



THE UNIFORM MEDIATION ACT

- A Summary -

Mediation is a process by which a third party facilitates communication and negotiation between parties to a dispute to assist them in reaching a voluntary agreement resolving that dispute. Because it is a voluntary process, and because of the relatively low costs associated with mediation versus a more formal legal proceeding or even arbitration, mediation has become one of the most popular forms of dispute resolution in America today. Mediation is available in a wide variety of contexts, and state law has adopted various situation-specific rules to cope with the growth in the use of mediation. The widespread success of mediation as a form of dispute resolution has led to some problems, however, in that over 2,500 separate state statutes affect mediation proceedings in some manner. In many cases, mediating parties cannot be sure which laws might apply to their efforts (especially in a multi-state context). This complexity is especially troublesome when it undermines one of the most important factors promoting mediation as a means of dispute resolution, namely the parties' ability to depend on the confidentiality of the proceeding, and their power to walk away without prejudice if an agreement cannot be voluntarily reached.

The Uniform Mediation Act, created in 2001, is designed to address this core concern about the confidentiality of mediation proceedings. The uniform act, jointly drafted by the Uniform Law Commission and the American Bar Association Dispute Resolution Section, is intended as a statute of general applicability that will apply to almost all mediations, except those involving collective bargaining, minors in a primary or secondary school peer review context, prison inmate mediation, and proceedings conducted by judicial officers who might rule in a dispute or who are not prohibited by court rule from disclosing mediation communications with a court, agency, or other authority.

The Act's prime concern is keeping mediation communications confidential. Parties engaged in mediation, as well as non-party participants, must be able to speak with full candor for a mediation to be successful and for a settlement to be voluntary. For this reason, the central rule of the Act is that a mediation communication is confidential, and if privileged, is not subject to discovery or admission into evidence in a formal proceeding [see Sec. 5(a)]. In proceedings following a mediation, a party may refuse to disclose, and prevent any other person from disclosing, a mediation communication. Mediators and non-party participants may refuse to disclose their own statements made during mediation, and may prevent others from disclosing them, as well. Thus, for a person's own mediation communication to be disclosed in a subsequent hearing, that person must agree and so must the parties to the mediation. Waiver of these privileges must be in a record or made orally during a proceeding to be effective. There is no waiver by conduct.

As is the case with all general rules, there are exceptions. First, the privilege extends only to mediation communications, and not the underlying facts of the dispute. Evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its use in a mediation. A party that discloses a mediation communication and thereby prejudices another person in a proceeding is precluded from asserting the privilege to the extent

necessary for the prejudiced person to respond. A person who intentionally uses a mediation to plan or attempt to commit a crime, or to conceal an ongoing crime, cannot assert the privilege.

Also, there is no assertable privilege against disclosure of a communication made during a mediation session that is open to the public, that contains a threat to inflict bodily injury, that is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding where a child or adult protective agency is a party, that would prove or disprove a claim of professional misconduct filed against a mediator, or against a party, party representative, or non-party participant based on conduct during a mediation. If a court, administrative agency, or arbitration panel finds that the need for the information outweighs the interest in confidentiality in a felony proceeding, or a proceeding to prove a claim of defense to reform or avoid liability on a contract arising out of the mediation, there is no privilege.

The Uniform Mediation Act is meant to have broad application, while at the same time preserving party autonomy. While a mediation proceeding subject to the Act can result from an agreement of the parties, or be required by statute, a government entity, or as part of an arbitration, the Act allows parties to opt out of the confidentiality and privilege rules described above. Also, the Act does not prescribe qualifications or other professional standards for mediators, allowing parties (and potentially states) to make that determination. The Act generally prohibits a mediator, other than a judicial officer, from submitting a report, assessment, evaluation, finding, or other communication to a court agency, or other authority that may make a ruling on the dispute that is the subject of the mediation. The mediator may report the bare facts that a mediation is ongoing or has concluded, who participated, and mediation communications evidencing abuse, neglect, or abandonment, or other non-privileged mediation matters. The Act also contains model provisions calling for a mediator to disclose conflicts of interest before accepting a mediation (or as soon as practicable after discovery). His or her qualifications as a mediator must be disclosed to any requesting party to the dispute.

The Uniform Mediation Act will further the goals of alternative dispute resolution by promoting candor of the parties by fostering prompt, economical, and amicable resolution of disputes, by retaining decision-making authority with the parties, and by promoting predictability regarding the process and the level of confidentiality that can be expected by participants.

For more information about this uniform act, please contact ULC Legislative Counsel Kari Bearman at (312) 450-6617 or kbearman@uniformlaws.org.