

A Bill for an Act Relating to the Uniform Mediation Act.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
UNIFORM MEDIATION ACT**

§ -1 **Short title.** This chapter may be cited as the Uniform Mediation Act.

§ -2 **Definitions.** In this chapter:
“International commercial mediation” means a process, whether referred to by the expression conciliation, mediation, or similar expression, whereby parties:

- (1) To an agreement to conciliation have, at the time of the conclusion of that agreement, their places of business in different countries; or
- (2) Who have their places of business in a country that is different from either the country in which a substantial part of the obligations of the commercial relationship is to be performed or the country with which the subject matter of the dispute is mostly closely connected, request a third person or persons, who do not have the authority to impose upon the parties a solution to the dispute, to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship.

“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.

“Mediation communication” means a statement, whether oral, in a record, 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.

“Mediation party” means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.

“Mediator” means an individual who conducts a mediation.

“Model law” means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on June 24, 2002, and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated November 19, 2002.

“Nonparty participant” means a person, other than a party or mediator, who participates in a mediation.

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

“Proceeding” means:

- (1) A judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or
- (2) A legislative hearing or similar process.

“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.

“Sign” means to:

- (1) Execute or adopt a tangible symbol with the present intent to authenticate a record; or
- (2) Attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

§ -3 **Scope.** (a) Except as otherwise provided in subsection (b) or (c), this chapter applies to a mediation in which:

- (1) The mediation parties are required to mediate by statute or court or administrative 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 who holds himself or herself out as providing mediation.

(b) This chapter shall 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 this chapter shall apply 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 mediation parties are students; or
 - (B) A correctional institution for youths if all the mediation parties are residents of that institution.

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

§ -4 **Privilege against disclosure; admissibility; discovery.** (a) Except as 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; and
- (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.

§ -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 who discloses or makes a representation about a mediation communication that 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 who 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.

§ -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 chapter 92F or made during a session of a mediation that 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 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 professional misconduct or malpractice filed against a mediator;
- (6) Except as 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 abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the department of human services participates in the mediation.
- (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 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 shall 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 mediation 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.

§ -7 Prohibited mediator reports. (a) Except as agreed to in writing by the parties or as permitted in subsection (b), a mediator shall 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 a mediation occurred or has terminated, whether a settlement was reached, and attendance at the mediation;

(2) Mediation communication as permitted under section -6; or

(3) A mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment, except as prohibited under section -6(a)(7).

(c) A report, assessment, evaluation, recommendation, finding, or other communication made in violation of subsection (a) shall not be considered by a court, administrative agency, or arbitrator.

§ -8 Confidentiality. Unless subject to disclosure pursuant to part I of chapter 92 or chapter 92F, mediation communications are confidential to the extent agreed by the mediation parties or provided by other law or rule of this State.

§ -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 mediation party or nonparty 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 who violates subsection (a) or (b) is precluded by the violation from asserting a privilege under section -4.

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

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

§ -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.

§ -11 International commercial mediation. (a) Except as provided in subsections (b) and (c), if a mediation is an international commercial mediation, the mediation is governed by the model law.

(b) Unless the mediation parties agree in accordance with section -3(c) that all or part of an international commercial mediation is not privileged, sections -4, -5, and -6 and any applicable definitions in section -2 also apply to the mediation and nothing in article 10 of the model law derogates from sections -4, -5, and -6.

(c) If the parties to an international commercial mediation agree under article 1, subsection 7, of the model law that the model law does not apply, this chapter applies in its entirety.

§ -12 Relation to Electronic Signatures in Global and National Commerce Act. This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 United States Code Section 7001 et seq.; provided that this chapter shall 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.

§ -13 Application to existing agreements or referrals. (a) This chapter shall govern a mediation pursuant to a referral for mediation or an agreement to mediate made on or after July 1, 2013.

(b) On or after January 1, 2014, this chapter shall govern an agreement to mediate whenever made.”

SECTION 2. This Act shall take effect on July 1, 2013.

(Became law on July 9, 2013, without the governor’s signature, pursuant to Art. III, §16, State Constitution.)