

P.L. 2004, CHAPTER 157, *approved November 22, 2004*  
Senate, No. 679

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

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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."

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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.

1       3. Scope.

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

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

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

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

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

14       (1) relating to the establishment, negotiation, administration, or  
15 termination of a collective bargaining relationship or to any mediation  
16 conducted by the Public Employment Relations Commission or the  
17 State Board of Mediation;

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

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

24       (4) conducted under the auspices of:

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

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

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

37

38       4. Privilege against Disclosure; Admissibility; Discovery.

39       a. Except as otherwise provided in section 6 of P.L. , c. (C. )  
40 (now pending before the Legislature as section 6 of this bill), a  
41 mediation communication is privileged as provided in subsection b. of  
42 this section and shall not be subject to discovery or admissible in  
43 evidence in a proceeding unless waived or precluded as provided by  
44 section 5 of P.L. , c. (C. ) (now pending before the Legislature  
45 as section 5 of this bill).

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

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

3 (2) a mediator may refuse to disclose a mediation communication,  
4 and may prevent any other person from disclosing a mediation  
5 communication of the mediator.

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

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

12

13 5. Waiver and Preclusion of Privilege.

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

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

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

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

28 c. A person who intentionally uses a mediation to plan, attempt to  
29 commit or commit a crime, or to conceal an ongoing crime or ongoing  
30 criminal activity is precluded from asserting a privilege under section  
31 4 of P.L. , c. (C. ) (now pending before the Legislature as section  
32 4 of this bill).

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34 6. Exceptions to Privilege.

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

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

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

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

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

46 (5) sought or offered to prove or disprove a claim or complaint

1 filed against a mediator arising out of a mediation;

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

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

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

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

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

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

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

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34 7. Prohibited mediator reports.

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

40 b. A mediator may disclose:

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

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

46 c. A communication made in violation of subsection a. may not be

1 considered by a court, administrative agency, or arbitrator.

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3 8. Confidentiality.

4 Unless made during a session of a mediation which is open, or is  
5 required by law to be open, to the public, mediation communications  
6 are confidential to the extent agreed by the parties or provided by  
7 other law or rule of this State.

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

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

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

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

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

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

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

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

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

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

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36 10. Participation in Mediation.

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

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

44 This act modifies, limits, or supersedes the federal Electronic  
45 Signatures in Global and National Commerce Act, 15 U.S.C. Section  
46 7001 et seq., but this act does not modify, limit, or supersede Section

1 101(c) of that act or authorize electronic delivery of any of the notices  
2 described in Section 103(b) of that act.

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4 12. Uniformity of application and construction.

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

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9 13. Severability clause.

10 If any provision of P.L. , c. (C. )(now pending before the  
11 Legislature as this bill) or its application to any person or circumstance  
12 is held invalid, the invalidity does not affect other provisions or  
13 applications of this act which can be given effect without the invalid  
14 provision or application, and to this end the provisions of this act are  
15 severable.

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

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21 STATEMENT

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23 This bill enacts the "Uniform Mediation Act" (UMA) which  
24 establishes uniform standards and procedures for mediation and  
25 mediators. The National Conference of Commissioners of Uniform  
26 State Laws (NCCUSL) proposed the UMA. This uniform act has been  
27 approved by the New Jersey Law Revision Commission, the New  
28 Jersey Association of Professional Mediators and the New Jersey State  
29 Bar Association.

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

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

41 This bill would establish a privilege for mediation communications.  
42 Under the provisions of the bill, mediators and parties to a mediation  
43 may refuse to reveal, and may prevent the mediator or another party  
44 from disclosing, mediation communications. The mediator and the  
45 parties may expressly waive their privilege, except that the parties may  
46 not waive the privilege of the mediator or any other party, and the

1 mediator may not waive the privilege of any party. The privilege is  
2 also subject to enumerated exceptions. However, even if a mediator  
3 waives the privilege the mediator cannot disclose what parties said in  
4 the mediation unless the parties consent or unless the communication  
5 falls under one of the specified exceptions to the privilege.

6 There is no privilege for a mediation communication that is in an  
7 agreement evidenced by a record that is signed by the parties.  
8 Privilege is not available with regard to a mediation session that is, or  
9 is required to be, held in public. Nor is there privilege with regard to  
10 any mediation communication that is a plan to commit a crime or a  
11 threat to commit a crime or a threat to inflict bodily injury. There is  
12 no privilege to conceal a mediation communication sought to be used  
13 to either prove or disprove child abuse. In a court proceeding  
14 involving a crime or a proceeding contesting the enforcement of an  
15 agreement that resulted from a mediation the court may set aside the  
16 privilege if the evidence is not otherwise available and if the need for  
17 the evidence substantially outweighs the interest in protecting  
18 confidentiality.

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

22 The bill would provide that all mediation communications are  
23 confidential to the extent agreed by the parties or provided under the  
24 law. The bill would also require mediators to make reasonable inquiry  
25 to determine whether there are any known facts that might reasonably  
26 be understood to affect their impartiality. The mediator would be  
27 required to disclose any known fact to the mediation parties before  
28 accepting a mediation, or as soon as practicable if such fact is  
29 discovered after accepting a mediation.

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

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36 Enacts the "Uniform Mediation Act."