

WORKING DRAFT

MINNESOTA UNIFORM MEDIATION ACT

SECTION 1. TITLE. This [Act] may be cited as the Minnesota 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 regarding their dispute.
- (2) "Mediation communication" means conduct or 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.¹
- (3) "Mediator" means an individual who conducts a mediation.
- (3a) "Mediator support staff" means a person who assists the mediator in any aspect of a mediation process, but does not conduct a mediation.²
- (4) "Nonparty participant" means a person, other than a party, a mediator or mediator support staff, who participates in a mediation.
- (5) "Mediation party" means a person who 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:

¹ After much discussion, we choose to add "conduct" to the general definition of "communication" to maximize coverage. Parties are still free to offer "conduct" evidence when necessary in connection with contract defenses under section 5(c)(2).

² Amendment designed to extend coverage to in-take staffers and others assisting in convening mediation or working with the mediator.

- (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 shall not be disclosed except as provided herein; 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) 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 of that institution.
 - (5) the parties and the mediator have agreed in writing at the outset that the Act or specific provisions thereof shall not apply. **[EAA NOTE: This provision needs to be removed and a provision inserted that allows parties to opt out of only certain provisions of the Act.]**

SECTION 4. INADMISSIBILITY AND PROTECTION FROM DISCLOSURE AND DISCOVERY.

(a) Except as otherwise provided in Section 5, a mediation communication is not subject to discovery and is not admissible in evidence in a proceeding. In addition 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 nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(b) In a proceeding, a mediator and mediator support staff are incompetent to testify and shall not disclose or provide discovery regarding any mediation communication except as specifically provided in Section 5.

(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.

(d) A mediation communication disclosed in violation of this section shall not be admissible or discoverable in any proceeding.

SECTION 5. EXCEPTIONS.

(a) The privileges provided in Section 4 do not apply to the following mediation communications:

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

(2) communications required to be public pursuant to Minn. Stat. §§ 13D.01 – 13D.07 (Open Meeting Law) and Minn. Stat. §§ 13.01 – 13.99 (Data Practices Act), or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) the communication is a crime of violence or threat to inflict bodily injury or commit a crime of violence;

(4) communication made for the express purpose of planning, attempting or concealing a crime or ongoing criminal activity;

(5) communication 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;

(6) the communication is 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 public agency participates in the child or adult protection mediation;³ or

³ This is “Alternate B” language from the UMA (we rejected “Alternate A”, which would have had the second clause reading: “case is referred by a court to mediation and a public agency participates”)

(7) the communication is prepared by or on behalf of fewer than all of the mediation participants; and those participants expressly agree to disclosure; and the disclosure would not reveal any mediation communication other than the mediation communication they prepared.

(b) In addition the privileges provided in Section 4 do not apply to a record signed in advance of a mediation that parties and non-party participants may disclose mediation communications made in that mediation. **[EAA NOTE: This provision needs to be rewritten. It was inserted to address issues raised in the California *Rojas* case. Like the Section 3(b)(5) provision, this ended up allowing a complete opt out of the Act, which was not intended.]**

(c) There is no privilege under section 4 if a court, administrative agency or arbitrator finds, after an *in camera* hearing, that the party seeking discovery or the proponent of the evidence has shown by clear and convincing evidence 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) a proceeding to prove or disprove⁴ a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

If a court, administrative agency, or arbitrator finds that the party seeking discovery or the proponent of the evidence has met the above standard, the specific mediation communication or communications that meet the standard shall be admissible or discoverable for the specific purpose proved.

(d) A mediator or mediator support staff shall be competent to testify regarding mediation communication if:

- (1) the communication is a threat to inflict bodily injury or commit a crime of violence; or
- (2) the communication gives rise to disqualification proceedings under the rules of professional conduct for attorneys; or
- (3) the communication constitutes professional misconduct by a nonparty participant.

SECTION 6. PROHIBITED MEDIATOR REPORTS.

(a) Except as allowed 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.

⁴ We added “or disprove” out of concern that original language limited rights of proponents of a contract – i.e., the enforcing party. Plus, the addition parallels other sections.

- (b) A mediator may disclose:
 - (1) whether the mediation occurred or has terminated;
 - (2) the persons who attended the mediation;
 - (3) a mediation communication permitted under Section 5; and
 - (4) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual 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.

SECTION 7. CONFIDENTIALITY.

Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

SECTION 8. 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) An individual who is requested to serve as a mediator shall provide his or her relevant training and experience to mediate the dispute.
- (d) This Act does not require that a mediator have a special qualification by background or profession.

SECTION 9. 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.

SECTION 10. EFFECT OF A SETTLEMENT REACHED IN MEDIATION⁵

The effect of a settlement reached in mediation shall be determined under principles of law applicable to contract. A court of competent jurisdiction shall also set aside or reform a settlement reached in mediation if there was evident partiality, corruption, or misconduct by a mediator prejudicing the rights of a party. That the relief could not or would not be granted by a court of law or equity is not ground for setting aside or reforming the mediated settlement agreement unless it violates public policy. This section does not apply to proceedings relating to the determination of criminal liability or proceedings brought under chapters 518, 518A, 518B, 518C, and 518D or proceedings relating to guardianship, conservatorship, or civil commitment.

SECTION 11. STATUTES OF LIMITATION

The running of the limitation of time within which an action may be brought is suspended from the date of a written agreement to mediate until 20 days after any party gives written notice of termination of mediation to all parties who signed the agreement to mediate.

SECTION 12. 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 13. 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.

SECTION 14. 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 15. EFFECTIVE DATE.

This [Act] takes effect

⁵ Sections 11 and 12 are added to the Act in order to retain elements of the Civil Mediation Act deemed effective by the drafting committee. All other sections of the Civil Mediation Act are to be repealed.

SECTION 16. REPEALS.

The following acts and parts of acts are hereby repealed:

- (a) Minn. Stat. 595.02, subd. 1(1).
- (b) Minn. Stat. 494.02
- (c) Minn. Stat. 572.31 - 572.40 (Civil Mediation Act)

SECTION 17. 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.

APPENDIX A

UNCITRAL Model Law on International Commercial Conciliation

[text needs to be inserted]

[NOTE: The following proposed amendments to existing law need to be reviewed and revised or eliminated in order to be consistent with the final draft of the proposed Minnesota Mediation Act]

**Proposed Amendment
Minn. Stat. § 595.02 Testimony of Witnesses**

Subdivision 1. Competency of witnesses. Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

(sections a-k omitted)

~~(l) A person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communication during mediation by the common law.~~

(existing sections m-q renumbered as l-p)

Subdivision 1a. ~~Alternative Dispute Resolution Privilege. Competency of ADR Provider as Witness.~~ (a) No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:

(1) constitute a threat to inflict bodily injury or commit a crime of violence;

Deleted: felony or gross misdemeanor

(2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or

(3) constitute professional misconduct.

(b) No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall provide discovery to parties in civil proceeding or administrative hearing unless ordered to disclose by a court. The court shall order disclosure only after a showing that the person presiding will provide relevant testimony not otherwise available and that the presiding person would be competent to testify pursuant to subsection (a). The presiding person and all parties to the alternative dispute resolution proceeding shall be given notice of the motion and be provided an opportunity to appear and be heard. The court may order that fees and expenses incurred by the presiding person be paid by one or more parties.