

SENATE, No. 679

STATE OF NEW JERSEY 211th LEGISLATURE

INTRODUCED JANUARY 26, 2004

Sponsored by:

Senator ROBERT J. MARTIN

District 26 (Morris and Passaic)

Senator DIANE ALLEN

District 7 (Burlington and Camden)

Assemblywoman LINDA R. GREENSTEIN

District 14 (Mercer and Middlesex)

Assemblyman PATRICK DIEGNAN, JR.

District 18 (Middlesex)

Co-Sponsored by:

Assemblyman McKeon

SYNOPSIS

Enacts the "Uniform Mediation Act."

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 10/8/2004)

1 AN ACT creating the "Uniform Mediation Act" and supplementing
2 Title 2A of the New Jersey Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. This Act shall be known and may be cited as the "Uniform
8 Mediation Act."

9

10 2. Definitions. As used in this act:

11 "Mediation" means a process in which a mediator facilitates
12 communication and negotiation between parties to assist them in
13 reaching a voluntary agreement regarding their dispute.

14 "Mediation communication" means a statement, whether verbal or
15 nonverbal or in a record, that occurs during a mediation or is made for
16 purposes of considering, conducting, participating in, initiating,
17 continuing, or reconvening a mediation or retaining a mediator. A
18 mediation communication shall not be deemed to be a public record
19 under P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and
20 supplemented by P.L.2001, c.404 (C.47:1A-5 et seq.).

21 "Mediator" means an individual who conducts a mediation.

22 "Nonparty participant" means a person, other than a party or
23 mediator, who participates in a mediation.

24 "Mediation party" means a person who participates in a mediation
25 and whose agreement is necessary to resolve the dispute.

26 "Person" means an individual; corporation; business trust; estate;
27 trust; partnership; limited liability company; association; joint venture;
28 government; governmental subdivision, agency, or instrumentality;
29 public corporation, or any other legal or commercial entity.

30 "Proceeding" means a judicial, administrative, arbitral, or other
31 adjudicative process, including related pre-hearing and post-hearing
32 motions, conferences, and discovery; or a legislative hearing or similar
33 process.

34 "Record" means information that is inscribed on a tangible medium
35 or that is stored in an electronic or other medium and is retrievable in
36 perceivable form.

37 "Sign" means to execute or adopt a tangible symbol with the
38 present intent to authenticate a record, or to attach or logically
39 associate an electronic symbol, sound, or process to or with a record
40 with the present intent to authenticate a record.

41

42 3. Scope.

43 a. Except as otherwise provided in subsection b. or c., this act shall
44 apply to a mediation in which:

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

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

4 (3) the mediation parties use as a mediator an individual who holds
5 himself out as a mediator, or the mediation is provided by a person
6 who holds itself out as providing mediation.

7 b. The act shall not apply to a mediation:

8 (1) relating to the establishment, negotiation, administration, or
9 termination of a collective bargaining relationship or to any mediation
10 conducted by the Public Employment Relations Commission or the
11 State Board of Mediation;

12 (2) relating to a dispute that is pending under or is part of the
13 processes established by a collective bargaining agreement, except that
14 the act applies to a mediation arising out of a dispute that has been
15 filed with a court or an administrative agency other than the Public
16 Employment Relations Commission or the State Board of Mediation;

17 (3) conducted by a judge who may make a ruling on the case; or

18 (4) conducted under the auspices of:

19 (a) a primary or secondary school if all the parties are students; or

20 (b) a juvenile detention facility or shelter if all the parties are
21 residents of that facility or shelter.

22 c. If the parties agree in advance in a signed record, or a record of
23 proceeding so reflects, that all or part of a mediation is not privileged,
24 the privileges under sections 4 through 6 of P.L. , c. (C.)
25 (now pending before the Legislature as sections 4 through 6 of this
26 bill) shall not apply to the mediation or part agreed upon. Sections 4
27 through 6 of P.L. , c. (C.) (now pending before the Legislature
28 as sections 4 through 6 of this bill) shall apply to a mediation
29 communication made by a person who has not received actual notice
30 of the agreement before the communication is made.

31
32 4. Privilege against Disclosure; Admissibility; Discovery.

33 a. Except as otherwise provided in section 6 of P.L. , c. (C.)
34 (now pending before the Legislature as section 6 of this bill), a
35 mediation communication is privileged as provided in subsection b. of
36 this section and shall not be subject to discovery or admissible in
37 evidence in a proceeding unless waived or precluded as provided by
38 section 5 of P.L. , c. (C.) (now pending before the Legislature
39 as section 5 of this bill).

40 b. In a proceeding, the following privileges shall apply:

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

43 (2) a mediator may refuse to disclose a mediation communication,
44 and may prevent any other person from disclosing a mediation
45 communication of the mediator.

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

4 c. Evidence or information that is otherwise admissible or subject
5 to discovery shall not become inadmissible or protected from
6 discovery solely by reason of its disclosure or use in a mediation.

7
8 5. Waiver and Preclusion of Privilege.

9 a. A privilege under section 4 of P.L. , c. (C.) (now pending
10 before the Legislature as section 4 of this bill) may be waived in a
11 record or orally during a proceeding if it is expressly waived by all
12 parties to the mediation and:

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

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

17 b. A person who discloses or makes a representation about a
18 mediation communication that prejudices another person in a
19 proceeding is precluded from asserting a privilege under section 4 of
20 P.L. , c. (C.) (now pending before the Legislature as section 4 of
21 this bill), but only to the extent necessary for the person prejudiced to
22 respond to the representation or disclosure.

23 c. A person who intentionally uses a mediation to plan, attempt to
24 commit or commit a crime, or to conceal an ongoing crime or ongoing
25 criminal activity is precluded from asserting a privilege under section
26 4 of P.L. , c. (C.) (now pending before the Legislature as section
27 4 of this bill).

28
29 6. Exceptions to Privilege.

30 a. There is no privilege under section 4 of P.L. , c. (C.)
31 (now pending before the Legislature as section 4 of this bill) for a
32 mediation communication that is:

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

35 (2) made during a session of a mediation that is open, or is
36 required by law to be open, to the public;

37 (3) a threat or statement of a plan to inflict bodily injury or commit
38 a crime;

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

41 (5) sought or offered to prove or disprove a claim or complaint
42 filed against a mediator arising out of a mediation;

43 (6) except as otherwise provided in subsection c., sought or
44 offered to prove or disprove a claim or complaint of professional
45 misconduct or malpractice filed against a mediation party, nonparty
46 participant, or representative of a party based on conduct occurring
47 during a mediation; or

1 (7) sought or offered to prove or disprove child abuse or neglect
2 in a proceeding in which the Division of Youth and Family Services in
3 the Department of Human Services is a party, unless the Division of
4 Youth and Family Services participates in the mediation.

5 b. There is no privilege under section 4 of P.L. , c. (C.)
6 (now pending before the Legislature as section 4 of this bill) if a court,
7 administrative agency, or arbitrator finds, after a hearing in camera,
8 that the party seeking discovery or the proponent of the evidence has
9 shown that the evidence is not otherwise available, that there is a need
10 for the evidence that substantially outweighs the interest in protecting
11 confidentiality, and that the mediation communication is sought or
12 offered in:

13 (1) a court proceeding involving a crime as defined in the "New
14 Jersey Code of Criminal Justice," N.J.S. 2C:1-1 et seq.; or

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

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

21 d. If a mediation communication is not privileged under subsection
22 a. or b., only the portion of the communication necessary for the
23 application of the exception from nondisclosure may be admitted.
24 Admission of evidence under subsection a. or b. does not render the
25 evidence, or any other mediation communication, discoverable or
26 admissible for any other purpose.

27
28 7. Prohibited mediator reports.

29 a. Except as required in subsection b., a mediator may not make a
30 report, assessment, evaluation, recommendation, finding, or other oral
31 or written communication regarding a mediation to a court,
32 administrative agency, or other authority that may make a ruling on
33 the dispute that is the subject of the mediation.

34 b. A mediator may disclose:

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

37 (2) a mediation communication as permitted under section 6 of
38 P.L. , c. (C.)(now pending before the Legislature as section 6 of
39 this bill);

40 c. A communication made in violation of subsection a. may not be
41 considered by a court, administrative agency, or arbitrator.

42
43 8. Confidentiality.

44 Unless made during a session of a mediation which is open, or is
45 required by law to be open, to the public, mediation communications
46 are confidential to the extent agreed by the parties or provided by
47 other law or rule of this State.

1 9. Mediator's Disclosure of Conflicts of Interest; Background.

2 a. Before accepting a mediation, an individual who is requested to
3 serve as a mediator shall:

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

10 (2) disclose any such known fact to the mediation parties as soon
11 as is practicable before accepting a mediation.

12 b. If a mediator learns any fact described in paragraph (1) of
13 subsection a. after accepting a mediation, the mediator shall disclose
14 it as soon as is practicable.

15 c. At the request of a mediation party, an individual who is
16 requested to serve as a mediator shall disclose the mediator's
17 qualifications to mediate a dispute.

18 d. A person who violates subsection a., b., or g. shall be
19 precluded by the violation from asserting a privilege under section 4
20 of P.L. , c. (C.) (now pending before the Legislature as section 4
21 of this bill), but only to the extent necessary to prove the violation.

22 e. Subsections a, b., c., and g. do not apply to a judge of any court
23 of this State acting as a mediator.

24 f. This act does not require that a mediator have a special
25 qualification by background or profession.

26 g. A mediator shall be impartial, notwithstanding disclosure of the
27 facts required in subsections a. and b.

28

29 10. Participation in Mediation.

30 An attorney or other individual designated by a party may
31 accompany the party to and participate in a mediation. A waiver of
32 representation or participation given before the mediation may be
33 rescinded.

34

35 11. Relation to Electronic Signatures in Global and National
36 Commerce Act.

37 This act modifies, limits, or supersedes the federal Electronic
38 Signatures in Global and National Commerce Act, 15 U.S.C. Section
39 7001 et seq., but this act does not modify, limit, or supersede Section
40 101(c) of that act or authorize electronic delivery of any of the notices
41 described in Section 103(b) of that act.

42

43 12. Uniformity of application and construction.

44 In applying and construing this act, consideration shall be given to
45 the need to promote uniformity of the law with respect to its subject
46 matter among states that enact it.

47

1 13. Severability clause.

2 If any provision of P.L. , c. (C.)(now pending before the
3 Legislature as this bill) or its application to any person or circumstance
4 is held invalid, the invalidity does not affect other provisions or
5 applications of this act which can be given effect without the invalid
6 provision or application, and to this end the provisions of this act are
7 severable.

8

9 14. This act shall take effect immediately and shall apply to any
10 agreements to mediate made on or after the effective date of this act.

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STATEMENT

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15 This bill enacts the "Uniform Mediation Act" (UMA) which
16 establishes uniform standards and procedures for mediation and
17 mediators. The National Conference of Commissioners of Uniform
18 State Laws (NCCUSL) proposed the UMA. This uniform act has been
19 approved by the New Jersey Law Revision Commission, the New
20 Jersey Association of Professional Mediators and the New Jersey State
21 Bar Association.

22 By establishing these uniform guidelines for mediation, it is the
23 sponsor's intent to protect all individuals who choose to resolve their
24 disputes through either court ordered mediation or voluntarily
25 undertaken mediation where the parties and mediator expect that
26 mediation communications will be privileged against disclosure.

27 The bill would not apply to collective bargaining, settlement
28 conferences with a judge who may make a ruling on the case and peer
29 mediation in schools when all the parties are students. This bill would
30 explicitly exempt from its coverage mediation conducted by the Public
31 Employment Relations Commission or the State Board of Mediation
32 pursuant to the regulations of these labor relations agencies.

33 This bill would establish a privilege for mediation communications.
34 Under the provisions of the bill, mediators and parties to a mediation
35 may refuse to reveal, and may prevent the mediator or another party
36 from disclosing, mediation communications. The mediator and the
37 parties may expressly waive their privilege, except that the parties may
38 not waive the privilege of the mediator or any other party, and the
39 mediator may not waive the privilege of any party. The privilege is
40 also subject to enumerated exceptions. However, even if a mediator
41 waives the privilege the mediator cannot disclose what parties said in
42 the mediation unless the parties consent or unless the communication
43 falls under one of the specified exceptions to the privilege.

44 There is no privilege for a mediation communication that is in an
45 agreement evidenced by a record that is signed by the parties.
46 Privilege is not available with regard to a mediation session that is, or
47 is required to be, held in public. Nor is there privilege with regard to

1 any mediation communication that is a plan to commit a crime or a
2 threat to commit a crime or a threat to inflict bodily injury. There is
3 no privilege to conceal a mediation communication sought to be used
4 to either prove or disprove child abuse. In a court proceeding
5 involving a crime or a proceeding contesting the enforcement of an
6 agreement that resulted from a mediation the court may set aside the
7 privilege if the evidence is not otherwise available and if the need for
8 the evidence substantially outweighs the interest in protecting
9 confidentiality.

10 This bill prohibits mediators from making a report, assessment,
11 recommendation or oral or written communication to a court that
12 would rule on the matter, unless the mediator and the parties consent.

13 The bill would provide that all mediation communications are
14 confidential to the extent agreed by the parties or provided under the
15 law. The bill would also require mediators to make reasonable inquiry
16 to determine whether there are any known facts that might reasonably
17 be understood to affect their impartiality. The mediator would be
18 required to disclose any known fact to the mediation parties before
19 accepting a mediation, or as soon as practicable if such fact is
20 discovered after accepting a mediation.

21 Any party to mediation may be accompanied by an attorney or any
22 other individual designated by a party.