

ACR Draft Revision of the Uniform Mediation Act

DRAFT

(February 20, 2001 UMA with proposed revisions approved by the Executive Board of the Association for Conflict Resolution (ACR) on March 20, 2001. Proposed Revisions are in **bold** font and underlined.

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

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

(1) the need to promote candor of parties and mediators through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests;

(2) the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties;

(3) the policy that the decision-making authority in the mediation process rests with the parties; and

(4) the need to promote uniformity of the law with respect to its subject matter among States.

SECTION 3. DEFINITIONS. In this [Act]:

(1) "Authenticate" means to:

(A) sign; or

(B) execute or adopt a symbol, or encrypt a record in whole or in part, with present intent to:

(i) identify the authenticating party; and

(ii) adopt, accept, or establish the authenticity of a record or term.

(2) "Court" means [a court of competent jurisdiction in this State].

(3) "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.

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

(5) "Mediator" means an **impartial** individual, of any profession or background, who conducts a mediation.

(6) "Nonparty participant" means a person, other than a party or mediator, who participates in a mediation.

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

(8) "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.

(9) "Proceeding" means a legislative process, or a judicial, administrative, arbitral, or other adjudicative process, including related pre- and post-hearing motions, conferences, and discovery.

(10) "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.

SECTION 4. SCOPE.

(a) Except as otherwise provided in subsections (b) or (c), this [Act] applies to a mediation in which the parties agree in a record to mediate or are required by statute or referred by a court, a governmental entity, or an arbitrator to mediate.

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

(1) relating to the negotiation of or arising under the terms of a collective bargaining relationship **or**

(2) **conducted under the auspices of a primary or secondary school which involves a student enrolled in the primary or secondary school** **[DELETE 'involving parties who are all minors which is conducted under the auspices of a primary or secondary school or correctional institution; or']**

(3) **[DELETE 'conducted by a judicial officer who might make a ruling on the case or who is not prohibited by court rule from communicating with an authority as provided in Section 8(a).']**

(c) A proceeding conducted by a judicial officer who might make or inform a ruling or order in the matter shall not be considered a mediation under this Act.

(d) 'If the parties agree in advance that all or part of a mediation is not privileged **or confidential**, the **[DELETE 'privileges'] protections** under Sections 5 through 7 do not apply to the mediation or part agreed upon. The agreement must be in an authenticated record or reflected in the record of a proceeding. The parties must inform the mediator and any nonparty participants of **this** **[DELETE 'the'] agreement** **in advance of the mediation.**

SECTION 5. CONFIDENTIALITY OF MEDIATION COMMUNICATIONS; PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY

(a) A mediation communication is confidential and, if privileged, is not subject to discovery or admissible in evidence in a proceeding.

(b) In a proceeding, the following rules of privilege apply:

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

(2) A mediator may refuse to disclose a mediation communication.

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

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

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

[(d)The protections of this act shall continue to apply even if a mediator is found to be partial or failed to act impartially.]

[Legislative Note. The [Act] does not supercede existing state statutes that make mediators incompetent to testify, provide for confidentiality of mediation, or that provide for cost and attorney fees to mediators who are wrongfully subpoenaed. See e.g. Cal. Ed. Code Sec. 703.5 (West 1994).] [This Legislative Note was approved by the NCCUSL and ABA UMA Drafting Committees in the February 2001 UMA Drafting Committee meetings, but was not included in the 2/20/01 black letter draft]

SECTION 6. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 5 may be waived in a record, or it may be waived orally during a proceeding, if it is expressly waived by all mediation parties, and:

- (1) in the case of the privilege of a mediator, it is **[also]** expressly waived by the mediator; and
- (2) in the case of the privilege of a nonparty participant, it is **[also]** expressly waived by the nonparty participant.

(b) A person who discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting the privilege under Section 5, to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person who intentionally uses or attempts to use a mediation for the primary purpose of planning or concealing a crime or criminal activity, or committing a crime may not assert the privilege under Section 5.

[(d) A mediator [DELETE 'person'] who violates a provision in Section 8 (d) through (f) is not precluded by the violation from asserting the privilege under Section 5.] **[This section should be bracketed].**

SECTION 7. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege against disclosure under Section 5 for a mediation communication which is:

- (1) in an agreement evidenced by a record authenticated by all parties to the agreement;
- (2) available to the public under [open records law] or that is made during a session of a mediation which is open, or is required by law to be open, to the public;
- (3) a threat to inflict bodily injury;
- (4) **[DELETE 'intentionally']** used to **intentionally** plan, attempt to commit, or commit a crime, or conceal an ongoing crime or criminal activity;
- (5) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a public agency is protecting the interests of an individual protected by law; but this exception does not apply where a [child protection] **matter is referred to [DELETE 'case is referred to participate in']** mediation by a court and a public agency participates [, or a public agency participates in the child protection mediation];
- (6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator in a proceeding; or
- (7) sought or offered to prove or disprove a claim or complaint of professional misconduct

or malpractice filed against a party, nonparty participant, or representative of a party based on conduct occurring during a mediation.

(b) There is no privilege under Section 5 if a court, administrative agency, or arbitration panel finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and the mediation communication is sought or offered in:

- (1) a court proceeding involving a felony; or
- (2) a proceeding to prove a claim or defense under other law sufficient to reform or avoid liability on a contract arising out of the mediation.

(c) Notwithstanding subsections 7(a)(7) and 7(b)(2), a mediator may not be compelled to provide evidence of a mediation communication or testify in such proceedings.

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

SECTION 8. EXCEPTIONS TO CONFIDENTIALITY

(a) A mediation communication is not confidential if it communicates

(1) a threat of physical harm to an individual for the purpose of warning the victim or notifying authorities, or

(2) evidence of abuse, neglect, abandonment, or exploitation of an individual which is required by law to be reported to a public agency designated to protect the individual in order to comply with mandatory reporting laws, or

(3) evidence of professional misconduct in order to report ethical violations of a professional involved in the mediation.

(b) This section applies only to the confidentiality of a mediation communication and does not affect the inadmissibility or privileged nature of the communication.

SECTION 9. DISCLOSURE BY MEDIATOR.

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

- (1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;
- (2) as permitted under Section 7; or
- (3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency that protects against such mistreatment.

(b) A report made in violation of subsection (a) may not be considered by a court or other tribunal.

[(c) A judicial officer acting in an official capacity is exempt from the requirements of subsections **[DELETE the words '(a) and' from this subsection and BRACKET this provision.]** (d) through (f)].

[(d) Before accepting a mediation an individual who is requested to serve shall:

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

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

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

[(e) A mediator shall disclose as soon as is practical any fact described in subsection (a)(1) learned by the mediator after accepting a mediation.]

[(f) A mediator shall disclose the mediator's qualifications to mediate a dispute, if requested to do so by a party.]

SECTION 10. NONPARTY PARTICIPATION IN MEDIATION.

An attorney or other individual designated by a party may accompany that party and participate in a mediation. A waiver of such participation given prior to the mediation may be rescinded.

SECTION 11. ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

The provisions of this [Act] governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. sec. 70002, and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.

[SECTION 12. SUMMARY ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS.

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

- (1) all parties to the mediated settlement agreement join in the [motion];
- (2) no litigation is pending on the subject matter of the mediation;
- (3) all parties to the mediated settlement agreement are represented by counsel at the time it is entered and the [motion] is filed;
- (4) the mediated settlement agreement contains a statement to the effect that the parties are all represented by counsel and desire to seek summary enforcement of their agreement;
- (5) no party withdraws support for the [motion] before entry of judgment; and
- (6) the mediated settlement agreement does not relate to a divorce or marriage dissolution.

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

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

SECTION 13. 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 14. EFFECTIVE DATE.

This [Act] takes effect

SECTION 15. REPEALS.

The following acts and parts of acts are hereby repealed:

(1) ...

SECTION 16. APPLICATION TO EXISTING RELATIONSHIP.

a) This [Act] governs an agreement to mediate made on or after [the effective date of this [Act]].

(b) On or after [a delayed date], this [Act] governs an agreement to mediate whenever made.