

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
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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 following

2 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 negotiation
8 between parties to assist them in reaching a voluntary agreement regarding their dispute.

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

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

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

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

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

20 (7) “Proceeding” means:

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

23 (B) a legislative hearing or similar process.

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

26 (9) “Sign” means:

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

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

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

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

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

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

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

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

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

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

46 (4) conducted under the auspices of:

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

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

49 (C) If the parties agree in advance in a signed record, or a record of proceeding reflects
50 agreement by the parties, that all or part of a mediation is not privileged, the privileges under
51 sections 4 through 6 do not apply to the mediation or part agreed upon. However, sections 4

52 through 6 apply to a mediation communication made by a person that has not received actual
53 notice of the agreement before the communication is made.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

110 Section 7. (a) Except as required in subsection (b), a mediator may not make a report,
111 assessment, evaluation, recommendation, finding, or other communication regarding a mediation

112 to a court, administrative agency, or other authority that may make a ruling on the dispute that is
113 the subject of the mediation.

114 (b) A mediator may disclose:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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