

UNIFORM MEDIATION ACT

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

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 or solution 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 a trained individual who conducts a mediation.

Deleted: who conducts a

(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.

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; or

(3) Deleted see Comment

(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 of that institution.

(c) If the parties and the mediator agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, 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.

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

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 a mediation communication, 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.

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.

Committee Comment

Additional comment to UMA comments that the intent of this section – 5(b) – is to prevent the unfair use of privilege.

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 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, commit a crime of violence, or threaten the safety of a child under the age of eighteen years;

(4) intentionally used to plan a crime, attempt to commit or 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 willful and wanton 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 or nonparty participant, including representative of a party, based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a public agency responsible for protecting individuals against such mistreatment is a party, unless the public agency participates in the child or adult protection mediation.

Comment: changed to reflect lack of specific adult protection services agency – consistent with UMA language of §7b(3)

Deleted: child or adult protective services agency

(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

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability based upon fraud, duress, or misrepresentation 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.

Committee Comment

Section 6(a)(1) is intended to apply to settlement agreements.

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 parties have met with a mediator, whether an agreement evidenced by a record signed by all parties to the agreement was reached, and attendance;

Deleted: mediation occurred or has terminated

Deleted: a settlement

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

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

(4) subject to section 4, a mediation communication to the extent agreed in a record signed by the parties.

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

SECTION 8. CONFIDENTIALITY.

Mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

Comment: Deleted intro – confusing and redundant

Deleted: Unless subject to the [insert statutory references to open meetings act and open records act].

Committee Comment

1. It is the intent of this committee to maintain and comply with the Colorado Dispute Resolution Act

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) or (b)][(a), (b), or (g)] is precluded by the violation from asserting a privilege under Section 4.

(e) DELETED.

Deleted: Subsections (a), (b), [and] (c), [and] [(g)] do not apply to an individual acting as a judge.

(f) DELETED.

(g) DELETED.

(h) Failure of a mediator to comply with this section does not create a cause of action [pull language from UAA].

Deleted: (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.]

SECTION 10. PARTICIPATION IN MEDIATION.

An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded upon reasonable notice to all mediation parties and the mediator.

Committee Comment

Colorado agrees with the drafters of the UMA that parties should be allowed to have their attorney, or another individual, accompany them to a mediation, and that a waiver may be rescinded. However, Colorado has added that the rescission of a waiver must be “with reasonable notice to all mediation parties and the mediator,” to ensure that such waiver does not result in prejudice to any other party who may have relied on the waiver.

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.

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

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)
- (2)
- (3)

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].