

JAN 23 2009

A BILL FOR AN ACT

RELATING TO THE UNIFORM MEDIATION ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

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

4 "CHAPTER

5 UNIFORM MEDIATION ACT

6 § -1 Short title. This chapter may be cited as the
7 Uniform Mediation Act.

8 § -2 Definitions. In this chapter:

9 "Mediation" means a process in which a mediator facilitates
10 communication and negotiation between parties to assist them in
11 reaching a voluntary agreement regarding their dispute.

12 "Mediation communication" means a statement, whether oral
13 or in a record or verbal or nonverbal, that occurs during a
14 mediation or is made for purposes of considering, conducting,
15 participating in, initiating, continuing, or reconvening a
16 mediation or retaining a mediator.



1 "Mediation party" means a person that participates in a
2 mediation and whose agreement is necessary to resolve the
3 dispute.

4 "Mediator" means an individual who conducts a mediation.

5 "Nonparty participant" means a person, other than a party
6 or mediator, that participates in a mediation.

7 "Person" means an individual, corporation, business trust,
8 estate, trust, partnership, limited liability company,
9 association, joint venture, government; governmental
10 subdivision, agency, or instrumentality; public corporation, or
11 any other legal or commercial entity.

12 "Proceeding" means:

13 (1) A judicial, administrative, arbitral, or other
14 adjudicative process, including related pre-hearing
15 and post-hearing motions, conferences, and discovery;

16 or

17 (2) A legislative hearing or similar process.

18 "Record" means information that is inscribed on a tangible
19 medium or that is stored in an electronic or other medium and is
20 retrievable in perceivable form.

21 "Sign" means:



1 (1) To execute or adopt a tangible symbol with the present
2 intent to authenticate a record; or

3 (2) To attach or logically associate an electronic symbol,
4 sound, or process to or with a record with the present
5 intent to authenticate a record.

6 § -3 Scope. (a) Except as otherwise provided in
7 subsection (b) or (c), this chapter applies to a mediation in
8 which:

9 (1) The mediation parties are required to mediate by
10 statute or court or administrative agency rule or
11 referred to mediation by a court, administrative
12 agency, or arbitrator;

13 (2) The mediation parties and the mediator agree to
14 mediate in a record that demonstrates an expectation
15 that mediation communications will be privileged
16 against disclosure; or

17 (3) The mediation parties use as a mediator an individual
18 who holds himself or herself out as a mediator or the
19 mediation is provided by a person that holds itself
20 out as providing mediation.

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



- 1 (1) Relating to the establishment, negotiation,
2 administration, or termination of a collective
3 bargaining relationship;
- 4 (2) Relating to a dispute that is pending under or is part
5 of the processes established by a collective
6 bargaining agreement, except that this chapter applies
7 to a mediation arising out of a dispute that has been
8 filed with an administrative agency or court;
- 9 (3) Conducted by a judge who might make a ruling on the
10 case; or
- 11 (4) Conducted under the auspices of:
 - 12 (A) A primary or secondary school if all the parties
13 are students; or
 - 14 (B) A correctional institution for youths if all the
15 parties are residents of that institution.
- 16 (c) If the parties agree in advance in a signed record, or
17 a record of proceeding reflects agreement by the parties, that
18 all or part of a mediation is not privileged, the privileges
19 under sections -4 through -6 do not apply to the mediation
20 or part agreed upon. However, sections -4 through -6
21 apply to a mediation communication made by a person that has not

1 received actual notice of the agreement before the communication
2 is made.

3 § -4 Privilege against disclosure; admissibility;
4 discovery. (a) Except as otherwise provided in section -6,
5 a mediation communication is privileged as provided in
6 subsection (b) and is not subject to discovery or admissible in
7 evidence in a proceeding unless waived or precluded as provided
8 by section -5.

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

10 (1) A mediation party may refuse to disclose, and may
11 prevent any other person from disclosing, a mediation
12 communication;

13 (2) A mediator may refuse to disclose a mediation
14 communication, and may prevent any other person from
15 disclosing a mediation communication of the mediator;
16 and

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

20 (c) Evidence or information that is otherwise admissible
21 or subject to discovery does not become inadmissible or



1 protected from discovery solely by reason of its disclosure or
2 use in a mediation.

3 § -5 Waiver and preclusion of privilege. (a) A
4 privilege under section -4 may be waived in a record or
5 orally during a proceeding if it is expressly waived by all
6 parties to the mediation and:

7 (1) In the case of the privilege of a mediator, it is
8 expressly waived by the mediator; and

9 (2) In the case of the privilege of a nonparty
10 participant, it is expressly waived by the nonparty
11 participant.

12 (b) A person that discloses or makes a representation
13 about a mediation communication which prejudices another person
14 in a proceeding is precluded from asserting a privilege under
15 section -4, but only to the extent necessary for the person
16 prejudiced to respond to the representation or disclosure.

17 (c) A person that intentionally uses a mediation to plan,
18 attempt to commit or commit a crime, or to conceal an ongoing
19 crime or ongoing criminal activity is precluded from asserting a
20 privilege under section -4.



1 § -6 Exceptions to privilege. (a) There is no
2 privilege under section -4 for a mediation communication that
3 is:
4 (1) In an agreement evidenced by a record signed by all
5 parties to the agreement;
6 (2) Available to the public under chapter 92F or made
7 during a session of a mediation which is open, or is
8 required by law to be open, to the public;
9 (3) A threat or statement of a plan to inflict bodily
10 injury or commit a crime of violence;
11 (4) Intentionally used to plan a crime, attempt to commit
12 or commit a crime, or to conceal an ongoing crime or
13 ongoing criminal activity;
14 (5) Sought or offered to prove or disprove a claim or
15 complaint of professional misconduct or malpractice
16 filed against a mediator;
17 (6) Except as otherwise provided in subsection (c), sought
18 or offered to prove or disprove a claim or complaint
19 of professional misconduct or malpractice filed
20 against a mediation party, nonparty participant, or
21 representative of a party based on conduct occurring
22 during a mediation; or



1 (7) Sought or offered to prove or disprove abuse, neglect,
2 abandonment, or exploitation in a proceeding in which
3 a child or adult protective services agency is a
4 party, unless the department of human services
5 participates in the mediation.

6 (b) There is no privilege under section -4 if a court,
7 administrative agency, or arbitrator finds, after a hearing in
8 camera, that the party seeking discovery or the proponent of the
9 evidence has shown that the evidence is not otherwise available,
10 that there is a need for the evidence that substantially
11 outweighs the interest in protecting confidentiality, and that
12 the mediation communication is sought or offered in:

13 (1) A court proceeding involving a felony or misdemeanor;
14 or

15 (2) Except as otherwise provided in subsection (c), a
16 proceeding to prove a claim to rescind or reform or a
17 defense to avoid liability on a contract arising out
18 of the mediation.

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



1 (d) If a mediation communication is not privileged under
2 subsection (a) or (b), only the portion of the communication
3 necessary for the application of the exception from
4 nondisclosure may be admitted. Admission of evidence under
5 subsection (a) or (b) does not render the evidence, or any other
6 mediation communication, discoverable or admissible for any
7 other purpose.

8 § -7 Prohibited mediator reports. (a) Except as agreed
9 to in writing by the parties or as required in subsection (b), a
10 mediator may not make a report, assessment, evaluation,
11 recommendation, finding, or other communication regarding a
12 mediation to a court, administrative agency, or other authority
13 that may make a ruling on the dispute that is the subject of the
14 mediation.

15 (b) A mediator may disclose:

- 16 (1) Whether the mediation occurred or has terminated,
17 whether a settlement was reached, and attendance;
- 18 (2) A mediation communication as permitted under
19 section -6; or
- 20 (3) A mediation communication evidencing abuse, neglect,
21 abandonment, or exploitation of an individual to a



1 public agency responsible for protecting individuals
2 against such mistreatment.

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

6 § -8 Confidentiality. Unless subject to disclosure
7 pursuant to part I of chapter 92 or chapter 92F, mediation
8 communications are confidential to the extent agreed by the
9 parties or provided by other law or rule of this State.

10 § -9 Mediator's disclosure of conflicts of interest;
11 background. (a) Before accepting a mediation, an individual
12 who is requested to serve as a mediator shall:

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

21 (2) Disclose any such known fact to the mediation parties
22 as soon as is practical before accepting a mediation.



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

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

7 (d) A person that violates subsection (a) or (b) is
8 precluded by the violation from asserting a privilege under
9 section -4.

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

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

14 § -10 Participation in mediation. An attorney or other
15 individual designated by a party may accompany the party to and
16 participate in a mediation. A waiver of participation given
17 before the mediation may be rescinded.

18 § -11 International commercial mediation. (a) In this
19 section, "Model Law" means the Model Law on International
20 Commercial Conciliation adopted by the United Nations Commission
21 on International Trade Law on June 28, 2002, and recommended by
22 the United Nations General Assembly in a resolution



1 (A/RES/57/18) dated November 19, 2002, and "international
2 commercial mediation" means an international commercial
3 conciliation as defined in Article 1 of the Model Law.

4 (b) Except as otherwise provided in subsections (c) and
5 (d), if a mediation is an international commercial mediation,
6 the mediation is governed by the Model Law.

7 (c) Unless the parties agree in accordance with
8 section -3(c) of this chapter that all or part of an
9 international commercial mediation is not privileged,
10 sections -4, -5, and -6 and any applicable definitions
11 in section -2 of this chapter also apply to the mediation and
12 nothing in Article 10 of the Model Law derogates from
13 sections -4, -5, and -6.

14 (d) If the parties to an international commercial
15 mediation agree under Article 1, subsection (7), of the Model
16 Law that the Model Law does not apply, this chapter applies.

17 § -12 Relation to Electronic Signatures in Global and
18 National Commerce Act. This chapter modifies, limits, or
19 supersedes the federal Electronic Signatures in Global and
20 National Commerce Act, 15 U.S.C. section 7001 et seq., but this
21 chapter does not modify, limit, or supersede section 101(c) of



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

3 § -13 Application to existing agreements or referrals.

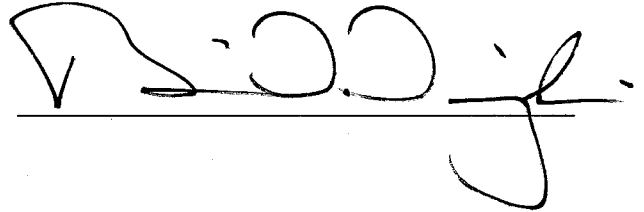
4 (a) This chapter governs a mediation pursuant to a referral or
5 an agreement to mediate made on or after July 1, 2009.

6 (b) On or after January 1, 2010, this chapter governs an
7 agreement to mediate whenever made."

8 SECTION 2. This Act, upon its approval, shall take effect
9 on July 1, 2009.

10

INTRODUCED BY:

A handwritten signature in black ink, appearing to read "V. S. O. J.", is written over a horizontal line. The signature is stylized and cursive.

Report Title:

Uniform Mediation Act

Description:

Adopts the Uniform Mediation Act. Provides certain rules for mediations. Establishes a privilege that assures confidentiality of mediations in legal proceedings. Protects integrity and knowing consent through provisions that provide exceptions to the privilege, limit disclosures by the mediator to judges and others who may rule on the case, requires mediators to disclose conflicts of interest, and assures that parties may bring a lawyer or other support person to the mediation session.

