HOUSE . . . . . No. 33

So much of the recommendations of the Commission on Uniform State Laws (House, No. 26) as relates to making uniform certain aspects of mediation. The Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand Thirteen

An Act making uniform certain aspects of 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. The General Laws are hereby amended by inserting after chapter 251 the
2 following chapter:--

3 CHAPTER 251A

4 UNIFORM MEDIATION ACT

5 Section 1. This chapter may be cited as the UNIFORM MEDIATION ACT.

6 Section 2. In this chapter:

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

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

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

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

16 (5) "Mediation party" means a person that participates in a mediation and whose
17 agreement is necessary to resolve the dispute.

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

21 (7) “Proceeding” means:

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

24 (B) a legislative hearing or similar process.

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

27 (9) “Sign” means:

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

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

32 Section 3. (a) Except as otherwise provided in subsection (b) or (c), this chapter applies
33 to a mediation in which:

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

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

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

41 (b) The chapter does not apply to a mediation:

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

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

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

48 (4) conducted under the auspices of:

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

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

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

56 Section 4. (a) Except as otherwise provided in section 6, a mediation communication is
57 privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence
58 in a proceeding unless waived or precluded as provided by section 5.

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

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

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

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

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

69 Section 5. (a) A privilege under section 4 may be waived in a record or orally during a
70 proceeding if it is expressly waived by all parties to the mediation and:

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

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

75 (b) A person that discloses or makes a representation about a mediation
76 communication which prejudices another person in a proceeding is precluded from asserting a
77 privilege under section 4, but only to the extent necessary for the person prejudiced to respond to
78 the representation or disclosure.

79 (c) A person that intentionally uses a mediation to plan, attempt to commit or
80 commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from
81 asserting a privilege under section 4.

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

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

85 (2) available to the public under chapter 66 or made during a session of a mediation
86 which is open, or is required by law to be open, to the public;

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

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

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

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

97 (7) sought or offered to prove or disprove abuse, neglect, abandonment, or
98 exploitation in a proceeding in which a child or adult protective services agency is a party, unless
99 the case is referred by a court to mediation and a public agency participates.

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

105 (1) a court proceeding involving a felony or misdemeanor; or

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

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

110 (d) If a mediation communication is not privileged under subsection (a) or (b),
111 only the portion of the communication necessary for the application of the exception from
112 nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not
113 render the evidence, or any other mediation communication, discoverable or admissible for any
114 other purpose.

115 Section 7. (a) Except as required in subsection (b), a mediator may not make a report,
116 assessment, evaluation, recommendation, finding, or other communication regarding a mediation
117 to a court, administrative agency, or other authority that may make a ruling on the dispute that is
118 the subject of the mediation.

119 (b) A mediator may disclose:

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

122 (2) a mediation communication as permitted under section 6; or

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

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

128 Section 8. Unless subject to the requirements of chapters 30A, 34, 39, and 40 regarding
129 open meetings and chapter 66 regarding public records, mediation communications are
130 confidential to the extent agreed by the parties or provided by other law or rule of this
131 Commonwealth.

132 Section 9. (a) Before accepting a mediation, an individual who is requested to serve as a
133 mediator shall:

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

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

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

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

145 (d) A person that violates subsection (a), (b), or (g) is precluded by the violation
146 from asserting a privilege under section 4.

147 (e) Subsections (a), (b), (c), and (g) do not apply to an individual acting as a
148 judge.

149 (f) This chapter does not require that a mediator have a special qualification by
150 background or profession.

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

153 Section 10. An attorney or other individual designated by a party may accompany the
154 party to and participate in a mediation. A waiver of participation given before the mediation
155 may be rescinded.

156 Section 11. This chapter modifies, limits, or supersedes the federal Electronic Signatures
157 in Global and National Commerce Act, 15 U.S.C. section 7001 et seq., but this chapter does not
158 modify, limit, or supersede section 101(c) of that Act or authorize electronic delivery of any of
159 the notices described in section 103(b) of that Act.

160 Section 12. In applying and construing this chapter, consideration should be given to the
161 need to promote uniformity of the law with respect to its subject matter among States that enact
162 it.

163 SECTION 2. This Act takes effect on July first, two thousand and fourteen. This chapter
164 governs a mediation pursuant to a referral or an agreement to mediate made on or after the
165 effective date of this chapter. On or after one year from the effective date of this chapter, this
166 chapter governs an agreement to mediate whenever made