECTION 4. SCOPE.**

8 **(a) Except as otherwise provided in subsection (b), this [Act] applies to a**
9 **mediation in which parties agree in a record to mediate, or are directed or**
10 **requested in a record by a court or governmental entity, to participate in a**
11 **mediation.**

12 **(b) This [Act] does not apply to:**

13 **(1) a mediation of a dispute relating to the negotiation of or arising**
14 **under the terms of a collective bargaining relationship;**

15 **(2) a mediation of a dispute involving minors that is conducted under**
16 **the auspices of a primary or secondary school; or**

17 **(3) a conference conducted by a judge acting within the scope of**
18 **judicial duties.**

19 **(c) Part 2 of this [Act] does not apply to those sessions of a mediation which**
20 **all parties agree in advance are not privileged, if the parties agree in a signed record**
21 **or orally during a judicial, administrative or arbitration proceeding.**
22

1 **PART 2. PRIVILEGE**

2
3 **SECTION 5. PRIVILEGE AGAINST DISCLOSURE.**

4 (a) In a civil proceeding before a court, an administrative agency, an
5 arbitral, or any other tribunal, including juvenile court, or in a criminal
6 misdemeanor proceeding, the following rules apply:

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

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

11 (3) A mediator may refuse to disclose evidence of a mediation
12 communication.

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

16 (b) In a criminal felony proceeding related to the matter mediated by [state
17 determines programs that should be covered by this provision], a party may refuse
18 to disclose, and may prevent any other person from disclosing, a mediation
19 communication, unless a court determines, after a hearing in camera, that the party
20 seeking discovery or the proponent of the evidence has shown that the evidence is
21 otherwise unavailable and that there is a need for the evidence that outweighs the
22 importance of the policy favoring the protection of confidentiality under this [Act].
23

1 **SECTION 6. ADMISSIBILITY; DISCOVERY.**

2 **(a) A mediation communication is not subject to discovery or admissible in**
3 **evidence in a civil proceeding before a court, an administrative agency, an**
4 **arbitration panel, or any other tribunal, including juvenile court, or in a criminal**
5 **misdemeanor proceeding, if:**

6 **(1) the communication is privileged under Section 5;**

7 **(2) the privilege is not waived or precluded under Section 7; and**

8 **(3) there is no exception that permits disclosure of the communication**
9 **under Section 8.**

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

13
14 **SECTION 7. WAIVER AND PRECLUSION OF PRIVILEGE.**

15 **(a) A privilege under Section 5 may be waived in a record or it may be**
16 **waived orally during a judicial, administrative, or arbitration proceeding, if it is**
17 **expressly waived:**

18 **(1) by all parties; and**

19 **(2) in the case of the privilege of a mediator, it is also expressly waived**
20 **by the mediator; and**

21 **(3) in the case of the privilege of the nonparty participant, it is also**
22 **expressly waived by the nonparty participant.**

1 (b) A party or mediator who makes a representation about or disclosure of a
2 mediation communication that prejudices another person in a judicial,
3 administrative, or arbitration proceeding is precluded from asserting the privilege
4 under Section 5, to the extent necessary for the person prejudiced to respond to the
5 representation or disclosure.

6 (c) A person who uses or attempts to use the mediation to plan or commit a
7 crime is precluded from asserting the privilege under Section 5.

8 (d) An individual who violates a provision in Part 3 of this [Act] is not
9 precluded by the violation from asserting the privilege under Section 5.

10
11 **SECTION 8. EXCEPTIONS TO PRIVILEGE.**

12 (a) There is no privilege against disclosure under Section 5 for:

13 (1) an agreement evidenced by a record signed by two or more
14 parties;

15 (2) a mediation communication that is available to the public under an
16 open records law or that is made during a session of a mediation that is open to the
17 public or is required by law to be open to the public;

18 (3) a mediation communication that constitutes a threat made by a
19 mediation participant to inflict bodily harm or unlawful property damage;

20 (4) a mediation communication that is used to plan, attempt to
21 commit, or commit a crime;

22 (5) a mediation communication offered to prove or disprove abuse,
23 neglect, abandonment, or exploitation in a judicial, administrative, or arbitration

1 proceeding in which a public agency is protecting the interests of an individual
2 protected by law;

3 (6) a mediation communication offered to establish or disprove a
4 claim or complaint of professional misconduct or malpractice filed against a
5 mediator; or

6 (7) a mediation communication offered to establish or disprove a
7 claim or complaint of professional misconduct or malpractice filed against a party
8 or representative of a party based on conduct occurring during a mediation, if
9 offered through evidence provided by an individual other than a mediator.

10 (b) There is no privilege under Section 5 if a court, administrative agency, or
11 arbitration panel finds, after a hearing in camera, that the party seeking discovery
12 or the proponent of the evidence has shown that the evidence is not otherwise
13 available, that there is a need for the evidence that substantially outweighs the
14 importance of the policy favoring the protection of confidentiality under this [Act]
15 and:

16 (1) the mediation communication is offered to establish or disprove a
17 claim or complaint of professional misconduct or malpractice filed against a party
18 or a representative of a party based on conduct occurring during a mediation, if
19 offered through evidence provided by a mediator;

20 (2) the mediation communication is offered in a judicial,
21 administrative, or arbitration proceeding to prove a claim or defense recognized by
22 law as sufficient to set aside, rescind, or reform a contract; or

1 (3) the mediation communication evidences a significant threat to
2 public health or safety.

3 (c) If a mediation communication is not privileged under an exception in
4 subsection (a) or (b), only the portion of the communication necessary for the
5 application of the exception for nondisclosure may be admitted. The admission of
6 particular evidence for the limited purpose of an exception does not render that
7 evidence, or any other mediation communication, admissible for any other purpose.

9 **PART 3. MEDIATOR DISCLOSURE, PARTY ACCOMPANIMENT**

10 11 **SECTION 9. DISCLOSURE BY MEDIATOR.**

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

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

19 (2) disclose any such fact known or learned soon as is practical before
20 accepting a mediation.]

21 [(b) The mediator shall disclose as soon as is practical any such fact learned
22 by the mediator after accepting a mediation.]

1 **[(c) If requested to do so by a party, a mediator shall disclose the mediator's**
2 **qualifications to mediate a dispute.]**

3 **(d) A mediator may not make a report, assessment, evaluation,**
4 **recommendation, finding, or other communication regarding a mediation to a court,**
5 **agency, or any other authority that may make a ruling on the dispute that is the**
6 **subject of the mediation, except that a mediator may report:**

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

9 **(2) as permitted under Sections 7 or 8; or**

10 **(3) a mediation communication evidencing abuse, neglect, abandonment, or**
11 **exploitation of an individual to a public agency that protects against such**
12 **abuse.**

13
14 **SECTION 10. PARTY'S RIGHT TO DESIGNATE MEDIATION PARTICIPANT.**

15 **A party has a right to have an attorney or other individual designated by the**
16 **party attend and participate in the mediation. Any waiver of this right may be**
17 **rescinded.**

1 **[SECTION 11. SUMMARY ENFORCEMENT OF MEDIATED SETTLEMENT**
2 **AGREEMENTS.**

3 *[Reporter's Note: The Drafting Committees recommend against adoption of Section*
4 *11, which was drafted in response to a request from the National Conference of*
5 *Commissioners on Uniform State Laws Conference in the Committee of the Whole at*
6 *the Annual Meeting in Denver, Colorado, on July 30, 1999.]*

7 (a) Parties who have entered into a mediated settlement agreement evidenced
8 by a record that has been signed by the parties and their attorneys, may [move] the
9 court to enter a judgment in accordance with the settlement agreement, if:

10 (1) all parties to the settlement agreement join in the [motion];

11 (2) no litigation is pending on the subject matter of the mediation;

12 (3) all parties to the settlement agreement are represented by counsel
13 at the time the agreement is entered, and the [motion] is filed;

14 (4) the settlement agreement contains a statement to the effect that the
15 parties are all represented by counsel and desire to seek summary enforcement of
16 their agreement;

17 (5) no party withdraws support for the [motion] prior to entry of
18 judgment, and

19 (6) the agreement does not relate to a divorce or marriage dissolution.

20 (b) If the requirements of subsection (a) are satisfied, the court may enter
21 judgment. The judgment may be recorded, docketed, and enforced as any other
22 judgment in a civil action.]

**PART 4. SEVERABILITY, APPLICATION, EFFECTIVE DATE,
REPEALS**

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:

SECTION 15. APPLICATION TO EXISTING RELATIONSHIP.

This [Act] applies....