

SENATE No. 697

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act relative to mediation..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

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

2 SECTION 2. DEFINITIONS. In this Act:

3 (1) "Mediation" means a process in which a mediator facilitates
4 communication and negotiation between parties to assist them in reaching a voluntary agreement
5 regarding their dispute.

6 (2) "Mediation communication" means a statement, whether oral or in a
7 record or verbal or nonverbal, that occurs during a mediation or is made for purposes of
8 considering, conducting, participating in, initiating, continuing, or reconvening a mediation or
9 retaining a mediator.

10 (3) "Mediator" means an individual who conducts a mediation.

11 (4) "Nonparty participant" means a person, other than a party or mediator,
12 that participates in a mediation.

13 (5) “Mediation party” means a person that participates in a mediation and
14 whose agreement is necessary to resolve the dispute.

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

19 (7) “Proceeding” means:

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

22 (B) a legislative hearing or similar process.

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

25 (9) “Sign” means:

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

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

30 SECTION 3. SCOPE.

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

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

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

39 (3) the mediation parties use as a mediator an individual who holds
40 himself or herself out as a mediator or the mediation is provided by a person that holds itself out
41 as providing mediation.

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

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

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

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

49 (4) conducted under the auspices of:

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

52 (B) a correctional institution for youths if all the parties are
53 residents of that institution.

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

59 SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY;
60 DISCOVERY.

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

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

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

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

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

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

74 SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.

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

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

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

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

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

88 SECTION 6. EXCEPTIONS TO PRIVILEGE.

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

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

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

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

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

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

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

106 (7) sought or offered to prove or disprove abuse, neglect,
107 abandonment, or exploitation in a proceeding in which a child or adult protective services agency
108 is a party, unless the

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

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

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

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

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

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

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

129 SECTION 7. PROHIBITED MEDIATOR REPORTS.

130 (a) Except as required in subsection (b), a mediator may not make a report, assessment,
131 evaluation, recommendation, finding, or other communication regarding a mediation to a court,

132 administrative agency, or other authority that may make a ruling on the dispute that is the subject
133 of the mediation.

134 (b) A mediator may disclose:

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

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

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

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

143 SECTION 8. CONFIDENTIALITY. Unless subject to the [insert statutory references to
144 open meetings act and open records act], mediation communications are confidential to the
145 extent agreed by the parties or provided by other law or rule of this State.

146 SECTION 9. MEDIATOR'S DISCLOSURE OF CONFLICTS OF INTEREST;
147 BACKGROUND.

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

150 (1) make an inquiry that is reasonable under the circumstances to determine whether
151 there are any known facts that a reasonable individual would consider likely to affect the

152 impartiality of the mediator, including a financial or personal interest in the outcome of the
153 mediation and an existing or past relationship with a mediation party or foreseeable participant in
154 the mediation; and

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

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

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

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

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

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

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

169 SECTION 10. PARTICIPATION IN MEDIATION. An attorney or other individual
170 designated by a party may accompany the party to and participate in a mediation. A waiver of
171 participation given before the mediation may be rescinded.

172 SECTION 11. INTERNATIONAL COMMERCIAL MEDIATION.

173 (a) In this section, “Model Law” means the Model Law on International
174 Commercial Conciliation adopted by the United Nations Commission on International Trade
175 Law on 28 June 2002 and recommended by the United Nations General Assembly in a resolution
176 (A/RES/57/18) dated 19 November 2002, and “international commercial mediation” means an
177 international commercial conciliation as defined in Article 1 of the Model Law.

178 (b) Except as otherwise provided in subsections (c) and (d), if a mediation is an
179 international commercial mediation, the mediation is governed by the Model Law.

180 (c) Unless the parties agree in accordance with Section 3(c) of this [Act] that all
181 or part of an international commercial mediation is not privileged, Sections 4, 5, and 6 and any
182 applicable definitions in Section 2 of this [Act] also apply to the mediation and nothing in Article
183 10 of the Model Law derogates from Sections 4, 5, and 6.

184 (d) If the parties to an international commercial mediation agree under Article 1,
185 subsection (7), of the Model Law that the Model Law does not apply, this [Act] applies.

186 SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
187 AND NATIONAL COMMERCE ACT. This Act modifies, limits, or supersedes the federal
188 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
189 this [Act] does not modify, limit, or supersede Section 101(c) of that Act or authorize electronic
190 delivery of any of the notices described in Section 103(b) of that Act.

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

194 SECTION 14. SEVERABILITY CLAUSE. If any provision of this [Act] or its
195 application to any person or circumstance is held invalid, the invalidity does not affect other
196 provisions or applications of this [Act] which can be given effect without the invalid provision or
197 application, and to this end the provisions of this [Act] are severable.

198 SECTION 17. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.

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

201 (b) On or after January 1, 2010 this Act governs an agreement to mediate whenever
202 made.