

HOUSE No. 19

Accompanying the fourth recommendation of the Commission on Uniform State Laws (House, No. 15). Labor and Workforce Development.

The Commonwealth of Massachusetts

In the Year Two Thousand and Five.

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
2 inserting after Chapter 251 the following chapter:—

3 **CHAPTER 251A.**
4 **UNIFORM MEDIATION ACT.**

5 Section 1. This chapter may be cited as the UNIFORM MEDI-
6 ATION ACT.

7 Section 2. In this Act:

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

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

16 (3) “Mediator” means an individual who conducts a mediation.

17 (4) “Nonparty participant” means a person, other than a party
18 or mediator, that participates in a mediation.

19 (5) “Mediation party” means a person that participates in a media-
20 tion and whose agreement is necessary to resolve the dispute.

21 (6) “Person” means an individual, corporation, business trust,
22 estate, trust, partnership, limited liability company, association,

23 joint venture, government; governmental subdivision, agency, or
24 instrumentality; public corporation, or any other legal or commer-
25 cial entity.

26 (7) “Proceeding” means:

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

30 (B) a legislative hearing or similar process.

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

34 (9) “Sign” means:

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

37 (B) to attach or logically associate an electronic symbol, sound,
38 or process to or with a record with the present intent to authenti-
39 cate a record.

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

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

45 (2) the mediation parties and the mediator agree to mediate in a
46 record that demonstrates an expectation that mediation communi-
47 cations will be privileged against disclosure; or

48 (3) the mediation parties use as a mediator an individual who
49 holds himself or herself out as a mediator or the mediation is pro-
50 vided by a person that holds itself out as providing mediation.

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

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

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

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

60 (4) conducted under the auspices of:

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

63 (B) a correctional institution for youths if all the parties are res-
64 idents of that institution.

65 (c) If the parties agree in advance in a signed record, or a
66 record of proceeding reflects agreement by the parties, that all or
67 part of a mediation is not privileged, the privileges under sections
68 4 through 6 do not apply to the mediation or part agreed upon.
69 However, sections 4 through 6 apply to a mediation communica-
70 tion made by a person that has not received actual notice of the
71 agreement before the communication is made.

72 Section 4. (a) Except as otherwise provided in section 6, a media-
73 tion communication is privileged as provided in subsection (b) and
74 is not subject to discovery or admissible in evidence in a pro-
75 ceeding unless waived or precluded as provided by section 5.

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

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

79 (2) A mediator may refuse to disclose a mediation communica-
80 tion, and may prevent any other person from disclosing a media-
81 tion communication of the mediator.

82 (3) A nonparty participant may refuse to disclose, and may pre-
83 vent any other person from disclosing, a mediation communica-
84 tion of the nonparty participant.

85 (c) Evidence or information that is otherwise admissible or sub-
86 ject to discovery does not become inadmissible or protected from
87 discovery solely by reason of its disclosure or use in a mediation.

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

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

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

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

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

104 Section 6. (a) There is no privilege under section 4 for a media-
105 tion communication that is:

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

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

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

113 (4) intentionally used to plan a crime, attempt to commit or
114 commit a crime, or to conceal an ongoing crime or ongoing crim-
115 inal activity;

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

118 (6) except as otherwise provided in subsection (c), sought or
119 offered to prove or disprove a claim or complaint of professional
120 misconduct or malpractice filed against a mediation party, non-
121 party participant, or representative of a party based on conduct
122 occurring during a mediation; or

123 (7) sought or offered to prove or disprove abuse, neglect, aban-
124 donment, or exploitation in a proceeding in which a child or adult
125 protective services agency is a party, unless the case is referred by
126 a court to mediation and a public agency participates.

127 (b) There is no privilege under section 4 if a court, administra-
128 tive agency, or arbitrator finds, after a hearing in camera, that the
129 party seeking discovery or the proponent of the evidence has
130 shown that the evidence is not otherwise available, that there is a
131 need for the evidence that substantially outweighs the interest in
132 protecting confidentiality, and that the mediation communication
133 is sought or offered in:

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

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

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

141 (d) If a mediation communication is not privileged under sub-
142 section (a) or (b), only the portion of the communication neces-
143 sary for the application of the exception from nondisclosure may
144 be admitted. Admission of evidence under subsection (a) or (b)
145 does not render the evidence, or any other mediation communica-
146 tion, discoverable or admissible for any other purpose.

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

152 (b) A mediator may disclose:

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

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

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

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

161 Section 8. Unless subject to the requirements of chapters 30A,
162 34, 39, and 40 regarding open meetings and chapter 66 regarding
163 public records, mediation communications are confidential to the
164 extent agreed by the parties or provided by other law or rule of
165 this Commonwealth.

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

168 (1) make an inquiry that is reasonable under the circumstances
169 to determine whether there are any known facts that a reasonable
170 individual would consider likely to affect the impartiality of the
171 mediator, including a financial or personal interest in the outcome
172 of the mediation and an existing or past relationship with a media-
173 tion party or foreseeable participant in the mediation; and

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

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

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

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

184 (e) Subsections (a), (b), (c), and (g) do not apply to an indi-
185 vidual acting as a judge.

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

188 (g) A mediator must be impartial, unless after disclosure of the
189 facts required in subsections (a) and (b) to be disclosed, the par-
190 ties agree otherwise.

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

195 Section 11. This chapter modifies, limits, or supersedes the fed-
196 eral Electronic Signatures in Global and National Commerce
197 Act, 15 U.S.C. section 7001 et seq., but this chapter does not
198 modify, limit, or supersede section 101(c) of that Act or authorize
199 electronic delivery of any of the notices described in section
200 103(b) of that Act.

201 Section 12. In applying and construing this chapter, considera-
202 tion should be given to the need to promote uniformity of the law
203 with respect to its subject matter among States that enact it.

204 Section 13. (a) This chapter governs a mediation pursuant to a
205 referral or an agreement to mediate made on or after the effective
206 date of this chapter.

207 (b) On or after one year from the effective date of this chapter,
208 this chapter governs an agreement to mediate whenever made.

1 SECTION 2. This Act takes effect on July first, two thousand
2 and three.