

DRAFT

FOR DISCUSSION ONLY

UNIFORM MEDIATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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Without Prefatory Note and Reporter's Notes

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by

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choosing to adopt it.

1 **UNIFORM MEDIATION ACT (2000)**

2 **SECTION 1. TITLE.** This [Act] shall be cited as the Uniform Mediation Act.

3 **SECTION 2. APPLICATION AND CONSTRUCTION.** In applying and construing this
4 [Act], consideration must be given to:

5 (a) the policy of fostering the prompt, economical, and amicable resolution of disputes in
6 accordance with the principles of integrity of the process and informed self-determination by the
7 disputants,

8 (b) the need to promote the candor of disputants and mediators through the protection of
9 confidentiality, subject only to overwhelming need for disclosure to accommodate compelling and
10 specific societal purposes, and

11 (c) the need to promote uniformity of the law with respect to its subject matter.

12 **SECTION 3. DEFINITIONS.**

13 (a) “Disputant” means a person who participates in mediation and:

14 (1) has an interest in the outcome of the dispute or whose agreement is necessary to
15 resolve the dispute, and

16 (2) is asked by a court, governmental entity, or mediator to appear for mediation or
17 entered an agreement to mediate that is evidenced by a record.

18 (b) “Mediation” means a process in which disputants in a controversy, with the assistance
19 of a mediator, negotiate toward a resolution of the conflict that will be the disputants’ decision.

20 (c) “Mediation communication” means a statement made as part of a mediation. The term

1 may also encompass a communication for purposes of considering, initiating, continuing, or
2 reconvening a mediation or retaining a mediator.

3 (d) “Mediator” means an impartial individual of any profession or background, who is
4 appointed by a court or government entity or engaged by disputants through an agreement
5 evidenced by a record.

6 (e) “Public policy mediation” means a mediation in which a governmental entity is a
7 participant, and which leads to a decision by the entity that has general application and
8 prospective effect.

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

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

14 (h) “State” means a State of the United States, the District of Columbia, Puerto Rico, the
15 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
16 the United States.

17 **SECTION 4. SCOPE.**

18 (a) Except as provided in subsection (b), this [Act] extends to all forms and types of
19 mediation.

20 (b) This [Act] shall not apply to the mediation of:

21 (1) disputes arising under, out of, or relating to a collective bargaining relationship; or

(2) disputes involving minors that are conducted under the auspices of a primary or secondary school.

SECTION 5. EXCLUSION FROM EVIDENCE AND DISCOVERY; PRIVILEGE.

(a) Mediation communications are not subject to discovery or admissible in evidence in a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding, if they are privileged under subsections (c) and (d), the privilege is not waived or estopped under Section 6, and there is no exception under Section 8.

(b) Information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.

(c) A disputant has a privilege to refuse to disclose, and to prevent any other person from disclosing, mediation communications in:

(1) a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding,;

[(2) a criminal or juvenile delinquency proceeding related to the matter mediated if:

(i) a court or law enforcement official referred that case to mediation; or

(ii) the mediation was done by a program supported by public funds to mediate criminal or juvenile cases;

[unless a court determines after a hearing in camera that the evidence is otherwise unavailable and that a miscarriage of justice would occur of such a magnitude as to substantially outweigh the state's policy favoring confidentiality in mediation.]

[(3) a proceeding in which a public agency is protecting the interests of a child,

1 disabled adult, or elderly adult protected by law, if

2 (i) the case is referred by the court,

3 (ii) the public agency participates in the mediation, or

4 (iii) the case involves allegations of abuse, neglect, abandonment or exploitation

5 and is mediated by an entity that is charged by law or a court to mediate such cases.]

6 (d) A mediator has a privilege to refuse to disclose, and to prevent any other person from
7 disclosing, the mediator's mediation communications, in a civil proceeding before a judicial,

8 administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding.

9 A mediator may also refuse to provide evidence of mediation communications in such a
10 proceeding.

11 **SECTION 6. WAIVER AND ESTOPPEL.**

12 (a) The disputants' privilege in Sections 5 (c) may be waived, but only if expressly waived
13 by all disputants, either in a record or during a judicial, administrative, or arbitration tribunal. A
14 disputant who makes a representation about or disclosure of a mediation communication that
15 prejudices another person in a proceeding may be precluded from asserting the privilege, but only
16 to the extent necessary for the person prejudiced to respond to the representation or disclosure.

17 (b) The mediator's privilege in Section 5 (d) may be waived, but only if expressly waived
18 by all disputants and the mediator, either in a record or during a civil proceeding before a judicial,
19 administrative, or arbitration tribunal. A mediator who makes a representation about or
20 disclosure of a mediation communication that prejudices another person in a proceeding may be
21 precluded from asserting the privilege, but only to the extent necessary for the person prejudiced

1 to respond to the representation or disclosure.

2 **SECTION 7. NONDISCLOSURE OUTSIDE OF DISCOVERY AND EVIDENTIARY**
3 **PROCEEDINGS.**

4 (a) In addition to the prohibitions regarding proceedings described in Sections 5 and 6, a
5 mediator may not disclose mediation communications unless all of the disputants agree, or the
6 mediator reasonably believes that disclosure is required by law, a specific public policy established
7 by statute or court decision, or professional reporting requirements.

8 (b) A mediator may not provide a report, assessment, evaluation, recommendation, or
9 finding regarding a mediation to a court, agency, or authority that may make rulings on or
10 investigations into a dispute that is the subject of the mediation, other than whether the mediation
11 occurred, a report of attendance at mediation sessions, whether the mediation has terminated, or
12 whether settlement was reached, except as permitted under Sections 6 and 8.

13 [(c) This [Act] does not restrict the disclosure of mediation communications by disputants
14 outside of discovery and evidentiary proceedings except as may be limited by the agreement of the
15 disputants, or by court or administrative order.]

16 **SECTION 8. EXCEPTIONS TO PRIVILEGE AND NONDISCLOSURE.**

17 (a) There is no privilege or prohibition against disclosure under Sections 5, 6, or 7 of this
18 [Act]:

19 (1) for a record of an agreement between two or more disputants;

20 (2) for the sessions of a mediation that must be open to the public under the law, or for

1 sessions of a public policy mediation for which the disputants have no reasonable expectation of
2 confidentiality;

3 (3) for threats made by a participant to inflict bodily harm or unlawful property
4 damage;

5 (4) for any mediation participant who uses or attempts to use the mediation to plan or
6 commit a crime;

7 (5) for mediation communications offered to prove or disprove abuse or neglect,
8 except as provided in Section 5 (c)(3), in a proceeding in which a public agency is protecting the
9 interests of a child, disabled adult, or elderly adult protected by law, or

10 [(6) for mediation communications in a pretrial conferences conducted by a judge or
11 other judicial officer who may make or inform rulings on the subject matter of the conference.]

12 (b) There is no privilege or prohibition under Sections (5), (6), or (7) of this [Act] if a
13 judicial, administrative, or arbitration tribunal finds, after a hearing in camera, that the party
14 seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise
15 available, that there is a need for the evidence that substantially outweighs the importance of the
16 state's policy favoring the protection of confidentiality and:

17 (1) the evidence is introduced to establish or disprove a claim or complaint of
18 professional misconduct or malpractice filed against a mediator, a disputant or a representative of
19 a disputant based on conduct occurring during a mediation;

20 (2) the evidence is offered in a proceeding in which fraud, duress, or incapacity is in
21 issue regarding the validity or enforceability of an agreement evidenced by a record and reached
22 by the disputants as the result of a mediation, but only if evidence is provided by persons other

1 than the mediator of the dispute at issue; or

2 (3) for mediation communications that evidence a significant threat to public health or
3 safety.

4 (c) If mediation communications are admitted under subsection (a) or (b), only the portion
5 of the communication necessary for the application of the excepted purpose shall be admitted.

6 The admission of 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.

8 **SECTION 9. MEDIATION PROCEDURES.**

9 (a) Before accepting appointment or engagement a mediator shall make an inquiry that is
10 reasonable under the circumstances to determine whether there are any facts that a reasonable
11 person would consider likely to affect the impartiality of the mediator, including any financial or
12 personal interest in the outcome of the mediation or existing or past relationships with a disputant
13 or any known or foreseeable participant in the mediation. The mediator shall disclose such facts
14 known or learned to the disputants as soon as is practical.

15 (b) If asked by a disputant, a mediator shall disclose the mediator's qualifications to
16 mediate a dispute.

17 (c) A disputant has the right to have an attorney or other individual designated by the
18 disputant attend and participate in the mediation. A waiver of this right may be revoked.

19 **SECTION 10. SUMMARY ENFORCEMENT OF MEDIATED SETTLEMENT** 20 **AGREEMENTS.**

1 (a) A disputant entering into a settlement agreement evidenced by a record made during
2 mediation, or as a result of mediation may, with the consent of all disputants to such agreement.
3 petition a court of general jurisdiction to enter a judgment in accordance with the settlement
4 agreement, provided that:

5 (1) A petition requesting such judgment is filed with the court within [30] days of the
6 execution of such mediated settlement agreement;

7 (2) Written and legally sufficient notice is given to all disputant signatories to the
8 agreement within [30] days of the filing of such petition; and

9 (3) No disputant to the agreement files an objection with the court within [30] days of
10 receipt of such notice or execution of waiver of notice.

11 (b) If the court finds that an objection has been filed as provided in subsection 10 (a)(3),
12 that a disputant failed to understand the rights being waived and that the settlement agreement
13 was not signed by the disputant and the disputant's attorney, or that the interests of justice
14 require, the court shall deny such petition, without prejudice to any contractual rights or remedies
15 that may otherwise be available.

16 (c) If on motion of any of the disputant signatories to the settlement agreement, the court
17 finds that the provisions of subsection 10 (a) have been met, and the provisions of subsection 10

18 (c) do not preclude entry, the court shall enter judgment in the terms set forth in the mediated
19 settlement agreement.

20 **SECTION 11. SEVERABILITY CLAUSE.** If any provision of this [Act] or its application
21 to any person or circumstance is held invalid, the invalidity does not affect other provisions or

1 applications of this [Act] which can be given effect without the invalid provision or application,
2 and to this end the provisions of this [Act] are severable.

3 **SECTION 12. EFFECTIVE DATE.** This [Act] takes effect

4 **SECTION 13. REPEALS.** The following acts and parts of acts are hereby repealed: