



STATE OF NEW JERSEY

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NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

relating to

UNIFORM MEDIATION ACT

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UNIFORM MEDIATION ACT

Introduction

At its 2001 annual meeting, the National Conference of Commissioners on Uniform State Laws approved the Uniform Mediation Act (UMA) and recommended its enactment by state legislatures.

The UMA was the result of a joint project of the NCCUSL and the Mediation Section of the American Bar Association. The project was motivated by the belief that effective mediation requires all parties to be confident that anything that took place during mediation would not be disclosed in any legal or administrative proceeding. The UMA would assure that confidence by enacting the broadest possible evidentiary privilege in every state. The UMA creates a privilege against disclosure of any “mediation communication” by (1) parties to the mediation, (2) the mediator, and (3) non-parties, such as experts, who attend the mediation. The privilege would apply in any judicial, administrative, or legislative proceeding and in any arbitration. The privilege would apply unless waived by all parties to the mediation and by the mediator. Exceptions to the privilege are few and set out in detail.

New Jersey now provides substantial protection to the confidentiality of mediation. The Rules of Evidence make any offer of compromise of a disputed claim inadmissible on the validity or amount of the claim. N.J.R.E. 408. In addition, New Jersey Court Rules provide: no disclosure made by a party during mediation shall be admitted as evidence against that party in any civil, criminal, or quasi-criminal proceeding.” R. 1:40. However, neither of these protections is a privilege and so is not as broad in scope as that provided by the UMA. The UMA privilege, like most privileges applies to more than court proceedings, and its application to administrative proceedings may be particularly important.

Moreover, the UMA privilege is more extensive in the persons protected than a traditional privilege. It provides protection not only to the parties to the mediation but also to the mediator. While a lawyer cannot invoke the lawyer–client privilege over the objection of the client, the mediator is separately protected by the privilege and cannot be forced to testify even if both parties wish him to. The UMA would even let the mediator bar testimony by the parties about the mediation that the parties have agreed to give.

The Commission recommends the enactment of the UMA because it has determined that a uniform state law is necessary to protect mediation. Most commercial litigation has interstate effects. It is important that all parties can understand that the rules concerning mediation will apply regardless where proceedings on the dispute mediated take place. The Commission agrees that a testimonial privilege is necessary to protect mediation. The need for uniformity in this area makes any in-depth consideration of the details of the UMA privilege irrelevant.

UNIFORM MEDIATION ACT

SECTION 1. Title.

This Act may be cited as the Uniform Mediation Act.

COMMENT

This section is identical to the uniform provision.

SECTION 2. Definitions.

In this [Act]:

(1) "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.

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

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

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

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

(6) "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.

(7) "Proceeding" means:

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

(B) a legislative hearing or similar process.

(8) "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.

(9) "Sign" means:

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

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

COMMENT

This section is identical to the uniform provision.

SECTION 3. Scope.

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

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

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

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

b. The [Act] does not apply to a mediation:

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

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

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

(4) conducted under the auspices of:

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

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

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

COMMENT

This section is identical to the uniform provision.

SECTION 4. Privilege against disclosure; admissibility; discovery

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

b. In a proceeding, the following privileges apply:

(1) A mediation 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, and may prevent any other person from disclosing a mediation communication of the mediator.

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

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

COMMENT

This section is identical to the uniform provision.

SECTION 5. Waiver and preclusion of privilege

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

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

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

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

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

COMMENT

This section is identical to the uniform provision.

SECTION 6. Exceptions to privilege

a. There is no privilege under Section 4 for a mediation communication that is:

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

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

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

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

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

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

(7) sought or offered to prove or disprove child abuse or neglect in a criminal proceeding or a proceeding in which the Division of Youth and Family Services is a party.

b. There is no privilege under Section 4 if a court, administrative agency, or arbitrator 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 that the mediation communication is sought or offered in:

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

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

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

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

COMMENT

This section is identical to the uniform provision except in regard to subsection (a)(7). In UMA, the exception to privilege applies where the evidence is used “to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party.” The words “abandonment” and “exploitation” have been deleted since they are duplicative and may be confusing because they are not used in this context in New Jersey. More important, the exception has been broadened to include criminal cases involving child abuse or neglect as well as civil child abuse and neglect actions. This expansion is in accord with state policy in regard to child abuse. See N.J.S. 9:6-8.10 requiring any person having information about child abuse to inform authorities. Last, the UMA provides two options for the end of subsection (a)(7) preserving the privilege where an abuse proceeding is mediated with the State protective agency, here the Division of Youth and Family Services. Since such mediations do not occur, the exception in either form is not necessary.

SECTION 7. Prohibited mediator reports

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

b. A mediator may disclose:

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

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

(3) a mediation communication evidencing abuse or neglect, of a child to a public agency responsible for protecting individuals against such mistreatment.

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

COMMENT

This section is identical to the uniform provision except for a small change in subsection (b)(3) in conformance with the change in Section 6, subsection (a)(7).

SECTION 8. Confidentiality

Unless subject to provisions on open public meetings or public records, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

COMMENT

This section is identical to the uniform provision. In place of statutory citations generic references have been used.

SECTION 9. Mediator's disclosure of conflicts of interest, background

a. Before accepting a mediation, an individual who is requested to serve as a mediator 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 an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

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

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

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

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

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

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

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

COMMENT

This section is identical to the uniform provision. Optional subsection (g) has been retained.

SECTION 10. Participation in mediation

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

COMMENT

This section is identical to the uniform provision.

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

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

COMMENT

This section is identical to the uniform provision.

SECTION 12. Uniformity of application and construction

In applying and construing this Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

COMMENT

This section is identical to the uniform provision.

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.

COMMENT

This section is identical to the uniform provision.

SECTION 16. Application to existing agreements or referrals

(a) This Act governs a mediation pursuant to a referral or 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.